

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FRED RIGGS, DONNA SINGER

AL DICKSON

Plaintiffs - Appellants,

v.

SAN JUAN COUNTY; SAN JUAN HEALTH
SERVICES DISTRICT; J. TYRON LEWIS,

Commissioner; BILL REDD, Commissioner;

CRAIG HALLS; MARK MARYBOY,

Commissioner, official capacity only; REID M.

WOOD; CLEAL BRADFORD; ROGER

ATCITY; JOHN LEWIS; JOHN

HOUSEKEEPER; KAREN ADAMS; PATSY

SHUMWAY; DR. JAMES D. REDD; DR. L.

VAL JONES; DR. MANFRED R. NELSON;

RICHARD BAILEY; SAN JUAN

FOUNDATION; MARILEE BAILEY; ORA

LEE BLACK; GARY HOLLADAY; LORI

WALLACE, also known as Laurie Walker;

FARMER'S/TRUCK INSURANCE; ST.

PAUL'S INSURANCE; CARLA GRIMSHAW;

GLORIA YANITO; JULIE BRONSON; R.

DENNIS ICKES; LAURIE SCHAFFER,

Defendants - Appellees,

08-4148

ON APPEAL FROM
THE U.S. DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

The Honorable Bruce S. Jenkins
D.C. 2:00cv0584

OPENING BRIEF

ORAL HEARING REQUESTED

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STATEMENT OF ORAL HEARING

This case presents complex issues of Indian law and of national importance and an oral hearing will facilitate a clearer understanding of the facts and issues.

I. JURISDICTION

This appeal is from the **U.S. District Court's July 2, 2008** order with notice timely filed **August 1, 2008**. Jurisdiction to enforce fully, not limit, Navajo Court actions is a federal question arising under 28 USC §1331. *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999) holds "Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction." It is these Defendant/Appellees ("Defendants") who have the burden for supporting a writ to prohibit these Navajo Court Appellants/Plaintiffs ("Navajo Plaintiffs") from petitioning the Navajo Court for further relief. **Jurisdiction to hear this appeal is found in 28 U.S.C. §1291.** Claims of denial of due process are never frivolous

and within this Court's jurisdiction to review. [1] The July 2, 2008 District Court Order (NP. Ad./ap. 350) is a final judgment in that it permanently and finally prohibits these Navajo Court Plaintiff Appellants ("Navajo Plaintiffs") from petitioning their Navajo Supreme Court for redress of their Navajo law injuries, after the Federal Courts below, "*MacArthur*" courts, denied enforcement of Navajo orders using "*Montana*", *infra*, and petitioning the Navajo Nation Supreme Court to issue a definitive ruling on its jurisdiction in this case, thereby exhausting their Navajo remedies under *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U. S. 845, 855-856 (1985). Plaintiffs are deprived of all their Navajo due process with no other Courts for relief. *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976) (noting that the Due Process Clause requires an assessment of, *inter alia*, "the risk of an

¹ *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972); *Schwartz v. United States*, 976 F.2d 213, 217 (4th Cir.1992); *Wi'inhoven v. United States*, 201 F. 2d 174 (9th Cir. 1952); *Hagans v. Lavine*, 415 U.S. 528, 529(1974)

The Docket shows for the dismissal of claims for federal claimants Helen Valdez and Michele Lyman in case 2:00cv0584, the District Court dismissed the amended complaint under Rule 16, without an Rule 16 hearing on the amended complaint that was allowed sua sponte, non pro tunc, back to a date prior to the rule 16 hearing on the original complaint. They were denied their Rule 16 hearing due process. Such claims are never frivolous. Id.

erroneous deprivation of [a liberty interest;] and the probable value, if any, of additional or substitute procedural safeguards”).

Navajo plaintiffs challenge this Court’s subject matter jurisdiction in all Federal Court orders to limit Navajo jurisdiction by the application of the “*Montana*” doctrine under §1331. Seemingly to conflict with the *MacArthur* rulings applying *Montana* to diminish Tribal authority, is the Tenth Circuit Court, different panel, in *Miner Electric Co. v. Muscogee (Creek) Nation*, No. 06-5216, September 19, 2007, holding that, that case’s U.S. district court, relying on the *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) (“*Montana*”) and its progeny [2] (“*Montana doctrine*”) erred in holding “it had jurisdiction to determine the extent of the Tribal Court’s jurisdiction under § 1331.” Plaintiffs assert that under §1331, subject matter jurisdiction to *enforce* Navajo Court orders as Treaty-Courts where Congress has executed those treaties, is distinguishable from jurisdiction to *limit* Tribal Court authority and deny enforcement, when Congress and the President have expressly *not* so limited Tribal Court

²*Atkinson Trading Post v. Shirley*, 532 U.S. 645, 653 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997); and *Nevada v. Hicks*, 533 U.S. 353 (2001)

authority. *Miner, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 67-68(1978). "...§ 1331 will only confer subject matter jurisdiction where some other statute provides such a waiver." *High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006). It can be raised at any time.[³] October 5, 2005, *MacArthur et al v. San Juan County et al*, 391 F.Supp.2d 895 (D.Utah 2005)(**MacArthur 2005**) identified why *Montana* was a standard that should not be used here.

II. STATEMENT OF ISSUES

ISSUE ONE: Have the Federal Courts in the "MacArthur" rulings issued "void judgments" based upon the Federal Courts exceeding Article III Court jurisdiction limits by applying the "Montana" doctrine, thereby

(1) limiting Navajo Court jurisdiction when its jurisdiction is a non judiciable question of Congressional and Executive branch defined Navajo Nation Court authority, and

(2) denying these U.S. Citizens their only Congressional and Executive branch recognized legal redress and due process (for acts arising within Utah Navajo borders), and

³ See *State Dep't of Soc. Servs. v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989) ("[W]hen a motion to vacate a judgment is based on a claim of lack of jurisdiction, the district court has no discretion: if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs."). *Freytag v. Commissioner*, 111 S. Ct. 2631, 501 U.S. 868 (U.S. 06/27/1991)(J. Scalia, concurrence (" Such jurisdictional defects "may be raised by a party, and indeed must be noticed *sua sponte* by a court, *at all points in the litigation*, see, e. g., *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951)...")

(3) now prohibiting the Navajo Plaintiffs from seeking clarification of Navajo Nation jurisdiction in the Navajo Nation Supreme Court?

ISSUE TWO: Have the United States Congress and the Executive branches fully executed Navajo and International Treaties such that all Navajo Court acts are domestically binding on all Federal Courts under the doctrine of U.S. Constitution Article VI Treaty-Courts rulings being the Supreme Law of the Land when Treaties recognizing the Courts are executed upon by Congress and the Executive, under the Supreme Court's ruling on Treaty law found in *Medellin* ?

ISSUE THREE: Were Plaintiffs denied due process, making the MacArthur decisions void, by not being allowed to litigate the applicability of the *Montana* doctrine before it was mandatorily applied by the 2002 Tenth Circuit orders?

III. STATEMENT OF THE CASE

This case presents the opportunity of this Court to eliminate the *Montana* doctrine from application to the Navajo Nation, and execute and enforce the Congressional and Executive intent to fully support Navajo Indian Self Determination and equality of all parties before Navajo Courts, through statutes and other legal instruments that fully execute the Navajo Nation and United Nations Covenant on Civil and Political Rights treaties, making Navajo law the 'Supreme Law of the Land' binding on all Courts domestically. *Medellin v. State of Texas*, 552 U.S. ____ (June 25, 2008) (Treaty Court acts are binding domestically

where Congress and the Executive have executed the Treaties into positive law). Both the 9th and 10th Circuit have areas of the Navajo Nation. Currently the 9th Circuit court in *Ford v. Todecheene*, 394 F.3d 1170 (9th Cir.2005)(vacated for Navajo Supreme Court consideration) is examining the tort law remedies against non Indians arising within the Navajo Nation. The Navajo Nation is relying on its Treaties and the U.S. promises to it for its jurisdiction. *Ford Motor v. Kayenta District Court*, SC-CV-33-07 N.N. S.CT. Dec. 18, 2008. Addendum/AP at 373 .

Public statistics show there are about over a million non-resident non-Indian visitors entering into the Navajo Nation annually. These “*MacArthur*” decisions applying “*Montana*” leave a potentially large class of people without any redress in any Courts. Therefore, in reality, the Nation law and Courts do not exist for an entire class of civilly injured plaintiffs, Indian and non Indian alike, as here, left as hapless victims of defendants who wish to harm others knowingly and deliberately, and simply say, “ “*Montana*” , we are non Indian and don’t live within the Nation” to escape responsibility under Navajo law. But no other Courts exist for these Plaintiffs either. State law does not apply based upon the (1) Treaty promises in the Navajo Treaty of 1849

Art. I that ‘forever’ only the Federal government would have authority over the Navajo Nation, and (2) the exclusivity of control found in the Navajo Treaty of 1868 Art. II, (3) the Indian Civil Rights Act (“ICRA”) (25 U.S.C. 1321-1322, (Ad/ap 553-554) not met here for Utah to take over the Utah portion of the Nation) executing these Treaty promises and protections, (4) the Congressional Enabling acts of Utah, (Ad/ap 477) Arizona, and New Mexico mandating the States disclaim all authority over Indian lands as a condition of statehood, also executing these Treaties’ promises to be free of ‘state’ authority (that execute into law the promises found in the Treaty of Guadalupe Hidalgo) and (5) title 25 of the U.S. code including the 2000 repeal of “*Montana’s*” allotment act mandating Navajo Courts treat all persons equally, executing into domestic law the Navajo Nation Bill of Rights adopted prior to the Indian Civil Rights Act (25 USC §§1301(2), 1302(8)). See, 25 USC §§331-333 repealed, thus repealing any Congressional intent to diminish Indian Nations (6) the Aneth Extension Act of 1933 [4], as the

⁴ Act of March 1, 1933, ch. 160, 47 Stat. 1418 (1933), 5 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 326–327 (1941), as amended by Pub.L. No. 90–306, 82 Stat. 121 (1968) (the “1933 Act”).

Navajo Nation purchased *from* Utah with \$20,000 dollars of Tribal funds, [5] and mineral royalties from non renewable resources.

A serious analysis of the 2005 *MacArthur* District Court *National Farmer's* analysis shows all other sources of law and Congressional and Executive intent, are directly opposite and contrary from Article III's 'allotment era' now 30 year expressed intent of *Montana* and its progeny, as to this Utah portion of the Navajo Nation and these Defendants. That decision shows all other sources *unanimously* support Congressional and Executive expressions of Indian Self Determination Act ("ISDA")-Indian Nations to have strong courts free of state or federal interference, with the responsibility to treat all persons, Indian and non-Indian alike, equally in their BIA – contracted, -approved, -ratified, -partially funded and -regularly

⁵ Chapter 570 August 9, 1937. | [H. R. 6958.] 50 Stat., 564." An Act Making appropriations for the Department of the Interior for the fiscal year ending June 30, 1938, and for other purposes Section --Purchase of land for Navajo Indians, Utah (tribal funds): For the purchase of lands and improvements thereon, *and* of improvements on former *public-domain* lands, within additions made to the Navajo Reservation, Utah, by Executive order of May 15, 1905, and the Act of March 1, 1933 (47 Stat., p., 1418), \$20,000, payable from funds deposited to the credit of the Navajo Tribe. "

monitored Navajo Nation Courts enforcing Navajo customs, traditions, and statutory law retained to the Nation by their Treaties.

Fear of non Indians being denied equality and due process in Navajo Courts should be resolved by understanding what the Bureau of Indian Affairs working with the Navajo Nation understands, "hoozhoojigo" is a very ancient Navajo custom and social norm, where people, all people, Indian and non Indian alike, can speak equally without interruption and with respect, *truthfulness*, and consideration, in order to peacefully resolve conflicts and heal injuries. [6] This doctrine is a key component as to why the Navajo Nation culture has survived genocide attempts, and has become a model for mediation of conflict in the world, using its traditions of pacifist peacemaking and restorative justice. Defendants enjoyed all their evidence, even though not available for prior review by Plaintiffs, (Ad/ap 10) to be accepted as part of their 'story', their 'side' of things, by this custom that allows all

⁶ 1. Navajo Nation v. Crockett, SC-CV-14-94; 2. Navajo Nation v. MacDonald, A-CR-o9-90; 3. Taylor v. Dilkon Community School, SC-CV-73-04; 4. Rough Rock Community School v. Navajo Nation, SC-CV-06-94; 5. A. P. v. Tuba City Family Court, SC-CV-02-05; 6. Benally v. Mobil Oil Co., SC-CV-05-01; 7. Perry v. Navajo Nation Labor Commission, SC-CV-50-05; 8. Yazzie v. Catron, A-CV-13-91; 9. Navajo Nation v. Blake, SC-CR-04-95; 10. Zuni v. Chinle Family Court, SC-CV-63-06

truthful facts to be considered even if under the Federal Rules of Evidence they might not otherwise be considered. Navajo due process is a much broader concept than the federal definitions under federal rules, and one Defendants' attorney was well acquainted with.

A. NATURE OF THE CASE, COURSE OF THE PROCEEDINGS AND THE DISPOSITION BELOW

This case seeks enforcement of Navajo Nation Court orders. Plaintiffs assert the Navajo Nation's jurisdiction is clearly defined by Navajo law that Congress and the Executive expressly protect, preserve and strengthen by all sources of law, aside from *Montana* and its progeny. The Plaintiffs never had the opportunity to challenge the application of *Montana* to this case prior to the 2002 Tenth Circuit sua sponte order mandating the U.S. District Court apply it. The 2005 District Court decision applying it holds it should not apply based on Congressional express intent and statutes and Executive actions unanimously supporting Navajo Nation definitions of its jurisdiction, being fully over all its lands and all persons causing an act to occur within its lands.

Plaintiffs assert respectfully that based upon splits in the U.S. Supreme Court Indian law rulings that points in opposite directions^[7] , and based upon the amorphous and ever changing and outdated ‘allotment era’ *Montana*’ doctrine applied in the federal “*MacArthur*” rulings, the “*MacArthur*” rulings (1) conflict within themselves, and (2) conflict with each other, without a required *en banc* hearing to overturn earlier rulings, (3) conflict with earlier historical case rulings, never reversed by an *en banc* hearing as required to alter earlier rulings, that give full faith and credit to Indian Nation Court actions, (4) conflict with the Congressionally-approved and Executive BIA trained, partially funded, regularly- monitored Indian Self Determination Act (ISDA) contracted Navajo Nation Court actions (P.Ad/ap 398 et seq), enforcing BIA and Congressionally-approved Navajo law, enacted

⁷ 2005 *MacArthur* at 1052 fn. 232 (“Justice Souter wrote, ‘Petitioners are certainly correct that ‘[t]ribal adjudicatory jurisdiction over nonmembers is ... ill-defined,’ since this Court’s own pronouncements on the issue have pointed in seemingly opposite directions.” 533 U.S. at 376, 121 S.Ct. 2304 (comparing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), and *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975), with *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978)). See also *id.*, 533 U.S. at 387, 121 S.Ct. 2304 (O’Connor, Stevens & Breyer, JJ. concurring in judgment) (“Part II of the Court’s decision [in *Hicks*] is unmoored from our precedents”).)

through the independent exercise of Navajo inherent sovereignty never limited by Treaty or any other statutes, and (4) conflict with the express wording and design and intent of other two branches of U.S. government legal instruments executing the Article VI U.S.

Constitutional Navajo Treaties (Ad/Ap. 386, 390) and International treaties (Supreme Law of the Land)(Ad/ap. 485 et seq) and government to government President's Executive Orders (Ad/ap 527 & 532) Indian Self Determination Act (ISDA) contracts (Ad/Ap 398 et seq) executing these treaties, and statutes, preserving, protecting, and strengthening Navajo Nation law, and Courts, with the mandate that Navajo Nation customs that require all persons, regardless of race, ethnicity, or political affiliations, or residency, be treated equally in all Navajo Courts and tribunals with an entitlement to . Under these conditions, the norm for Indian Court jurisdiction cases utilizing the *Montana* doctrine is 8-10 years [8], a denial of a meaningful time for due process hearings. *Mathews, supra*.

⁸ *Nevada v. Hicks*, 533 U.S. 353 (2001) (ten year tribal state sovereignty dispute); *Ford Motor Company v. Todecheene*, 394 F.3d 1170 (9th Cir. 2005)(now being decided by the Navajo Nation Supreme Court, Indian, non Indian jurisdiction, ten years on jurisdiction question without the case going to a jury); *Atkinson Trading Post v. Shirley*, 532 U.S. 645

B. STATEMENT OF FACTS

In the year 1999- 2000, the Navajo Nation District Court, District of Shiprock, issued four orders in behalf of these Navajo Plaintiffs, Indian and non Indian alike. Plaintiffs have battled an ever changing *Montana* doctrine for nine years to achieve enforcement of the Navajo Nation orders. A complete record of all the Navajo Court documents and proceedings including hearing CD's were made part of the U.S. District Court record and was available to the U.S. District Court for review.

1. DEC. 28, 1999 NAVAJO COURT INJUNCTION ORDER

2. MARCH 1, 2000 NAVAJO COURT ORDER DENYING RECONSIDERATION OR CHANGE OF INJUNCTION

3. MARCH 6, 2000 NAVAJO COURT SPECIAL ORDER IN AID OF SATISFACTION OF THE INJUNCTION

4. MAY 3, 2000 NAVAJO COURT ORDER MANDATING THAT ALL DEFENDANTS' TO BE BOUND BY THE PRELIMINARY INJUNCTION ORDER

(2001)(Indian/non Indian jurisdiction question 8 years); *Sinanjani v. Board of Education of San Juan County*, Tenth Circuit Court, No. 99-4130 Nov. 30, 2000(several appeals involving a 25 year consent decree regarding San Juan County School district and duty to Navajo children taken from their homes to schools outside their Nation); *Prairie Band of the Potawatami v. Wagnon*, 10th Cir. Feb. 26, 2007 (State/Indian jurisdictional authority for taxing motor vehicles, nine years, three appeals)

(a) The Land On Which the Acts Occurred Was Navajo, not State ‘fee’, Land, set aside for exclusive Navajo Use

The Navajo Court Defendants are Indian and non Indian alike, most residing outside Navajo borders. They counterclaimed for money damages for alleged Navajo common law torts against Plaintiff Singer. The Navajo Court found the Defendants actions it ruled upon, took place at (1) Montezuma Creek clinic, on land set aside for the exclusive use of the Navajo Nation citizens (Ad/ap 159-162) by the 1933 Aneth Extension act [⁹], with all surface rights of the Utah portion of the Navajo nation purchased from Utah with \$20,000 dollars of Tribal funds, [¹⁰], (Ad Ap 481) and (2) took place at Navajo Court on trust land

⁹ Act of March 1, 1933, ch. 160, 47 Stat. 1418 (1933), 5 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 326–327 (1941), *as amended* by Pub.L. No. 90–306, 82 Stat. 121 (1968) (the “1933 Act”).

¹⁰ Chapter 570 August 9, 1937. | [H. R. 6958.] 50 Stat., 564.” An Act Making appropriations for the Department of the Interior for the fiscal year ending June 30, 1938, and for other purposes Section --Purchase of land for Navajo Indians, Utah (tribal funds): For the purchase of lands and improvements thereon, *and* of improvements on former *public-domain* lands, within additions made to the Navajo Reservation, Utah, by Executive order of May 15, 1905, and the Act of March 1, 1933 (47 Stat., p., 1418), \$20,000, payable from funds deposited to the credit of the Navajo Tribe. “

in Shiprock, (Ad/Ap. 162) during 32+ hours of hearings, one being a 19 hour evidentiary hearing. State taxes had nothing to do with the purchase of the lands FROM Utah by the Navajo Nation under the 1933 Aneth Extension act.

(b) Defendants Enjoyed Full Due Process of the Navajo Nation

The Navajo Court counterclaiming Defendants enjoyed the due process of the due process of (a) filing two answers (Ad/ap 25); (b) filing counterclaims seeking money damages from Plaintiff Singer for acts alleged to occur within Montezuma Creek, Utah within Navajo exterior borders (Ad/ap 25); (c) through Navajo Bar counsel Mr. Ickes (Ad/ap 42); (d) submitting and responding to motions (Ad/ ap 25); (e) having all their evidence submitted (Ad/ap 9); (f) in a Court of record for which, if they wished, they could have had a certified Court reporter (Ad/ap 26) ; (g) and in several hearings(Ad/ ap 25), and (h) the examination and cross examination of witnesses and evidence through their Navajo Bar Counsel (Ad/ap 15, 25,. If there are any problems, they have full access to the Navajo Nation Supreme Court by way of Appeal or by Petition for a Special Writ, equally, as with all other people in the Navajo Nation. (Ad/ap 348) ... a Navajo due process judicial process the BIA has

approved in the Navajo Nation's ISDA judicial program contracts mandating Navajo law apply within the Navajo Nation with no exceptions for land types or ownership consistent with 18 U.S.C. 1151 (*McClanahan, infra*). (Ad/ap 433, and 400-463)

If there were any denials of due process or evidence the case was brought into Navajo Court in bad faith, the 2005 District Court decision would have identified bad faith or due process denials in its exhaustive study and review of all Navajo proceedings, (Ad/ap 104 fn. 4 dkt. 568) the record of which is in the U.S. District Court file, and did not do make any such findings.

(c) The Defendants Actions Were Deliberate and Willful

The case is not a 'mere' employment case. After the final 19 hour evidentiary hearing, the Navajo Court made factual findings showing the Defendants were (1) deliberately and intentionally harming these whistleblowing Plaintiffs (Ad/ap 8, 18), (2) deliberately and intentionally harming and injuring helpless, poverty-stricken, clinic-dependent often diabetic patients by knowingly driving them from the only local health care for the next 65-100 miles and making the patients believe they now had to pay for their Treaty guaranteed health care,

(Ad/ap 2, 13, 15) and (3) deliberately harming and damaging the Navajo Court's ability to secure the safety of the Plaintiffs and patients in the area by the numerous enumerated actions of the defendants toward the Navajo Court. (Ad/ap 13, 16-19, 34)

(d) The Voluntary Counterclaiming Defendants Were Not the State

The voluntary Navajo Nation counterclaiming Defendants, Indian and non Indian alike, Navajo member Roger Atcitty being a Navajo Nation resident, consisted of the Utah political subdivision of San Juan County, that was operating the San Juan Health Services District on a daily basis, was collectively referred to by the Navajo Court as the "District", with all defendants being held jointly and severally liable. The Navajo Court understood from testimony of County Commissioner Maryboy, that the County Commissioners were known to sitting on the Districts governance board, understood from the testimony of Rick Bailey, that the full time County Commission Administrator Rick Bailey was the District's full time CEO (without the Utah State required Hospital Administrator's license) and full time EMT administrator (filing three 80 hr full time pay cards every two weeks), and the County Attorney Craig Halls counseled Rick Bailey, County

aide/District CEO/EMT administrator, regarding District affairs and these Navajo Plaintiffs administrative proceedings (ad/ap 6).

The Navajo Court after the 19 hour evidentiary hearing, reasoned that the Defendants could not have deceived the Navajo Court into believing they were not harming the Plaintiffs and patients, thereby interfering with the Court's ability to give Navajo law protections to the people, without the aid and assistance of Truck Insurance and the Defendants attorney R. Dennis Ickes, who referred to these Navajo Plaintiffs as 'bald faced liars', upon which the Navajo Court originally relied to not help the Plaintiffs and patients. They were joined as Defendant parties under Navajo law customs and traditions and standards. (Ad/ap 42)

The Navajo Court relied on that false accusation for nine long months, only to discover that while the Navajo Court was relying on them, the Defendants, with staff physicians, nurses, physician assistants, and other medical personnel *familiar with* clinic-dependant life-endangering disease processes epidemic in the area, were deliberately and knowingly depriving the clinic-dependent Native American patients of Treaty-guaranteed care by (1) making them pay

at the time of their visit, (Ad/ap 2, 13, 22)(2) privately billing them,(Ad/ap 2) (3) hailing them into state court to pay District medical bills, (dkt. No. 14) and (4) making them produce a Certified Degree of Indian Blood certificate many elderly Navajo and Ute patients do not have, (Ad/ap 31)and (5) by convincing the largely non-English speaking people, often without phones, or capability of traveling 65 to 100 miles away to another I.H.S. facility, that they now had to pay for their Treaty –guaranteed Health care, while patients were going without their insulin and glucometer strips and regular testing and medications for other clinic dependant conditions (Ad/ap 13), with a 250% drop in diabetic patient visits alone (Ad/ap 13). The world now knows decades of toxic and hazardous waste contributes to the poor health and clinic dependency of the people. Judy Pasternak reports^[11], and Congressman Waxman’s Oct. 23, 2007 House Committee hearing^[12].

¹¹ <http://www.latimes.com/news/nationworld/nation/la-na-navajo19nov19,0,1645689.story?page=8>

¹² Hearing on the Health and Environmental Impacts of Uranium Contamination in the Navajo Nation

<http://oversight.house.gov/story.asp?ID=1560>;

<http://www.radiationcontrol.utah.gov/Board/Agenda.pdf>

“Mill tailings and chunks of uranium ore were used to build foundations, floors, and walls for some Navajo homes. Navajo children played in the mines and the piles of radioactive debris. They

The Navajo Court orders specifically identify by name and testimony and documentary evidence, how witness after witness, including the defendants witnesses, attested to the Defendants injurious actions, and the falsity of their counterclaims against Mrs. Singer, through out its Court orders. Ad/ap 1 et seq.

(e) The Defendants “Business” by UTAH Standards was Proprietary and Not an Exclusive Government Function

The type of business the “district” was occupied with, was generating revenue from the business of providing clinic medical services to the Indian Health Service and Medicaid insured Navajo patients in the Montezuma Creek, Aneth, Red Mesa, Mexican Hat, and other Navajo communities, within the Utah portion of the Navajo Nation, so as to cut property taxes of northern, largely non Indian property owners. (Ad/ap 16, 20, 31). If *Montana* applies, they entered into thousands of patient contracts for profit, fitting this aspect of it. No state law obliged them to participate in such a ‘business’, and they

drank contaminated water that came straight from the mines. When the U.S. EPA took readings at one mine site, the radium levels were over 270 times the EPA standard. ...That’s happening today. Right now. If a fraction of the deadly contamination the Navajos live with every day had been in Beverly Hills or any wealthy community, it would have been cleaned up immediately.” Id.

did so using their quasi-corporate functions. Such a business- via a privately bid upon and competed for, independent I.H.S. subcontractor's contract-- is often done by private businesses and charities, so by Utah law, the Defendants business actions were not an exclusive 'government function' that only a government can do such as installing storm drains, or other such functions. See, *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989); *Laney v. Fairview City*, 2002 UT 79, 57 P.3d 1007. Utah Navajo Health Systems is a private non profit, not owned or daily controlled by the Navajo Nation at all. Here, the state treasury is not at risk. The federal treasury is not at risk. Utah simply is not a party defendant.

The Navajo Court rulings observed the defendants were not an 'arm of the state', or the 'state', (Ad/ap 19) and if state sovereign immunity applied, it was waived when the Defendants voluntarily counterclaimed in Navajo Court for money damages under Navajo common law, relying on Navajo law, but also looking to *Clark v. Barnard*, 180 U.S. 436, 448(1883). Ad/ap. Pg. 32-33.

(f) The Navajo Court Upheld Navajo Jurisdiction Protected by Treaties

The Navajo Court rulings upheld Navajo jurisdiction over all lands and all persons causing an act to occur within the Utah portion of the Navajo Nation on a 'territorial basis' (Ad/ap 1, 21, 33, 36-37) reflecting the organic law of the Navajo Treaty of 1868 Art. II territory jurisdiction, executed by Congressional and Executive protected inherent sovereign civil authority over non Indians, enacted into statutory- law found in Navajo Nation Title 7 sec. 253 and 254, (Ad/ap 117)(2005 *MacArthur* at 917) the Navajo Nation Bill of Rights, Navajo custom and traditions, Navajo Preference in Employment act, the Navajo Supreme Court law, the Federal Indian Civil Rights Act, and federal requirements on the defendants doing business within the Navajo Nation through an independent subcontractor I.H.S. contract the Navajo Court found the Defendants were violating (Ad/ap 20).

C. STATEMENT OF THE PROCEEDINGS BELOW

(a) The U.S. District Court issued the following orders:

6. October 10, 2001 Order by Judge Kimball cloaking the minor political subdivisions with 'state' sovereign immunity dismissing the case. (Ad/ap 45)

7. December 13, 2000 Order by Judge Kimball making factual findings regarding Truck Insurance and R. Dennis Ickes, dismissing them as parties within the Navajo Nation Court. (Ad/ap 67)

(b) The Tenth Circuit Court in 2002 (“MacArthur 2002”) issued the following order:

October 7, 2002 *MacArthur et al v. San Juan County et al*, case no. 01-4001, (Ad/ap 83) identified most of the facts of the case, albeit the Court was in error that the land of Montezuma Creek clinic was purchased by Utah. All surface rights were purchased from Utah for \$20,000 of Tribal funds, in accord with the 1933 Aneth Extension Act extending Navajo law and authority over all lands within the Utah extension of the Navajo Nation. The Tenth Circuit in vacated Judge Kimball’s orders applying state sovereign immunity to defendants, looking to *Luning v. Lincoln County* (see also fn. 5), and upholding Judge Kimball’s orders to dismiss Truck and Dennis Ickes as Navajo Court parties applying federal standards to displace the Navajo Court decisions joining them as parties, and stating squarely that ‘state sovereign immunity’ does not apply to minor political subdivisions, and mandating that the District Court (1) apply the “*Montana*” doctrine

and (2) do a *Nat'l Farmer's* analysis, observing that “without first determining whether the tribe has regulatory jurisdiction, it is impossible to know which "immunity defenses" the federal court is supposed to consider.”

(c) The U.S. District Court issued the following (2005 MacArthur) decision order:

8. October 5, 2005, *MacArthur et al v. San Juan County et al*, 391 F.Supp.2d 895 (D.Utah 2005), (Ad/ap 95) applied “*Montana*” as mandated, but under the exhaustive “*National Farmer's*” analysis, found the “*Montana*” doctrine should not be applied to the Navajo Nation, and the U.S. Supreme Court probably erred in so applying it in *Atkinson Trading Post v. Shirley*, by not doing the *National Farmer's* historical analysis of the history of the area, and observing the intent of Congress in ***expanding the Nation's borders and jurisdictional authority*** in the Utah portion of the Navajo Nation (1933 Aneth Extension Act)... a Congressional intent that is the opposite of the “*Montana*” ‘allotment act’ where Congress expressed the intent to diminish Crow Nation authority. The 2005 Court also shows how “*Montana*” is unmoored in its intent and application for the Navajo

Nation from all other U.S. branches of modern Indian law and pre- and post- *Montana* Supreme Court rulings, by examining all sources of law. The ruling shows how all other sources of law express Congress and the Executive's steadfast intent by Congress and the Executive to protect, preserve, and strengthen the unlimited Navajo Nation inherent sovereign authority over *all lands* and *all persons* causing acts to occur within its borders. While the Navajo BIA Indian Self Determination act Judicial program contracts were raised as a basis for finding Navajo Court jurisdiction over these counterclaiming defendants (*2005 MacArthur* at fn. 4 March 28, 2003 dkt 535, at pg. 905) this 2005 decision does not discuss it.

9. On Dec. 15, 2000 (Ad/ap 258) the U.S. District Court issued a clarification decision and held

“The Bureau of Indian Affairs has continued to provide partial funding for the Navajo court system since that time, but the operation of the Navajo Nation Judicial Branch continues to embody the exercise of inherent Navajo sovereignty as recognized and enhanced by federal treaty and statutes.”

10. Dec. 15, 2005 (Ad/ap 328) supplemental order.

(d) The Tenth Circuit Court then issued its 2007 MacArthur decision.

11. July 18, 2007 in *(2007 MacArthur) MacArthur et al v. San Juan County et al*, case no. 05-4295 and 05-4310, (Ad/ap 330) the Tenth Circuit adopted a 'state qua state' rational not seen in Indian law before, and cured all the conflicts in Indian law for this case by displacing the Navajo fact finder and Navajo law enforcer, by simply finding all the political subdivisions and their employees, were 'state' employees, which is not true, and the land was 'state' 'fee' land, and ignored the denial of medical services here, and ignoring Utah law, cited to *Colorado* law for the idea that the Defendants' business activities, encompassing thousands of medical patient contracts, was a 'police power', that Utah's *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989); *Laney v. Fairview City*, 2002 UT 79, 57 P.3d 1007 are in direct odds with.

"In the instant case, the employment relationships at issue involved two members of the Navajo Nation and SJHSD, a political subdivision of the State of Utah. SJHSD is strictly a creature of Utah law, see Utah Code Ann. 17A-2-1304 (1999), and nearly all of its board members were state employees. The employment relationships at issue were entered into exclusively in SJHSD's governmental capacity, and those relationships were part and parcel of SJHSD's duty to provide medical services to residents of San Juan County. See *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 679 F.2d 805, 810 (10th Cir. 1982) ("In its

'governmental capacity' a municipality acts as an arm of the state for the public good on behalf of the state rather than itself."). The provision of medical services is unquestionably an exercise of the police power. See *Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens.") (internal quotations omitted); see also *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 758 (1985) (explaining that a mandated-benefit law was a "valid and unexceptional exercise of the . . . police power" where "[i]t was designed in part to ensure that . . . less wealthy [Massachusetts] residents . . . would be provided adequate mental-health treatment should they require it"). Accordingly, the employment relationships between SJHSD and Mr. Riggs and Mr. Dickson were not "private consensual relationships" in any sense of the term and do not fall within the first *Montana* exception."

Id. at pg. 13.

This Tenth Circuit panel made new fact findings that "The record indicates that the land on which the Clinic is located is *fee* land owned by the State of Utah as part of the Navajo Trust Fund. SJHSD relinquished operation of the Clinic as of January 1, 2000, at which time Utah Navajo Health Systems, an entity affiliated with the Navajo tribe, took over operation." This factual finding is at odds with 2005 MacArthur 'record' at 961-962 in the 2005 decision's discussion of the lands as follows:

“In contrast, the state-owned lands at the Montezuma Creek Clinic are *not* the product of “land alienation occasioned by” the allotment policy; they are lands incorporated within Reservation boundaries extended by Congress, and [surface rights] purchased [by Navajo funds] using funds derived from tribal oil and gas leasing in the 1933 Aneth Extension, funds held in trust for the Navajo people of the area. *See Pelt v. State of Utah*, 104 F.3d 1534 (10th Cir.1996); *State of Utah v. Babbitt*, 53 F.3d 1145, 1149 (10th Cir.1995) (noting Congress’ clear intent that oil and gas development on the Aneth Extension benefit San Juan [County] Navajos). The presumptions underlying the Allotment policy find no application here because the Montezuma Creek area was *added* to the Navajo Reservation as part of the major shift in federal Indian policy reflected in legislation such as the Indian Reorganization Act of 1934. - ...The 1933 Act cannot be read in terms of the prior Allotment policy where the contrary view of the destiny of Indian tribes already held sway at the time the 1933 Act was adopted. Likewise the rationale of *Montana* concerning the limitations on the Crow Tribe’s authority under Article 2 of the 1868 Crow Treaty because of the alienation of lands occasioned by allotment finds no application to the scope of the Navajo Nation’s authority under Article 2 of the 1868 Navajo Treaty as to lands within its reservation boundaries as enlarged by Congress.”

Id.

The 2007 *MacArthur* panel in fn. 4 recharacterized the case, relying on the 2005 decision, from a Navajo case with claims arising from Navajo law, to holding the case

“... is one arising under federal law because it turns on substantial questions of federal law.” *MacArthur II*, 391 F. Supp. 2d at 987-88 (internal quotations and modifications

omitted); see also *Superior Oil Co. v. United States*, 798 F.2d 1324, 1329 (10th Cir. 1986) ("[I]n cases encompassing the federal question whether a tribal court has exceeded its lawful limits of jurisdiction involving an exercise of civil subject-matter jurisdiction . . . the federal district court is empowered to review a tribal court decision under 28 U.S.C. § 1331."); *Wilson v. Marchington*, 934 F. Supp. 1176, 1178 (D. Mont. 1995), reversed on other grounds at 127 F.3d 805 (9th Cir. 1997). This is especially true considering the prior panel's holding that the *Montana* analysis is a threshold issue. See *MacArthur I*, 309 F.3d at 1226-27."

Congress has provided no *de novo* review for Indian Court cases. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 67-68, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). This 2007 Tenth Circuit case, (a) reversed the 2002 Tenth Circuit holding that the Defendants were not the state, without an en banc hearing; (b) discarded the entire *National Farmer's* analysis ultimately showing *Montana* should not apply here by Congressional expression and intent, (c) displaced the Navajo Court facts and characterization of the case as one arising under Navajo law enforcing only Navajo law, and (d) for the first time since Lord Coke in England, cloaked political subdivisions where the state fisc was not at risk, with state sovereign immunity, *Cook County, Illinois v. U.S. ex rel Chandler*, 538 U.S. 119 (2003), without the required en banc hearing *Burlington Northern & Santa Fe Ry. Co. v. Burton*, 270 F.3d 942 (10th

Cir. 2001) (e) ignored the 2005 decisions' exhaustive recognition of all Congressional and Executive law sources and their unanimous express intentions to protect, preserve, expand and strengthen Navajo Nation inherent sovereignty and Navajo Court authority and equal application of its laws over all lands within its borders, and over all its persons, by analyzing all other sources of law, the *Montana* doctrine violates, because Congress and the Executive by legal instruments expressly reject the allotment act era's intent.

The holding that the lands were 'state' 'fee' lands contradicts the 2005 District Court at pg. 960, holding:

"The 1933 Act did not create a jurisdictional "checkerboard" of Reservation land and non-tribal land holdings; it delineated a continuous Reservation boundary, bringing the lands thus encompassed "within the exclusive sovereignty of the Navajos under general federal supervision," *McClanahan*, 411 U.S. at 175, 93 S.Ct. 1257, and within "Indian country" under 18 U.S.C.A. § 1151(a).

Id.

This decision also applied 'comity' to not enforce the orders as claiming such is within the Court's discretion, even though this Court's historical roots are in the 8th Circuit that consistently applied full faith and credit to Indian Nation courts, and does so without an en banc hearing. 2005 *MacArthur* at 1016-1017.

And its finding of mootness deprives the Navajo Court of making any such Navajo law determinations of mootness under Navajo law the exclusive law of the Nation. Ad/ap 433, 386, 388, 391, 394.

(e) The Navajo Court issues its ruling allowing Plaintiffs to seek redress and clarification of Navajo Court jurisdiction, just not by joining an amicus.

12. On April 2, 2008 the Navajo Nation Supreme Court in *Ford Motor v. Kayenta District Court*, (Ad/ap 347) disallowed these plaintiffs joining with this counsel in her amicus brief, but allowed the Plaintiffs could posit their question of Navajo Court jurisdiction in this case, to the Navajo Nation Supreme Court in three different ways under Navajo law.

(f) The Federal District Court Issues Its Ruling Preventing the Navajo Plaintiffs from going into the Navajo Nation Supreme Court to seek a clear definition of Navajo Nation authority.

13. July 2, 2008 (Ad/ap 350) the U.S. District Court issued its order prohibiting these Navajo Plaintiffs from seeking clarification of the question of Navajo Nation jurisdiction from the Navajo Nation Supreme Court, in this case from the Navajo Nation Supreme Court to exhaust their remedies under *National Farmer's*. In this order, the U.S. District Court once again stated it had to

apply *Montana* due to the 2002 mandates while recognizing the credibility of the Plaintiffs' arguments as supported by case law and other legal sources.

(g) The Navajo Nation issues its Supreme Court decision in another case, but defines its jurisdiction over non Indian tortfeasors, by Treaty.

14. Ford Motor v. Kayenta District Court, SC-CV-33-07 Dec. 18, 2008.

Ad/ap at 373 .

D. FINAL DISPOSITION

The final disposition of all these cases is that these Plaintiffs are denied enforcement of their Navajo Court orders, and are now prohibited from petitioning the Navajo Supreme Court, though it said they could do so, to define the Navajo jurisdiction in this case by Federal Courts relying on a "*Montana*" standard the 2005 District Court found should not apply, but had to apply because this Court so instructed his Court to do so in its 2002 *MacArthur* ruling.

The result is that for over a million people, entering onto or living within the Navajo Nation, Indian and non Indian alike, injured by non Indian defendants, residing outside Navajo borders, there is no Court of redress for their injuries in a Court with orders fully enforceable where

Defendants reside. The Navajo Nation Supreme Court in *Ford Motor v. Kayenta District Court, supra*, finds the application of the *Montana* Doctrine is intruding on its sovereign authority, undermining its ability to govern and secure the peace and welfare of its people against non Indians in both the criminal and civil areas, as guaranteed by its Treaties.

IV. SUMMARY OF THE ARGUMENT

Plaintiffs assert that Article III Courts are exceeding their authority in not enforcing Treaty protected BIA-contracted ISDA-Navajo Court actions, and by prohibiting these Plaintiffs from seeking relief from the Navajo Supreme Court in defining its jurisdiction, by relying on and applying a judicially-created doctrine “*Montana*” that the 2005 District Court found is unmoored from all other legal sources regarding this case’s issues. When Congress and the Executive clearly expressly define Indian Nation civil authority, unaltered, undivested, or unlimited by Congress or the Executive, there is no federal judiciable question before the Court. *See, Nat’l Farmer’s, Santa Clara, and Miner Electric, supra.*

The 2005 District Court with the full Navajo Court file including audio cds for hearings, made no findings of the Navajo Plaintiffs or Navajo Courts acting in bad faith or denying the parties due process of law, and would have had that Court found any as part of the *Nat'l Farmer's* analysis.

Plaintiffs also assert that the Article III Courts exceed their authority by not enforcing the Navajo law and Navajo Court actions over all parties, equally, Indian and non Indian alike, based upon the Navajo Court being a Treaty-recognized Court, based upon Navajo and International Treaties Congress and the Executive exercising their Article I and II Treaty powers, have executed upon, thereby making Navajo law and Court actions domestically binding, under Article VI of the U.S. Constitution, based upon the Treaty-law analysis found in *Medellin v. State of Texas*, 552 U.S. ____ (June 25, 2008) (Treaty Court acts are binding domestically where Congress and the Executive have executed the Treaties into positive law).

Without the ability to litigate the applicability of the *Montana* doctrine, before the 2002 Tenth Circuit *sua sponte* mandated it be applied by the lower court, the 2002 *MacArthur sua sponte* orders

denies these Navajo Plaintiffs of a fair opportunity to challenge the doctrine or its applicability here, void^[13] as violating the 5th Amendment of the Constitution, exceeding this Court's decision.

V. ARGUMENT

B. STANDARD OF REVIEW FOR ALL THREE ISSUES AND ARGUMENTS IS THE SAME

Each issue in the arguments raised in this Appeal deals with the scope of subject matter jurisdiction of the Article III Courts. The standard of review for subject matter jurisdiction is *de novo*. *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, [190 F.3d 1156](#), 1160 (10th Cir. 1999). (We also review a claim of subject matter jurisdiction *de novo*. *Id.* "Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction." *Id.*)

ISSUE 1. The Federal Courts in the “MacArthur” rulings issued “void judgments” based upon the Federal Courts exceeding Article III Court jurisdiction limits by applying the “Montana” doctrine thereby

(1) limiting Navajo Court jurisdiction when its jurisdiction is a non judiciable question of Congressional and Executive branch defined Navajo Nation Court authority, and

¹³ *Schwartz v. United States*, 976 F.2d 213,2 17 (4th Cir.1992); *Wi'inhoven v. United States*, 201 F. 2d 174 (9th Cir. 1952)

**(2) denying these U.S. Citizens their only Congressional and Executive branch recognized legal redress and due process (for acts arising within Utah Navajo borders), and
(3) now prohibiting the Navajo Plaintiffs from seeking clarification of Navajo Nation jurisdiction in the Navajo Nation Supreme Court.**

While the *MacArthur* courts apply *Montana*, to deprive these Navajo Plaintiffs of Navajo law due process and redress, they don't inform these Navajo Plaintiffs or the potentially million or more like-situated Plaintiffs with non Indian defendants, into which Court they may go to petition their government for redress of injuries. "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 1 Cranch 137, 147 (1803) (citing 3 Blackstone Commentaries 109).

Leaving over a million people potentially injured by non Indian non resident defendants without fully enforceable Navajo Court orders where the non Indian defendants reside (a) directly interferes with Navajo governance and its ability to exercise its police powers to secure the peace and safety of all persons in its area, and (b) violates the U.S. Treaties and U.S. fiduciary duty to secure Navajo Nation members and visitors well being and safety from state invasions promised in the

Treaty of Guadalupe Hidalgo, and the Navajo Treaties of 1849 and 1868, and (c) violates the terms of their ISDA judicial program contracts that by statute (25 USC 450(l) and (n), executing those Treaties. See, the Navajo Nation latest Supreme Court ruling defining its jurisdiction over all lands and all people. *Ford Motor v. Kayenta District Court*, SC-CV-33-07 Dec. 18, 2008. Ad/ap 373 .

1. MONTANA’S DOCTRINE WAS NEVER INTENDED TO BE A DE FACTO BOYCOTT OF INDIAN LAW AND INDIAN COURT AUTHORITY OVER NON INDIANS

Montana’s doctrine is stated as follows:

“To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee, supra*, at 223, 79 S.Ct. 269; *Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct. 712, 48 L.Ed. 1030; *Buster v. Wright*, 135 F. 947, 950(CA8); see *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 – 154, 100 S.Ct. 2069, 65 L.Ed.2d 10. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See *Fisher v. District Court*, 424 U.S. 382, 386, 96 S.Ct. 943, 47 L.Ed.2d 106; *Williams v. Lee, supra*, at 220, 79 S.Ct. 269; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128 – 129, 26 S.Ct. 197, 50 L.Ed. 398; *Thomas v. Gay*, 169 U.S. 264, 273, 18 S.Ct. 340, 42 L.Ed. 740.”

Montana v. United States, 450 U.S. at 565–566, 101 S.Ct. 1245

The U.S. Supreme Court in 1981’s *Montana* decision on page 558 explains that the decision applies to the Crow only over its specific allotment act prior alienated lands and not its Treaty reserved *non allotment* alienated lands. In addition, the U.S. Supreme Court also identified that *Montana*’s reasoning would not apply to those Indian Nations who were promised ‘forever’ they would only be under Federal, not state, authority like the Cherokee and Choctaw. ***Montana* fn. 5, a third exception.** The Supreme Court has consistently likened the Navajo Nation to the undiminished and independent and self determined Choctaw and Cherokee Nations over which state authority and Federal Court authority is never to be found as in *Montana*’s fn. 5, in *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164 (1973); *Warren Trading Post Co. v. Arizona Tax Comm’n*, [380 U.S. 685, 690](#) (1965); *Williams v. Lee*, 358 U.S. 217, (1959)). See, Navajo ruling in *Ford*, *supra*.

Simply put, Congress’ and the Executive’s Treaty protections were strictly observed and supported by the *Montana* court. In 1984, observing *Montana*’s narrow holding, “general principles of tribal

sovereignty applicable to tribal authority over tribal land should not be extrapolated from *Montana*, a narrow, fact-bound case.” *Jicarilla Apache Tribe v. Supron Energy Corp.* 728 F.2d 1555, 1571 n.6 (10th Cir. 1984) (Seymour, J., dissenting in part), *adopted as opinion en banc*, 782 F.2d 855 (10th Cir.), *cert. denied*, 479 U.S. 970 (1986).

The legal instrument relied upon to diminish Crow authority was the allotment act. It has been repealed in 2000. See, 25 USC §§331-333 repealed. Congress’ intent to diminish was repealed. '[W]hen an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.' *Ex Parte McCardle*, 74 U.S. 506 (1868).

2. FOR THE NAVAJO NATION, MONTANA’S APPLICATION VIOLATES THE SEPARATION OF POWERS DOCTRINE

Under the separation of powers doctrine, Article III courts enforce Congressional acts and Executive execution of those acts, “legal instruments”. U.S. Constitution Article III sec. 1. Legal instruments, such as *Montana’s* allotment act, must exist for a judicial doctrine to be based upon it, to apply to diminish Indian Nation jurisdiction. *Montana*, *Santa Clara*, *Nat’l Farmers*, *Miner Electric*, *supra*. A void judgment results if the Court exceeds those limits if the judicial doctrine is

unmoored from any legal instruments expressing the other two branches desire to limit Indian Nation jurisdiction.^[14] Congress expressly and adamantly provides no ‘state’ authority or ‘state’ Courts for redress within any part of the Navajo Nation by the Navajo Treaties of 1849 Art. 1 (promising ‘forever’ only federal law would have authority over the Nation) and 1868 Art. II (establishing Navajo civil authority within its borders without exception for land ownership or types of land or race, ethnicity or political affiliations or residency of defendants), executed upon by 18 USC §1151 (prohibiting checkerboarding of

¹⁴ Under Federal Constitutional standards the U.S. Supreme Court stated that if a court is "without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers." *Elliot v. Piersol*, 1 Pet. 328, 340, 26 U.S. 328, 340 (1828); **BLACK'S LAW DICTIONARY**, Sixth Edition, page 1574: “**Void judgment.** One which has no legal force or effect, invalidity of which may be asserted by any person whose rights are affected at any time and at any place directly or collaterally. [citation omitted].. One which from its inception is and forever continues to be absolutely null, without legal efficacy, *ineffectual to bind parties or support a right, of no legal force and effect whatever*, and incapable of confirmation, ratification, or enforcement in any manner or to any degree. ..” ; *Rose v. Himely* (1808) 4 Cranch 241, 2 L ed 608; *Pennoyer v. Neff* (1877) 95 US 714, 24 L ed 565; *Thompson v. Whitman* (1873) 18 Wall 457, 21 l ED 897; *Windsor v. McVeigh* (1876) 93 US 274, 23 L ed 914; *McDonald v. Mabee* (1917) 243 US 90, 37 Sct 343, 61 L ed 608.”

jurisdiction expressly civilly and criminally), and 25 USC §§1321-1326 (the only means any state can exercise authority over any portion of the Navajo Nation) and no federal *de novo* review of Tribal proceedings by refusal to pass required statutes giving Federal Courts such powers.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 67-68, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

“As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. *See Lone Wolf v. Hitchcock*, 187 U. S. 553, 187 U. S. 565 (1903). Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. **But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.**”

Id. Emphasis added.

The U.S. Supreme Court in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U. S. 845, 855-856 (1985) looked to the Choctaw Nation as *Montana* did in fn. 5's exemption from the *Montana* doctrine, holding there was no federal question before the federal courts due to

Congress' express refusal to take federal jurisdiction of civil matters within the Nation. There were no legal instruments for the Article III Courts to enforce or execute so as to diminish Choctaw jurisdiction.

"Speaking of civil jurisdiction, Attorney General Cushing wrote: "But there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this, a question of property strictly internal to the Choctaw nation; nor is there any written law which confers jurisdiction of such a case in any court of the United States.

.....

"The conclusion seems to me irresistible, not that such questions are justiciable nowhere, **but that they remain subject to the local jurisdiction of the Choctaws.**

.....

"Now, it is admitted on all hands . . . that Congress has `paramount right to legislate in regard to this question, in all its relations. It has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters. . . . By all possible rules of construction the inference **is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation.**" 7 Op. Atty. Gen. 175, 179-181 (1855) (emphasis added).

Id. Emphasis added.

In 1987, looking to the necessity of a legal instrument to execute upon to diminish Tribal authority, again post-dating *Montana*, the U.S. Supreme Court held an opposite presumption of *Montana*,

"Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute..."

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); *see Pela v. Peabody Coal Co.*, No. A–CV–18–89 (Navajo S.Ct. 09/28/1990), at ¶ [29] (“Consistent with congressional policy, tribal courts presumptively have civil jurisdiction over reservation activities unless affirmatively limited by treaty or a federal statute. ...*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).”).

A very old case, *Taylor v. Morton*, 2 Curt C. C. 454, 23 F. Cas. 74 (1855) shows how Article III Courts must observe Treaties and their statutes strictly, as they lack power to do anything else. Without any legal instrument the 2005 U.S. District Court can identify for taking away power from the Navajo Nation, Federal Courts exceeds their jurisdiction by applying *Montana* in this case, equally as to the *Miner Electric* lower District Court did when it applied *Montana* to attempt to circumvent Indian Nation sovereign immunity.

ISSUE TWO: The United States Congress and the Executive branches have fully executed Navajo and International Treaties such that all Navajo Court acts are domestically binding on all Federal Courts under the doctrine of U.S. Constitution Article VI Treaty-Courts rulings being the Supreme Law of the Land when Congress and the Executive, execute the Treaties by statutes, Treaties and other law under the Supreme Court’s ruling on Treaty law found in *Medellin*.

“A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law and which are capable of enforcement as between private parties in the courts of the country. A treaty, then, is a law of the land, as an act of Congress is whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.”

Head Money Cases, 112 U.S. 580 (1884). See, *Taylor v. Morton*, *supra*.

See BIA-Judicial Program Executive Agreement contracts, under 25 USC 450(l) (Ad/ap 559) mandating Navajo law and Courts adjudicate civil disputes within the Nation, the Tribal Justice Support act and 2000 Tribal Justice Support Act and ICRA providing for Navajo Treaty Courts to adjudicate civil disputes for Indian and non Indian alike. *Santa Clara*.

As the foregoing shows, there are no Congressional or Executive legal instruments diminishing Navajo Nation authority over all its lands, and all the people within those lands since Congress and the Executive branches have repealed the allotment era. Congress by statutes has executed the Navajo and UNCCPR into domestic law.

1. THE NAVAJO NATION DEFINITION OF ITS OWN JURISDICTION IS CONSISTENT WITH CONGRESSIONAL AND EXECUTIVE DESIGNS EXECUTED INTO FEDERAL DOMESTIC LAW

Today, the Nation's largest Indian Nation by the BIA-adopted and ratified and Indian Self Determination Act (ISDA)- contracted Navajo Nation inherent sovereign-enacted statutes, has full jurisdiction over all lands and all persons without exception for land ownership or any checkerboarding of jurisdiction barred by Congress in 18 USC §1151, both civilly and criminally. *McClanahan infra*. 2005 *MacArthur* at 960.

This full Navajo Supreme Court jurisdiction is consistent with its Navajo Treaties promising (a) 'forever' they would only be under Federal authority (Navajo Treaty of 1849 Art. I)(Ad/ap 386) and (b) consistent with the property descriptions and exclusionary power provisions of the Navajo Treaty of 1868 Art. II, (Ad/ap 390)and (c) consistent with the 1933 Aneth Extension Act (Ad/ap 479)and its property descriptions.

The 2005 *MacArthur* U.S. District Court found no law to the contrary of Navajo Court jurisdiction definitions. As that Court observed,

"The 1933 Act [expressly extending Navajo government authority to new lands in the era of the new deal

extinguishing the allotment act era] cannot be read in terms of the prior Allotment policy where the contrary view of the destiny of Indian tribes already held sway at the time the 1933 Act was adopted. Likewise the rationale of *Montana* concerning the limitations on the Crow Tribe's authority under Article 2 of the 1868 *Crow* Treaty because of the alienation of lands occasioned by allotment *finds no application* to the scope of the Navajo Nation's authority under Article 2 of the 1868 Navajo Treaty as to lands within its reservation boundaries *as enlarged* by Congress [in aid of Indian Nation self determination and self governance.]”

Id at 962 and fn. 105. Emphasis and [] comments added.

2. THE ANETH EXTENSION ACT EXECUTES AND EXPANDS THE NAVAJO NATION TREATIES AND FEDERAL EXPANSION OF NAVAJO AUTHORITY BY STATUTE

This 2005 MacArthur court only applied *Montana* under Tenth Circuit orders to do so, finding doing so was probably in error without first thoroughly examining the legal history of the area. Id. The Aneth Extension act is an ‘allotment’ act *from* Utah, *from* the State, *to* the Navajo Nation, based upon an exchange of Tribal funds for the Navajo purchase of the Utah lands with all surface rights on all lands, and shared mineral royalties on state school trust lands, on lands set aside for exclusive Navajo use, “permanently”.

ANETH EXTENSION ACT

(KAPPLER'S INDIAN AFFAIRS VOL V)

“Chapter 160

March 1, 1933. | [H.R. 11735.] 47 Stat., 1418.

An Act To permanently set aside certain lands in Utah as an addition to the Navajo Indian Reservation, and for other purposes¹

Section 2

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all vacant, unreserved, and undisposed of public lands within the areas in the southern part of the State of Utah, bounded as follows: Beginning at a point where the San Juan River intersects the one hundred and tenth degree of west latitude; thence down said river to its confluence with the Colorado River; thence down the Colorado River to a point where said river crosses the boundary line between Utah and Arizona; thence east along said boundary line to the one hundred and tenth degree of west longitude; thence north to the place of beginning; also beginning at a point where the west rim of Montezuma Creek or wash intersects the north boundary line of the Navajo Indian Reservation in Utah; thence northerly along the western rim of said creek or wash to a point where it intersects the section line running east and west between sections 23 and 26, township 39 south, range 24 east, Salt Lake base and meridian in Utah; thence eastward along said section line to the northeast section corner of section 26, township 39 south, range 25 east; thence south one mile along the section line between sections 25 and 26 to the southeast section corner of section 26, township 39 south, range 25 east; thence eastward along the section line between sections 25 and 36, township 39 south, range 25 east, extending through township 39 south, range 26 east, to its intersection with the boundary line between Utah and Colorado; thence south along said boundary line to its intersection with the north boundary line of the Navajo Indian Reservation; thence in a westerly

direction along the north boundary line of said reservation to the point of beginning be, and the same are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon: *Provided*, That no further allotments of lands to Indians [not from Indians] on the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said county under the Act of July 4, 1884 (23 Stat. 96; U.S.C., title 43, sec. 190). Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37 1/2 per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: *Provided*, That said 37 1/2 per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.

SEC. 2.

That the State of Utah may relinquish such tracts of school land within the areas ***added to the Navajo Reservation*** by section 1 of this Act as it may see fit ***in favor of the said Indians***, and shall have the right to select other unreserved and nonmineral public lands contiguously or noncontiguously located within the State of Utah, equal in area and approximately of the same value to that relinquished, said lieu selections to be made in the same manner as is provided for in the Enabling Act of July 16, 1894 (28 Stat. L. 107), except as to the payment of fees or commissions which are hereby waived.

Approved, March 1, 1933.”

Id. Emphasis Added [] comment added.

“All” lands are clearly understood to be ‘permanently’ withdrawn.

The property description makes no exceptions for any ‘state’ school

lands or other lands that it could have so specifically identified, if Utah

or Congress desired it to be so. Tribal funds *purchased* from Utah the Navajo complete surface rights authority fairly and more than squarely based upon Utah's mispending of their mineral rights royalty shares.

Looking to *Atkinson, supra*, the 2005 *MacArthur* court at 962, fn. 105 reasoned *Montana* and its allotment act presumptions of diminishment, did not apply to the Utah portion of the Nation and these lands, and the U.S. Supreme Court application of *Montana* in *Atkinson*, was probably in error as not looking to modern Congressional expressions of Indian Nation sovereignty.

“the *Atkinson* Court remarked that the enlargement “did not alter the status of the property: It is, like millions of acres throughout the United States, non-Indian fee land within a tribal reservation.” 532 U.S. at 648, 121 S.Ct. 1825 (citing Act of June 14, 1934, ch. 521, 48 Stat. 960–962). But remembering that most of those “millions of acres” were ***alienated*** [from Indians] through various Allotment acts rather than ***being added*** [to Indians] through enlargement of reservation boundaries **in aid of tribal self-government**—or by being purchased using Indian trust funds—the lands in question at Montezuma Creek are not “like” those “millions of acres” at all. Viewed through the lens of the *relevant Indian policy of the political branches in 1934*, the *Atkinson* Court may have erred by importing *Montana*’s “general principle” into the context of the Navajo Nation without examining the historical relevance of *Montana*’s rationale. See Robert N. Clinton, Carole E. Goldberg & Rebecca Tsosie, *American Indian Law: Native Nations and the Federal System* 719 (4th ed.2003) (text note re: “*Atkinson*” *Id. emphasis added. [] comments added.*

“Looking to the policy of the Allotment Acts—“the eventual assimilation of the Indian population ... and the ‘gradual extinction of Indian reservations and Indian titles,’ ” the *Montana* Court asserted that “that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands.” *Id.* at 559 n. 9, 561, 101 S.Ct. 1245 (citations omitted)....

The presumptions underlying the Allotment policy find no application here because the Montezuma Creek area was *added* to the Navajo Reservation as part of the major shift in federal Indian policy reflected in legislation such as the Indian Reorganization Act of 1934....

The 1933 Act cannot be read in terms of the prior Allotment policy where the contrary view of the destiny of Indian tribes already held sway at the time the 1933 Act was adopted.

Likewise the rationale of *Montana* concerning the limitations on the Crow Tribe’s authority under Article 2 of the 1868 Crow Treaty because of the alienation of lands occasioned by allotment finds no application to the scope of the Navajo Nation’s authority under Article 2 of the 1868 Navajo Treaty as to lands within its reservation boundaries as enlarged by Congress.”

2005 *MacArthur* at 961-962.

3. THE INDIAN CIVIL RIGHTS ACT EXECUTES THE NAVAJO TREATY PROMISES THAT NO STATE WOULD HAVE AUTHORITY WITHIN ITS BORDERS AND THE PRE EXISTING NAVAJO NATION BILL OF RIGHTS

Congress had two goals in passing the ICRA: (1) to preserve Constitutional rights within Indian Country; and (2) to foster Indian Nation self determination and independence from State and Federal intrusions. According to *Santa Clara Pueblo*, ICRA’s 25 U.S.C. §§1301-

1303 accomplish the provisions of Constitutional rights within Indian Nations, and §§1321-1326 ensures no states can take over authority within the Nation without complying with these federal requirements, not met here, and §1303 is the only review a federal court has, and it is habeas relief for criminal matters. The Navajo Nation prior to ICRA adopted its Bill of Rights which guarantees due process and equality of all persons before its Courts. ICRA executes the Navajo law into domestic law, while expressly preserving Navajo inherent sovereignty. Both Santa Clara, and post Montana, observe Congress' refusal to give de novo review of Tribal Court actions to federal courts as Congress' intent to protect Tribal Court's from intrusion and displacement of Tribal law with Federal law, as has occurred here.

4. THE INDIAN SELF DETERMINATION ACT (ISDA) EXECUTES THE UNCCPR AND BY CONGRESSIONAL STATUTORY CONTRACT (25 U.S.C. 450(L)), THE PRESIDENT HAS AN EXECUTIVE AGREEMENT CONTRACT EXECUTING THIS STATUTE, WITH THE NAVAJO NATION FOR IT TO PROVIDE JUDICIAL PROGRAM SERVICES TO ALL LANDS OVER ALL PEOPLE WITHIN ITS BORDERS.

The Navajo Nation BIA-ISDA contract for judicial program services mandates Navajo law and the Indian Civil Rights Act apply within Navajo Indian Country as Navajo law defines it. Under the *Head*

Money Case observation, Congress and the Executive by way of clearly recognizing and by statute establishing Navajo Nation authority, defines Navajo authority by federal statutes and the President executing those statutes, and nothing can diminish that Treaty-executed authority.

In the 1994 in the U.S. report to the UNITED NATIONS regarding the UNCCP compliance, where the President interprets Indian treaties, the U.S. recognizing the ISDA project and laws as executing the Treaty for aboriginal people, stated,

“Once aboriginal rights are recognized by Congress, then the tribe has title that cannot be extinguished without a clear and specific action by Congress in a treaty, statute or executive order, and compensation for the extinguishment of the right. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *United States ex rel. Hualapai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941).”

The President also interprets treaties as establishing a U.S. fiduciary duty for all U.S. departments to uphold, recognizing persons injured may compel the government to do its duty.

“The United States also has a more general trust relationship with the Indian people, *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*), and that relationship creates an overriding duty to deal fairly with all Indians. *Morton v. Ruiz*, 415 U.S. 199,

236 (1974). The trust obligation is a strict fiduciary standard that applies to all departments of the government that deal with Indians, not just the departments specifically charged with responsibility for Indian affairs. If Indians believe the government is not acting in accordance with its trust responsibilities, they may seek injunctive relief from the courts to compel the government to perform its duties or, if damage has already occurred, they may obtain damages through a breach of trust action. *Mitchell II*, 463 U.S. at 226-28.

U.S. report 1994

Just these ICRA and ISDA statutes execute Navajo Nation sovereign authority into domestic law, by further executing Navajo and UNCCPR treaties into domestic federal law. Congress does not stop with just these two laws. Since 1981's *Montana*, Congress has been exercising its 'exclusive' and 'plenary' powers placing nails in the coffin of the allotment act era.

Under ... the clear and unambiguous language of Treaties and statutes, this Court can sustain, under Article VI of the Constitution, the Navajo Court Orders as an exercise of 'inherent sovereign' rights (25 U.S.C. § 1301(2)) to 'enact and enforce laws' (25 U.S.C. § 3665 [15])

¹⁵ "Nothing in this chapter shall be construed to - (1) encroach upon or diminish in any way the inherent sovereign authority of each tribal

within the confines of due process and equal protection to ‘any person’ (25 U.S.C. § 1302(8)) in ‘Indian lands’ the Tribes are ‘responsible’ for governing, as the ‘most appropriate’ Courts for resolving civil disputes in ‘suits at law’ (25 U.S.C. § 3651 [16]), based upon the Navajo Nation’s

government to determine the role of the tribal justice system within the tribal government or to enact and enforce tribal laws; (2) diminish in any way the authority of tribal governments to appoint personnel; (3) impair the rights of each tribal government to determine the nature of its own legal system or the appointment of authority within the tribal government; (4) alter in any way any tribal traditional dispute resolution fora; (5) imply that any tribal justice system is an instrumentality of the United States; or (6) diminish the trust responsibility of the United States to Indian tribal governments and tribal justice systems of such governments. “

¹⁶ “The Congress finds and declares that - (1) there is a government-to-government relationship between the United States and Indian tribes; (2) Indian tribes are sovereign entities and are responsible for exercising governmental authority over Indian lands; (3) the rate of violent crime committed in Indian country is approximately twice the rate of violent crime committed in the United States as a whole; (4) in any community, a high rate of violent crime is a major obstacle to investment, job creation and economic growth; (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments; (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the *most appropriate* forums for the adjudication of disputes affecting personal and property rights on Native lands; (7) enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency; (8) there is both inadequate funding and an inadequate coordinating

right to enact and enforce their laws (25 U.S.C § 3665(1), 3601, 3602), for Indians

and non-Indians alike (25 U.S.C. 1302(8) ‘all’ or ‘any’ person) under the Navajo Nation Bill of Rights, Navajo customs and traditions, and Navajo statutes and other legal instruments.

If the intent of Congress is clear and unambiguous, judicial inquiry stops... *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 & n. 21(1978) also *Nat’l Farmer’s*. And any statutory ambiguity in this regard should be resolved by liberal construction, with “ ‘doubtful expressions being resolved in favor of the Indians.’ *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 63 L.Ed. 138 (1918)). The Treaty of 1868 sec 10 mandates no further cessions from

mechanism to meet the technical and legal assistance needs of tribal justice systems and this lack of adequate technical and legal assistance funding impairs their operation; (9) tribal court membership organizations have served a critical role in providing training and technical assistance for development and enhancement of tribal justice systems; (10) Indian legal services programs, as funded partially through the Legal Services Corporation, have an established record of providing cost effective legal assistance to Indian people in tribal court forums, and also contribute significantly to the development of tribal courts and tribal jurisprudence; and (11) the provision of adequate technical assistance to tribal courts and legal assistance to both individuals and tribal courts is an essential element in the development of strong tribal court systems.” Emphasis added.

the Nation without a popular vote. All the Treaties, Executive Agreements, and statutes are drafted by the United States and should be construed against the drafter, if the U.S. was fighting these Plaintiffs position, which they are not. *Id. Anthony v. United States*, 987 F.2d 670 (10th cir. 1993) (It is the duty of the government to deal honorably with its citizens). Navajo Plaintiffs, Navajo Judges, and Navajo people are U.S. citizens also. “Congress has determined [that] the Tribe’s are responsible for the governance of Indian lands, and their courts are the ‘most’ appropriate forums for doing so.” (*Id.* (citing 25 U.S.C.A. §§ 3601, 3602, 3651, 3665)).

Through the ISDA, Tribal Justice Support act and 2000 amendments, and all the Presidents executive orders or statements since President Roosevelt and Nixon, the Navajo Treaty promises against state and federal intrusion for civil cases based upon Navajo definitions of its law, are now fully executed by domestic law and under Medellin, where the President, by statutory contract, is executing the federal law, designed and intended to strengthen and expand Navajo authority over all its lands and all its people, the Federal Courts are left with nothing to do but enforce the Navajo orders, which is enforcing the

other two branches exercise of their exclusive and plenary power in Indian Affairs. It goes without saying, the ISDA project of 1988 the President recognized as executing into law the UNCCPR in its 1994 report to the UN was after “*Montana*” and makes Navajo law the “supreme law of the land” with its Court’s actions binding domestically under *Medellin’s analysis*. **There is no federal design or purpose for not fully enforcing such a ISDA Indian Nation Court’s actions fully, so there is no subject matter jurisdiction to do anything else.**

Barring Navajo Plaintiffs from exhausting their remedies in Navajo Court where they have also a right to seek Navajo Nation support for them to seek possible injunctive relief or other relief for Treaty violations under breach of contract principles the President and Federal Circuit recognize, is not within the Article III powers as there are no legal instruments supporting this prohibition, and no Federal or international UNCCPR design to warrant such prohibitions by a Federal Court, by *Montana’s doctrine*, that the District Court acknowledges is a wrong standard in its 2005 ruling at pg. 960-962.

ISSUE THREE: Plaintiffs were denied due process, making the *MacArthur* decisions void, by not being allowed to litigate the

applicability of the *Montana* doctrine before it was mandatorily applied by the 2002 Tenth Circuit orders.

The 2002 MacArthur Tenth Circuit Court ordered the District Court to apply *Montana* and do the *Nat'l Farmer's* analysis. That Court did so and said the *Montana* standard was the improper standard to apply. 2005 *MacArthur* 961-962. For about nine years now, these Navajo Plaintiffs seeking relief of the Navajo orders have had to battle not only opposing counsel but the Courts dedicated to allotment era policies Congress and the Executive in every manner imaginable have rejected. These Federal Courts cite to no Federal interest in not enforcing these Navajo Court actions under Article VI, aside from the idea that these Defendants were non Indian and non residents. Federal Courts lack authority to simply declare a 'fact' such as the Montezuma Creek land being 'state' 'fee' land and the employees being 'state' employees who were carrying out State 'police powers' to protect the patients health and welfare, while not addressing the fact they were not only harming the patients, but lying to the Navajo Court about their actions, so they could continue to harm them. As the 2002 *MacArthur* court properly identified,

“Contrary to County defendants' assertion on appeal, tribes are not subordinate to the states, see *Washington v. Confederated Tribes*, 447 U.S. 134, 154 (1980), and certainly not to counties. We must reject County appellees' assertion "that the natural dominion of States and their political subdivisions over tribal governments was clearly established before the United States Constitution came into being and that there has been nothing post Constitution to change that fact"

Id. see fn. 5 therein.

Most recently in *Ford Motor v. Kayenta District Court*, SC-CV-33-07 Dec. 18, 2008 the Navajo Court observed the U.S. Supreme Court judicial doctrines were directly impairing its ability to govern, secure peace and safety for the people, and are violating its Treaty-guarantees that the *Montana* court itself recognized in its narrow ruling.

VI. CONCLUSION

There are no ‘legal instruments’ for this Court to execute upon so as to totally deprive these Plaintiffs of all due process in any Court, to intrude upon the Navajo Nation’s self determination and inherent sovereignty, and to do anything other than hold Navajo Court actions are fully binding domestically as the Supreme Law of the Land. No one has yet identified a specific federal interest in relieving Court found tortfeasors of their responsibility because their race is non Indian, and residence is outside Navajo borders. These Navajo Plaintiffs enjoy the

full entitlement to their day in Court, a Navajo Court, because this right of due process is fundamental to all people in the world, and the United States exemplifies this to the world.

The allotment era by Congressional and Executive actions is over. The 2005 *MacArthur* decision shows that there is a new day for Article III Courts to join with these other two branches and welcome into the United States family of Courts, their brethren and sister Judges of the Navajo Nation Courts, here under Article VI of the U.S. Constitution with fully executed upon Treaties and BIA Executive Agreement government to government contracts for judicial services to all equally on all land without exception, within the exterior borders of the Navajo Nation, in keeping with the post *Montana* UNCCPR and the ISDA and Treaties reflecting fundamental rights found in the Declaration of Independence, Northwest Ordinance, U.S. Constitution, Navajo Nation Bill of Rights and common law and traditions, Navajo Treaties of 1849, 1868, 25 USC 71, 450, 450(a), 450(l), 450(n), 1301-1326, 3601 et seq and 3651 et seq, executive order 13175 and the 1994 Executive memorandum, the UNCCPR, Executive Reports on the UNCCPR, that no Courts have authority to displace.

Based upon all the foregoing, it is proper, particularly in light of the combined *Medellin*'s Article VI treaty analysis and the 2005 District Court *Nat'l Farmer*'s analysis to hold that for the Navajo Nation Treaty-protected Courts, (1) Article VI mandates Article III Courts to give full enforcement Navajo Court orders, enforcing Navajo law, as here, and (2) hold Congress and the Executive have made Navajo law, including Navajo Court authority to enforce Navajo laws, fully binding domestically by executing upon their Navajo and the UNCCPR Treaties, adopting the reasoning of *Medellin*, for when Treaty-court actions are binding domestically, and (3) hold that there is no longer a federal question of any ambiguities in Navajo Court jurisdiction to which the *Montana* doctrine can apply, and (4) hold that to the degree any Federal Courts did not fully enforce the Navajo Court orders, and are now prohibiting the Petitioners from seeking further relief in the Navajo Court, or dismissed Navajo Court parties, they acted outside their Article III jurisdiction, as no Congressional or Executive Treaty provisions, or statutes, or other legal instruments exist to deprive anyone of their fundamental rights. Alternatively, this case fits within Montana's exceptions at all levels, if Montana still exists for the Navajo

Nation. Further, these Plaintiffs pray for all other relief fair in equity and just under the law.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 13, 870 words, not counting the title page or table of contents. I relied on my word processor and its Microsoft Word software to obtain this count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Susan Rose 3/18/09

CERTIFICATE OF ELECTRONIC COMPLIANCE

I have scanned this document with Norton Antivirus 2000 professional edition updated today and find no problems. /s/ Susan Rose

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2008 I served a copy of this opening brief and rule 28.2 addendum/attachments upon the following counsel electronically, except R. Dennis Ickes (whose email address is unavailable), and am serving by Fed Ex ground, two copies of the opening brief and rule 28.2 addendum/attachments, and one appendix, on each of the following and am serving this Court electronically,

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(*In converting the Navajo decisions to a word searchable format

A very few formatting /spelling errors occurred)*

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THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK, NEW MEXICO

DONNA SFNGER; Fred Riggs C#1S57a;)
Alison Dickson C#212,755;)
Plaintiffs,)

SR-CV-162 -99-CV

V)

SAN JUAN COUNTY. San Juan Health
Service District; Rick Bailey; Reid)
Wood; Lauren Stinafer; Craig Halls;
Commissioner Bill Redd; Roger Atcitty;)
Commissioner Mark Maryboy; John Lewis;)
Commissioner J. Tyron Lewis; Karen
Adams; Patsy Shurnway .and other John)
and Jane Does as yet unnamed in their)
personal and official capabilities,)
Defendants.

FINDINGS, OPINION AND JUDGMENT
AT PRELIMINARY INJUNCTION

THE COURT, having jurisdiction over these parties and proceedings made out on a territorial premise, that is, the area in which the subject health care facility is located is within the territorial jurisdiction of the Navajo Nation, and for further cause that two of the three Plaintiffs are members of the Navajo Tribe of Indians, the third is married to an enrolled member, and they ALL have significant contact with the Navajo Nation, as does the clinic itself as a major health care provider to the Navajo and other local Native Americans who look to this Court for justice. Such contentions of jurisdiction are well founded by way of Montana v. United States, 450 U.S. 544 (1981) and the exception found in Strate, Associate Tribal Judge, Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, et al, v. A-I Contractors, U. S. Supreme Court, April 28, 1997, notwithstanding 7 NNC 233(B), and therefore, having now before it the above styled proceedings ripe for decision in the matter of the application of the plaintiffs for a preliminary injunction pursuant to Rule 65(c) of the Navajo Nation Rules of Civil Procedures, pending trial in chief in the matter of the initial complaint drawn by the plaintiffs against the defendants raising issues of denial of due process;

denial of equal protection;
denial of free speech and assembly;
defamation;
theft;
conspiracy;
and interference with the public policies of the Navajo Nation.

Despite the contentions of the defendants, the Court specifically finds all these claims raise issues clearly extending well beyond the mere loss of income or loss of a job, directly into the wellbeing of the plaintiffs and Navajo Nation citizens and as argued by the plaintiffs, go to the soul of a person and their inalienable rights that exceeds monetary value.

Likewise the plaintiffs also raise claims that the Native American, and in particular, Navajo patients of Montezuma Creek Clinic, have likewise been and are being harmed by the San Juan Health Services District conduct, by way of:

stopping emergency and routine ambulance and EMT service;
stopping laboratory services; and
billing of IHS patients creating the chilling result of effectively turning many patients, including diabetic patients, away from the Montezuma Creek Clinic for fear of their inability to pay for their care.

For raising such claims, the plaintiffs, as well as plaintiffs counsels, were labeled 'bold faced liars' by the defendants and likewise, San Juan Health Services District has totally disregarded the Navajo Nation's chapters' resolutions and the concerns for the Navajo patients' well being. On initial application the Court issued a temporary restraining order on behalf of the plaintiffs in prelude to the proceedings in chief on injunctive relief. The TRO was dismissed on the motion of the defendants and the proceedings on the preliminary injunction commenced thereafter on testimony. Testimony was taken in sequential setting with written closing arguments received by the court on the 6th of December, 1999.

With the plaintiffs represented by Wm. P. Baules, Esq. of the firm of Wm. P. Battles and Associates of Window Rock, Navajo Nation, and Susan Schildmeyer, Esq., and the defendants by Dennis Ickes, Esq., all testimony and arguments are now fully before the Court, and well

considered in their total; the Court draws attention to the issues of injunctive relief as found at Rule 65(c) of the Rules of Civil Procedure, stating:

That the moving parties, the plaintiffs herein, must demonstrate to the Court that they have a claim framed in a protectable right or interest and have a high likelihood of success on the merits; and,

That the plaintiffs then must further demonstrate that they are likely to suffer irreparable injury, loss, or damage to their protectable right or interest unless injunctive relief is issued; and,

That the likely injury, loss, or damage to the plaintiffs are substantial in nature and character; and finally,

That the plaintiffs do not have an otherwise available and adequate remedy at law.

The Court is mindful that the issuance of injunctive relief is clearly within the sound discretion of the trial court, *Kenai Oil & Gas, Inc. v. Department of Interior*, 671 F.2d 858, 866 (10th Cir. 1982).

Accordingly, the Court makes the following findings based on the testimony before it:

That as to the matter of plaintiff Fred Riggs:

That Mr. Riggs is a Physicians Assistant and a permanent regular employee of the San Juan Health Services District at the Montt na Creek Clinic; and, on or about the 11th day of November, 1998, Mr. Riggs was REF and rehired with a \$10,000.00 pay cut; was made to start using a time card; and lost three years of raises, including his raise for being a Navajo-English interpreter; and,

That the RIF was not done in compliance with the Navajo Preference in Employment Act (NPEA) in as much as there was no written justification as to just cause for the RIF; nor was a warning of the RIF made to Mr. Riggs; nor was Mr. Riggs RIF last, as a Navajo Physician Assistant; and, Prior to November of 1998 Mr. Riggs had 30 years of unblemished employment as a Physicians Assistant, and had not prior to November 1998 ever been required to have hourly time keeping responsibilities; and,

That in the second week of November, 1998, or thereabouts, on Mr. Riggs first ever time card, Mr. Riggs accidentally represented 8.4 hours as a day and a half, or 12 hours; and, That as a result of this time card mistake Mr. Riggs was disciplined from the 2nd day of December, 1998 to the 8th day of December 1998 by:

Being placed on administrative leave, and being told that he could not speak or associate with other clinic employees; and, being charged with fraud, in writing, and the same being placed in his personnel file as a disciplinary measure; and,

Being placed on probation for the term of 30 days, creating fear from the loss of his employment; and, given further warnings that he may be terminated for repeating such time card errors; and,

That Mr. Riggs never received any warning letters; any time card instruction; nor any time to correct any alleged deficiencies, either prior to this November RIF, or the aforesated discipline or probation; and,

That within less than 10 (ten) days of being charged with. fraud and being placed on administrative leave, and subsequently probation, Mr. Riggs was offered a promotion to fill the position made vacant by Ms. Singers termination, as manager of the Montezuma Creek Clinic; and,

That Mr. Riggs grieved his discipline as being discriminatory in a letter to Mr. Wood, and Mr. Wood nearly immediately withdrew the offered promotion because Mr. Riggs had accused him of discrimination; and,

That the personnel policies and procedure of the San Juan Health Services District prohibit punishment of employees who make discrimination grievances such as Mr. Riggs had done; and,

That Mr. Riggs has specialized medical training and has not been on hourly time card keeping requirements in the 30 years or so prior to November of 1998, and that as a bona fide professional, is exempt from time card keeping requirements; and,

That Mr. Reid Wood stated that time cards were a problem throughout the San Juan Health Service Districts payroll activities and had to be stopped; and,

That after Mr. Riggs' grievance hearing he was placed on an additional 30 days probation without justification; and,

That Rick Bailey found Reid Wood had falsely informed Bailey of the breadth of discipline meted out to Riggs, and Wood was never disciplined for telling his superior a falsehood; and, That the spread sheet analysis of Bryan Bolander, and the time cards submitted to the Court show similar and multiple errors on the time cards throughout the San Juan Health Services District; and,

That particular time cards showed, for example, that even in the first week of November, 1498, just one week prior to Mr. Riggs being disciplined, Reid Woods time card had ink; cross outs; and write ins, errors for which others, notably the plaintiffs, were disciplined, however Reid Woods was not similarly disciplined for his time cards errors; and,

That a second example is the time carats of Bruce Bryant, a caucasian physician assistant, bad time cards showing he was not required to punch in or out, either before or after the November, 1998, RIF; and,

That a third noted example are the time cards of Mary Nielson, again showing ink; cross outs; and white outs, while Mr. Riggs and Ms. Singer were being severely disciplined for like infractions, no discipline was taken in respect to Ms. Nielson; and,

The defendants offered absolutely no credible evidence of the San Juan Health Services District affording any evidence of Mr. Riggs receiving any due process; evidence of any degree of equal protection of the policies and procedures, as well as the law, applicable to his employment; no evidence of any consideration of the Navajo Preference in Employment Act in its actions towards Mr. Riggs; and no evidence that the San Juan Health Services District had not intentionally used the reputation of Mr. Riggs without his permission essentially to stop the time card problems throughout the San Juan Health Services District; and,

he defendants did not offer any evidence that the defendants had not administratively conspired to continue to use Mr. Riggs reputation and case as a means of arbitrarily, capriciously, and abusively making an example of what happens to people who take grievance of decisions of the San Juan Health Services District, and who make allegations of racial or other discrimination; and,

Testimony of Ms. Singer.

Ms. Singer was a permanent employee and manager of the Montezuma Creek Clinic; and, Mrs. Singer had previously helped set up and manage the Blanding Urgent Care Center, and the

Blanding Birthing Center; and,

That Ms. Singers career started as an x-ray technician working up to being the manager of three different health care clinics; and, that for some of Ms. Singers career *as a* clinic manager she did not have to punch in and out on time *cards*; and,

That the San Juan Health Services District recognized managers as FSLA exempt as a matter of policy; and, Ms. Singer had three job assignments with the San Juan Health Services District

(1) as an x-ray technician; (2) an Ultrasound technician; and (3) the Manager of the Montezuma Creek Clinic; and,

That Ms. Singer worked approximately 3000 hours off the clock without being paid overtime; and,

That Ms. Singer had a great deal of latitude in making management decisions since Montezuma Creek Clinic was so far from the Monticello, Utah, headquarters of the San Juan Health Services District and the District administrators seldom visited the Montezuma Creek Clinic; and,

That on the 13th day of November, 1998, Ms. Singer was unaware of another persons clocking in on her Montezuma Creek Clinic time card when she was in Blanding, Utah; and,

That Ms. Singer told the Chief Financial Officer of her whereabouts on the date in question; and,

That the purported time card error involved only four hours of work for which Ms. Singer was never paid, and Mrs. Singer admitted to having made the time card error; and,

That Ms. Singer was charged with fraud; placed on administrative leave; told not to communicate with anyone at the clinic; and then terminated; and,

That Ms. Singer was not previously aware that Rick Bailey was the instigator of her termination until she received the Answer of the 14th of Mays, 1999, and suspected from the information therein provided that Mt, Bailey had authorized her termination; and,

That Rick Bailey testified that he felt uncomfortable being Ms. Singers grievance bearing officer because he had actually participated in the decision to terminate Ms. Singer, and he testified further that he relied on Craig We advice to proceed as her grievance hearing officer anyway in spite of Utah Supreme Court law to the Contrary and further Mr. Bailey and Mr. Wood concealed this information from Ms. Singer; and,

That Ms. Singers future in public health and in her small community where she resides has been harmed due to the adverse publicity of the malicious and unfounded fraud charges against her,

and,

That Reid Wood likewise threatened Ms. Singer by telling her "she needed to remember who she worked for" after speaking out in public San Juan Health Services District board meetings; and,

That Rick Bailey told Ms. Singer that she was viewed as an "enemy to the hospital" and, Mark Maryboy, San Juan County Commissioner, testified that he was concerned that Ms. Singer be given due process and that all protocols be followed since he knew from previous experience that people who spoke out in respect to the San Juan Health Services District were viewed as troublemakers and dealt with by the San Juan Health Services District and San Juan County, accordingly; and,

That as to the testimony of Bryan Belander regarding Ms. Singer.

That Bryan Bolander is a Certified Public Accountant with a professional background in working with time cards and as per his testimony he found no pattern of fraud in Ms. Singers time cards; and,

That as per the testimony of Mr. Bolander Ms. Singer documented things such as places; or times; in detail, which he testified is not consistent with the commission of time card fraud; and, That as testimony of b 4r. Bolander Ms. Singer`s time cards showed she worked on holidays; weekends; and whenever an emergency arose; and,

That Mr. Bolander testified that he attributed Ms. Singers time card errors to the fact that she was required to be clocking in and out at three different work places and had so many responsibilities; and,

That Bolander further testified that it was his professional experience that managers are not usually rewired to use time cards because of their FSLA exemption; managers were expected to carry out many heavy responsibilities; and Managers were usually expected to work in excess of 40 hours per week; and,

That Ora Lee Black, a similarly experienced manager with San Juan Health Services District, **testified that she could not complete all her job duties** in forty hours despite the fact that she did not have three jobs nor was she required to be in three different locations in the San Juan Health Service District to perform her management duties; and,

That likewise according to the time cards presented Mary Anderson, a Caucasian manager of the

Monument Valley Clinic, also within the San Juan Health Services District, was not obliged to punch in and out on time cards; and,

That Mr. Bolander testified that as per his spread sheet analysis the number and types of errors commonly found by him to exist in the San Juan Health Services District that if everyone time cards were multiplied by three places of work and had to have documented time they would probably all look the same as Ms. Singer and Beverly Harris cards; and,

That as per Mr. Bolander's testimony, Beverly Harris time cards are worse than Singers and Ms. Harris was never disciplined; charged with fraud; or terminated; and,

That according to the further testimony of Ora Lee Black, Caucasian, she testified that she had herself personally called into work to have someone clock in for her on numerous times, so numerous that Ms. Black when questioned could not recall how many times, and that to Ms. Black further knowledge that other nurses in B landing, Utah, did likewise as a common practice, without being disciplined; charged with fraud; or terminated; and,

The defendants offered absolutely no credible no evidence of the San Juan Health Services District affording any evidence of Ms. Singer receiving any due process; evidence of any degree of equal protection of the policies and procedures, as well as the law, applicable to her employment; no evidence of any consideration of the Navajo Preference in Employment Act in its actions towards Ms. Singer, and no evidence that the San Juan Health Services District had not intentionally used the reputation of Ms. Singer without her permission essentially to stop the time card problems throughout the San Juan Health Services District nor did the defendants offer any evidence that the defendants had not administratively conspired to continue to use Ms. Singers reputation and case as a means of arbitrarily; capriciously, and abusively making an example, even as to trial by the media of what happens to people who stand up for their rights and take grievance of decisions of the San Juan Health Services District, and who make allegations of racial or other discrimination; and take any position in opposition to the San Juan Health Services District or the defendants themselves; and,

That as to the matter of Allison Dickson status of employment:

That Mr. Dickson started working for the San Juan Health Services District as a full time temporary fill-in in March of 1998 and in November of 1998 applied for full time employment status; and,

That Mr. Dickson time cards and W-2 show that Mr. Dickson worked some 700 hours after his temporary fill-in position had expired; and,

That the policies and procedures of the San Juan Health Services District states that after an employee has worked for the total of 520 hours they will be made to be regular employees of the San Juan Health Services; and,

That the defendants acknowledge that Mr. Dickson formally requested in writing to Mary Nielson on the 11th day of December, 1998, that he be given regular employment status; and,

That Mr. Dickson signed an affidavit attesting to the highly racially inflammatory and insensitive comment of Reid Wood concerning Certificates of Degree of Indian Blood being equated with "dog tags" and,

That the time cards entered into evidence demonstrates the current Montezuma Creek Clinic manager's nephew is working full time as a regular status employee and working for more hours than Mr. Dickson with less time in seniority; and,

That finally, the records of the San Juan Health Services District show that there is no other employee of the San Juan Health Services District with Mr. Dickson's time in service measure by regular work hours that is not a regular permanent employee with benefits of regular status employment.

Defendants' Evidence is Completely Admitted

Commensurate with Navajo Nation Customs and Traditions that highly value fairness and everyone having their say, the Court allowed into the record all of the defendants' exhibits as follows:

All of Ms. Singer's time cards and payroll records, and the time cards of all other persons in the employ of the San Juan Health Services District, and a spreadsheet drafted by CPA Bolander explaining the patterns of mistakes and errors were admitted on behalf of the defendants.

a. The time cards show that errors were rampant throughout the San Juan Health Services District system and were not at all limited to just the time cards of the plaintiffs Mr. Riggs and Ms. Singer; and,

That three of the time cards of Ms. Singer were never given to either Singer at the time of her termination, nor used in any evaluation of Ms. Singer's termination, not provided to the counsels for the plaintiff despite appropriate discovery being timely requested; and,

b. That on the hearing of the .14th day of May, 1999, Mr. Bolander testified that the three time cards shown to him were not part of the cards he was previously provided with to examine either by the San Juan Health Services District or provided to plaintiffs counsels; and

A letter from Lauren Shafer critical of Ms. Singer was likewise accepted, and notably had a "check mark" in the upper right corner signifying it was not kept in Singer's ordinary personnel file, but a secret file in the CEO's office.

a. Lauren Schafer, a chief administrator with the San Juan Health Services District never rebutted in her testimony where the letter was kept; and,

b. That despite the inflammatory nature of the letter it was never placed in Ms. Singer`s appropriate personnel file, nor did the prior Chief Executive Officer apparently consider the letter when Ms. Singer was given regular merit pay raises and additional duties and expanding management responsibilities; and,

c. The Court accordingly views the letter with substantial lack of importance; and,

That Lauren Schafer testified that after a "scrupulous examination of Singer's records for over nine months, Ms. Schafer had not discovered one piece of evidence as to Ms. Singer's intent to commit fraud.

Ms. Singer testified that she never remembered doing anything to intentionally cheat the San Juan Health Services District or San Juan County out of anything; nor does any evidence presented otherwise indicate anything to the contrary; and,

Ms. Singer testified that she never remembered ever calling anyone to clock in for her on any occasion; nor does any credible evidence presented otherwise indicate anything to the contrary; and,

Contrary to the assertions of the defendants, Mr. Bolander testified that Ms. Singer's cards show that:

Ms. Singer documented where she was at on a consistent basis; and,

That Mr. Bolander could find no evidence whatsoever of fraud; and,

That Mr. Bolandees spreadsheet analysis, along with a multitude of time cards in comparison, illustrated plainly that time card errors were and are a problem in the district, and not at all limited to only dir. Riggs and Ms. Singer; and,

That the defendants have all failed to submit even one piece of evidence rebutting the expert

testimony of Mr. Bolander, or his analysis, or his well-reasoned and documented findings which rely exclusively on the evidence which was in the possession of the defendants and tendered by the defendants to the Court as discussed in the foregoing.

LEGAL CONCLUSIONS AND FINDINGS

At first glance, and without the benefit of testimony, these proceedings appeared to have been framed solely as a labor-employment issue. Closer examination and scrutiny of the testimony before the Court it is not nearly so simply the cast herein, especially in light of the sworn testimony. Discrimination never is obvious or simple. It is most commonly found in subtle subterfuge manifesting deceit and contempt for the human condition to which each of us are differently born, and for which, without the benefit of those strong enough to come forward through the feigned veil of petty righteousness and resulting humiliation, it can only be endured in the silent pain of accepting disgrace and indifference. It is always a sad sad moment in the condition of mankind. No exception is found here.

With minor adaptation from the arguments delivered to the Court; the Court has largely adopted the position of the plaintiffs to the legal reasoning of these proceedings. Wherein the premise of the case before the Court is multi-faceted - framed in the original complaint, and now seeking parallel injunctive relief. Rule 65 of the Navajo Rules of Civil Procedure provides for the preservation and consequence of evidence and testimony, and further sets forth the legal basis for an injunction which lays in Navajo case law, and focuses to proving four criteria for an injunction.

Case Law

The case law of the Navajo Nation provides that an injunction is extraordinary relief that is granted when an injury is unquantifiable and when there is no adequate remedy at law. Gudac v.

Mariato, 1 Nav. R. 3 95, Nav. App. Feb. 28, 1975. The United States Supreme Court has likewise found that while economic loss alone generally does not constitute irreparable injury, "cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may be so far departed from the normal situation that irreparable injury might be found." Sampson v. Murray, 415 U.S. 61, 92 n. 68 (1974). Notably, and contrary to the contentions of the defendants, the factual circumstances of Sampson are well

seen to be nearly wholly unlike the factual circumstances here, but as so stated. Here, now having taken evidence and testimony, and on the examination of the Court, we have instead permanent employees or employees who qualify for regular employee staff. Sampson involved a temporary employee with no vested interest in her employment. Sampson also had the availability of a completely impartial hearing panel. Here, it is noted from the testimony that such an impartial hearing panel was tainted in bias and deceit. The plaintiffs did not have the availability of such an impartial panel. Further, and unlike Sampson that concerned only employee matters, these plaintiffs produced testimonial evidence and documentary evidence to support their claims of violation of civil and personal rights which are protected by the Navajo Nation Bill of Rights, notwithstanding the 1968 Indian Civil Rights Act, and as well the San Juan Health Services District's endangerment of the Native American and Navajo public that SJHSD did commercially, and voluntarily within their corporate powers contract to provide services to

As in the case of *Halona v. Navajo Nation*, I Nay. R. 189, the key to this case lies not in non-Indian analysis" as to any matter of standing. *Id.* at 199. The fact that makes this case most distinguishable from Sampson in terms of the need for protection of the plaintiffs, is that the plaintiffs have a privilege and a duty under Navajo custom and tradition for Mrs. Singer in her tribal in-law status and Mr. Riggs and Mr. Dickson in their enrolled status, to look out for the welfare of their fellow Navajo "citizens". In *Halona*, this Tribal status raises issues "peculiar to Navajo tradition and law." The Navajo clan system, applicable to in-laws through their spouses, demonstrates the unique bonding of Navajos to other Tribal members or non-tribal members as family, and the familial duties inherent to care for other members of the Tribal family as demonstrated by the plaintiffs in this case and by the common nature of Navajo custom and tradition, and not dissimilar from the familial duties as found among other tribes that remain likewise in their nearest to original condition in respect to their customs and traditions.

Further, and while not controlling it is at least instructive, that the Tenth Circuit has established the following four criteria for a preliminary injunction, not dissimilar to the requirements at Navajo law:

The movant must establish that the injunction would not be adverse to public interest; and,

That the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and,

That the movant will suffer irreparable injury unless the injunction issues; and,

That there is a substantial likelihood that the movant will eventually prevail.

Accordingly :

The Preliminary Injunction will not
Be Adverse to the Public Interest

In this case, a preliminary injunction will insure the protection of overwhelming public interest by way of the restoration and preservation of patients' welfare in the northeastern sector of the Navajo Nation; restoration of the clinic operations of the Montezuma Creek Clinic that are sensitive to Navajo needs; customs; and economic levels; and eliminating nepotism and favoritism in employment; thereby improving adherence to the provisions, terms, and conditions of the Navajo Preference in Employment Act; and reducing the chilling effect on the people's rights as is so well evidenced here. The injunction will further support and sustain the local Chapters resolutions.

Patient Welfare

On November 9, 1999, the Court was given a letter from Nettie Pratt, the Montezuma Creek Clinic's diabetic clinician, indicating that there had been as much as a 250% drop in visits by diabetic patients alone to the Montezuma Creek Clinic, and many of those patients have now not been seen for three months or more. The reason these patients have not been coming in for life critical medical care is due to San Juan Health Service District's billing of IHS eligible patients, making them believe they must pay for medical services before receiving medical attention. Even one more month without effective management and adhering to compliance in stopping the billing, may lead to death, or serious irreversible eye or kidney damage to the patients, or other complications for the diabetic patients. Likewise in a similar vein, Debbie Benally, an Emergency Medical Technician for the Montezuma Creek Clinic, testified that when the ambulances were "locked down", Mrs. Singer, and plaintiffs attorneys, were the only one who cared, who called, and who tried to get something done about it despite the sneers and jeers of the defendants.

Smooth Clinic Operations

Brenda Brown, the current manager of the Montezuma Creek Clinic testified on September 24, 1999, that on numerous occasions the administration has refused to give even her the financial reports for the clinic that would have enabled her to do her job or otherwise - effectively assist in the appropriate day to day management and operation of the Montezuma Creek Clinic especially in light of the now upcoming transition to local tribal control.

Limiting Nepotism

Nepotism, likewise contrary to the personnel policies and procedures of the San Juan Health Services District as per the testimony received, is rampant at Montezuma Creek Clinic in that, for example, the manager is the sister of the Chairman of the Board, and likewise San Juan Health Services District, also by testimony, employs the current managers aunt, cousin, and nephew all working at the same clinic despite policy otherwise.

NPEA Adherence

Testimony likewise reflected that employment positions throughout the San Juan Health Services District have not been advertised either "in house" to existing San Juan Health Services District employees or in the Navajo Tunes or KTTN Radio as required by the Navajo Preference in Employment Act. As a matter of the public policy of the Navajo Nation labor is regulated to a certain extent including the provisions of the Navajo Preference in Employment Act - which compels a competitive process for employment which does not exclude Navajos, and other particular persons, and creates a qualified preference pool of Navajo labor whenever possible in that economic development and employment of the surplus Navajo work force are of significant public interest to the Navajo Nation and applicable whenever possible.

Little or No Damage to The Opposing Party

The defendants have confessed at the hearing of these proceedings on the 9th of November, 1999, that the Montezuma Creek Clinic will be removed from the control and supervision of the San Juan Health Services District beginning the 1st day of January, 2000, in part at least due to the impact of this litigation. The defendants therefore argue that if the injunction issues now, it will only have effect for one month. The plaintiffs offer that even if for only a short time, that time is still crucial to the clinic's existence. The defendants can not complain of damage due to large sums of back pay if the defendants

could have cut the time very short by telling the truth on May 14, 1999. "Justice delayed is injustice" and "(N)o party can claim prejudice if the ability to prepare or raise claims was within his or her control, as here." Plummer v. Plummer, A-CV-30-89 at page 182.

Plaintiffs will Suffer Irreparable Injury if the Injunction Does Not Issue

If the injunction does not issue, people will consider the charges and actions against the plaintiffs to be true, and they will continue to suffer the irreparable harm to their names and reputations as attested to by the testimony of Pauline Oshley, George Jones and Debby Benally. These witnesses testified as to the harm to the Clinic, and to the plaintiff, in specificity; (a) stoppage of ambulance services; (b) interference with pharmaceutical services; (c) stoppage of lab services; (d) harm to the reputations of Mr. Riggs and Ms. Singer; (e) and violations of rights of association of the plaintiffs.

There will be a chilling effect upon the rights of all Navajo citizens in the work place if they do not believe there can be redress against their employers for rights violations in the workplace. San Juan County Commissioner Mark Maryboy testified that San Juan County has a deliberate pattern of not treating the Navajo people equally; violating the rights of Navajo and other Native American employees, and retaliation and discrimination against Navajo and other Native Americans that has continued for generations.

The harm has been irreparable. Ms. Singer testified that the scarcity of her personal resources, and the length of time the defendants have stalled these proceedings by obstructive tactics and false statements to the Court, has necessitated her to become separated from her husband in order for the family to financially survive. One can not quantify and compensate for the total disruption of a marriage and home done simply at the folly of her oppressors.

Mr. Riggs attested that his uncle, a veteran of the United States Armed Forces, died for these rights and freedoms for all Americans, and that can never be adequately compensated for by money or by the law. How does the Court or defendants compensate for the loss of rights bought with Navajo blood? It can't. Still an injunction will begin the process of healing and the removal of the indignation of the phony fraud charge that still maliciously clouds Mr. Riggs' and Ms. Singer's name.

Pauline Oshley testified as to the "shabby" treatment the manager's family has been giving to her, and her small children. How is a young Brenda Brown, as Montezuma Creek Clinic manager, supposed to give orders or reprimands to her elder Aunt, Dorothy Kay, and stay in keeping with Navajo tradition and the family interrelationship of "Ke"?

Likewise, the plaintiffs legal fees and costs continue to escalate rapidly. One way irreparable injuries may be partially compensated for is by the payment of accrued legal fees and costs, and all expenses necessary for the plaintiffs to defend their rights as the Court will order herein.

There is Substantial likelihood the Movants Will Succeed on the Merits

The plaintiffs stand more than an excellent prospect of success of prevailing on the merits in these proceeding given the presentation and testimony to date. Pursuant to the FSLA, the time cards are irrelevant as a reason for disciplining or terminating Ms. Singer and Mr. Riggs. Even speaking in the opposite even if Singer's fraud charge (which has been found to be not true by this Court) were taken as possibly true, that does not excuse the denial of due process and equal protection as evidenced herein.

Defendants have produced no well-founded or substantial *evidence* to rebut the plaintiffs claims of rights deprivation; and, the defendants have placed at risk numerous patients by billing policies they are using to continue to turn away otherwise eligible Native Americans from vital medical and emergency care at the Montezuma Creek Clinic, in violation of IHS contracts and regulations not to even mention elementary common human dignity for their fellow man.

Patterns of Bad Faith Toward the Court

Bad faith conduct towards the Court, and all the surrounding circumstances as are found to be true and appropriate in the sound discretion of this Court, can likewise be grounds for the plaintiffs to prevail. Herein, the Court sees as obvious the harm to the public and plaintiffs' rights and the waste of judicial processes in this Court by the plaintiffs repeated misrepresentations of fact and law; spoliation of evidence; witness intimidation and tampering; obstructing testimony; sandbagging of evidence; and repeated and substantive violations of the Navajo Nation Rules of Civil Procedure.

Misrepresentation of facts and law in violation of NNRCP at Rule 11. On May 14,1999,

defendants called the plaintiffs 'bold faced liars' as to activities at the Clinic, injuries to the Native American patients of the Clinic, and misrepresented Sampson v. Murray, upon which the Court relied to discharge its TRO. If minimal research had been done by the defense, and the truth had been told, and which Navajo Nation case law depended upon, the TRO could have easily been simply replaced by the Preliminary Injunction on May 14, 1999, with no further deprivations to the plaintiffs of rights, time, money, embarrassment and loss of reputation by a trial by tabloid conjured by the defendants. Further, numerous diabetic patients would not have continued to go without treatment for a life threatening disease.

Spoliation of evidence. Evidence submitted with the time cards of the Districts time cards shows, Richard Bailey's time card, that was viewed by plaintiffs Counsel and Bryan Bolander, is missing. This card showed Bailey represented he worked 80 hours with a hand written '80' on a card he signed when he was working full time for San Juan County as the County Administrator, and as well claimed full time employment in the same time period with the San Juan Health Services District. Mr. Bailey was never disciplined for working in one place full time while he was employed full time at another and drawing full compensation from both positions at the same time.

Witness Intimidation. Debbie Benally testified she had never spoken with Mr. Wood prior to the day before her testimony, at which time he warned her over the telephone in the evening hours just before her anticipated testimony, as he did Ms. Singer personally, "you need to remember who you work for".

Ora Lee Black in her testimony stated the reason she did not wish to testify on Singer's behalf, or submit her affidavit which she declared to be true in all respects.

Ora Lee Black testified that she and the other nurses had been told "not to get involved" in the case by Reid Wood, after submitting their affidavits in support of Ms. Singer in respect to her position as manager of the Montezuma Creek Clinic.

Surprise and Prejudicial Evidence. Nearly all of the defendants' evidence was submitted to the Court, despite prior discovery applications as provided for in the Navajo Nation Rules of Civil Procedure, in the last hour of so of a 19 hour hearing, without notification or review by plaintiffs' counsel prior to its presentation in the September .24, 1999, hearing.

Rule Violations. The defendants' have accumulated and advanced a substantial and impressive list of substantive rule violations under the Navajo Nation Rules of Civil Procedure which

remain currently before the Court in various summary motions. The defendants, for example, plead fraud, without one piece of evidence as to Singers intent to commit fraud, and without the specificity of pleadings as required by the Navajo Nation Rules of Civil Procedure at Rule 9.

Despite this, local and international newspaper coverage published the ill-plead claim since it was in the May 14, 1999, 'Answer' of the defendants. The defendants have purposefully subjected Ms. Singer, W Riggs; and Mr. Dickson, to a trial by tabloid.

All of the above enumerated actions of the defendants and defendants' counsel, have here constituted a pattern of behavior that only magnifies and exemplifies past and continued deprivations of the plaintiffs' inalienable rights, be they tribal or federal in nature, and harm to Native American patients acid community in the Montezuma Creek area of the Utah Strip.

As like in Gudac, such actions demonstrate the arrogance of the defendants, their cultural insensitivity, and the contempt and disdain in which they hold this Court; the Navajo Nation judicial system; and Native Americans in general.

Damages such as deprivation of rights; discrimination; denial of due process; infringements on freedom of speech; denial of dignity; and impunity of a person's reputation are all deprivations that far exceed were deprivation of money, or employment or embarrassment These constitute "direct action,... potent with circumstances... irretrievable." Adams v. Vance, 574 F.2d 950, 953 (1978). No amount of money, no availability of any Order of the Court, can fully compensate the plaintiffs and the Native American population in the Montezuma Creek for these past and ongoing substantial and inestimable damages.

While not controlling in the Navajo Nation Court as a matter of law it is at least instructive that this Court look to our sister sovereign through its Tenth Circuit and see that when the United States of America finds that when the three requirements of injury, ongoing harm, and more potential harm to the plaintiffs outweighs the harm to the defendants, then the plaintiffs need "only show that they have raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation", Tri-State Generation and Transmission Association, Inc. v, Shoshone River Power, Inc., 805 F.2d 351, 358 (10th Cir. 19 86). Here, to date, facts show, that not only are three

elements satisfied., but overwhelmingly, it is also the case that the fourth prong has been met.

The Navajo Preference in Employment Act defines the rights of employees in the work place of the Navajo Nation. The Navajo Preference in Employment Act has been violated by lack of clear warnings; lack of a fair hearing process; retaliation for grieving discriminatory acts; and lack of willingness to eliminate the problems. If the Navajo Preference in Employment Act has been violated, it is presumptive that the Native American employee's rights have been violated and Navajo Nation public policy has been undermined and disregarded for naught.

Chilling Effect

Resultantly if injunction does not issue herein the public, Native American and non-Native American alike, will believe erroneously that nothing can be done when the San Juan Health Services District, or when any other entity; organization; group; or individual violates their rights, and such an assumption will have a chilling effect upon others who may wish to come forward with similar claims, and suppress such efforts to the detriment of all Native Americans and non-Native Americans alike. Such is not the foundation of a free society, and shall not be commenced here.

Conclusion

The defendants have, compared:

Failed to show how a service district, a minor political subdivision, is an "arm of the state" with immunity under Alden, et al. v. Maine, U.S. , Docket No. N8-036, when

Alden exempts minor political subdivisions from immunity; and,

Failed to show how civil rights violations are given immunity, when Alden v. Maine exempts those types of injuries from immunity, and Alden did not address Navajo civil rights as defined within Navajo custom and traditions; and,

Failed to show how a special service district not implementing a merit system within the Utah Special District Personnel Management Act as is established" by the Utah Legislature, can be an "arm of the state" if it is violating the laws of the State within which it seeks to obtain immunity; and,

Failed to show how a minor political subdivisions limited governmental authority exceeds that of the entire Navajo Nation sovereignty, particularly when the injury sustained by the plaintiffs so specifically directly effects the health and welfare of the Navajo Nation chapters

and their residents pursuant to the Montana exception of Strait v. A-I Contractors; and,

Failed to show how a minor political subdivision of a State can benefit itself an the taxpayers of the district by voluntarily seeking out and entering into contracts with Navajo citizens, within the Navajo Nation boundaries, and then treat the Navajo Nation's customs and traditions; Bill of Rights; the Navajo Preference in Employment Act; the Utah merit system requirements, and HIS contract obligations, all with impunity, and believe that the district is somehow now immune from claims injury; and further,

Failed to show, or raise any issue or defense, as to the transcription records of the proceedings herein being unavailable by their inaudibility, despite the order of the Court the 9th of November, 1999, to notify the Court of any problem, and therefore the Court finds that the parties have waived any such issue or defense thereto; and,

Accordingly, as set forth fully in the foregoing, injunctive relief is overwhelmingly justified and shall issue immediately. It is clear and convincing to the Court that the plaintiffs have (1) demonstrated to the Court that they have a claim framed in a protectable right or interest and have a high likelihood of success on the merits; (2) that are likely to suffer irreparable injury, loss, or damage to that protectable right or interest unless injunctive relief is issued; (3) that the likely injury, loss or damage to the plaintiffs are substantial in nature and character, and (4) that the plaintiff's do not have an otherwise available and adequate remedy at law. These protectable rights include denial of due process; denial of equal protection; denial of free speech and assembly; defamation; theft; conspiracy; and interference with the public policies of the Navajo Nation.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED:

That the defendants be and are hereby ordered to immediately reinstate Ms. Singer and Mr. Riggs to their previous positions of employment as was occurring on the 1st day of November, 1998; and,

That the defendants be and are hereby ordered to immediately tender to Mr. Dickson full time status as an employee of the Montezuma Creek Clinic and that he be paid all commensurate back pay and benefits as may be due to him from the occasion of being eligible for such status; and,

That the defendants be and are hereby ordered to immediately pay all lost income from whichever source derived within the District, including but not limited to frill back pay and compensation as well as back benefits to the Plaintiffs, including but not limited to retirement benefits and other compensations regularly received by the plaintiffs with all such compensations to be credited and/or paid immediately; and,

That the defendants be and are hereby ordered to delete and expunge all the charges and writings pertaining to the December 2nd through the December 8th 1998 charges of fraud, discipline, and termination, from Mr. Riggs and Ms. Singer's personnel file, with a letter so stating the expungement to the Plaintiffs and to this Court; and,

That the defendants be and are hereby ordered to not put Ms. Singer, and other like managers, and Mr. Riggs, and other like Physicians Assistants, on hourly time card keeping requirements for the purposes of salary and compensations or otherwise; and,

That Ms. Singer be returned to her role and position as a technician for and on behalf of the San Juan Health Services District; and,

That the defendants be and are hereby ordered to not interfere with clinic operations or move any clinic personnel; and,

That the defendants be and are hereby ordered to issue full payment of attorney's fees, costs, and expenses associated with these proceedings to date to be paid by cashier's check within five working days of the issuance of the injunction and to be paid not later than the 31st day of December, 1999, by and through the Registry of this Court; and,

The Court orders a waiver of any security deposit due to (a) the limited financial circumstances of Ms. Singer, W. Dickson, and Mr. Riggs and (b) SJHSD's placing of Montezuma Creek Clinic employees in jeopardy as the transition from state to local tribal management nears; and,

The Court order that the defendants be and are hereby prohibited f orn
Eliminating Emergency Medical Technician services and coverage within the territorial
Jurisdiction of the Navajo Nation in service to the local Navajo and other Native American
population for or on behalf of the Montezuma Creek Clinic; and,

Interfering with the laboratory services to the Montezuma Creek Clinic; and,

Interfering with the pharmaceutical services provided to the Montezuma Creek Clinic, and

immediate payment of all current and past due billings; and,

Interfering with any form of patient care, by, among any other matter or things, billing IB patients; and,

Interfering or harassing Ms. Singer as the manager of the Montezuma Creek Clinic; and,

The Court further hereby Orders the defendants to assist the Montezuma *Creek* Clinic and the local Navajo Chapters, and chapter governments, by any means necessary, including Navajo and Ute language announcements on Navajo Nation wide radio, letters, etc. to help diabetic IHS patients to return to the clinic for treatment, including informing such Native American patients that as an IHS patient they do not have to directly pay for their health care treatment at the Montezuma Creek Clinic; and,

The Court further Orders that the plaintiffs report any such interference, harassment, or intimidation of Montezuma Creek Clinic operations, patients, and employees immediately to this Court; and,

The proceedings in chief herein he and are hereby scheduled for initial pretrial conference by this court, unless these proceedings are not earlier settled and compromised by the parties by stipulation. on the limited factual; legal; and damage issues remaining.

So Signed and Ordered this 28th Day of December, 1999 at 4:45 p.m.

[signed]

The Honorable Judge Raymond A. Begaye
District Trial Judge of the Navajo Nation

I HEREBY CERTIFY THAT THIS IS A
TRUE AND CORRECT COPY
INSTRUMENT ON FILE
IN THE DISTRICT COURT OF THE NAVAJO NATION

_____ signed clerk of the court

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK, NEW MEXICO

DONNA SINGER; Fred Riggs C#18570	)	
Alison Dickson C#212,765;	)	
Plaintiffs,	)	SR-CV-I62-99
vs.	)	
SAN JUAN COUNTY; San Juan Health	)	
Service District; Rick Bailey, Raid Wood,	)	
Law en Schafer; Craig His;	)	
Commission Bill Redd; Roger Atcitty;	)	
Commissioner Mark Maryboy; John Lewis	)	
Commissioner J. Tyron Lewis; Karen	)	ORDER DENYING DEFENDANTS'
Adams; Patsy Shumway and other John	)	MOTION TO DISSOLVE OR MODIFY
and Jane Does as yet unnamed in their	)	THE PRELIMINARY INJUNCTION ORDER
personal and official capabilities,	)	
Defendants.	)	

THE COURT having received and reviewed (1) the defendants' "Motion to Dissolve or Modify Findings, Opinion and Judgment at Preliminary Injunction" and (2) the plaintiffs' response to the same motion, hereby denies the defendants' motion and makes the following findings of fact and conclusions of law, that will incorporate herein and add to the original Preliminary Injunction Order raised in issue, as follows:

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

- I. The defendants accuse the Court throughout their motion of the Court denying the defendants due process of law in claiming the defendants were denied the services of an in courtroom certified court reporter.

Findings of Fact

The defendants requested by written motion that they be allowed to have a certified court reporter take oral transcription of the proceedings before the Court. The request was responded, in written response

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stipulating to the defendants motion. The Court gated the motion. The defendants never presented any qualified reporters for consideration of the Court. The Court is not responsible for what the defendants did not do.

The defendants were never denied the opportunity to have a Court Reporter present in the Courtroom; were never denied the opportunity to make further motions concerning the said reporter in the numerous hearings between April 24 and November 9, 1999; and were never denied the opportunity to make a written motion at any time in the last nine months. The only restriction on the reporter was that any such reporter would be able to perform their reporting services for non-Navajo, as well as Navajo speaking witnesses, and that counsel for the defendants was advised to seek out the services of the federal interpreters office in Albuquerque, New Mexico, for a list of qualified Navajo speaking reporters -- and it was likewise the case that the Court order the reporter to provide copies of the transcripts to both parties and this Court. The plaintiffs even concurred in the motion for a reporter.

Likewise, it was only the plaintiff Riggs, thusfar, who was prejudiced by the lack of a qualified reporter inasmuch as Navajo (his first language) was his preferred language in portions of his testimony, and he was denied the use of his own language in deference to the defense.

Conclusion of Law

The defendants were not denied due process of law and were provided with every opportunity to be heard as required by Navajo common law; by Navajo statutory law, by Navajo Rules of Civil Procedure; by applicable US law, by the Navajo Nation Bill of Rights, and by the 1955 Indian Civil Rights Act.

The defendants submitted motions; two `Answers'; filed, responded to and argued motions; called witnesses; and even by the defendants own accord they invoked the jurisdiction of this court on its own initiative by seeking the Court's authority and jurisdiction over its own counterclaims filed in this Court

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seeking its own independent damages as against the defendant Singer. No Court rulings prohibited them from further participation in any form or fashion. No Court order denied them the privilege of using a certified court reporter.

The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. "
Anderson National Bank v. Lockett, 321 U.S. 233, 246.

This court cannot possibly understand why it would be responsible for securing a qualified court reporter on behalf of the defendants. Those duties and responsibilities fall squarely on the shoulders of the defendant and their counsel -the defendants requested the reporter- the defendants motion was granted with condition:
- and the defendants failed thereafter to pursue and protect their interests as granted.

It is not the duty of the Court provide a reporter, other than what is provided under the limited budget of the Court. It is, however, the case that this Court determine the qualifications of those persons to whom it would entrust the record of the Court for purposes of accuracy and trustworthiness of the record. The Court is not obliged to simply rely on the representations of the party seeking the assistance of an independent and qualified Court reporter. A court reporter is essentially an officer of the Court, not an agent of the party paying the reporter.

- II. The defendants argue to the Court that they were denied due process of law due to a lack of a perfect record of the proceedings before the Court for cause of intermittent inaudibles found in the Court's own recording/reporting system

Findings of Fact

The defendants and plaintiffs were ORDERED from the bench to report any problems with the hearing transcripts to the Court on November 9, 1999, and neither party did so. Both the defendants and the plaintiffs became aware of concerns in the transcription of the taped proceedings nearly a full month prior to submitting their written conclusions, by written notice, as was the Court. In fact, after the very first proceeding it v

cautioned by counsel for the plaintiffs, Wm. P. Battles, that the record was being garbled and asked that the Court caution the speakers in reference to preserving the record. The defendants, as well as the plaintiffs were free to make motions, for new beings or other protective motions prior to the filing of their written concluding statements, but failed to do so and instead - like the plaintiffs submitted their closing arguments on the record as presented.

Wherein the trial record as a whole, including hearings on April 24,1999; May 14,1999; June 30,1999; and November 9, 1999; along with records of the September 23rd and 24th proceedings, of 1999, are all available to this Court and the parties, and well evidence the foundation and outcome of the Courts considerations in rendering the decision to grant the preliminary Injunction -despite the lack of a "perfect" trial record as claimed required by the defense.

The defendants knew they were obligated to put on evidence to rebut the plaintiffs evidence and simply failed to do so. Indeed, moreso than not, the record and recollection of the Court actually reflects that the majority of the evidence and testimony solicited and presented to the Court by the defendants actually went to support each and every claim of the plaintiffs as raised in these proceedings. Accordingly, the defendants failed to offer the Court barely so much as one piece of evidence that was reliably found to be admissible within the Navajo Nation Rules of Evidence, or in aid to their assertions to the contrary to those of the plaintiffs.

Conclusions of Law

The defendants were not denied due process pursuant to the 'harmless error' rule of Chapman v. California, 385 US. 1 (1967) that overturned the case of Griffin upon which the defendants would apparently prefer the Court to rely as they assert - and for which the defendants, through counsel, had a responsibility to inform the court of, in that Griffin had been superceded by Chapman - but failed to do so.

Further, the defendants are not being denied the ENTIRE court record, as found in the cases they rely

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upon and therefore defendants' case cites are without merit in *this* case -. but in misguiding this Court

The Court therefore concludes that as a matter of law, notwithstanding our own Rule 61 of the Navajo Nation Rules of Civil Procedure, and in agreement to Chapman the existence of inaudible sections of the tape recordings is harmless, when the record can still remain to be considered in its whole dispositive of the findings, conclusions and' orders of the Court.

As offered by the United States Supreme Court -

"Since Chapman, we have "consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless including most constitutional violations." United States v. Hasting, 461 US 499, 509 (1983). In Hasting we again emphasized that "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants there can be no such thing As an error free perfect trial and.-.. the Constitution does not guarantee such a trial. Id. 08-509 " United States..V. Lane et al 474 U. S. 439,446 (1985).

The Court here, in considering the trial record as a whole, finds the same well supports the findings and conclusions of this Court without any question in the mind of the Court - whatsoever.

III. The next argument offered by the defendants is that the Preliminary Injunction should be denied or modified because the findings go to the merits of the case.

Findings of Fact

The burden of coming forward in the seeking of a Preliminary Injunction, *premised on the case in chief* under the Navajo Nation Rules of Civil Procedure, is elementary. Pursuant to Rule 65(c) the moving party, here the plaintiff's, are put to the burden of "*presenting evidence sufficient for the court to find all of the following*":

That the moving party has or is claiming a protectable right or interest and has a high likelihood of success on the merits;

That irreparable injury, loss or damage to that right or interest is likely to occur unless the preliminary injunction is issued;

That the threatened injury or loss is substantial in nature and character; and

That the moving party does not have an adequate remedy at law.

Likewise, Rule 65(d) of the Navajo Nation Rules of Civil Procedures, provides, for judicial economy, not dissimilar from any other jurisdictions of our sister sovereign United States, that

Before or after the commencement of the hearing of a petition for a Preliminary Injunction, the court may order trial on the merits to be advanced and consolidated with the hearing of the petition. Even when this consolidation is not ordered any evidence received upon a petition for a preliminary injunction which would be admissible upon a trial on the merits, becomes part of the record at trial and need not be repeated at trial. This subdivision shall be construed to save the parties any rights to a trial by jury.

The Defendants were warned several times during the proceedings that they were failing to meet their responsibility of rebutting the Plaintiffs' evidence and testimony and that they were proceeding in nearly a fatal fashion to not only the preliminary injunction but as to the case in chief and that likewise they were thus far actually reinforcing the contentions of the plaintiffs in defense witness after defense witness, and the collective of the evidence and testimony before the Court was overwhelmingly in favor of the plaintiffs.

And accordingly,

The plaintiffs proved absolutely that they were being denied protectable rights which were guaranteed at law and therefore had a certain likelihood of success on the merits -- which is largely reduced to damages; and,

The plaintiffs likewise proved that unless relief was granted, by way of a preliminary injunction or otherwise, that such violations on their protectable rights would continue with resulting injuries, losses, and damages.

That the injuries, losses, and damages were substantial in both their nature and character, including injuries ranging from damages to reputation to money damages; and,

And that unless a preliminary injunction was granted the harm, injuries, damages, and loss, would continue unimpeded;

Likewise, the Court is obliged by Rule of Court and in the exercise of Judicial economy to receive during the proceedings on the preliminary injunction evidence which is likewise admissible in the case in chief as though occurring during the trial on the merits, and that evidence becomes a part of the record at trial and need not be repeated at trial. See Rule 65(d). Such preservation of the record does not go to taint the trial by jury requested by the plaintiff, but does substantially reduce their burden of proof which has already well been met even as to the case in chief. Whereas, as the Court would note, that but for the preservation of a trial by jury, in most instances of preliminary injunctions it is more normal to actually combine the proceedings in chief with the proceedings for the preliminary injunction.

For example, Lauren Schafer, it defendant's witness, admitted on September 24, 1999, that after an exhaustive study of Mrs. Singer's records, she did not have one piece of evidence as to Mrs. Singer's intent to commit fraud;

For example, the Court observed that the person who initiated the termination process, was also the grievance hearing officer (unbeknownst to Singer) and admitted he had a problem with being so thinking that it improper for him to proceed by his own judgment but did nonetheless,

For example, no defenses were made for the treatment of Fred Riggs and Al Dickson, except that the time card errors diminished after the discipline meted out, supporting the theft claim of the Plaintiffs in that their reputations were taken without their permission for use of the district to discourage time card errors and for speaking out regarding discrimination and unequal treatment of Native Americans in employment with the Health Services District.

For example, the defense presented evidence that the reason that Singer was fired was because she allegedly called in to work to have someone punch her timecard, and then offered testimony of one witness that such conduct was common among the employees of the Health Services District, and so common in fact that

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she herself had certainly done the same thing "at least a hundred times" but had never even been disciplined in any form or fashion. This witness was non-Indian.

For example, human beings being somehow seriously referred to in such a way as to make people believe because they are Native Americans they are being called dogs - is only something this Court would prefer to hear the evidence on only one time - in its life time.

For example, coming to understand that because Native American elders, grandmothers, and grandchildren are being denied medical care and treatment even as under a direct government contract with the United States Government to provide health care to Native Americans because they are being arbitrarily required "to show their Certificate of Indian Blood" to actually receive necessary health services, when the required documentation for Health Services through the Indian Health Service is a "Beneficiaries Identification Card" at most, is something this Court would have preferred to have never heard.

The Court's resources, and the plaintiffs' resources are limited - and the findings, facts and case are clear, even as to the merits in chief:

Conclusions of law

The findings of the Court had no alternative but to reach to the merits, as such is the primary burden of the plaintiffs coming forward. The plaintiff had a clear duty to demonstrate to the Court that they are substantially entitled to judgment on their case in chief, in order to prevail on the preliminary injunction. The defendants, likewise, failed to put on any credible evidence to rebut the volume of testimony and evidence of the plaintiffs, after having ample opportunity to have done so.

The Court is therefore well within its rights to find to the merits, the same way as a Court may find for a party if the plaintiff fails to prosecute a claim, in order to protect the due process rights of the plaintiff's, and to protect the Court's processes from being used for harassment and other wasteful and abusive purposes.

The Court, given the proceedings to date, the testimony and evidence of record, is obligated to grant relief to the plaintiffs and provide relief to those harmed, damaged, and injured.

“Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities. ” Chambers v. Nasco Inc., 501 U.S 31, 43-46 (1991), Link v. Wabash L Co., 370 U.S 6,26, 630-631 (1962). The Supreme Court recognised in Roadway Express that outright dismissal of a lawsuit which has been upheld in Link is a particularly severe sanction, yet is within the court's discretion. 1st Sen., 6 (1852); Roadway v. Piper, 447 U.S 752, 765 (1980).”

The Preliminary Injunction was addressed to rectifying the harm done. The defendants' recommendation fails to address the financial harm suffered by the plaintiffs which has injured their families, as well as, failing to recognize, much less rectify; the harm to their reputations and the patients. As such, the Court finds the Injunctive Order is well within the the prongs of Missouri v. Jenkins, ___ U.S. ___ (1995), at page 16. The Defendants neither recognized the three prong test of Missouri in their pleadings, nor-recognize the Navajo tradition of compensating injury with Money or other things of recognizable uniform value.

The defendants' definition of `status quo' differs from the Court's, in that, the Court's definition wishes to place the plaintiffs in nearly as good a position as they would have been without the harm of the defendants, and that includes financially.

IV. The defendants rather vaguely continue to misstate and minimize the Court's jurisdiction.

Findings of Fact

A 'formun of resolution' and the premise of having a hearing for injured parties among Native Americans people predates the European settlers and is well grounded in Navajo customs and traditions. This tradition has continued through the continuum of history, and in contemporary time has come to include the provisions of

the United States Code by way of the 1968 Indian Civil Rights Act which colored Tribal Courts with federal legislative mandates of 25 U.S.C. §1301.

And accordingly the Court cites to tribal code and Montana and Strate, to further its finding of jurisdiction.

Conclusions of Law

The Court has jurisdiction over the defendants partly because they are the named parties who have committed acts within the Navajo Nation territorial boundaries, and as well because the defendants became plaintiffs by filing their counterclaims.

The Court has jurisdiction over the defendants partly because they are named parties who have committed acts within the Navajo Nation territorial boundaries, and partly because the defendants became plaintiffs by filing their counterclaims. In accord with Dodge v. Nakai, 298 F. Supp.. 17 (Ariz dist 1969) and Clark v. Barnard 108 U.S. (1883). This Court has jurisdiction.

Alternatively, the Court also has jurisdiction over the defendants because, even if, the defendants are an 'arm of the state', (which they have not shown any evidence to support), the defendants waived any rights of immunity when they filed counterclaims and fully participated in the Court proceedings. The Court therefore concludes that it has legal foundations for jurisdiction in this case, within the Navajo Nation's inherent sovereignty, the Navajo Nation Code, 25 U.S.C.S. § 1301 and 1302, the Montana and Strate decisions, and the United States Supreme Court rulings in Clark v. Barnard, 109 US, (1883) as cited approvingly in College Savings Bank v. Florida Prep Aid Postsecondary Education Expense Board et al, -____ U.S._____, decided June 23, 1999.

"We are relieved however, from its consideration by the voluntary appearance of the State in intervening as a claimant of the fund, in court. . The immunity from suit belonging to a state which is respected and protected by the constitution within the limits of the Judicial power of the United States is a personal privilege which it may waive at pleasure; so in a suit otherwise well brought in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction, while of course those courts are always open to it as a suitor in controversies between it and [108

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U.S. 436, 448] citizens of other states.” Clark v. Barnard, 180 U.S. 436, 448(1883)

In conclusion; the Court finds the arguments and case cites of the defendants without merit or legal foundations. The Court, despite previous denials, now attempt to justify their placing of Native American patients in danger in a cloud of "confusion" on the 14th day of May, 1999. The prior Temporary Restraining Order directed the defendants to not interfere with the Clinic operations. This effort of the defendants at this juncture lacks sincerity. The defendants' motion to dissolve the preliminary injunction lacked even so much as an apology for the harm they have done over the last nine months of billing indigent Native American patients discouraging their attendance to both emergency and routine health care. The motion of the defendants lacks even the smallest appreciation-for their blatant violations of civil-rights of the plaintiffs that has torn a family apart, and grossly harmed the plaintiffs, and innocent patients and families relying on the clinic for health care. Likewise such cold, insensitive, and malignant attitudes on the part of the defendants further goes to illustrate the defendants' bad faith to these proceedings and presents a foundation from which so much prejudice can grow like a scavenging parasite of people ignorant of the harm of their malignant acts and who lack any remorse for their harm to plaintiffs, the patients and this Court.

The Preliminary Injunction and findings of the Court, accordingly shall remain undisturbed. To do so would continue to place Navajo employees and patients who the defendants interact with at both Montezuma Creek Clinic and at Monument Valley, in harm's way. Navajo common law, is customs and traditions mandate that the Court protect the people, and this Court shall not hesitate to exercise all its powers to do so.

The Motion to Dissolve-or Modify the Preliminary Injunction Order be and is, therefore, denied.

IT IS THEREFORE ORDERED that pursuant to the Navajo Nation Rules of Civil Procedure at Rule 11 and this Court's tribal and federal authorities, and the Court's recognized inherent authority to protect its judicial processes, the Court hereby ORDERS as follows pursuant to its Preliminary Injunctions:

That the Motion to Dissolve or Modify the Preliminary Injunction Order be and is hereby denied. The Preliminary Injunction as issued shall be dissolved immediately, and no later than the 3rd day,

of March, 2000, in all respects, with written confirmation delivered to this Court on or by that date, or be subject to the contempt power of this Court

That the defendants be and are hereby ordered to immediately reinstate Mrs. Singer as an x-ray and ultrasound technician making her whole to the 1st day of November, 1998, not later than the 3rd day of March, 2000, with written confirmation delivered to this Court on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court.

That the defendants be and are ordered to immediately reinstate the plaintiff Mr. Riggs to his previous position of employment and compensation as occurring at the time of his reduction in force and reduction of pay with written confirmation delivered to this Court on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court; and,

That the defendants be and are hereby ordered to immediately tender to Mr. Dickson full time status as an employee of the Montezuma Creek Clinic and that he be paid all commensurate back pay and benefits as may be due to him from the occasion of his being eligible for such status; and provide written confirmation of such compliance on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court; and,

That the defendants be and are hereby ordered to immediately pay all due income from whichever source derived within the District, including but not limited to full back pay and compensation as well as back benefits to the Plaintiffs, including but not limited to retirement benefits and other compensations regularly received by the plaintiffs with all such compensations to be credited and/or paid immediately with confirmation of such compliance

delivered in writing to this Court on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court; and,

That the defendants be and are hereby ordered to delete and expunge all the charges and writings pertaining to the December 2nd through the December 8th, 1998 charges of fraud, discipline and termination from Mr. Riggs and Ms. Singers personnel file, with written compliance delivered to this Court on or by the 3rd of March, 2000, or be subject to the contempt powers of this Court; and,

That the defendants be and are hereby ordered to not, within the territorial jurisdiction of the Navajo Nation, put Ms. Singer, and other like managers, and Mr. Riggs, and other like Physicians Assistants, on hourly time card keeping requirements for the purposes of salary and compensation or otherwise, and provide a copy of the written policy to this effect on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court; and,

That the defendants be and are hereby ordered to not interfere with clinic operations or move any clinic personnel, or be subject to the contempt powers of this Court; and,

That the defendants be and are hereby ordered to issue full payment of attorney's fees, costs, and expenses associated with these proceedings to date to be paid by cashier's check within five working days of the issuance of the injunction and to be paid not later than the -31st -day of March, 2000, by and through the Registry of this Court, or each and every one of the defendants shall be subject to execution on their personnel properties, and otherwise individually subject to the contempt powers of this Court; and,

That the prior Order of the Court waiving any security deposit of the part of the plaintiffs be and is hereby affirmed; and,

That the Defendants be and are hereby prohibited from:

Eliminating any Emergency Medical Technician services and coverage- within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic or any other facility or activity of the San Juan Health Services District conducted within the territorial jurisdiction of the Navajo Nation; and, Interfering with the laboratory services to the Montezuma Creek Clinic or any other facility or activity of the San Juan Health Services District conducted within the territorial jurisdiction of the Navajo Nation; and,

Interfering with the pharmaceutical services provided to the Montezuma Creek Clinic or any other facility or activity of the San Juan Health. Services District Conducted within the territorial jurisdiction of the Navajo Nation

That the defendant shall immediately make payment of any and all current and past due billings of the Montezuma Creek Clinic occurring before the 1st day of January, 2000,

and provide written confirmation of such payment on or before the 31' day of March, 2000, or be subject to the contempt powers of this Court; and,

That the defendants be and are prohibited from interfering with any form of patient care being provided by the Montezuma Creek Clinic; and,

That the defendants be and are hereby immediately ordered to cease billing eligible IHS patients for medical services; and,

13. That the Court further hereby Orders the defendants to assist the Montezuma Creek Clinic and the local Navajo Chapters, and chapter gov meats, by any means necessary, including Navajo and the language announcements on Navajo Nation wide radio; letters, etc. to help

diabetic I.H.S. patients to return to the Montezuma Creek Clinic for treatment; including informing such Native American patients that as an IHS patient they do not have to directly pay for health care at Montezuma Creek Clinic, with written confirmation of such compliance provided to this Court on or before the 3rd of March, 2000, or be subject to the contempt powers of this Court; and,

14. That the Court further Orders that the plaintiffs report any such interference, harassment, or intimidation of Montezuma Creek Clinic operations, patients, and employees immediately to this Court; and,

That the proceedings in chief herein be and are hereby scheduled for initial pretrial conference on the 18th day of __APRIL-, 2000, unless these proceedings are not earlier settled and compromised by the parties by stipulation on the limited factual; legal; and damage issues remaining as previously noted to the Court

So Signed and Ordered this 1st day of March, 2000.

//s/ Judge Raymond A. Begaye,

JUDGE, District Court of the Navajo Nation

"I hereby certify that this is
a true and correct copy of the
instrument on file in the
District Court of the Navajo Nation"

/s/Irma Paul
Clerk District Court
of the Navajo Nation

Singer et al v. San Juan County et al, SR-CV-162-99-cv
Order Denying Motion to Dissolve/Modify Preliminary Injunction

1. That in the event that the defendants fail to obey the Order of this Court, commencing the 4th day of March, 2000, the defendants shall be fined at the rate of \$10,000.00 (Ten Thousand Dollars) per day, for each and every day the Order of this Court is not carried out in its entirety
- 2: That each and every personal defendant and defendants counsel will pay \$ 1000 per day of the \$10,000 daily fine beginning on March 2,2000, from their own personal assets.
3. That any and all appeals or attempted appeals will not forestall these fines if the Preliminary Injunction Order is not carried out in accord with this Order.
4. Such fines are a fair and just means for this Court to protect its judicial processes, and to ensure its orders that protect the people, will be carried out.

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK NEW MEXICO

DONNA SINGER, Fred Riggs C#18570;
Alison Dickson C#212,765.
Plaintiffs,

SR-CV-162-99-Cy

vs,

SPECIAL ORDER
IN AID TO SATISFACTION
OF
PRELIMINARY INJUNCTION

SAN JUAN COUNTY; San Juan Health,
Service District: Rick Bailey; Reid Wood;
Lauren Schafer; Craig Halls;
Commissioner Bill Redd; Roger Atcitty;
Commissioner Mark Maryboy; John Lewis;
Comissioner.J. Tyron Lewis; Karen Adams)
Patsy Shumway; and other Johon and Jane)
Does as yet unnamed in their personal and)
official capabilities,)
Defendants.)

NOW COMES THE COURT and having received and reviewed the plaintiffs' motion for a special order and finding good cause therein hereby Orders as follows;

1. That the defendants are hereby restrained from alienating any and all money, property and assets of any type until the plaintiffs are paid their relief as granted in the Preliminary Injunction Order; and.
2. That a list of all assets be immediately given to the plaintiffs since the defendants admitted in their concluding statement that the defendants state of finances were in a precarious position; and.
3. That defendants immediately list the plaintiffs first in order of priority as secured creditors on the files of the County Recorder of San Juan County and any other county wherein their property is located; and.
4. That the defendants provide a complete income tax return for 1998 and 1999, including all attachments and schedules submitted to the IRS with the returns; and.
5. That any disobedience to this. Order will be viewed as contempt of the Court and

Singer et al v. San Juan County et al. SR-CV-162-99-CV SPECIAL ORDER

warrants for the arrest of the defendants disobeying this Order will issue; and

6. That the plaintiffs are granted leave to seek enforcement of this Order as appropriate in any Utah or federal Court where it will be enforce pursuant to principles of comity and applicable law.

So signed and this -6th day of March, 2000

/s/ Judge Raymond A. Begaye

JUDGE RAYMOND A. BEGAYE

I hereby that this is a
a true and correct copy of the
instrument on file in the
District Court of the Navajo
Nation"

/s/ Irma Paul
Clerk, District Court
Of the Navajo Nation

,I hereby certify that this is
a true and correct copy of the
instrument on file in the
trict Court of the Navajo

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK NEW MEXICO

DONNA SINGER, Fred Riggs C#18570;	)	March 15, 2000
Alison Dickson C#212,765.	)	SR-CV-162-99-CV
Plaintiffs,	)	
	)	
vs,	)	ALL DEFENDANTS TO BE BOUND
	)	BY PRELIMINARY INJUNCTION ORDER
SAN JUAN COUNTY; San Juan Health,	)	
Service District: Rick Bailey; Reid Wood;	)	
Lauren Schafer; Craig Halls;	)	
Commissioner Bill Redd; Roger Atcitty;	)	
Commissioner Mark Maryboy; John Lewis;	)	
Comissioner.J. Tyron Lewis; Karen Adams	)	
Patsy Shumway; and other Johon and Jane	)	
Does as yet unnamed in their personal and	)	
official capabilities,	)	
Defendants.	)	Received May 03, 2000

Now comes the Court, having received and reviewed the plaintiffs' motion to bind the defendants R. Dennis Ickes, Esq. and Farmers Insurance Group of Companies and/or Truck Insurance by the Preliminary Injunction Order, based upon the findings of the Court in the Preliminary Injunction Order, after approximately 6 hearings over a time month period. The Court bases this Order upon the following findings of fact and Conclusions of Law;

I. On December 28, 1999, the Court made factual findings pertaining to misrepresentation of case law and facts, intimidation of witnesses, spoliation of evidence, upon which the plaintiffs have made a motion for a supplemental pleading, and that said activities were known, or should have been discovered easily by a reasonable investigation that is required pursuant o NNRCP at Rule 11; and,

'In his official capacity any.
21n her official capacity only.

Singer et al v. San Juan County et al,
Order Binding all Defendants by the Preliminary Injunction Order

3. That the new defendants. Mr. Ickes and Farmer's Insurance Group of Companies and/or Truck Insurance as based upon the Court's findings did participate in these activities prior to the issuance of the preliminary injunction order, and,

4 That the new defendants Mr Ickes and Farmer's Insurance Group of Companies and/or Truck Insurance, did participate fully in all the proceedings from approximately April 1999 through November 9, 1999, and in the defendants' motion to dissolve or modify the Preliminary Injunction Order, dated December 28, 1999, and,

5. That Mr. Ickes and Farmer's Insurance Group of Companies and/or Truck Insurance Company, as his employer, were aware, or should have been aware, of the actions of the defendants, and their own actions in privity with the defendants, based upon a reasonable investigation at required pursuant to NNRCF at Rule 11, and,

Therefore, the Court now Orders that Mr. Ickes and Farmer's Insurance Group of Companies and/or Truck Insurance Company are bound with the previous defendants in this action as now Identified John and Jane Does who prolonged the proceedings,

and further deprived the plaintiffs' of due process and equal protections of the law, and are

hereby bound by the Preliminary injunction Order of Member 28, 2000, and their names will

be herein after, added to the defendants' caption, and are officially declared to have

responsibility for all legal liabilities incurred by the defendants as declared in the December 28,

1999 Preliminary Injunction Order

Signed this 27th day April of 2000
/s/ Judge Raymond A. Begaye
Judge Raymond Begaye

I hereby certify that this is
a true and correct copy
of the instrument on
file in the District
Court of the Navajo
Nation **
Ima Paul
Clerk, District court
Of the Navajo Nation

FILED DISTRICT COURT 30 OCT 00 PM 1:41 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH DISTRICT OF UTAH CENTRAL DIVISION BY: _____		FILED DISTRICT COURT 30 OCT 00 PM 1:41 DISTRICT OF UTAH BY: _____	
DR. STEVEN MACARTHUR et al., Plaintiffs, vs. SAN JUAN COUNTY et al., Defendants.		MEMORANDUM DECISION AND ORDER Case No. 2:00CV584K FILED DISTRICT COURT 30 OCT 00 PM 1:42 BY: _____ DISTRICT OF UTAH	

This matter is before the court on the San Juan County Defendants' (the "County Defendants") Motion to Dismiss Plaintiffs' Declaratory Judgment Claim with Prejudice Based on Sovereign Immunity, in which the San Juan Health Services District Defendants (the "Health District Defendants") have joined,¹ and also on Plaintiffs' Cross-Motion for Summary Judgment on the same issue.² A hearing on these motions was held on October 5, 2000.³ At the hearing,

¹ The Health District Defendants joined in the motion to dismiss in their Memorandum in Opposition to Motion for Preliminary Injunction.

² The precise posture of these motions is that they arose in connection with Plaintiffs' motion for a temporary restraining order. Part of the relief requested in that motion was for this court to enforce the Orders entered by the Navajo Tribal Court, which were entered within the past year against most of the Defendants in the instant case. At the August 22, 2000 hearing on Plaintiffs' request for a temporary restraining order, the County Defendants and Health District Defendants notified the court that they believed that this court could not enforce the Tribal Court Orders against them because, among other reasons, they were immune from suit in the Tribal Court. All of the Defendants (including Truck/Farmer's Insurance Company and R. Dennis Ickes) also argued that the Tribal Court Orders are unenforceable for a variety of other reasons, including that the Tribal Court did not have subject matter jurisdiction over them, that the Orders are not entitled to full faith and credit, and that this court should not enforce the Tribal Court Orders under principles of comity. This court then requested briefing on these legal issues and set a hearing for October 5, 2000. Plaintiffs' motion for a temporary restraining order was denied, except that the Health District was ordered to suspend their collection efforts pertaining to any named Plaintiff. In an Order dated September 29, 2000, the October 5, 2000 hearing was limited solely to the County Defendants' and

(continued...)

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the County Defendants⁴ were represented by Jesse C. Trentadue, the Health District Defendants⁵ were represented by Carolyn Cox, and Plaintiffs were represented by Susan R. Schildmeyer. Before the hearing, the court considered carefully the memoranda relating to these motions, along with Plaintiffs' original motion for a temporary restraining order and the other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to these motions. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. BACKGROUND

The issue before the court is whether the County Defendants and the Health District Defendants (sometimes collectively referred to as "Defendants") were immune from suit in the

²(...continued)

Health District Defendants' argument pertaining to immunity. The other Defendants' arguments pertaining to the alleged unenforceability of the Tribal Court Orders will be addressed in the near future, as set forth at the end of this Memorandum Decision and Order.

³ At the hearing, Plaintiffs submitted the Affidavit of San Juan County Commissioner Mark Maryboy. The County Defendants and Health District Defendants objected based on their contention that the law firm of Suiter Axland represents Mr. Maryboy, and thus Plaintiffs' counsel should not have communicated with Mr. Maryboy directly. Plaintiffs' counsel claimed that Mr. Maryboy initiated the contact. On October 11, 2000, counsel for Plaintiffs filed the affidavit with the court, with a proper caption. In light of the court's ruling contained herein, the oral motions to strike the affidavit are moot.

⁴ The County Defendants include San Juan County; San Juan County Commissioners J. Tyron Lewis, Mark Maryboy, and Bill Redd; San Juan County Attorney Craig Halls; and San Juan County Administrator Richard Bailey. In the Complaint filed in the Tribal Court, these individual defendants were named in both their official and personal capacities, except for Mark Maryboy, who was named in his official capacity only.

⁵ The Health District Defendants include the San Juan Health Service District, Cleal Bradford, Roger Atcitty, John Lewis, John Housekeeper, Karen Adams, Patsy Shumway, Dr. James Redd, Dr. Lloyd Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Gary Holliday, Lori Wallace, Carla Grimshaw, Gloria Yanito, Julie Bronson, and Laurie Schafer. In the Complaint filed in the Tribal Court, not all of the individual Health District Defendants were named. The individual Health District Defendants in the Tribal Court action—and thus the individuals to whom this Memorandum Decision and Order pertains—were Roger Atcitty, John Lewis, Karen Adams, Patsy Shumway, and Laurie Schafer. These individuals were named in both their official and personal capacities, except for Patsy Shumway, who was named in her official capacity only.

Navajo Tribal Court (the “Tribal Court”), thereby precluding this court from enforcing the Tribal Court Orders against them.

A. THE TRIBAL COURT ORDERS

The Tribal Court action pertained generally to the Health District’s operation of the Montezuma Creek Clinic (the “Clinic”), which is located within the exterior boundaries of the Navajo Reservation.⁶ The Clinic, and the land on which it is located, is owned by the State of Utah as part of the Utah Navajo Trust Fund. The Clinic serves members of the Navajo Nation and is operated by the Health District pursuant to a contract with Indian Health Services (“IHS”).

In the Tribal Court action, Defendants unsuccessfully argued that they were immune from suit. In ruling on the plaintiffs’ application for a preliminary injunction, the Tribal Court found that Defendants had failed to show how a service district—a minor political subdivision—is an “arm of the state” with immunity under *Alden v. Maine*, 527 U.S. 706 (1999). See Findings, Opinion and Judgment at Preliminary Injunction at (unnumbered) 9, dated December 28, 1999, attached as Exhibit 5 in Defendants’ Submission of Tribal Court Record. In addition, the Tribal Court found that Defendants had “failed to show how civil rights violations are given immunity when *Alden v. Maine* exempts those types of injuries from immunity” *Id.* The Tribal Court also found that Defendants had “[f]ailed to show how a minor political subdivisions [sic] [with] limited governmental authority exceeds that of the entire Navajo Nation sovereignty.” *Id.* Based

⁶ In their Tribal Court Complaint, the plaintiffs (who do not include all Plaintiffs in the instant case) alleged claims for (1) violation of their right to free speech, (2) violation of their right to assemble, (3) violation of their due process rights, (4) wrongful hiring, (5) defamation and tortious interference with contractual relations, (6) theft (of reputation), (7) violation of their equal protection rights, (8) intentional and negligent infliction of emotional distress, (8) breach of fiduciary duties, (9) misfeasance, and (10) malfeasance in office.

on these conclusions, among others, the Tribal Court entered a preliminary injunction on December 28, 1999, ordering Defendants to take several actions regarding the plaintiffs, such as reinstating them, paying lost income, expunging the charges against them, etc. *Id.* at (unnumbered) 20. In addition, the Tribal Court ordered that Defendants are prohibited from:

- (a) Elimination of emergency medical technician services and coverage within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic;
- (b) interfering with the lab services to the Montezuma Creek Clinic;
- (c) interfering with the pharmaceutical services provided to the Montezuma Creek Clinic;
- (d) interfering with any form of patient care, by among any other matter or things, billing IHS patients; and
- (e) interfering or harassing Ms. Singer as the manager of the Montezuma Creek Clinic.

Id. at (unnumbered) 21. The Tribal Court further ordered Defendants “to assist the Clinic and the local Navajo Chapters and chapter government, by any means necessary including Navajo and Ute language announcements on Navajo Nation wide radio; letter, etc. to help diabetic IHS patients to return to the clinic for treatment, including informing them that as an IHS patient, they do not have to directly pay for their health care treatment at the Montezuma Creek Clinic.” *Id.* at (unnumbered) 22.

Additionally, on March 1, 2000, the Tribal Court signed an Order Denying Defendants’ Motion to Dissolve or Modify the Preliminary Injunction Order. Although the Health District’s contract with IHS to operate the Clinic had expired on December 31, 1999 and was not renewed, the Tribal Court, in the March 1, 2000 Order, restated its previous prohibitions and mandates from its December 28, 1999 Order, added further directives to Defendants, and imposed a fine of

\$10,000 a day for each day that the Order was not “carried out in its entirety.” *See Order Denying Defendants’ Motion to Dissolve or Modify the Preliminary Injunction Order* at 16, attached as Exhibit 12 in Defendants’ Submission of Tribal Court Record. The Tribal Court also ordered that “every personal defendant and defendants[’] counsel will pay \$1,000 per day of the \$10,000 daily fine from their own personal assets.” *Id.*

II. DISCUSSION

A. THE COUNTY DEFENDANTS’ ARGUMENTS

The County Defendants claim that they were immune from suit in the Tribal Court under the doctrine of sovereign immunity, and consequently they have urged the court to dismiss Plaintiffs’ claim for declaratory relief pertaining to enforcement of the Tribal Court Orders. The County Defendants assert that, “as an arm of the State of Utah, San Juan County and its elected officials and employees are immune from suit in Navajo Tribal Court.” The County Defendants point out that the states, in joining the Union, did not surrender any of their sovereign immunity with respect to tribal governments. They also argue that persons or entities subject to tribal governance, including tribal courts, do not enjoy the due process and other rights and protections that are given to citizens under the United States Constitution. Thus, they claim that “Congress could not by treaty or statute permit tribal governments with dominion over state governments and/or their political subdivisions because to do so would be to deprive these entities of their constitutional rights.” Because the Tribal Court’s dominion, if any, over Defendants does not arise under the United States Constitution or the Acts of Congress, then the only source for such jurisdiction would be the Tribe’s inherent sovereignty, which, Defendants contend, does not

reach the State of Utah or its political subdivisions or their officers and employees.

Accordingly, Defendants contend that the common law, as well as the Utah Governmental Immunity Act (“UGIA”), render them immune from suit in the Tribal Court. Additionally, they argue that, to the extent that governmental immunity is waived as to any political subdivision or its employees or officials, the UGIA expressly restricts lawsuits against political subdivisions and their officials and employees to district courts of the State of Utah. *See* Utah Code Ann. § 63-30-16(1) (Supp. 2000).

The County Defendants also argue that Craig Halls (“Mr. Halls”), as the elected County Attorney, is an officer of the state because he prosecutes public offenses on behalf of the State of Utah, represents the State of Utah in civil cases, and assists the State as required by the Utah Attorney General. *See* Utah Code Ann. § 17-18-1(2) (1999). Thus, they argue, Mr. Halls enjoys the sovereign immunity of the state and the Tribal Court’s Orders are unenforceable against him. In addition, the County Defendants contend that the remaining County Defendants are immune because “counties as quasi municipal corporations partake under the common law of the sovereign immunity of the State, as an arm of the State” relying on *Shaw v. Salt Lake County*, 224 P.2d 1037 (Utah 1950). They also claim that common law immunity also exists for public officers and employees performing discretionary acts or carrying out official policy. *Ross v. Schackel*, 920 P.2d 1159, 1161-62. (Utah 1996).

B. THE HEALTH DISTRICT DEFENDANTS’ ARGUMENTS

The Health District Defendants have joined in the County Defendants’ Motion to Dismiss, claiming that the Health District and its officers and employees were similarly immune

from suit in the Tribal Court based on the state's retention of sovereignty and the UGIA. The Health District Defendants rely on the fact that, under the UGIA, the Health District is deemed a "governmental entity." They claim that the Health District was created in 1988 as a special service district, which, it claims, clearly falls within both the "special improvement district" and "public corporation" language of the UGIA. Further, they argue that Utah courts have held that such districts constitute governmental entities that fall within the UGIA, relying on *Lyon v. Burton* 5 P.3d 616, 612-23 (Utah 2000) (county fire district entitled to governmental immunity).

In addition, the Health District Defendants claim that they are immune because the UGIA provides immunity for the Health District's actions that involve the exercise of governmental functions. They point out that the UGIA specifically provides that a governmental entity is immune from suit for any injury that results from the operation of a hospital or health care facility.

The Health District Defendants also claim that the individual defendants who are employees of the Health District are entitled to immunity, unless the acts were undertaken with fraud and malice, which, they ostensibly contend, the acts were not. Finally, they claim that, even if immunity was waived, suit may only be brought in state district courts—not in tribal courts.

C. PLAINTIFFS' ARGUMENTS

Plaintiffs offer numerous arguments why Defendants were not immune from suit in the Tribal Court. They argue that, under *Alden v. Maine*, 527 U.S. 706 (1999), states have consented to be sued for constitutional and federal law violations. They also claim that the doctrine of

claim preclusion precludes any rehashing of the immunity issue or the jurisdiction issue, arguing that this court should not “second guess” the Tribal Court.

Plaintiffs also argue that Defendants are not arms of the state and that the County and Health District have failed to address the Tenth Circuit’s analysis of the “arm-of-the-state” doctrine. *See, e.g., Sturdevant v. Paulsen*, 218 F.3d 1160 (10th Cir. 2000) (setting forth and applying test to determine whether a State Board for Community Colleges and Occupational education was an arm of the state). Plaintiffs contend that the County and the District are not arms of the state “because they are not represented in this action by the Utah Attorney General’s Office, their judgments are not paid by the State fisc and risk management office, [they can] sue and be sued, own and alienate land, and enter freely into contracts.” Thus, Plaintiffs contend that, because the County and Health District are not arms of the state, they are not entitled to sovereign immunity.

Moreover, Plaintiffs claim that “immunity fails by the *Strate* analysis,” referring to *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and contend that, under *Strate*, the Navajo Nation “retain[s] inherent sovereign power to exercise some form of civil jurisdiction over non-Indians on their reservations, even on fee lands.” Accordingly, they argue, “the immunity argument is irrelevant.”

In sum, Plaintiffs claim that “[n]o authority exists for minor political subdivisions to override the Treaty and their congressional enactments,” that “[n]o statutory authority exists for this Court to circumscribe the inherent powers of the Navajo Court,” and that, “because a Treaty preserves them, this District Court has an affirmative obligation to enforce them.” Plaintiffs also

argue that, because the Tribal Court was protecting its own authority (from the bad faith conduct toward the court), there is no immunity for this set of wrongful acts.

Even if Defendants were immune, Plaintiffs claim that Defendants waived their immunity when they filed counterclaims and participated in the Tribal Court proceedings. Plaintiffs also argue that Mr. Halls did not raise the immunity defense “with specificity,” and thus he waived his immunity. Finally, they argue that, because Mr. Halls was acting outside his authority, he had no immunity.

D. ANALYSIS

This court has jurisdiction pursuant to 28 U.S.C. § 1331 to determine whether a tribal court has exceeded the limits of its jurisdiction. *Strate*, 520 U.S. at 448. When reviewing tribal court decisions on jurisdictional issues, district courts should review tribal courts’ findings of fact for clear error and conclusions of law *de novo*.⁷ *Atkinson Trading Co., Inc. v. Shirley*, 210 F.3d 1247, 1250-51 (10th Cir. 2000); *see also Strate*, 520 U.S. at 449. The immunity issue addressed by this court is a purely legal issue, which is reviewed *de novo*.

Sovereign immunity is a common law doctrine that precludes litigation against an

⁷ Typically, courts must follow a deferential exhaustion rule that gives examination of the jurisdictional question in the first instance to the tribal court system. *Strate*, 520 U.S. at 448-49 & n.7. Thus, a party can challenge in federal court a tribal court’s assertion of jurisdiction only after that party has exhausted the remedies available in the tribal court system, unless an assertion of tribal jurisdiction is “motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court’s jurisdiction. *Id.* n.7 (quotations and citation omitted); *Atkinson*, 210 F.3d at 1250. In the instant case, tribal exhaustion is not at issue because Plaintiffs—not Defendants—filed suit in this court, requesting, among other things, that this court enforce the Tribal Court Orders. In fact, the Tribal Court granted leave to seek enforcement of the Orders “as appropriate in any Utah or federal court where it will be enforce[d] pursuant to principles of comity and applicable law.” Special Order in Aid to Satisfaction of Preliminary Injunction at (unnumbered) 2, attached as Exhibit 9 to Defendants’ Submission of Tribal Court Record.

unconsenting government. *See, e.g., Montana v. Gilham*, 932 F. Supp. 1215, 1219 (D. Mont. 1996) (citing Restatement (Second) of Torts § 895B)), *aff'd*, 133 F.3d 1133 (9th Cir. 1997). This court is not aware of any published case that has addressed the issue of whether political subdivisions of a state are immune from suit in a tribal court. The most analogous published case involves the question of whether a *state* is immune from suit in tribal court. In *Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1997), the State of Montana brought a declaratory judgment action in federal court to determine the enforceability of a judgment entered against it in the Blackfeet Tribal Court.

The *Gilham* case arose out of a fatal automobile accident that occurred when a car driven by a tribal member struck a state highway sign. Montana asserted immunity as a defense, but the tribal court entered judgment in favor of the plaintiff, and the Tribal Court of Appeals affirmed. The district court determined that Montana was immune from suit in tribal court. *See* 932 F. Supp. 1215, 1224 (D. Mont. 1996). The Ninth Circuit affirmed, stating that “tribal courts historically did not possess and have not retained sovereign powers over States” and that [t]he power to subject other sovereigns to suit in tribal court was simply not a part of the tribe’s inherent sovereignty.” 133 F.3d at 1137-38. The Ninth Circuit noted that “[c]ourts will find that a State has waived its Eleventh Amendment immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.” *Id.* at 1139 (internal quotations omitted). Because the language of Montana’s Constitution did not meet that standard, the *Gilham* court found that Montana had not waived its immunity from suit in federal court, and that “[f]or similar reasons, Montana has

not waived its immunity from suit in tribal court. Indeed, given the standard to find a waiver, the only reasonable construction of the [Montana Constitution] is that Montana has consented to suit only in its own state courts.” *Id.*

In the instant case, this court agrees with the reasoning of the Ninth Circuit in *Gilham* that tribal courts historically did not possess and therefore have not retained sovereign powers over states. Therefore, absent a state’s express waiver of immunity, a state cannot be sued in tribal court. In addition, as explained below, this court finds that the same reasoning applies to a state’s political subdivisions. Consequently, political subdivisions of the State of Utah, as defined by Utah law, are immune from suit in tribal courts because the State of Utah has not waived the common law immunity of its political subdivisions from suit in tribal courts.

The United States Supreme Court has made clear that “[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.” *Alden v. Maine*, 527 U.S. 706, 727 (1999) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n.2 (1985)). The Supreme Court has repeatedly emphasized that point. For example, in *Monaco v. Mississippi*, 292 U.S. 313 (1933), the Court stated:

“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is not enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention it will remain with the States”

Id. at 324 (quoting *The Federalist* No. 81, p. 487).

The Court has also explained that “sovereign immunity derives not from the Eleventh

Amendment but from the structure of the original Constitution itself.”⁸ *Alden v. Maine*, 527 U.S. 706, 728 (1999). Thus, because “the Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle, it follows that that immunity’s scope is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.” *Id.* at 728-29. In other words, the Eleventh Amendment stands “not so much for what it says, but for the presupposition . . . which it confirms.” *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991).

The Constitution’s structure and history, and the interpretations of the Supreme Court, make clear that “the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.” *Alden*, 527 U.S. at 713. Accordingly, there is a “presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the constitution was adopted.” *Alden*, 527 U.S. at 727 (quotations and citations omitted). Therefore, the Court has “looked to the history and experience, and the established order of things, rather than adhering to the mere letter of the Eleventh Amendment in determining the scope of the States’ constitutional immunity from suit.” *Id.*

States have impliedly consented to suit in the “plan of the convention.” *See Blatchford*,

⁸ The Eleventh Amendment provides: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.” U.S. Const. Amend. XI.

501 U.S. at 781. Under the “plan of convention” theory, states are deemed to have impliedly waived some of their sovereignty when they ratified the Constitution. *See Monaco*, 292 U.S. at 322-23. The theory recognizes that, in order for the constitutional system to function, a relationship of reciprocal rights and responsibilities was necessarily imposed upon the states when they joined the Union. The states ceded some aspects of their sovereign immunity to the federal government, but they did not relinquish their sovereign immunity as against entities other than the United States and sister states. *See Blatchford*, 501 U.S. at 781. As a result, a state’s implicit waiver of sovereign immunity as to suits by the United States or “sister states” is predicated upon the “mutuality of concession” inherent in the formation of the Union.⁹ *Id.*; *see also Alden*, 527 U.S. at 749 (“the immunity of one sovereign in the courts of another has often depended in part on comity or agreement.”)

However, the Supreme Court determined in *Blatchford v. Native Village of Noatak* that “there is no such mutuality with either foreign sovereigns or Indian Tribes.” 501 U.S. at 782. The Court recognized that “[w]hat makes the States’ surrender of immunity from suit by sister States plausible is the mutuality of that concession.” *Id.* The *Blatchford* Court further explained that Indian tribes enjoy immunity against suits by States, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.” *Id.* But, “if the convention could not surrender the tribes’ immunity for the benefit of the States, we do not

⁹ In addition, states have consented to some suits pursuant to subsequent constitutional Amendments, such as the Fourteenth Amendment. For example, in adopting the Fourteenth Amendment, the people required the states to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting states pursuant to its section 5 enforcement power. *See Alden*, 527 U.S. at 756.

believe that it surrendered the States' immunity for the benefit of the tribes." *Id.*

Although the *Blatchford* Court was addressing a different question than that presented to this court, it stands to reason that, if states cannot be sued by Indian tribes in a state's own courts, then tribal members certainly cannot sue a state in tribal court. This is particularly true when tribal courts do not recognize the Constitutional protections that are guaranteed to citizens and entities of the United States. Consistent with Supreme Court precedent and the Ninth Circuit's analysis in *Gilham*, this court agrees that a state, unless it has consented to such a suit, cannot be sued in tribal court. While the State of Utah surrendered some of its common law immunity as a member of the United States—based upon a mutuality of concession—there is no indication whatsoever that the State of Utah ever waived its common law immunity to suit in tribal courts.

The question in the instant case, then, is whether Defendants possess the same immunity as the State of Utah. In *Gilham*, the court looked to Montana's Constitution and state law to determine whether it had waived immunity from suit in tribal court. *See* 133 F.3d at 1139. This court also finds it appropriate to look to Utah state law to determine whether Defendants enjoy the same immunity as the State of Utah and also whether the State of Utah has waived the immunity of Defendants from suit in tribal court.

Utah law is clear that political subdivisions enjoy the same immunity possessed by the State of Utah. *See* Utah Code Ann. § 60-30-2, -3. Political subdivisions are defined as "any county, city, town, school district, . . . special improvement or taxing district, or other governmental subdivision, or public corporation." *Id.* § 63-30-2(7). Governmental entities, which are defined as "the state and its political subdivisions as defined by this chapter," *id.* § 63-

30-2(3), are, unless otherwise provided in the UGIA, “immune from suit for any injury which results from a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility” *Id.* § 63-30-3(1).¹⁰

A state may expressly waive its sovereign immunity through legislative enactments that intentionally relinquish the state’s immunity. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974). The State of Utah has expressly waived its sovereign immunity—and also the immunity of its political subdivisions—regarding certain claims, such as contractual obligations, actions involving property, and certain negligence actions, to name a few. *See Utah Code Ann.* §§ 63-30-5, -6, -10. Accordingly, Utah has consented to be sued in its own courts for such claims. *Id.* § 63-30-16.

However, a state’s waiver of immunity in its own courts is not a waiver of its Eleventh Amendment immunity in federal court. *Edelman*, 415 U.S. at 677 n.19 (“Whether [the State] permits such a suit to be brought against the State in its own courts is not determinative of whether [it] has relinquished its Eleventh Amendment immunity from suits in the federal courts.”); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (“A State’s constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued.”). Accordingly, it is axiomatic that a state’s waiver of immunity in its own courts is not a waiver of its sovereign immunity in tribal courts.

In the case at bar, there is nothing in the record or in the laws of the State of Utah to

¹⁰ A “governmental function” means “any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.” *Utah Code Ann.* § 63-30-2(4)(a).

suggest that Utah has waived the sovereign immunity of its political subdivisions and thus consented to their being sued in tribal court. Unless sovereign immunity is waived, it is retained.

Further supporting the conclusion that Utah's political subdivisions are immune from suit in tribal courts is the fact that there has been no mutuality of concession with Indian tribes, as there was when the states surrendered some of their immunity to the federal government. Not only are tribes generally immune from suit, absent their consent, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), but subordinate economic organizations of a tribe are also clothed with tribal immunity. *See Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1108 (Ariz. 1989) (“[T]he subordinate economic organization doctrine allows Indian tribes to conduct their economic affairs through subordinate governmental agencies without fear of an unintended waiver of immunity.”); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 656 (Ariz. 1971) (finding that absent waiver, subordinate economic organization of Indian tribe enjoyed same immunity from suit that tribe enjoyed); *Snowbird Constr. Co., Inc. v. United States*, 666 F. Supp. 1437, 1441 (D. Idaho 1987) (“The attributes of tribal sovereignty generally extend to a housing authority, established by a tribal council pursuant to its powers of self-government.”).

It would be nonsensical—in the absence of any mutuality of concession—to conclude that a political subdivision of a state is subject to suit in a tribal court when subordinate tribal governmental agencies are immune from suit in state courts. Moreover, it would be a ludicrous result if tribal members could sue political subdivisions in tribal court for claims for which no other citizen of the entire country could sue. For example, in the Tribal Court action filed by some of the Plaintiffs in the instant case, the plaintiffs alleged a claim for defamation. No other

citizen in the entire nation could successfully allege such a claim against Defendants because the UGIA retains Defendants' immunity for such claims. See Utah Code Ann. § 63-30-10(2).

There is simply no basis for finding that tribal members can sue political subdivisions of the State of Utah in tribal court when that option is not available to any other individual in the United States.

Plaintiffs' arguments, which are based largely on the Tribal Court's erroneous conclusions of law, fail to convince the court otherwise. First, Plaintiffs' reliance on *Alden v. Maine*, 527 U.S. 706 (1999) is misplaced. The *Alden* case involved a suit brought by state probation officers against the State of Maine for violations of overtime provisions of the Fair Labor Standards Act. The Court held that Congress could not subject a state to suit in a state court without its consent. *Id.* at 759-60. *Alden* would be applicable only if it pertained to Congress subjecting a state to suit in tribal court.

Plaintiffs, relying on the Tribal Court Orders, correctly argue that the *Alden* Court noted that "lesser entities" of states, such as municipal corporations that are not arms of the state, are not immune from suit under the Eleventh Amendment. See *id.* at 756. However, the issue in the instant case is not an Eleventh-Amendment issue, i.e., this court is not faced with a question of whether a political subdivision of a state can be sued in federal court or whether Congress can abrogate the immunity of such political subdivisions. Accordingly, *Alden*'s instruction on this issue is inapplicable to this case, and Plaintiffs' claim that Defendants' failed to even conduct an "arm of the state" analysis is groundless. *Alden* is relevant only to the extent that it provides a comprehensive history of sovereign immunity and the presuppositions behind the Eleventh

Amendment.

Plaintiffs also argue that issue preclusion bars review of the Tribal Court's conclusions and that this court cannot second-guess the Tribal Court. However, as stated above, according to the United States Supreme Court, it is entirely appropriate for this court to review the Tribal Court's legal conclusions regarding whether it had jurisdiction over the Defendants.

Plaintiffs' argument that *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) compels the conclusion that "immunity" is irrelevant is also erroneous. The Court in *Strate* provided an analysis of circumstances in which a tribal court can exercise subject matter jurisdiction in a civil case over the activities of non-Indians on non-Indian land within a reservation. *See id.* at 439-41. Quite obviously, the *Strate* Court did not determine that its subject-matter-jurisdiction analysis would apply even to parties that were immune from suit.

In addition, Plaintiffs claim that "[n]o authority exists for minor political subdivisions to override the Treaty [presumably of 1868] and their congressional enactments." However, Plaintiffs have not provided any authority for the proposition that any treaty or congressional enactment abrogates a state's or its political subdivision's immunity. Plaintiffs also mistakenly claim that, because the Tribal Court was protecting its own authority (from the bad faith conduct toward the court), there is no immunity for this set of wrongful acts. There is simply no authority for such a proposition.

Even if Defendants were immune, Plaintiffs claim, that immunity was waived by filing a counterclaim in the Tribal Court. However, the Tenth Circuit has made clear that when a defendant continued to assert its immunity, the filing of a counterclaim did not destroy that

immunity. *See Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379 (10th Cir. 1997). In this case, the filing of a counterclaim similarly did not destroy immunity.

Regarding the individual County Defendants and Health District Defendants in the Tribal Court action, this court finds that they were also immune. The UGIA provides that:

An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

Utah Code Ann. § 63-30-4(4). In this case, neither of the governmental entities can be liable, and thus, the individuals cannot be liable in their official capacities.¹¹ Furthermore, because there is no finding of fraud or malice in the Tribal Court's Orders, the individuals cannot be liable in their individual capacities.¹²

III. OTHER ISSUES IN THIS CASE

Pursuant to the court's instructions at the August 22, 2000 hearing on Plaintiffs' motion for a temporary restraining order, Defendant Truck Insurance Company has filed a "Brief Regarding Subject Matter Jurisdiction, Full Faith and Credit, Comity, and Exhaustion," which will be treated as a motion to dismiss Plaintiffs' declaratory judgment claim against Truck. Defendant R. Dennis Ickes has also filed a memorandum on the same issues, which will also be

¹¹ Plaintiffs argue that Mr. Halls waived his immunity defense by failing to raise it in the Tribal Court. The court finds no merit in this argument because there is clearly an immunity defense raised in Defendants' Answer in the Tribal Court.

¹² Plaintiffs claim that "Mr. Hall[s] was not acting within his authority," but offer no support. Aside from Mr. Halls, Plaintiffs did not specifically address arguments related to the individual defendants, in either their official or individual capacities.

treated as a Motion to Dismiss Plaintiffs' declaratory judgment claim against him. Plaintiffs, on October 26, 2000, filed a "Memorandum of Facts and Law in Support of Plaintiffs' Summary Judgment Motion for Declaratory Judgment and Writ of Mandamus Orders and Rebuttal to the Defendants Counterclaims," which is presumably in response to Truck's and Ickes' briefs. The parties are hereby notified that a hearing will be held on these three motions on November 17, 2000 at 10:00 a.m. The hearing is scheduled for 90 minutes. Truck and Ickes may—but are not required to—file reply memoranda supporting their motions to dismiss and opposing Plaintiffs' summary judgment motion no later than November 10, 2000.

In addition, Plaintiffs recently filed a motion to stay the preliminary injunction proceedings, except for the portion pertaining to enforcement of the Tribal Court Orders. Plaintiffs also requested an expedited hearing. All Defendants, including Truck and Ickes, if they choose to respond, should do so no later than November 10, 2000. Plaintiffs may then file a reply brief no later than November 15, 2000. This motion will be addressed at the November 17, 2000 hearing.

Finally, the Defendants have informed the court that there are various other legal issues regarding why this court cannot grant the relief requested in Plaintiffs' preliminary injunction motion, which issues should be addressed prior to holding an evidentiary hearing on that motion. Depending on the result of Plaintiffs' motion to stay proceedings on the preliminary injunction motion, a briefing schedule regarding all other legal issues pertaining to the preliminary injunction motion will be set at the November 17, 2000 hearing.

IV. CONCLUSION

For the foregoing reasons and good cause appearing, it is hereby ORDERED that the County Defendants' Motion to Dismiss is GRANTED, and Plaintiffs' claim for declaratory judgment pertaining to enforcement of the Tribal Court Orders against the County Defendants is DISMISSED; the Health District's Motion to Dismiss is GRANTED, and Plaintiffs' claim for declaratory judgment pertaining to enforcement of the Tribal Court Orders against the Health District Defendants is DISMISSED; and Plaintiffs' Cross-Motion for Summary Judgment is DENIED. Plaintiffs' motion for a preliminary injunction¹³ is DENIED to the extent that it requests enforcement of the Tribal Court Orders against Defendants.

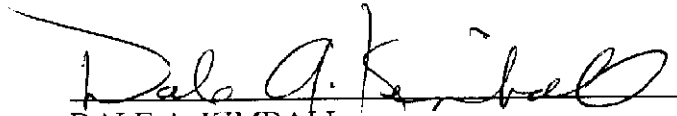
However, because Plaintiffs have sought injunctive relief regarding the Health District's billing practices (a claim separate from their request to enforce the Tribal Court Orders), the Health District remains enjoined from pursuing collection efforts against any named Plaintiff—as set forth in the Order dated September 5, 2000—until the court resolves this specific issue, either on motions or after an evidentiary hearing.

A hearing on the arguments of Defendants Truck and Ickes, pertaining to the enforceability of the Tribal Court Orders against them, is set for November 17, 2000 at 10:00 a.m., at which time, Plaintiffs' motion to stay the preliminary injunction proceedings will also be addressed, after briefing as set forth herein.

¹³ Plaintiffs' Application for a Temporary Restraining Order has been converted into a motion for a preliminary injunction.

DATED this 30th day of October, 2000.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Dale A. Kimball", written over a horizontal line.

DALE A. KIMBALL

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
FILED IN UNITED STATES DISTRICT COURT, DISTRICT OF UTAH

CENTRAL DIVISION

DEC 13 2000

DR. STEVEN MACARTHUR et al.,

Plaintiffs,

vs.

SAN JUAN COUNTY et al.,

Defendants.

MARKUS B. ZIMMER, CLERK

BY DEPUTY CLERK

MEMORANDUM DECISION AND
ORDER

Case No. 2:00CV584K

This matter is before the court on (1) the legal issues pertaining to whether the Tribal Court Orders should be enforced against Defendants Truck Insurance Company ("Truck") and R. Dennis Ickes ("Mr. Ickes"),¹ (2) Plaintiffs' Motion for Reconsideration, and (3) Plaintiffs' Motion for Declaratory Judgment. A hearing on the legal issues pertaining to enforcement of the Tribal Order was held on November 17, 2000, and the remaining motions have been decided without oral argument. At the hearing, R. Dennis Ickes represented himself, Kyle Finch represented Truck Insurance Company ("Truck"), Kathleen M. Liuzzi represented the County Defendants, Carolyn Cox represented the Health District Defendants, and Susan R. Schildmeyer represented Plaintiffs. Before the hearing, the court considered carefully the memoranda relating

¹ Specifically, there are four motions on these issues: (1) Truck's motion to dismiss Plaintiffs' declaratory judgment claim, (2) Mr. Ickes' motion to dismiss Plaintiffs' declaratory judgment claim, (3) Plaintiffs' Motion for Summary Judgment, and (4) Plaintiffs' Amended Motion for Summary Judgment. Truck's opening brief is actually entitled "Memorandum Brief Regarding Subject Matter Jurisdiction, Full Faith and Credit, Comity, and Exhaustion." Mr. Ickes' brief is similarly captioned. In a previous Order, the court stated that it would treat these briefs as motions to dismiss Plaintiffs' declaratory judgment claim.

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to these motions and the other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to these motions, as well as the briefs that have been filed since the hearing. Now being fully advised, the court renders the following Memorandum Decision and Order.

**I. LEGAL ISSUES PERTAINING TO WHETHER THE TRIBAL COURT ORDERS
ARE ENFORCEABLE AGAINST TRUCK OR MR. ICKES**

A. BACKGROUND

The background of this case in general has already been set forth in this court's Order dated October 30, 2000 ("October 30 Order"). The background set forth herein pertains specifically to Truck and Mr. Ickes' involvement in the Tribal Court action. The Complaint filed in the Tribal Court originally sought relief against San Juan County, the San Juan Health Services District, and various individuals. Along with their Complaint, Plaintiffs also filed an Application for Preliminary Injunctive and Temporary Relief, and the Tribal Court entered a temporary restraining order on the same date. Neither Truck nor Mr. Ickes was named as a party.

However, at the time in question, April 1999, there was in effect a Comprehensive Hospital Liability Policy issued by Truck, which, among other things, covered the Montezuma Creek Clinic, which was operated by the San Juan Health Services District ("Health District"). Consequently, Truck retained Mr. Ickes to represent the District and related defendants (the "Tribal Court Defendants") in the Tribal Court action. Because, there were coverage issues as to many of the claims brought by Plaintiffs in the Tribal Court proceedings, however, Mr. Ickes was retained solely to represent the interests of Truck's insureds. Mr. Ickes was not retained to, and has not, represented Truck at any time pertinent to this action.

Upon motion of the Tribal Court Defendants, the Tribal Court dissolved the Restraining Order on May 14, 1999, apparently based at least in part on Mr. Ickes' arguments regarding *Sampson v. Murray*, 415 U.S. 61 (1964). On that date, the Tribal Court also began a preliminary injunction hearing. On December 28, 1999, the Tribal Court issued a preliminary injunction, ordering the Tribal Court Defendants to take several actions, which are set forth in the court's October 30 Order. In addition, the Tribal Court found that the Tribal Court Defendants and their counsel, Mr. Ickes, had engaged in bad faith conduct toward the court. Although it is not entirely clear which of the findings of bad conduct pertain to Mr. Ickes, it appears that the Tribal Court found misrepresentations of fact and law, spoliation of evidence, submission of evidence at the end of the preliminary injunction hearing, failure to plead fraud with specificity in the Tribal Court Defendants' counterclaims, and other unspecified violations of the Navajo Nation Rules of Civil Procedure.

On January 18, 2000, the Tribal Court Defendants filed a Motion to Dissolve or Modify Findings, Opinion and Judgment at Preliminary Injunction, arguing that it must be dissolved for lack of due process to Defendants, among other things. On January 27, 2000, Plaintiffs filed a Motion to Supplement the Pleadings in the case, seeking to add Mr. Ickes and Farmer's Insurance Companies and Truck Insurance Companies (collectively referred to as "Truck") as defendants in the action. Plaintiffs asserted claims against them for obstruction of justice, misuse of judicial process, defamation, denial of due process, denial of equal protection, and endangerment of Navajo patients at the Clinic. Plaintiffs claimed that Truck was responsible for Mr. Ickes' conduct through legal theories of agency. Plaintiffs requested that the Tribal Court

order Mr. Ickes and Truck, jointly and severally, to pay \$18,000,000 to Plaintiffs and \$6,000,000 to the Clinic.

On February 23, 2000, the Tribal Court entered an Order granting Plaintiffs' Motion to Supplement the Pleadings. On March 1, 2000, the Tribal Court entered an Order denying the Tribal Court Defendants' Motion to Dissolve, again making references to their bad faith conduct in the proceedings. The Tribal Court also ordered that the Preliminary Injunction Order be carried out immediately, and no later than March 3, 2000, and imposed a fine of \$10,000 a day for each day that the Order was not carried out in its entirety. In addition, the Tribal Court ordered that "every personal defendant and defendants['] counsel will pay \$1,000 per day of the \$10,000 daily fine from their own personal assets."

On March 6, 2000, the court entered a Special Order in Aid to Satisfaction of Preliminary Injunction, ordering, among other things, that the Tribal Court Defendants (presumably including Truck and Mr. Ickes) be restrained from alienating money or personal property until they paid the relief granted in the Preliminary Injunction Order and that they submit a listing of their assets to Plaintiffs. The court also stated that Plaintiffs could seek comity in the Utah and federal courts.

On March 15, 2000, Plaintiffs filed with the Tribal Court a Motion for All Defendants to be Bound by the Preliminary Injunction Order, seeking to bind the newly added defendants, Truck and Mr. Ickes. On April 27, 2000, without notice or an opportunity to be heard, the Tribal Court entered an Order Mandating that All Defendants be Bound by the Preliminary Injunction Order. In that Order, the Tribal Court held that Mr. Ickes and Truck were bound in privity with the other defendants and that they had "responsibility for all legal liabilities incurred by the

defendants as declared in the December 28 Preliminary Injunction Order.”

On June 12, 2000, Truck filed a Motion to dismiss Plaintiffs’ claims against it based on the fact that Mr. Ickes had been hired under a reservation of rights and was not acting as Truck’s agent in the tribal proceeding and therefore Truck could not be held liable for any misconduct of Mr. Ickes and because, as a matter of policy, a party should not be allowed to sue an adverse party’s attorney. After Plaintiffs failed to file a timely response, the Tribal Court entered an Order dismissing Truck, but without substantively ruling on Truck’s motion. Apparently, the judge indicated that he would issue an Order clarifying whether the dismissal was with or without prejudice; however, he has not yet done so. Based upon conversations with the court clerk, Truck believes that the dismissal will be without prejudice, and Plaintiffs have again filed a motion in Tribal Court to join Truck as a Defendant in the proceedings and bind it to the Tribal Court’s prior Orders.

B. DISCUSSION

Both Truck and Mr. Ickes argue that the Tribal Court did not have jurisdiction over them, and thus, this court cannot enforce the Tribal Court Orders against them.² In addition, they argue that even if the Tribal Court did not have subject matter jurisdiction over them, this court should not, under principles of full faith and credit or comity, enforce the Tribal Court Orders. Among other arguments, Mr. Ickes also argues that, as an attorney, he was immune from suit. Plaintiffs,

² Whether a tribal court has civil jurisdiction over a non-Indian defendant is a question that must be answered by reference to federal law and is therefore a federal question under 28 U.S.C. 1331. *See, e.g., National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985).

however, adamantly disagree with all of Truck's and Mr. Ickes' arguments.

As a preliminary matter, both Truck and Mr. Ickes argue that exhaustion does not apply in this case. First, it is not a jurisdictional prerequisite. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987). Thus, there are several exceptions to the requirement. For example, there are exceptions when the assertion of jurisdiction was motivated by a desire to harass or conducted in bad faith, where the action was patently violative of express jurisdictional prohibitions, or where exhaustion would be futile. *National Farmers*, 471 U.S. at 857 n.21. There is also an exception when the requirement would serve no purpose but for delay. *Strate v. A-1 Contractors*, 520 U.S.438, 459 n.14 (1997). Similarly, the Ninth Circuit has found that exhaustion is not required when tribal court jurisdiction did not exist under *Montana v. United States*, 450 U.S. 544 (1981) and *Strate*, 520 U.S. at 459. *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir.), *cert. denied*, ___ U.S. ___, 120 S. Ct. 1964 (2000); *see also Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1093 (8th Cir. 1998) (exhaustion not required where court clearly lacked jurisdiction because there was no on-reservation conduct by defendant).

In this case, the court has previously found that exhaustion is not required because Plaintiffs—not Defendants—brought this action in federal court, after the blessing of the Tribal Court judge. *See* October 30 Order at 9 n.7. In addition, the court finds that, because the Tribal Court clearly lacked jurisdiction over both Truck and Mr. Ickes, as discussed below, exhaustion is not necessary. Furthermore, the court finds that exhaustion would be futile and would serve no purpose but for delay.

I. Truck

a. Subject Matter Jurisdiction

It is well-established that a tribe's jurisdiction will not extend to non-Indian conduct beyond the reservation's borders. *See Hornell*, 133 F.3d at 1093. In the Tribal Court action, Truck had not engaged in any conduct within the boundaries of the Navajo Nation. The claims against Truck are based solely on the conduct of Mr. Ickes. However, Mr. Ickes was never an agent of Truck in the Tribal Court proceedings, and Mr. Ickes' conduct was therefore not the conduct of Truck. Truck did not retain control over Mr. Ickes, and Plaintiffs have not pointed to any evidence to the contrary. In fact, because Truck was reserving its rights to deny coverage for a number of Plaintiffs' claims, and a conflict of interest existed between Truck and its insureds, Truck specifically advised both the Health District and Mr. Ickes, in a letter dated April 23, 1999, that Mr. Ickes was only to represent the Health District and that the hospital would control the defense. The letter stated that Mr. Ickes had no obligation to represent Farmers' interest in this matter. Thus, Truck did not engage in any on-reservation conduct, and consequently the Tribal Court did not have jurisdiction over Truck. Thus, the Tribal Court Orders are therefore not enforceable against Truck.

Even assuming, however, that Plaintiffs could establish an agency relationship between Truck and Mr. Ickes or that Truck otherwise engaged in on-reservation conduct, the Tribal Court still did not have subject matter jurisdiction over Truck. The seminal case on this issue is *Montana v. United States*, 450 U.S. 544 (1981). The *Montana* Court noted that 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 tribes, and so cannot survive without express congressional delegation.” *Id.* at 563-64.

The *Montana* court set forth two exceptions that would permit tribes to exercise civil jurisdiction over nonmembers under limited circumstances: The first exception permits a tribe to “regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.” *Id.* at 565. The second exception allows tribes to exercise inherent sovereign power over the conduct of non-Indians on a reservation when that conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 566. The Supreme Court, however, has clarified that this second exception must be narrowly applied, explaining that “the exception applies when to hold otherwise would threaten “the right of reservation Indians to make their own laws and be ruled by them.” *Strate*, 520 U.S. at 459.

Truck argues, and this court agrees, that neither exception applies in this case. Truck does not have any “consensual relationship” with the Tribe or any of the individual Plaintiffs, and therefore the first exception does not apply. In addition, the second exception does not apply because, as in *Strate*, regulatory or adjudicatory authority over the alleged tortious conduct by Truck against Plaintiffs (*i.e.*, Mr. Ickes’ alleged bad faith conduct during the Tribal Court proceedings) is not needed to preserve the Navajo Nation’s right to make its own laws and be ruled by them. As in *Strate*, jurisdiction is not necessary to protect tribal self-government and is not crucial to the political integrity, economic security or health or welfare of the Navajo Nation.

Under Plaintiffs' analysis, the exception would swallow the rule because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the Tribe. *See County of Lewis v. Allen*, 163 F.3d 509, 514 (9th Cir. 1998) (narrowly construing the second *Montana* exception to find that tribal court lacked jurisdiction over tribal member's claim that county deputy sheriff had committed a tort against Plaintiff while engaging in law enforcement activities on the reservation).

b. Full Faith and Credit and Comity

Truck argues that the Tribal Court Orders are not entitled to full faith and credit. In *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998), the Ninth Circuit found that the Full Faith and Credit Clause of the Constitution applies only to the states and that there is nothing in the debates of the Constitutional Convention concerning this clause that indicates the framers thought the clause would apply to Indian tribes. *Id.* at 808. The *Wilson* court determined that whether a tribal court judgment was to be enforced should be considered solely as a matter of comity. This court agrees.

Truck also argues that the Orders should not be enforced against Truck as a matter of comity. The *Wilson* court set forth the proper test to apply when considering whether to enforce a tribal judgment as a matter of comity. The court found that, as a general principle, federal courts should recognize and enforce tribal judgments. *Id.* at 810. However, the court stated that federal courts must neither recognize nor enforce tribal judgments if the tribal court did not have both personal and subject matter jurisdiction or if the defendant was not afforded due process of law. *Id.*

In this case, Truck argues, and this court agrees, that the Tribal Court did not have subject matter jurisdiction and that Truck was not afforded the basic tenets of due process. Truck and Mr. Ickes were added as defendants and bound—after the fact—by the Orders entered by the Tribal Court. The Tribal Court made findings about their conduct without any evidentiary hearing. Neither Truck nor Mr. Ickes was ever given an opportunity to defend against these new claims. Accordingly, this court will not enforce the Tribal Court Orders under principles of comity.

2. Mr. Ickes

a. Subject Matter Jurisdiction

Plaintiffs claim that the Tribal Court had jurisdiction over Mr. Ickes pursuant to the *Montana/Strate* analysis because, among other things, he entered into a consensual contract with the Tribe by contracting with the Navajo Court to be an officer of the court. This court rejects the argument that he entered into a consensual contract with the Tribe by becoming an officer of the Navajo Court. Moreover, the absence of any nexus between the allegations contained in the Complaint filed in Tribal Court and the alleged misconduct of Mr. Ickes also defeats Plaintiffs' argument. In addition, for the reasons set forth above pertaining to Truck, the court finds that the second *Montana/Strate* exception does not apply. Thus, the court finds that the Tribal Court did not have jurisdiction over Mr. Ickes, and it therefore will not enforce the Tribal Orders against him.

b. Full Faith and Credit and Comity

As stated above, this court finds that the Tribal Court did not have jurisdiction over Mr. Ickes, and, for the reasons set forth above pertaining to Truck, that Mr. Ickes was not afforded the

basic tenets of due process. Like Truck, Mr. Ickes was added as a Tribal Court Defendant and bound—after the fact—by the Orders entered by the Tribal Court.³ The Tribal Court made findings about his conduct without any evidentiary hearing. Mr. Ickes was never given an opportunity to defend against these new claims. Accordingly, this court will not enforce the Tribal Court Orders under principles of comity.

c. Attorney Immunity

Mr. Ickes also argues that this court should not enforce the Tribal Court Orders because it is against the public policy of both Utah and the United States to hold an attorney liable to a non-client absent fraud, collusion or privity of contract. *Oxedine v. Overturf*, 973 P.2d 417, 421 (Utah 1999)(citing *National Sav. Bank v. Ward*, 100 U.S. 195, 205-06 (1880)); see also *Tappen v. Ager*, 599 F.2d 376, 378 (10th Cir. 1979); *Garcia v. Rodey, Dickason, Sloan, Akin & Robb*, 750 P.2d 118 (N.M. 1988). The *Garcia* court noted that appropriate means generally existed to redress grievances concerning the alleged misconduct of an adverse attorney, either within the action itself or by invoking disciplinary proceedings through the disciplinary board. *Id.* at 763.

This court agrees that Mr. Ickes could not be liable to Plaintiffs in the circumstances

³ Mr. Ickes cites numerous examples regarding the Tribal Court's due process violations. However, Plaintiffs dispute Mr. Ickes' characterization of the events in the Tribal Court that he contends deprived him of due process. Plaintiffs maintain that, if the court were to rely on such examples, it would be obligated to review the entire Tribal Court record. Rather than examining the entire record of the Tribal Court, the court relies solely on the fact that Mr. Ickes was added as a defendant and "bound" by the Tribal Orders without the opportunity to be heard. Thus, the Tribal Court necessarily made findings about his conduct based solely upon Plaintiffs' briefs and without any input from Mr. Ickes. This court will not enforce any order from any court that is made under such circumstances.

involved in the Tribal Court action.⁴ Thus, this court will also not enforce the Tribal Orders entered against Mr. Ickes for this reason.⁵

II. PLAINTIFFS' MOTION FOR RECONSIDERATION AND REQUEST FOR DECLARATORY JUDGMENT

Plaintiffs have moved for reconsideration of this court's Order dated October 30, 2000, relying on "new case law." Plaintiffs claim that on September 26, 2000, the Tenth Circuit issued a relevant decision in *NLRB v. Pueblo San Juan*, 228 F.3d 1195 (10th Cir. 2000). In addition, they point out that the First Circuit recently issued a decision in *Ninigret Dev't Corp. v. Narragansett Indian Wetuojuck Housing Auth.*, 207 F.3d 21 (1st Cir. 2000) (decided March 22, 2000). Plaintiffs, however, have failed to provide any legitimate ground for reconsideration.

Courts generally recognize three grounds for reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *Ekotek Site PRP Comm. v. Self*, 932 F. Supp. 1319 (D. Utah 1996). The two

⁴ Mr. Ickes has also filed a Motion to Dismiss requesting that the court dismiss him as a Defendant in the case at bar. The court had previously granted Plaintiffs' request to hold this motion in abeyance until twenty days after the court's ruling on the Tribal Court issues. Given the court's ruling regarding Mr. Ickes, it is difficult to imagine any scenario under which Mr. Ickes would be an appropriate defendant in this action. However, before the court rules on Mr. Ickes' motion, Plaintiffs are invited to file a memorandum in opposition to Mr. Ickes' motion to dismiss if they believe that some legitimate basis still exists despite the court's ruling pertaining to Mr. Ickes. In addition, in the same memorandum, Plaintiffs should discuss whether Truck should be retained as a defendant in the instant case in light of the court's ruling herein. Such memorandum must be filed and served no later than January 9, 2001 and must be within the page limitations set forth in the local rules. Mr. Ickes and Truck may then file and serve a reply memorandum no later than January 22, 2001.

⁵ Of course, because this court finds that Mr. Ickes could not be liable to Plaintiffs in the Tribal Court action, and in light of Plaintiffs' argument that Truck's liability was based upon Mr. Ickes' conduct, an additional basis exists upon which the court finds that the Tribal Court Orders are not enforceable against Truck.

“new” cases on which Plaintiffs rely were decided prior to the court’s October 5, 2000 hearing on the matter and prior to the court’s October 30 Order. Thus, Plaintiffs could have timely argued the relevance of these cases, but failed to do so. Moreover, these cases are not contrary to the court’s Order and thus are not intervening changes in controlling law. Finally, due to the court’s own research, the court was aware of these two cases prior to issuing its Order. Thus, the court will not reconsider its Order based on these cases.

Plaintiffs also rehash several of the arguments made previously in the Plaintiffs’ supporting briefs, and thus again have failed to provide a legitimate basis for reconsideration of these arguments. However, even considering the merits of Plaintiffs’ arguments, they all fail for the reasons set forth in the court’s October 30 Order and in the Health District’s Memorandum in Opposition to Plaintiffs’ Motion for Reconsideration.

Finally, Plaintiffs have also filed a Motion for Declaratory Judgment and Amendment to the Plaintiffs’ Motion for Reconsideration Due to the Unconstitutionality of the Utah Governmental Immunity Act (“UGIA”). It is unclear whether Plaintiffs’ motion is directed at only Plaintiffs’ claim seeking enforcement of the Tribal Court Orders or also at Plaintiffs’ remaining claims in this action. The court has assumed that it pertains only to enforcement of the Tribal Court Orders. If Plaintiffs intended to file such a motion regarding any remaining claims, they may do so at a later date.

Again, Plaintiffs have not provided a basis for reconsideration, as they could have made such arguments prior to the court’s Order. Addressing the merits of the argument, however, the court denies Plaintiffs’ motion. The court, in its October 30 Order relied on the State of Utah’s

inherent immunity—not Governmental Immunity—in finding that the County and Health District Defendants were immune from suit in Tribal Court. The court relied on only one portion of the UGIA, Utah Code Ann. § 63-30-4(4), which pertains to the immunity of individual employees of the State. This provision has been found by a majority of the Utah Supreme Court to be constitutional. *See Lyon v. Burton*, 5 P.3d 616 (Utah 2000). Thus, the court denies Plaintiffs' motion.

IV. CONCLUSION

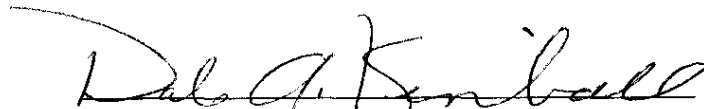
For the foregoing reasons and good cause appearing, it is hereby ORDERED that:

- (1) What has been treated as Mr. Ickes' motion to dismiss Plaintiffs' declaratory judgment action against him (docket entry # 32) is GRANTED, and Plaintiffs' claim for declaratory judgment pertaining to enforcement of the Tribal Court Orders against Mr. Ickes is DISMISSED;
- (2) What has been treated as Truck's motion to dismiss Plaintiffs' declaratory judgment action against it (docket entry # 31) is GRANTED, and Plaintiffs' claim for declaratory judgment pertaining to enforcement of the Tribal Court Orders against Truck is DISMISSED;
- (3) Plaintiffs' Motion for a Temporary Restraining Order (docket entry # 5), which has been converted to a Preliminary Injunction Motion, is DENIED to the extent that it requests enforcement of the Tribal Court Orders against Mr. Ickes or Truck.
- (4) Plaintiffs' Motions for Summary Judgment (docket entries #77 and 82) are DENIED;

- (5) Plaintiffs' Motion for Reconsideration (docket entry # 86) is DENIED;
- (6) Plaintiffs' Motion for Declaratory Judgment and Amendment to the Plaintiffs' Motion for *Reconsideration Due to the Unconstitutionality of the Utah Governmental Immunity Act* (docket entry # 103) is DENIED;
- (7) Plaintiffs' Motion for Declaratory Judgment (docket entry #106) is DENIED;
- (8) Plaintiffs may file and serve a memorandum in opposition to Mr. Ickes' motion to dismiss (docket entry # 18) no later than January 9, 2001. Plaintiff should address whether, in light of this court's ruling herein, there exists any basis for retaining Mr. Ickes as a Defendant in the instant case. Plaintiffs should also address whether Truck should be retained as a defendant in the instant case in light of the court's ruling herein. Such memorandum must be within the page limitations set forth in the local rules. Mr. Ickes and Truck may then file and serve a reply memorandum no later than January 22, 2001.
- (9) Regarding Plaintiffs' Motion for Certification Under Rule 54(b) (docket entry #84), no later than January 12, 2001, any party to this action may file a brief pertaining to whether this court should certify, under Rule 54(b), the instant Order and also the Order dated October 30, 2000. The court will then rule on that motion.

DATED this 12th day of December, 2000.

BY THE COURT:


DALE A. KIMBALL
United States District Judge

kam

United States District Court
for the
District of Utah
December 14, 2000

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:00-cv-00584

True and correct copies of the attached were either mailed or faxed by the clerk to the following:

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

OCT 7 2002

PATRICK FISHER

Clerk

DR. STEVEN MACARTHUR; DR.
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CACAPARDO; SUE BURTON; AMY
TERLAAK; ALISON DICKSON; CANDACE
HOLIDAY; NICOLE ROBERTS; DONNA
SINGER; FRED RIGGS,

Plaintiffs - Appellants,

v.

SAN JUAN COUNTY; SAN JUAN HEALTH
SERVICES DISTRICT; J. TYRON LEWIS,
Commissioner; BILL REDD, Commissioner;
CRAIG HALLS; MARK MARYBOY,
Commissioner, official capacity only; REID M.
WOOD; CLEAL BRADFORD; ROGER
ATCITY; JOHN LEWIS; JOHN
HOUSEKEEPER; KAREN ADAMS; PATSY
SHUMWAY; DR. JAMES D. REDD; DR. L.
VAL JONES; DR. MANFRED R. NELSON;
RICHARD BAILEY; SAN JUAN
FOUNDATION; MARILEE BAILEY; ORA
LEE BLACK; GARY HOLLADAY; LORI
WALLACE, also known as Laurie Walker;

FARMER'S/TRUCK INSURANCE; ST.
PAUL'S INSURANCE; CARLA GRIMSHAW;
GLORIA YANITO; JULIE BRONSON; R.
DENNIS ICKES; LAURIE SCHAFER,

Defendants - Appellees,

No. 01-4001

Appeal from the United States District Court
for the District of Utah

(D.C. No. 00-CV-584-K)

Susan Rose of Sandy, Utah, for the Plaintiffs-Appellants.

Carolyn Cox (Blaine J. Benard with her on the brief) of Holme Roberts & Owen L.L.P., Salt Lake City, Utah, for Defendants-Appellees San Juan Health Services District, Reid Wood, Roger Atcitty, John Lewis, John Housekeeper, Karen Adams, Patsy Shumway, Gary Holliday, and Lauren Schafer.

Jesse C. Trentadue of Suitter Axland, Salt Lake City, Utah, for Defendants-Appellees San Juan County, J. Tyron Lewis, Mark Maryboy, Bill Redd, Craig Halls, and Richard Bailey.

Kyle M. Finch of Miller, Stratvert & Torgerson, P.A., Farmington, New Mexico, submitted a brief for Defendant-Appellee Farmer's/Truck Insurance.

Robert R. Harrison and David W. Slagle, of Snow, Christensen & Martineau, Salt Lake City, Utah, submitted a brief for Defendants-Appellees Cleal Bradford, Dr. James Redd, Dr. L. Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Lori Wallace, Carla Grimshaw, Gloria Yanito, and Julie Bronson.

R. Dennis Ickes, pro se.

Before **EBEL**, **McKAY**, and **LUCERO**, Circuit Judges.

LUCERO, Circuit Judge.

Key to our determination of this appeal is the question whether the courts of the Navajo Nation may exercise jurisdiction over a case brought by private individuals against a Utah county alleging violations of Navajo law. Contrary to the district court's ruling, we conclude that resolution of this question lies in Montana v. United States, 450 U.S. 544 (1981) (defining the scope of tribes' inherent sovereignty), rather than in the doctrine of state sovereign immunity.

I

The parties bring to us a procedural quagmire marked by a profound lack of clarity--at times approaching confusion--in their litigation before the Navajo Nation district court and their pleadings before the federal district court below. That pattern continues here.

Rather than including a complete statement of relevant facts as required by Fed. R. App. P. 28, appellants' opening brief incorporates facts as stated in a Navajo Nation judicial record. Appellants fail to comply with Fed. R. App. P. 30(a)(1)(B), which requires the filing of an appendix to the briefs including "relevant portions of the pleadings." This being an appeal from a Fed. R. Civ. P. 12(b)(6) dismissal for the complaint's failure to state a claim upon which relief may be granted, Rule 30(a)(1)(B) requires, at a minimum, inclusion in the appendix of the complaint at issue. See 10th Cir. R. 30.1(A)(1) (stating that the appendix to the briefs must be "sufficient for considering and deciding the issues on appeal"). Were it not for appellees' submission of the complaint, we would be inclined to affirm the district court's dismissal on this basis alone. See 10th Cir. R. 30.1(A)(3) (stating that this court is not

obliged to "remedy any failure of counsel to provide an adequate appendix").

As best as we can tell, the facts are as follows.

A

Montezuma Creek Clinic is located within the boundaries of the Navajo Nation and was, during relevant times, operated by the San Juan Health Service District ("Health District")--a special service district organized by San Juan County, Utah ("County")--under contract with the federal Indian Health Service ("IHS") to provide health care to members of the Navajo community. The clinic and land upon which it is located was purchased by the State of Utah as part of the Utah Navajo Trust Fund.

In April 1999, Fred Riggs, Donna Singer, and Alison Dickson, all of whom were employed at the clinic, sued the Health District and County, among others,⁽¹⁾ in Navajo Nation district court for, among other things, alleged violations of the Navajo Preference in Employment Act ("NPEA"), Nation Code tit. 15, §§ 601609.⁽²⁾ The NPEA, which was enacted by the Navajo Nation, requires employers to "[g]ive preference in employment to Navajos," *id.* § 604(A)(1), and to file with the Office of Navajo Labor Relations a written affirmative-action plan, § 604(A)(2).

In pretrial proceedings, the Navajo court concluded that Riggs, Singer, and Dickson demonstrated a substantial likelihood of success on the merits of their NPEA claims and entered a preliminary injunction in their favor. The Navajo court was troubled by what it perceived as a sharp drop in visits to the clinic by diabetic patients. In the court's view, "The reason these patients have not been coming in for life critical medical care is due to San Juan Health Service District's billing of IHS eligible patients, making them believe they must pay for medical services before receiving medical attention." (1 Appellants' App. at 77.) Under the preliminary injunction, the County and Health District were required to reinstate Singer and Riggs to their prior positions at the clinic; to give Dickson full-time employment status; to compensate Singer, Riggs, and Dickson for their lost income; to expunge Singer's and Riggs's personnel files; and to pay attorney's fees. Moreover, the Navajo court prohibited the County and Health District from:

Eliminating Emergency Medical Technician services and coverage within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic; and, Interfering with the laboratory services to the Montezuma Creek Clinic; and, Interfering with the pharmaceutical services provided to the Montezuma Creek Clinic, and immediate payment of all current and past due billings; and, Interfering with any form of patient care, by, among any other matter or things, billing IHS patients; and Interfering or harassing Ms. Singer as the manager of the Montezuma Creek Clinic

(1 *id.* at 8586.)⁽³⁾

In its order granting a preliminary injunction, the Navajo court found that the defendants had engaged in a pattern of bad faith conduct toward the court, had wasted judicial resources, had engaged in "repeated misrepresentations of fact and law," had engaged in evidence spoliation, had intimidated and tampered with witnesses, had obstructed testimony, and had engaged in the sandbagging of evidence. (1 *id.* at 80.) In the Navajo court's view, the defendants had made frivolous claims against Navajo plaintiffs and subjected them "to a trial by tabloid." (1 *id.* at 81.) Seizing on these conclusions, Riggs, Singer, and Dickson modified their complaint to add as defendants the clinic's insurer, Truck Insurance Exchange ("Truck Insurance"), and its attorney, R. Dennis Ickes. On May 3, 2000, the Navajo court took the extraordinary step of holding that Truck Insurance and Ickes should be bound by the preliminary

injunction. The court also granted Riggs, Singer, and Dickson leave to seek enforcement of the preliminary injunction in state or federal court "pursuant to principles of comity and applicable law." (1 id. at 106.)

B

Riggs, Singer, Dickson, and twelve other individuals filed a complaint in United States district court against (1) the County, Health District, and a number of County and Health District officials ("County and Health District defendants"); (2) Truck Insurance; and (3) Ickes. The complaint listed various causes of action: discrimination and denial of equal protection; denial of free speech and association; denial of due process; antitrust and racketeering violations; fraud, conversion, and theft; and invasion of privacy and defamation. Their complaint also sought enforcement of the Navajo court preliminary injunction and "a declaratory judgment that the Preliminary Injunction Order designed to protect the welfare of the Navajo Nation was issued within the sound jurisdiction of the Navajo Nation District Court and is authoritative over the defendants and the political subdivision" (Health District's Supplemental App. ("H.D. App.") at 46). The complaint asserted: "Pursuant to Strate v. A-1 Contractor, 117 S.Ct. 1404, (1997) [the] Navajo Nation District Court . . . has the right to protect the Navajo Patients' health and welfare, contractual rights of the Navajo people, and the civil rights of all those who are within the Navajo Nation boundaries and seek [the] Court's assistance." (H.D. App. at 48.)

Ruling on a motion to dismiss, the district court held that County and Health District defendants were entitled to sovereign immunity in the Navajo court. Reasoned the district court:

[T]ribal courts historically did not possess and therefore have not retained sovereign powers over states. Therefore, absent a state's express waiver of immunity, a state cannot be sued in tribal court. . . . Consequently, political subdivisions of the State of Utah, as defined by Utah law, are immune from suit in tribal courts because the State of Utah has not waived the common law immunity of its political subdivisions from suit in tribal courts.

(2 Appellants' App. at 185.) In a separate decision, the district court dismissed plaintiffs' claim as against Truck Insurance and Ickes. Applying Montana v. United States, the district court held that the Navajo court lacked subject-matter jurisdiction over them.

Appellants seek review of the district court decisions.⁽⁴⁾

C

We review the district court's dismissal of appellants' claims under Rule 12(b)(6) for failure to state a claim de novo. Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999). At this stage of the litigation, we accept all well-pleaded allegations in the complaint as true and will sustain the district court's Rule 12(b)(6) dismissal only if it is clear beyond doubt that no relief could be granted under any set of facts that could be proved consistent with the allegations. Id. Our role in this context "is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." Id. (quotation omitted). "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982).

In deciding a Rule 12(b)(6) motion, a federal court generally "should not look beyond the confines of the complaint itself." Dean Witter Reynolds, Inc. v. Howsam, 261 F.3d 956, 960 (10th Cir. 2001), cert.

granted, 122 S. Ct. 1171 (2002). There are two exceptions to this rule. First, the district court may consider "mere argument" contained in the parties' memoranda concerning a motion to dismiss. Ohio v. Peterson, Lowry, Rall, Barber & Ross, 585 F.2d 454, 457 (10th Cir. 1978). Second, "[i]t is accepted practice, if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." Howsam, 261 F.3d at 961 (quotation omitted).

As stated above, appellants' failure to submit a copy of their complaint to this court on appeal is rendered less harmful by appellees' submission of that crucial document. However, the district court docket entries indicate that appellants filed attachments and an addendum to their complaint on July 26, 2000. We are at a loss as to the contents of these filings. Although it seems clear that the district court relied on facts beyond those alleged in the body of the complaint, there is no way to know from the record before us whether these factual allegations are reflected in the attachments to the complaint. Because appellants do not challenge the district court's decisions on grounds that the court exceeded the proper scope of Rule 12(b)(6) review, we defer to the district court's statements of factual allegations.

II

We first consider whether the district court properly dismissed appellants' claims against Truck Insurance and Ickes.

A

Long before the arrival of Europeans on this continent, tribes were self-governing political communities. Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 851 (1985). As such, the tribes possessed the full attributes of sovereignty, which included "the inherent power to prescribe laws for their members and to punish infractions of those laws." United States v. Wheeler, 435 U.S. 313, 323 (1978). Although "[t]heir incorporation within the territory of the United States, and their acceptance of its protection necessarily divested them of some aspects of the sovereignty which they had previously exercised," id., this divestiture was not absolute. Today, tribes retain sovereignty of a

unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Id.

As Felix Cohen observed in his seminal work on the subject of federal Indian law, "[T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." Felix S. Cohen, Handbook of Federal Indian Law 122 (1941); see Wheeler, 435 U.S. at 322. Contrary to County defendants' assertion on appeal (see County Appellees' Br. at 20), tribes are not subordinate to the states, see Washington v. Confederated Tribes, 447 U.S. 134, 154 (1980), and certainly not to counties.⁽⁵⁾

The leading case defining the scope of tribal inherent civil authority is Montana v. United States. Montana articulates the general rule that "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. Generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 565. But there may be cases in which inherent civil authority will extend to the conduct of non-Indians on reservations. First, "[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." Id. Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566.

In a pair of subsequent cases, the Supreme Court applied Montana to address the scope of inherent civil adjudicative authority as well, holding that "[a]s to nonmembers . . . , a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997); Nevada v. Hicks, 533 U.S. 353, 35758 (2001). In Hicks, the Court acknowledged that this "formulation leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction." 533 U.S. at 358.

B

In evaluating appellants' declaratory judgment claim against Truck Insurance, the district court stated that in April 1999,

there was in effect a Comprehensive Hospital Liability Policy issued by Truck, which, among other things, covered the Montezuma Creek Clinic, which was operated by the San Juan Health Services District Consequently, Truck retained Mr. Ickes to represent the District and related defendants . . . in the Tribal Court action. Because, there were coverage issues as to many of the claims brought by Plaintiffs in the Tribal Court proceedings, however, Mr. Ickes was retained solely to represent the interests of Truck's insureds. Mr. Ickes was not retained to, and has not, represented Truck at any time pertinent to this action.

(2 Appellants' App. at 198.) In their opening brief, appellants neither take issue with the district court's statement of these allegations nor contend that Truck Insurance is a member of the Navajo Nation such that Montana's presumption against tribal authority would not apply. Rather, they contend that Truck Insurance falls within Montana's consensual relationship exception. According to appellants,

Truck's contract for liability insurance was an inherent aspect attaching to each Navajo patient's contract for services with the clinic. But for the Navajo patients, Truck would not have had a contract with the defendants for the clinic. Truck's contract was an inherent aspect of Attorney Ickes' representation of the defendants. Attorney Ickes kept Truck informed.

(Appellants' Br. at 28.)

We reject appellants' argument. Under Montana's consensual relationship exception, the relationship must be one between the nonmember and "the tribe or its members." 450 U.S. at 564. Here, Truck Insurance's contractual relationship was with the clinic, another nonmember. Thus, the Navajo Nation's exertion of authority over Truck Insurance is too attenuated to fall under Montana's consensual relationship exception. See Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001) ("Montana's consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.>").

We also reject appellants' contention that their declaratory judgment claim against Ickes, who is not a member of the Navajo Nation, was improperly dismissed. Appellants claim that the Navajo Nation may regulate Ickes's activity because he entered into a consensual relationship with the tribe--i.e., he became a member of the Navajo Nation Bar Association. We agree that Ickes's membership in the Navajo Nation Bar Association and his practice before the Navajo district court constitute a consensual relationship with the Navajo Nation. However, our Montana inquiry does not end with this determination. As was the case with respect to Truck Insurance, the requisite nexus between the consensual relationship and the exertion of tribal authority is missing.

By enrolling as a member of the Navajo Nation Bar Association, Ickes agreed to follow the American Bar Association's Model Rules of Professional Conduct, which have been adopted by the Navajo Nation Supreme Court. Rule 8.5(a) of the Model Rules provides, "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction" In our judgment, the power to discipline an attorney for alleged misconduct in court is distinct from the power to join the attorney as a defendant with the clients he is representing before that court.⁽⁶⁾ As the Supreme Court observed in Atkinson, the rule is not "in for a penny, in for a Pound." 532 U.S. at 656 (quotation omitted).

We are also unpersuaded that Montana's self-government exception should apply with respect to Ickes. This exception "grants Indian tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations." Id. at 65859 (quotations omitted). Surely, the Navajo Nation's interest in regulating attorney conduct is great. See Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975). But it is a long leap, and one we are unwilling to take, to suggest that the action taken by the Navajo court in this case was necessary to protect Navajo self-government or control its internal relations. If warranted, the Navajo Nation may protect its political integrity through other means, such as "the imposition of disbarment, suspension or reprimand of the offending attorney[]." Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 750 P.2d 118, 123 (N.M. 1988).

C

Appellants contend that the Navajo court's actions respecting Ickes are sanctioned by federal law, namely 25 U.S.C. § 1302. This argument is utterly devoid of any merit. Section 1302 is an express divestiture of tribal authority, providing, among other things, that no Indian tribe may "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(7); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57 (1978) (stating that in § 1302, "Congress acted to . . . impos[e] certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment"). **D**

In contrast to their claim seeking a declaratory judgment, appellants' claim for enforcement of the Navajo court's preliminary injunction with respect to Truck Insurance and Ickes raises important questions concerning the proper role of federal courts.⁽⁷⁾ Although a tribal court defendant may bring a federal cause of action for an injunction where the basis of the claim is assertion of "a right to be protected against an unlawful exercise of Tribal Court judicial power," Nat'l Farmers, 471 U.S. at 851, 852, this right to be free from tribal court interference does not necessarily support a federal claim seeking enforcement of a tribal decree. Although the sovereign powers of the Navajo Nation are held "only at the sufferance of Congress," Wheeler, 435 U.S. at 323, these powers are rooted in Navajo, not federal, law. "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate." NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1192 (10th Cir. 2002) (en banc) (footnote omitted). To the extent appellants' complaint anticipates a defense arising under

federal law, it runs up against the well-pleaded complaint rule. See Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

Appellants nonetheless seek enforcement of the Navajo court injunction under Full Faith and Credit Clause of the Constitution or, in the alternative, comity principles. Under the Full Faith and Credit Clause,

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1. Full faith and credit principles are also in place as a matter of statute:

Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738. According to appellants, tribes historically have been viewed as territories of the United States. In fact, Supreme Court cases point in opposing directions. Compare United States ex rel. Mackey v. Coxe, 59 U.S. (18 How.) 100, 103 (1855) (holding that the Cherokee Nation was a "territory" for purposes of a federal letters of administration law), with New York ex rel. Kopel v. Bingham, 211 U.S. 468, 474-75 (1909) (citing, with approval, Ex Parte Morgan, 20 F. 298, 305 (W.D. Ark. 1883), which held that the Cherokee Nation was not a "territory" within the meaning of the federal extradition statute). See generally Wilson v. Marchington, 127 F.3d 805, 808-09 (9th Cir. 1997) (discussing the issue at length and ultimately holding that neither the Full Faith and Credit Clause nor 28 U.S.C. § 1738 is applicable to tribal judgments). We need not address this issue because appellants admit that they

did not argue full faith and credit in the Federal [district] Court, but upon further consideration of the full pervasiveness of the United States in Tribal Court systems, and given the need for preliminary injunctions in health and public safety emergencies, the Plaintiffs now argue full faith and credit is appropriate for exclusively tribal claims under the facts of this case.

(Appellants' Br. at 36 n.14.) As a general rule, this court will not consider an issue on appeal that was not pressed below, Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992), and we choose not to do so today. We thus proceed with the assumption that the Navajo Nation injunction is enforceable in federal court as a matter of comity.

We are unwilling to enforce judgments of tribal courts acting beyond their authority, especially where defendants have a federal right "to be protected against an unlawful exercise of Tribal Court judicial power," Nat'l Farmers, 471 U.S. at 851; see Wilson, 127 F.3d at 810 (holding that "federal courts must neither recognize nor enforce tribal judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law"). Therefore, given our earlier conclusion that the Navajo court lacked subject-matter jurisdiction over Truck Insurance and Ickes, we must affirm the district court's dismissal of appellants' enforcement claim as against those parties.

III

We proceed to review the district court's dismissal of appellants' claims against County and Health District defendants.

A

In its memorandum decision and order, the district court ruled that the Navajo court suit against County and Health District defendants was barred by the doctrine of sovereign immunity. The Navajo court's exercise of jurisdiction over these defendants was, in the district court's view, "nonsensical" and "ludicrous." (2 Appellants' App. at 190.) The district court based its decision on constitutional sovereign-immunity principles, stressing that the Constitution never would have been ratified had the states been stripped of their sovereign authority "except as expressly provided by the Constitution itself." (2 *id.* at 185 (quoting *Alden v. Maine*, 527 U.S. 706, 727 (1999)).) As exemplified by such decisions as *Alden* and *Hans v. Louisiana*, 134 U.S. 1 (1890), the federal doctrine of sovereign immunity holds that the federal government may not, as a general matter, infringe the states' immunity from private suit.

Appellants contend that the district court's analysis of their claims against County and Health District defendants should have proceeded under *Montana* and subsequent cases defining tribal inherent sovereignty. Had these principles been applied, say appellants, dismissal would have been improper.**B**

We begin our analysis with the acknowledgment that federal sovereign immunity and *Montana* are distinct legal doctrines. On a practical level, however, both *Montana* and sovereign immunity may potentially divest the Navajo court of the power to adjudicate the parties' suit.⁽⁸⁾

The district court's reliance on federal sovereign immunity misunderstands the doctrine as defined by the Supreme Court. See *Nevada v. Hicks*, 533 U.S. 353, 37374 (2001); *Nevada v. Hall*, 440 U.S. 410, 414 (1979) ("The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign."). Nonetheless, at this point in the analysis it would be premature to decide the sovereign immunity question because there remains a threshold question of the tribe's jurisdiction under *Montana*.

C

The threshold question in our review of the Navajo court judgment is whether the Navajo Nation's decision to exercise adjudicative power over County and Health District defendants passes muster under *Montana*. If, and only if, appellants overcome the heavy presumption *Montana* establishes against the existence of tribal jurisdiction will a federal court have occasion to address the sovereign immunity issue at all.

Our judgment is guided by *Nevada v. Hicks*, 533 U.S. 353 (2001) decided by the Supreme Court after the district court's dismissal in the present case. The primary issue in *Hicks* was whether a tribal court possessed "jurisdiction to adjudicate the alleged tortious conduct of state wardens executing a search warrant for evidence of an off-reservation crime." *Id.* at 357. The Court concluded that the tribal court did not have jurisdiction, applying the two *Montana* principles of Indian law that we have already discussed: first, that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *id.* at 35758 (quoting *Strate*, 520 U.S. at 453); and second, that "[w]here nonmembers are concerned, 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,'" *id.* at 359 (quoting *Montana*, 450 U.S. at 564) (emphasis removed). Although the Court did not answer the question of whether a tribe's adjudicative jurisdiction over nonmembers equals its regulatory jurisdiction, the Court made clear that without regulatory jurisdiction under *Montana*, a tribe is definitively without adjudicative jurisdiction. *Id.* at 358.

Hicks expressly acknowledges that Montana and sovereign immunity are distinct doctrines. Moreover, Hicks rejects the view that "immunity defenses should be considered in reviewing tribal court jurisdiction," id. at 373 (quotation omitted), and provides two reasons for this conclusion:

The first is that it is not true. There is no authority whatever for the proposition that absolute- and qualified-immunity defenses pertain to the court's jurisdiction--much less to the tribe's regulatory jurisdiction, which is what is at issue here. (If they did pertain to the court's jurisdiction, they would presumably be nonwaivable. Cf. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997)). And the second problem is, that without first determining whether the tribe has regulatory jurisdiction, it is impossible to know which "immunity defenses" the federal court is supposed to consider.

Id. at 37374 (parallel citations omitted). Hicks thus stands for the proposition that Montana analysis should proceed before considering immunity defenses.⁽⁹⁾ In sum, we conclude that the district court should have performed a Montana analysis before reaching the sovereign immunity question.

D

Although the district court did not conduct a proper analysis under Montana, we are nonetheless free to affirm the district court's dismissal on any grounds for which there is a record sufficient to permit conclusions of law, provided the litigants have had a fair opportunity to develop the record. See Seibert v. Oklahoma ex rel. Univ. of Okla. Health Scis. Ctr., 867 F.2d 591, 597 (10th Cir. 1989). We decline to do so, however, and instead vacate the court's dismissal of appellants' claim against County and Health District defendants, and remand the matter for further proceedings. In addition to the fact that County and Health District defendants did not brief the Montana issues on appeal,⁽¹⁰⁾ we have kept in mind the limited nature of our inquiry when assessing Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief may be granted. "The granting of a motion to dismiss must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." Pelt v. Utah, 104 F.3d 1534, 1540 (10th Cir. 1996) (quotation omitted).

Appellants' position has been that the district court relied on the wrong doctrine in dismissing its claims against County and Health District defendants. We do not intend to suggest an outcome on remand. However, as the Supreme Court has observed, "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." Nat'l Farmers, 471 U.S. at 85556 (footnote omitted).

IV

The district court's dismissal of appellants' claim against Ickes and Truck Insurance is **AFFIRMED**. Dismissal of appellants' claim against County and Health District defendants is **VACATED**, and the matter is **REMANDED** for further proceedings consistent with this opinion. All outstanding motions are **DENIED**.

FOOTNOTES

Click footnote number to return to corresponding location in the text.

¹ Sued in the Navajo court action were the Health District; chairman of the district governance board Roger Atcity; former governance board member John Lewis; governance board members Karen Adams

and Patsy Shumway; and district director of patient care Laurie Shafer. (See 2 Appellants' App. at 176 n.5.) Also sued were San Juan County, Utah; county commissioners J. Tyron Lewis, Mark Maryboy, and Bill Redd; county attorney Craig Halls; and county administrator Richard Bailey. (See 2 *id.* at 176 n.4.) Except for Shumway and Maryboy, who were sued in their official capacities only, the individual defendants were sued in both their official and personal capacities.

² Appellants' claim that "[t]hey brought only Navajo law claims before the Navajo tribunal" is incorrect. (See Health District Appellees' App. at 247 (Navajo court complaint) (setting forth a claim entitled "The Right to Free Speech as Protected by the Navajo Nation, the United Nations, and the United States"); *id.* at 248 ("Freedom to Assemble as Protected by the Navajo Nation, the United Nations, and the United States."); *id.* at 249 ("The right to Due Process protected by the Navajo Nation, United Nations, and the United States."); *id.* at 255 ("The Right of Equal Protection Specifically Protected by the Navajo Nation, the United Nations, [and] the United States.").

³ The Navajo court also held "[t]hat in the event that the defendants fail to obey the Order of this Court, commencing the [fourth] day of March, 2000, the defendants shall be fined at the rate of \$10,000.00 . . . per day, for each and every day the Order of this Court is not carried out in its entirety." (1 Appellants' App. at 104.) Moreover, the court ordered "[t]hat each and every personal defendant and defendants [sic] counsel will pay \$1000 per day of the \$10,000 daily fine beginning March 2, 2000, [sic] from their own personal assets." (*Id.*)

⁴ The district court did not act on appellants' other claims, and consequently, this court originally lacked jurisdiction over this appeal. Title 28 U.S.C. § 1291 grants the courts of appeal "jurisdiction of appeals from all final decisions of the district courts of the United States." Ordinarily, an appealable final judgment is one that terminates "all matters as to all parties and causes of action." D&H Marketers, Inc. v. Freedom Oil & Gas, Inc., 744 F.2d 1443, 1444 (10th Cir. 1984) (en banc).

While this matter was pending, however, the district court exercised its discretion under Fed. R. Civ. P. 54(b) to direct entry of final judgment on plaintiffs' Navajo preliminary injunction claim. As a result, this court now has jurisdiction over this appeal under § 1291. See Seatrains Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 58384 (1980).

⁵ We must reject County appellees' assertion "that the natural dominion of States and their political subdivisions over tribal governments was clearly established before the United States Constitution came into being and that there has been nothing post Constitution to change that fact" (County appellees' Br. at 20).

⁶ See Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 750 P.2d 118, 122 (N.M. 1988) (collecting cases, and stating that "[a]n attorney has no duty . . . to protect the interests of a non-client adverse party for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services and that the attorney's undivided loyalty belongs to the client").

⁷ Because we recognize a federal right to be free from tribal court interference, it stands to reason that an action for a mere declaration that a tribal court defendant has no such right might be permitted as well. See Fed. R. Civ. P. 57; 10B Charles Alan Wright et al., Federal Practice & Procedure § 2767, at 650 (3d ed. 1998). We do not consider, nor do we decide, whether such relief is available at this interlocutory stage of the parties' tribal court litigation.

⁸ We note that County and Health District defendants do not assert sovereign immunity from suit in

federal court. Cf. Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (holding that Eleventh Amendment immunity does not extend to counties, cities, or municipal corporations); cf. also Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 28081 (1977) (holding that Eleventh Amendment immunity does not extend to local school districts). Moreover, it must be remembered that the County and Health District asserted their sovereign immunity defense in Navajo court. We sit in review of that judgment.

⁹ In another telling passage, the Court in Hicks stressed the narrowness of its holding: "We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of Montana analysis." Id. at 373.

¹⁰ (Cf. County Appellees' Br. at 3 ("Because the District Court never ruled on the issue of subject matter jurisdiction with respect to San Juan County Appellees, it would be inappropriate for this Court to address that issue on this limited appeal."); Health District Appellees' Br. at 3 (stating that the sole issue on appeal was "[w]hether the district court erred in dismissing plaintiffs' claim seeking enforcement of the tribal court orders as against the Health District defendants on the grounds that the Health District defendants are immune from suit in the tribal court under the doctrine of sovereign immunity").)



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MACARTHUR v. SAN JUAN COUNTY
Cite as 391 F.Supp.2d 895 (D.Utah 2005)

895

To reach Granite State's conclusion that the existence of substantially same occurrences transforms two physical locations into one, however, requires the Court to ignore the plain language of the policy which goes on to qualify the definition of occurrence as "existing or emanating from one premises location."

ACCORDINGLY,

IT IS ORDERED:

- (1) Plaintiff's motion for partial summary judgment that Granite State's policies contain no aggregate limits and that the Granite State stub policy provides a separate set of per-occurrence limits (Dkt.# 113) is **GRANTED**;
- (2) Plaintiff's motion for partial summary judgment that Granite State is jointly and severally liable to defend Plaintiff and pay defense costs commencing with the date of exhaustion of the property damage limits in the Royal policies and that Granite State has breached that duty (Dkt.# 116) is **GRANTED**;
- (3) Plaintiff's motion for partial summary judgment that the Swan Site and the Cadet Site are "two premises location," and therefore, each a separate "occurrence" for purposes of determining insurance limits (Dkt.# 135) is **GRANTED**; and
- (4) Granite State's cross-motion for partial summary judgment that Cadet's insurance coverage reflects a single "occurrence, (Dkt.# 152)" is **DE-NIED**.



Dr. Steven MACARTHUR,
et al., Plaintiffs,

v.

SAN JUAN COUNTY, et
al., Defendants;

Donna Singer, Fred Riggs, and Allison
Dickson, Plaintiffs,

v.

San Juan County, San Juan Health Ser-
vices District, Commissioner Tyron
Lewis, Commissioner Bill Redd, Craig
Halls, Richard Bailey, Reid Wood,
Roger Atcitty, John Lewis, Karen
Adams, Patsy Shumway, and Lauren
Schafer, Defendants.

No. 2:00 CV 584 J.

United States District Court,
D. Utah,
Central Division.

Oct. 12, 2005.

Background: Employees of county health clinic, alleging torts and civil rights violations, sought enforcement of preliminary injunctive relief obtained from Navajo Nation district court. The United States District Court for the District of Utah, Dale A. Kimball, J., granted county's motion to dismiss, and employees appealed. The Court of Appeals, 309 F.3d 1216, affirmed in part, but remanded for consideration of whether tribal court had adjudicative jurisdiction.

Holdings: On remand, the District Court, Jenkins, Senior District Judge, held that:

- (1) tribal court lacked subject-matter jurisdiction over claims asserted by non-Indian spouse of tribal member against non-Indian defendants;
- (2) there was no evidence that county defendants had engaged in any tortious conduct;

- (3) tribal court had subject-matter jurisdiction over tribal members' claims against county health district;
- (4) tribal court's interlocutory, non-final orders were not enforceable in federal court;
- (5) county health district was immune from suit in tribal court; and
- (6) district's immunity extended to all claims against district employees except for defamation claim.

Motions granted in part and denied in part.

1. Indians ⇨32(4.1)

Indian tribes possess inherent powers of self-government rooted in their own historic sovereignty.

2. Indians ⇨32(7)

Indian tribe's judicial powers are coextensive with its legislative or executive powers.

3. Federal Courts ⇨433

In fashioning federal common law of tribal civil jurisdiction over non-Indians, court must take into account consistent congressional and Executive policies favoring tribal self-government and effective operation of tribal courts.

4. Indians ⇨32(8)

Indian tribe's civil authority extends to regulate and adjudicate interests of non-Indians who enter into variety of consensual relationships with tribe or its members, through commercial dealing, contracts, leases, or other arrangements, or whose conduct or activities threaten, imperil or have some direct effect on political integrity, economic security, or health and welfare of tribe.

5. Indians ⇨32(8)

Where Indian tribe possesses authority to regulate activities of nonmembers,

civil jurisdiction over disputes arising out of such activities presumptively lies in tribal court.

6. Constitutional Law ⇨68(1)

Federal Courts ⇨195

Scope of tribal court's jurisdiction over non-Indian litigants presents federal question over which federal district courts have jurisdiction; issue is not nonjusticiable political question. 28 U.S.C.A. § 1331.

7. Federal Courts ⇨195

Court has federal question jurisdiction over action seeking enforcement of Indian tribal court judgment; although complaint does not plead cause of action created by federal law, action turns on substantial questions of federal law. 28 U.S.C.A. § 1331.

8. Indians ⇨27(7)

District court, reviewing Indian tribal court's jurisdictional determinations, should review tribal court's findings of fact for clear error and conclusions of law de novo.

9. Indians ⇨32(8)

Civil actions between non-Indian litigants arising from events occurring on non-Indian land within reservation boundaries fall within state or federal regulatory and adjudicatory governance and, absent express authorization by federal treaty or statute, tribal courts may not entertain claims against nonmembers arising out of such circumstances.

10. Indians ⇨32(8)

Navajo Nation district court lacked subject-matter jurisdiction over employment-related and common-law tort claims asserted against non-Indian employer by non-Indian spouse of tribal member who did not satisfy Navajo Preference in Employment Act's (NPEA's) residency requirement.

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11. Indians ⚡32(8)

Navajo Nation district court lacked subject-matter jurisdiction over county and county employees, in tribal members' employment-related and common-law tort action against county health district, absent evidence that county defendants had engaged in any tortious conduct.

12. Indians ⚡32(8)

Navajo Nation district court had subject-matter jurisdiction over tribal members' employment-related claims against county health district, which had operated facility located on state-owned land within boundaries of Navajo reservation; district was members' "employer," within meaning of Navajo Preference in Employment Act (NPEA).

13. Indians ⚡32(8)

Navajo Nation district court had subject-matter jurisdiction over tribal members' common-law tort claims against county health district, which had employed members at facility it operated on state-owned land within boundaries of Navajo reservation; district had consensually entered into contractual relationships with members, and its alleged conduct affected economic security, health or welfare of tribe.

14. Indians ⚡32(8)

Navajo Nation district court lacked subject-matter jurisdiction over individual, non-Indian directors of county health district, which had allegedly taken adverse action against tribal member employees; Navajo Preference in Employment Act (NPEA), though governing conduct of employer, did not extend liability to employer's individual directors or trustees.

15. Indians ⚡32(7)

Navajo Nation district court had subject-matter jurisdiction over employment-

related and common law tort claims asserted by tribal members and non-Indian spouse of tribal member against individual director of county health district, who was himself member of tribe who resided on reservation.

16. Indians ⚡32(8)

Navajo Nation district court had subject-matter jurisdiction over defamation claims asserted by tribal member against non-Indian chief executive officer (CEO) of county health district, which had employed plaintiffs at facility it operated on state-owned land within boundaries of Navajo reservation; CEO had allegedly acted with malice when characterizing plaintiffs' time-card errors as fraudulent.

17. Judgment ⚡813

Judgment will not be recognized or enforced in other states insofar as it is not final determination under local law of state of rendition. Restatement (Second) of Conflict of Laws § 107.

18. Judgment ⚡813

Judgment for payment of money will not be enforced in other states unless amount to be paid has been finally determined under local law of state of rendition. Restatement (Second) of Conflict of Laws § 108.

19. Judgment ⚡813

Only judgments that are both valid and final generally are entitled to full faith and credit. U.S.C.A. Const. Art. 4, § 1.

20. Courts ⚡512

Judgment ⚡830.1

Navajo Nation district court orders granting preliminary injunctive relief, in employment law and common-law tort actions brought by tribal members and non-Indian spouse of tribal member against county health district, were interlocutory, non-final orders that were not enforceable

in federal district court, either as matter of full faith and credit or as matter of comity. U.S.C.A. Const. Art. 4, § 1; 28 U.S.C.A. § 1738.

21. Federal Courts ⇌12.1

Claim is “moot” when there is no reasonable expectation that alleged violation of law will recur and interim relief or events have eradicated effects of violation in question.

See publication Words and Phrases for other judicial constructions and definitions.

22. Injunction ⇌22

Past exposure to illegal conduct does not in itself show present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects.

23. Injunction ⇌132, 163(5)

Preliminary injunction represents award of extraordinary relief, and its enforcement is not justified if there is no likelihood that complained of behavior will continue.

24. Declaratory Judgment ⇌65

Mootness principles govern cases brought under Declaratory Judgment Act. 28 U.S.C.A. § 2201.

25. Federal Civil Procedure ⇌103.4

In federal court, plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on legal rights or interests of third parties.

26. Federal Courts ⇌4

When party invokes jurisdiction of federal court, he or she does so subject to constitutional and prudential constraints that govern that court’s exercise of its own judicial power.

27. Courts ⇌99(6)

Law of the case doctrine did not preclude district court from reconsidering interlocutory decision, made prior to transfer of case to current judge, concerning county health district’s immunity from suit in Indian tribal court.

28. Counties ⇌141

Utah county health district was immune from suit in Indian tribal court. U.S.C.A. Const.Amend. 11; West’s U.C.A. §§ 63–30–2, 63–30–3, 63–30–10(2).

29. Counties ⇌141

Indians ⇌32(7)

County health district’s filing of counterclaim against non-Indian plaintiff in Indian tribal court did not amount to waiver of district’s sovereign immunity; district continued to assert immunity even after filing counterclaim and, in any event, tribal court lacked subject matter jurisdiction over plaintiff’s underlying claims.

30. Indians ⇌27(1)

Indian tribal immunity from suit in state court applies to activities of tribe whether on or off reservation, and whether activity is deemed governmental or commercial.

31. Indians ⇌27(1)

Indian tribal immunity from suit in state court embraces tribal agencies, tribal housing authorities, and subordinate economic organizations.

32. Counties ⇌129

Indians ⇌32(8)

Given limited nature of state’s waiver of sovereign immunity, any breach of contract suit by tribal members against Utah county health district, based on violation of members’ rights under Navajo Preference in Employment Act (NPEA), had to be brought in Utah state court. West’s U.C.A. §§ 63–30–5(1), 63–30–16(1).

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33. Counties ⇌59

Indians ⇌32(7)

Utah county health district's immunity from suit for intentional torts extended to claims asserted in tribal court by tribal members against member of district's governing board who was himself member of tribe. West's U.C.A. §§ 63-30-2(2)(a), 63-30-10(2).

34. Counties ⇌146

Indians ⇌32(7)

Utah county health district's immunity from suit for intentional torts did not extend to defamation claim asserted in tribal court by tribal members against district employee; Utah Governmental Immunity Act expressly excepted malice-based claims of libel and slander. West's U.C.A. §§ 63-30-4, 63-30-10(2).

35. Civil Rights ⇌1376(4)

States cannot apply sovereign immunity rules to bar § 1983 claims against local governments in state court. U.S.C.A. Const.Amend. 11; 42 U.S.C.A. § 1983.

36. Civil Rights ⇌1322

Bivens-style action implied directly under Fourteenth Amendment will not lie against state or local employees in their individual capacities where § 1983 is available. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

37. Indians ⇌32(5)

Neither Indian Civil Rights Act (ICRA) nor Navajo Bill of Rights apply to constrain conduct of state or its subdivisions. Civil Rights Act of 1968, § 202, as amended, 25 U.S.C.A. § 1302.

38. Federal Courts ⇌162

International Law ⇌10.45(1)

United Nations' Universal Declaration of Human Rights does not of its own force impose obligations on states and by itself cannot support creation of cause of action that federal district court would have jurisdiction to hear.

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MEMORANDUM OPINION & ORDER

JENKINS, Senior District Judge.

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The original complaint filed in this action asserted claims by fifteen plaintiffs, including Donna Singer, Fred Riggs, and Allison Dickson.¹ (*See* Complaint (Verified), filed July 25, 2000 (dkt. no. 1).) These three plaintiffs’ claims were addressed early in this litigation by Judge Kimball, the district judge then assigned to this case, who entered orders dismissing their claims against San Juan County, the San Juan Health Services District and various individual defendants on the grounds that neither the County nor the Health District had waived their sovereign immunity from suit in tribal court, and that individual employee defendants likewise remained immune from suit under Utah law absent allegations of fraud or malice.

The court dismissed their claims against Truck Insurance and R. Dennis Ickes on the ground that the tribal court lacked subject matter jurisdiction. (*See* Memorandum Decision and Order, filed October 30, 2000 (dkt. no. 81); Memorandum Decision and Order, filed December 13, 2000 (dkt. no. 115).) Those rulings became the subject of a Rule 54(b) certification and an appeal. (*See* Notice of Appeal, filed January 4, 2001 (dkt. no. 126); Order, filed March 6, 2001 (dkt. no. 168).) On October 7, 2002, The court of appeals affirmed the dismissal of Truck Insurance and Ickes on jurisdictional grounds, but vacated the dismissal of the County and Health District defendants and remanded the matter for

1. In a number of instances, Mr. Dickson’s name was spelled “Alison” rather than “Allison” in plaintiffs’ pleadings, affidavits, and other papers. Except when it would alter a

quotation, this court uses the “Allison” spelling, as it appears on this record to be the one Mr. Dickson uses in writing his own name.

further proceedings. See *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir.2002). By that time, the case had already been reassigned to this court.

One month later, in November of 2002, the plaintiffs sought leave to file an amended complaint that, among other things, would clarify the claims of Singer, Riggs and Dickson in light of the appellate court opinion. Leave to amend having since been granted, the claims of these three plaintiffs are now set forth in Part II of the Amended Complaint. (See Amended Complaint, filed June 14, 2005 *nunc pro tunc* to November 14, 2002 (dkt. no. 744) (“Amended Complaint”), at 98–120.)

I. THE ISSUES ON REMAND

The Tenth Circuit vacated the court’s dismissal of Singer, Riggs and Dickson’s claims against County and Health District defendants, and remanded the matter for further proceedings consistent with its opinion that “the district court should have performed a *Montana* analysis before reaching the sovereign immunity question,” referring to *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). *MacArthur v. San Juan County*, 309 F.3d at 1227, 1228.

The threshold question in our review of the Navajo court judgment is whether the Navajo Nation’s decision to exercise adjudicative power over County and Health District defendants passes muster under *Montana*. If, and only if, appellants overcome the heavy presumption *Montana* establishes against the existence of tribal jurisdiction will a federal court have occasion to address the sovereign immunity issue at all.

Id. at 1226.

On remand, then, this court must first determine whether the Navajo Nation District Court had subject-matter jurisdiction over the parties and claims in *Donna Sing-*

er, et al. v. San Juan County, et al., Case No. SR-CV-162-99-CV (Navajo Nation Dist. Ct., filed April 12, 1999), the proceeding in which the orders now at issue were originally entered. To make that determination, this court has examined (1) the nature and scope of Navajo sovereignty; (2) the tribal forum’s relationship to the parties and the subject matter of the claims, including the nature of the interests and injuries asserted by these plaintiffs, and whether the scope of the protection of Navajo law extends to embrace those interests and injuries; and (3) the extent of the jurisdiction of the Navajo courts to adjudicate plaintiffs’ pleaded claims against the County and Health District defendants and grant the relief reflected in the three orders now at issue.

Should plaintiffs’ claims fall within the subject matter jurisdiction of the Navajo court, this court must decide whether the Navajo court’s adjudication of those claims was barred by sovereign immunity—as asserted by the County and Health District defendants and previously held by this court—or whether the plaintiffs are entitled to enforcement of the Navajo court orders through further proceedings in this court, applying either principles of comity or full faith and credit.

II. PRÉCIS

For reasons explained in some detail below, this court holds that the Navajo Nation District Court had subject-matter jurisdiction of plaintiffs Riggs and Dickson’s claims against the San Juan Health Services District, and Riggs’ defamation claim against one individual defendant, Reid Wood, arising from Riggs and Dickson’s employment at the Montezuma Creek Clinic, a facility located on state-owned land within the boundaries of the Navajo Reservation: both Riggs and Dickson are Navajo tribal members living on the Navajo Reservation, and (1) their em-

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ployment by the District was a “consensual relationship with the tribe or its members” entered into “through . . . contracts, . . . or other arrangements,” and (2) employer conduct in such employment relationships “has some direct effect on . . . the economic security, or the health or welfare of the tribe,” all within the meaning of *Montana v. United States*, 450 U.S. 544, 565–566, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), the controlling Supreme Court precedent vindicating the exercise of Navajo civil jurisdiction over non-Indians under either of those circumstances. The Navajo court also had exclusive subject-matter jurisdiction of the claims of Riggs, Dickson and Singer against defendant Roger Atcitty, a Navajo tribal member residing on the reservation who had served as a member of the Health District’s governing board, under *Navajo Nation Code*, tit. 7, § 253(B).

This court holds that the Navajo court did not have subject-matter jurisdiction of Riggs and Dickson’s claims against San Juan County and the named non-Indian individual defendants (other than defendants Wood and Atcitty) under *Montana* or the *Navajo Nation Code*. Under controlling Supreme Court precedent, the Navajo court also did not have subject-matter jurisdiction of the claims of plaintiff Singer, a non-Indian living outside of the Navajo Reservation who is married to a Navajo tribal member, as against San Juan County, the Health District, or the non-Indian individual defendants arising from her employment as manager of the same clinic.

Excepting Riggs’ defamation claim pleaded against Wood individually, adjudication in the Navajo court of Riggs and Dickson’s cognizable claims against the

San Juan Health Services District, Atcitty and Wood (and Singer’s claim against Atcitty) is barred by the District’s sovereign immunity under the limited-waiver, exclusive-remedy and exclusive-forum provisions of the Utah Governmental Immunity Act. The Act’s limited waiver of immunity does not give the State of Utah’s consent to suit against its political subdivisions in Indian tribal courts.

Sovereign immunity aside, the plaintiffs have asked this court to enforce three interlocutory orders “as issued” by the Navajo court granting preliminary injunctive and other equitable relief against the Health District and defendant Wood as a matter of full faith and credit, or under principles of comity. Yet much of that injunctive relief was rendered moot even before this action was filed in July of 2000; the portion of the equitable relief prescribed by those orders that is not moot still remains interlocutory and unliquidated as to sums ordered to be paid. For these reasons, the three Navajo court orders at issue need not be recognized or enforced in this forum at this time.

III. PROCEDURAL HISTORY

Following receipt of the Tenth Circuit’s mandate in this case on November 20, 2002 (dkt. no. 460), this court set a schedule for consideration of the issues on remand. (See Minute Entry, dated January 7, 2003 (dkt. no. 480).) Those issues were briefed by counsel for the parties. (See “Plaintiffs’ Briefing on *Montana*,” filed February 13, 2003 (dkt. no. 492);² San Juan Health District Defendants’ Memorandum Regarding Subject Matter Jurisdiction and in Support of Motion to Dis-

2. Plaintiffs “incorporate[d] the briefing done in their Supreme Court petition and Writ of Mandamus petitions into this briefing,” apparently referring to their “Petition for a Writ of Certiorari,” *Riggs v. San Juan County*, No. 02–1253 (U.S.S.Ct., filed February 6, 2003),

and “Petition for a Writ of Mandamus and Prohibition,” *In re: Riggs, et al. v. San Juan County, et al.*, Case No. 03–4036 (10th Cir., filed February 13, 2003), copies of which are lodged in this court’s file. Those briefs are

miss or for Summary Judgment, filed February 20, 2003 (dkt. no. 497); San Juan County Defendants' Memorandum Regarding Tribal Court Jurisdiction, filed February 20, 2003 (dkt. no. 499); Adoption of San Juan Health District Defendants and San Juan County Defendants' Memoranda Regarding Subject Matter Jurisdiction, filed February 21, 2003 (dkt. no. 501); "Federalism and Article III Court Limitations in Defining Navajo Tribal Court Jurisdiction" [unsigned original document submitted by plaintiffs' counsel], filed February 24, 2003 (dkt. no. 502).³

The issues on remand were set for hearing on February 24, 2003. At that time, the court heard and considered the arguments of counsel and the matter was taken

under advisement. (See Minute Entry, dated February 24, 2003 (dkt. no. 503); Transcript of Hearing, dated February 24, 2003 ("Tr.2/24/03"), *passim*.)

Following the hearing, counsel submitted additional written materials, including plaintiffs' motion for summary judgment. See Plaintiffs' Motion for Summary Judgment for Enforcement of the Navajo Court Orders under Full Faith and Credit or Comity and Response of the District and County's Briefs and Motions for Summary Judgment [& Memorandum in Support], filed February 28, 2003 (dkt. no. 504) ("Pltfs' Summ. Judg. Mem. (504)").⁴

The court revisited the issues on remand at a December 19, 2003 hearing on pending motions:

hereinafter cited as "**Pltfs' Cert. Pet.**" and "**Pltfs' Mandamus Pet.**," respectively.

The plaintiffs' Tenth Circuit mandamus petition was denied on February 20, 2003, and certiorari was denied on June 2, 2003, *see* 539 U.S. 902, 123 S.Ct. 2246, 156 L.Ed.2d 110 (2003). Plaintiffs also filed in the Supreme Court a Petition for Writ of Mandamus and Prohibition, *In re Riggs*, Case No. 02-1774, 2003 WL 22428213 (U.S.S.Ct. filed May 28, 2003), which was denied on October 6, 2003, *see* 540 U.S. 810, 124 S.Ct. 105, 157 L.Ed.2d 260 (2003). The Supreme Court denied rehearing on plaintiffs' petition on December 1, 2003, *see* 540 U.S. 1069, 124 S.Ct. 864, 157 L.Ed.2d 734 (2003).

3. As it turns out, this submission consisted of exhibits that were supposed to be appended to "Plaintiffs' Motion to Allow Plaintiffs Corrections of Factual Assertions in the February 24, 2003 Hearing," (dkt. no. 571), which was served on opposing counsel on or about February 24, 2003, but was not filed with the court until November 18, 2003. *Cf.* Fed. R.Civ.P. 5(d).
4. (See also "Plaintiffs' Motion to Compel," filed March 6, 2003 (dkt. no. 507); Memorandum in Support of the Plaintiffs' Motion to Compel, filed March 6, 2003 (dkt. no. 508).) This "motion to compel" did not concern discovery or disclosure. *Cf.* Fed.R.Civ.P. 37(a). Instead, the Part II Plaintiffs sought an order requiring the defendants to brief the

jurisdictional question in the manner consistent with language found in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), to "express their waiver of any claims of immunity for this Court's jurisdiction," and to "brief this Article III court's subject matter jurisdiction to define . . . the Navajo Court's subject matter jurisdiction in any way other than as Congress defines tribal court jurisdiction." (Plaintiffs' Motion to Compel, filed March 6, 2003 (dkt. no. 507), at 2.) The motion was briefed, (*see* Health District Defendants' Memorandum in Opposition to Plaintiffs' Motion to Compel, etc., filed March 20, 2003 (dkt. no. 524); San Juan County Defendants' Memorandum in Opposition to Plaintiffs' Motion to Compel, filed March 24, 2003 (dkt. no. 526); Plaintiffs' Reply to the County Defendant's Opposition to the Plaintiffs' Motion to Compel a Nat'l Farmers Analysis, filed March 28, 2003 (dkt. no. 537)); was argued at the December 19, 2003 hearing; was taken under advisement; and was ultimately denied. (See Order re: Pending Motions, filed March 30, 2005 (dkt. no. 718), at 1-2.)

Plaintiffs' "Motion to Allow Plaintiffs 'Pertinent Parts of the Navajo Court Record' as Originally Served on Navajo Court Defendants and in Possession of the Court and Defendants be Accepted as Evidence for the Enforcing [of] Navajo Court Orders," was filed on November 17, 2003 (dkt. no. 568),

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THE COURT: ... Now people have filed a great deal of material couched under some fairly interesting labels, but they relate really to the question of the subject matter of the mandate, namely the jurisdictional powers of the Navajo Court. And the defendants have filed a memorandum which I think is their effort to deal with the jurisdiction issue on remand and

plaintiffs have filed a motion but it relates to the jurisdictional question on remand and it seems to me we have got three questions. We have got the jurisdiction of the Navajo Court, which is the subject matter of the mandate. We have got the question then of the jurisdiction of this court and then we have got the ques-

with a memorandum in support (dkt. no. 569). It appears that this motion was served on opposing counsel on or about February 24, 2003, but was not filed with the court until November 17, 2003. *Cf.* Fed.R.Civ.P. 5(d). The defendants had filed memoranda responding to this motion on March 11, 2003. (See San Juan County Defendants' Memorandum in Opposition to Plaintiffs' Motion to Allow Parts of the Navajo Court Record Be Accepted as Evidence for Enforcing Navajo Orders, filed March 11, 2003 (dkt. no. 512); Health District Defendants' "Memorandum in Opposition to Motion to Allow Plaintiffs' Pertinent Parts of the Navajo Court Record as Originally Served on Navajo Court Defendants and in Possession of the Court and Defendants [to] Be Accepted as Evidence for the Enforcing [sic] Navajo Orders," filed March 11, 2003 (dkt. no. 515).) Plaintiffs replied. (Plaintiffs' Reply to Defendant's Memorandum in Opposition to the Plaintiffs' Submitting Parts of the Navajo Court Record, filed March 18, 2003 (dkt. no. 520); "Plaintiffs' Reply to the District/County Memorandum Opposition to Allow Plnt's' Pertinent Parts of the Navajo Record, [etc.]," filed March 31, 2003 (dkt. no. 539).) The court granted this motion in part. (See *infra* note 12; Order re: Pending Motions, filed March 30, 2005 (dkt. no. 718), at 2.)

It also appears that plaintiffs' "Motion to Allow Plaintiffs Corrections of Factual Assertions in the February 24, 2003 Hearing" was not filed until November 18, 2003 (dkt. no. 571), with a memorandum in support (dkt. no. 570); ironically preceded by opposition memoranda, and a reply. (Plaintiffs' Reply to Defendant's Memorandum in Opposition to the Plaintiffs' Correction of Record for February 24, 2003, filed March 18, 2003 (dkt. no. 519).)

On March 13, 2003, plaintiffs filed a motion attacking the defendants' sovereign immunity defense. (See Plaintiffs' Motion to Strike All

Defendants' Cases re: "State" Immunity, filed March 13, 2003 (dkt. no. 516); Memorandum in Support of Motion to Strike All Defendants' Cases re: "State" Immunity, filed March 13, 2003 (dkt. no. 517).) This motion was discussed briefly at the December 19, 2003 hearing, *see* Transcript of Hearing, dated December 19, 2003 ("Tr.12/19/03"), at 6:21-7:1 (the Court), and was stricken by order of the court as premature. (See Order on Motions Decided at December 19, 2003 Hearing, filed on January 29, 2004 (dkt. no. 603), at 3.) Further, Plaintiffs' Motion for Declaratory Judgment with Regard to Government Immunity, filed August 16, 2002 (dkt. no. 407), was likewise stricken as premature. (*Id.*)

Plaintiffs filed additional motions and memoranda in March of 2003. (See Plaintiffs' Motion for Immediate Enforcement of Navajo Orders against the County and County Commissioners Stevens and Morgan, filed March 18, 2003 (dkt. no. 521); Memorandum in Support of Plaintiffs' Motion for the Immediate Enforcement of Navajo Orders against the County and the County Commissioners Stevens and Morgan, filed March 18, 2003 (dkt. no. 522); Plaintiffs' Motion to Correct Their Submission of the BIA Contract with the Navajo Nation Judicial Program, filed March 28, 2003 (dkt. no. 535); "Plaintiffs' Reply to the District/County (1) Memorandum in Opposition to the Plaintiffs' Motion to Compel; (2) Summary Judgment Motion; (3) Motion to Strike State Cases and (4) Response to the Def's Gag Order Motion; (5) Response to Def's Opposition to the Plnt's Motion for Reconsideration," filed March 31, 2003 (dkt. no. 540).) The defendants, in turn, filed responsive memoranda. (See, *e.g.*, Health District Defendants' Memorandum in Opposition to Plaintiffs' Motion to Correct Their Submission of the BIA Contract with the Navajo Nation Judicial Program, filed April 17, 2003 (dkt. no. 554).)

tion as to whether immunity is available.

But the first thing we have to decide, it seems to me, is the power of the Navajo Court to do what it did and the effort on the part of the plaintiffs here to enforce the order that was received from the Navajo Court.

(Tr. 12/19/03, at 7:2–18 (the Court).)⁵ The court inquired “if anybody wants to add anything in writing, in dealing with the jurisdictional question?” (*Id.* at 7:19–20.) Plaintiffs’ counsel indicated that she wished to submit further written materials.

5. Shortly before the December 19th hearing, plaintiffs’ counsel filed motions seeking to “remand” this action in favor of requiring the defendants to exhaust tribal appellate remedies as to the jurisdictional question and other issues. (See Plaintiffs’ Motion for an Order to Reschedule the Hearing of Dec. 19th and Schedule a Hearing for the Motion to Remand or Allow Plaintiffs’ to Dismiss their Action,” filed December 12, 2003 (dkt. no. 575); Plaintiffs’ Motion for an Order of Remand to Navajo Court or in the Alternative an Order Allowing Plaintiffs’ to Withdraw their Complaint for Enforcement of Navajo Court Orders, filed December 12, 2003 (dkt. no. 579).) There was some preliminary discussion of plaintiffs’ “remand” concept at the December 19th hearing, (see Tr. 12/19/03, at 25:11–27:6, 51:4–52:6, 53:5–12), but the defendants had not yet filed written responses. Thereafter, the San Juan County defendants filed a memorandum opposing the “remand” motion, joined by the Health District defendants, to which the plaintiffs then filed a reply. (See San Juan County Defendants Memorandum in Opposition to Plaintiffs’ Motion for an Order of Remand to Navajo Court or in the Alternative an Order Allowing Plaintiffs’ to Withdraw their Complaint for Enforcement of Navajo Court Orders, filed December 31, 2003 (dkt. no. 586); Joinder in San Juan County Defendants’ Memorandum, etc., filed January 2, 2004 (dkt. no. 587); The Health District Defendants’ Joinder in San Juan County Defendants’ Memorandum, etc., filed January 6, 2004 (dkt. no. 588); Plaintiffs’ Reply to and Motion to Strike or Dismiss Defendants’ Opposition to Plaintiffs’ Motion

(*Id.* at 8:3–13 (Ms. Rose).)⁶ The court then asked if anyone wanted to add anything “in the way of oral argument at this point” as to the issues on remand, and plaintiffs’ counsel indicated that she did. (*Id.* at 8:14–9:10 (Ms. Rose).) Counsel presented argument at some length concerning the jurisdictional question, (see *id.* at 9:18–65:13), and the court once again took the matter under advisement. (*Id.* at 66:20–22; see Minute Entry, dated December 19, 2003 (dkt. no. 582).)

The filing of motions and memoranda continued.⁷ Counsel also submitted sever-

to Remand or in the Alternative to Withdraw the Complaint Without Prejudice, filed January 9, 2004 (dkt. no. 591).) Subsequently, however, counsel indicated that the “remand” motion was to be withdrawn, and later, deferred “until the Court and the parties have disposed of the prior motions,” (Letter from Ms. Rose to the Court (via fax), dated September 28, 2004, at [2]); the remand motion was not listed by counsel as among the matters still needing to be addressed as of the time of the September 28, 2004 status conference. (See Transcript of Hearing, dated September 28, 2004, *passim*.)

6. See “Compendium of Exhibits in Support of Enforcing Navajo Court Orders Under Full Faith and Credit or Remanding the Case for Exhaustion,” duplicate copies of which were submitted as Plaintiffs’ Exhibits “A” and “B” (hereinafter cited as “**Pltfs’ 12/19/03 Compendium A/B**”).

7. See “Motion to Correct Facts Asserted in the 12–19–03 Hearing and Supplement the Hearing Record,” filed on December 19, 2003 (dkt. no. 583), and memorandum in support (dkt. no. 584); “Plaintiffs’ Notice to the Court of a Pending Indian Law Decision in U.S. v. Lara,” filed February 3, 2004 (dkt. no. 607); “Plaintiffs’ Motion for an Order Granting Parties Permission to Brief the U.S. v. Lara Supreme Court Decision,” filed April 20, 2004 (dkt. no. 641), and supporting memorandum (dkt. no. 642); Health District Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for an Order Granting Parties Permission to Brief the U.S. v. Lara Supreme Court Decision, filed May 5, 2004 (dkt. no. 643); “Plain-

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al citations to supplemental authority as allowed by DUCivR 7-1(b)(4).⁸

tiffs' Motion for this Court to Address the Defendants' Immunity Issue and Full Faith and Credit Issue in any Order on Jurisdiction," filed September 24, 2004 (dkt. no. 661), with supporting memorandum (dkt. no. 662).

Plaintiffs' counsel also submitted proposed forms of order finding that the Navajo court had subject matter jurisdiction (currently lodged in the court's file), precipitating a flurry of written objections filed by the defendants, to which plaintiffs filed a reply. (See San Juan County Defendants' "Objection to Plaintiffs' Order Finding the Navajo Court Had Subject Matter Jurisdiction Over Navajo Nation Law and Indian Civil Rights Act Violations," filed January 14, 2004 (dkt. no. 593); Health District Defendants' "Objection to Plaintiffs' Proposed Order Finding the Navajo Court Subject Matter Jurisdiction Over Navajo Nation Law and Indian Civil Rights Act Violations," filed January 14, 2004 (dkt. no. 594); Health District Defendants' "Objection to the Plaintiffs' Proposed Orders Finding the Navajo Court Subject Matter Jurisdiction Over Navajo Nation Law and Indian Civil Rights Act Violations and Memorandum in Opposition to Plaintiffs' Motion to Strike or Dismiss," filed January 20, 2004 (dkt. no. 596); San Juan County Defendants' Joinder in the Health District Defendants' Objection, etc. [dkt. no. 596], filed January 22, 2004 (dkt. no. 598); Plaintiffs' Reply to Defendants' Objections to the Plaintiffs' Proposed Orders Supporting Navajo Nation Court Jurisdiction, filed January 26, 2004 (dkt. no. 600); Objection of the San Juan Health Service Defendants to Plaintiffs' Proposed Order Finding the Navajo Court Had Subject Matter Jurisdiction and Proposed Order Allowing Withdrawal of the Complaint Without Prejudice for Further Fact Finding in Light of Supreme ... Court Rulings, filed January 27, 2004 (dkt. no. 601); Plaintiffs' Reply to Attorney Harrison's Objection to the Plaintiffs' Proposed Orders and Motion to Strike the Objection, filed January 29, 2004 (dkt. no. 605); Plaintiffs' Motion to Strike Mr. Harrison's Objection to the Proposed Orders Finding the Navajo Court Had Subject Matter Jurisdiction, filed January 30, 2004 (dkt. no. 606); Health District Defendants' Response to Plaintiffs' Motion to Strike Mr. Harrison's Objection to the Proposed Orders Finding the Navajo Court Had Subject Matter Jurisdiction, filed February 11, 2004 (dkt. no. 608); Plaintiffs' "Reply to Mr. Harrison's February 11, Response," filed February 20, 2004 (dkt. no. 613).)

8. Those authorities include *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 123 S.Ct. 1887, 155 L.Ed.2d 933 (2003); *Jinks v. Richland County*, 538 U.S. 456, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 123 S.Ct. 1239, 155 L.Ed.2d 247 (2003); *Prairie Band of Potawatomi Nation v. Wagnon*, 402 F.3d 1015 (10th Cir.2005); *Prairie Band of Potawatomi Nation v. Richards*, 379 F.3d 979 (10th Cir.2004); *Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139 (10th Cir. 2004); *Skull Valley Band Of Goshute Indians v. Nielson*, 376 F.3d 1223, 198 A.L.R. Fed. 741 Env'tl. L. Rep. 20,064 (10th Cir.2004), petition for writ of certiorari filed, 73 U.S.L.W. 3287 (Oct 28, 2004) (No. 04-575); *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir.2004); *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Comm'n*, 327 F.3d 1019 (10th Cir.2003); cert. denied sub nom. *Ashcroft v. Seneca-Cayuga Tribe of Oklahoma*, 540 U.S. 1218, 124 S.Ct. 1505, 158 L.Ed.2d 153 (2004); *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir.2004); *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir.2004), cert. denied, — U.S. —, 125 S.Ct. 1397, 161 L.Ed.2d 190 (2005); *Boozier v. Wilder*, 381 F.3d 931 (9th Cir.2004); *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir.2004); *United States v. Archambault*, 97 Fed.Appx. 59, 2004 WL 1058069, 2004 U.S.App. LEXIS 9288 (8th Cir.2004); *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for Western Dist. of Michigan*, 369 F.3d 960 (6th Cir.2004); *Marathon Oil Co. v. Johnston*, Case No. 03-CV-1031J (D. Wyo., decided June 1, 2004); *Azure-Lone Fight v. Cain*, 317 F.Supp.2d 1148 (D.N.D.2004); *Johnston v. Marathon Oil Co.*, Case No. CV-02-010 (Shoshone & Arapahoe Trib. Ct., decided January 7, 2005); *Judy v. White*, No. SC-CV-35-02 (Navajo S.Ct. 08/02/2004); *Ackerman v. Edwards*, 121 Cal. App.4th 946, 17 Cal.Rptr.3d 517 (3d Dist. 2004); *State of South Dakota v. Cummings*, 2004 SD 56, 679 N.W.2d 484; *Rodriguez v. Wong*, 119 Wash.App. 636, 82 P.3d 263 (2004).

On April 4, 2005, plaintiffs' counsel also filed a document entitled "Plaintiffs' Motion for an Order Enforcing Navajo Court Orders," (dkt. no. 719), which consisted of a citation to supplemental authority buttressed

In May of 2004, plaintiffs' counsel requested that this case be referred to mediation or a settlement conference.⁹ Though the defendants initially opposed a referral to mediation, by the time of the July 6, 2004 hearing on the subject, they had joined in the request, and this court referred the matter for a judicial settlement conference pursuant to the court's Local Rule, DUCivR 16-3(b), deferring further consideration of the matter pending the outcome of the settlement conference. (See Minute Entry, dated July 6, 2004 (dkt. no. 657).)

The court set the matter for a status conference on September 28, 2004. (See Notice of Hearing, filed September 7, 2004 (dkt. no. 660).) At that time, counsel reported that the settlement conference had failed, and court and counsel discussed the issues then remaining for decision. (See Minute Entry, dated September 28, 2004 (dkt. no. 663); Transcript of Hearing, dated September 28, 2004, *passim*.)¹⁰

More recently, the court granted the plaintiffs' "Rule 15 Motion to Amend and Supplement Complaint to Conform to the Evidence & The 10th Cir. Court 10-7-02 Opinion," filed November 6, 2002 (dkt. no. 438), which *inter alia*, cast the pleadings of the Part II Plaintiffs (Singer, Riggs and Dickson) in their current form, purportedly clarifying the Part II Plaintiffs' claims

in light of the court of appeals' October 7, 2002 opinion. (See Amended Complaint, filed June 14, 2005 (*nunc pro tunc* to November 14, 2002) (dkt. no. 744), at 98-120.) That amendment to the pleadings, however, did not significantly alter the analytical framework for consideration of the issues on remand—a framework that was examined in detail at both the February 24 and December 19, 2003 hearings, was reviewed briefly at the September 28, 2004 status conference, and now guides this court's consideration and resolution of the issues on remand.

IV. THE CLAIMS OF THE PART II PLAINTIFFS

At the outset, the subject-matter jurisdiction of the Navajo court must be examined in the context of the pleadings that originally invoked that jurisdiction, the parties over whom the Navajo court sought to exercise its adjudicative authority, and the remedies that it prescribed in an effort to resolve the disputes brought before it.

According to Part II of the Amended Complaint, plaintiffs Singer, Riggs and Dickson (the "Part II Plaintiffs") seek an order of this court enforcing four orders previously entered by the Navajo District Court against several of the named defen-

by further written argument as to the issues on remand. The court struck the filing because of counsel's failure to comply with the court's Local Rules concerning supplemental memoranda and citations to supplemental authority, *see* DUCivR 7-1(b)(4), DUCivR 7-2. (See Order re: Plaintiffs' April 4, 2005 Motion, filed April 5, 2005 (dkt. no. 720).)

9. (See Plaintiffs' Motion to Refer Case to Mediation, Filed May 10, 2004 (dkt. no. 644), and supporting memorandum (dkt. no. 645); Plaintiffs' Motion for Settlement Conference with the County and County Defendants, filed June 7, 2004 (dkt. no. 652), and supporting memorandum (dkt. no. 653).)

10. Thereafter, plaintiffs' counsel filed a series of motions involving the Part I Plaintiffs (MacArthur, Lyman and Valdez), as well as two motions to amend the complaint, primarily involving revisions to the Part I Plaintiffs' claims. On June 13, 2005, this court entered a Memorandum Decision & Order detailing the reasons for the dismissal of the Part I Plaintiffs' claims—claims which had previously been disposed of pursuant to Fed.R.Civ.P. 16(c)(1) in the context of the Final Pretrial Conference on November 14 and 15, 2002. (See Memorandum Decision & Order, filed June 13, 2005 (dkt. no. 742), *passim*.)

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dants, including San Juan County, the San Juan Health Services District, Rick Bailey (County administrator and CEO of the District); Reid Wood (District CEO); Laurie Schafer (District Patient Care Director); San Juan County Attorney Craig Halls; County Commissioners Bill Redd and J. Tyron Lewis (both as commissioners and Health District Board members); and Health District Board members Roger Atcitty, John Lewis, Karen Adams, and Patsy Shumway.¹¹ (Amended Complaint at 105–106.)

A. Ms. Donna Singer

Donna Singer is the “non-Indian spouse of a Navajo Tribal Member who lives outside but near the reservation, and who worked at Montezuma Creek Clinic,” a facility operated by the San Juan Health Services District at the time of the events of which she complains. (Amended Complaint at 104.) She was employed as the

manager of the Montezuma Creek Clinic from 1995 until the termination of her employment by the SJHSD in December 1998. She is currently employed at the clinic by Utah Navajo Health Systems, Inc., a Native American non-profit organization that has operated the Montezuma Creek Clinic under a Pub.L. 93–638 (Indian Self-Determination and Education Assistance Act) contract with the Navajo Nation since January 1, 2000.

According to her Navajo court pleadings, Ms. Singer “over the years had made numerous minor time card mistakes,” as had “[m]any people throughout the San Juan Health Services District system.” Complaint for Damages, filed April 12, 1999, in *Donna Singer, et. al. v. San Juan County, et al.*, Case No. SR–CV–162–99–CV (Navajo Nation District Court, Shiprock District (“Navajo Ct. Cmplt.”), at 7 ¶¶ 43–44; available in “Pertinent Parts of the Navajo Court Record As Attachment to the Amended Complaint,” received No-

11. Former County Commissioner Mark Maryboy was also named as a defendant in the Navajo court, but has since been dismissed as a defendant in this action and is not now before this court. (See Order re: Dismissal of Defendant Mark Maryboy, filed November 29, 2001 (dkt. no. 234).) In this action, Commissioner Maryboy had been sued solely in his official capacity, which as a practical matter “is the same as a suit ‘against [the] entity of which [the] officer is an agent,’ in this case, San Juan County, which remains a named defendant in this action. *McMillian v. Monroe County*, 520 U.S. 781, 785 n. 2, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (quoting *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978))). Recalling that an adverse judgment in an “official capacity” suit “‘imposes liability on the entity that [the officer] represents,’” *id.* at 785 n. 2, 117 S.Ct. 1734 (quoting *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985)), and noting that the plaintiffs sought no specific remedy

as against former Commissioner Maryboy—in contrast to other named individual defendants—this court saw no need to prolong former Commissioner Maryboy’s presence as a defendant in this case.

And essentially the same may be said for defendant Shumway, also sued only in her official capacity. Plaintiffs’ counsel indicated to the United States Supreme Court in 2003 that Ms. Shumway is no longer a defendant in this action. (See Petition for Writ of Mandamus and Prohibition, *In re Riggs*, Case No. 02–1774, 2003 WL 22428213 (U.S.S.Ct. filed May 28, 2003), at iv (“Previously Commissioner Mark Maryboy and Patsy Shumway were named in their official capacities only, and have since left office and are no longer parties.”).)

Mary Nielson (a/k/a Mary Nielsen), the Health District financial officer, was listed as a defendant in plaintiffs’ original Complaint (Navajo Ct. Cmplt. at 1, 3 ¶10), (District CFO); but is not listed in the caption of the three Navajo court orders. Nor was she named as a defendant in this case.

vember 8, 2002 (dkt. no. 438 note).¹²) Yet she “received no official letter or notice with warning language concerning time card mistakes or errors in nearly 18 years” of working for the County and the SJHSD. (*Id.* at 7 ¶ 47 & Exhs. 25, 27, 28.)¹³ As an “exempt” managerial employee under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (2000), Ms. Singer asserted that she “was not allowed to have overtime” compensation, (*id.* at 8 ¶¶ 51–52¹⁴), yet was required to keep time cards, allegedly “in violation of SJHSD board policies.” (*Id.* at 8 ¶ 53 & Exh. 38.)

Ms. Singer alleged that she “was asking questions about ambiguous budget expense

items put onto Montezuma Creek Health Clinic’s budget at a public meeting of the Administrative Control Board of the San Juan Health Services District regular monthly scheduled meeting as a participating member of the audience,” apparently in June of 1998, (*id.* at 8–9 ¶ 60 & Exh. 64, at [1]–[2]), and that she had been both “privately” and “publicly” supportive “of a private hospital coming into Blanding.” (*Id.* at 9 ¶¶ 61–62.)¹⁵

She further alleged that on or about November 13, 1998, a mistake was made on her time card: “Mrs. Singer was in Blanding when an unknown person at the

12. Though filed on November 8, 2002—two days after the plaintiffs’ “Rule 15 Motion to Amend and Supplement Complaint to Conform to the Evidence & The 10th Cir. Court 10–7–02 Opinion,” filed November 6, 2002 (dkt. no. 438)—this three-inch-thick compendium of documents purported to be “attached to the amended Complaint” and “incorporated into the complaint.” (“Pertinent Parts of the Navajo Court Record As Attachment to the Amended Complaint,” received November 8, 2002 (dkt. no. 438 note), at [1].) The plaintiffs’ Rule 15 motion was granted on June 13, 2005. *nunc pro tunc* to November 14, 2002, (see Memorandum Decision & Order, filed June 13, 2005 (dkt. no. 742), at 187), and the Amended Complaint was filed on June 14, 2005 (dkt. no. 744), together with four attached documents originally submitted with the proposed Amended Complaint on November 6, 2002. However, the plaintiffs’ “Pertinent Parts” compendium was not embraced in that filing.

The plaintiffs had previously filed a “Motion to Allow Plaintiffs ‘Pertinent Parts of the Navajo Court Record’ as Originally Served on Navajo Court Defendants and in Possession of the Court and Defendants be Accepted as Evidence for the Enforcing [of] Navajo Court Orders,” filed November 17, 2003 (dkt. no. 568). This court had already granted that motion in part, *viz.*, “to the extent that the submitted documents shall be received as evidentiary exhibits.” (Order re: Pending Motions, filed March 30, 2005 (dkt. no. 718), at 2.) The plaintiffs’ “Pertinent Parts” compendium thus remains a part of the record in this

action as a compilation of *evidentiary exhibits*, rather than as a part of the Amended Complaint itself, and is hereinafter cited as “**Pertinent Parts Navajo Ct. R.**”

13. It appears that the plaintiffs’ original Navajo court complaint was accompanied by a series of documentary “attachments,” including the plaintiffs’ ONLR complaints, a legal memorandum discussing jurisdictional issues, and 65 evidentiary exhibits. (See Pertinent Parts Navajo Ct. R. (“Memorandum SMJ” and “Table of Exhibits 1–65” Tabs).) For purposes of this discussion, the plaintiffs’ original Navajo court complaint and all of its attachments are treated as a single pleading.

14. Memoranda attached to the original tribal court complaint refer to Ms. Singer receiving overtime compensation based upon her time cards. (Navajo Ct. Cmplt. at Exhs. 25, 32.)

15. Her public comments apparently provoked some reaction within the SJHSD. Ms. Singer recounts that on November 25, 1998, SJHSD financial officer Mary Nielson told her “All I can say is that you made some people very angry with your questions and comments at [the] board meeting.” (Navajo Ct. Cmplt. at Exh. 64, at [4].) When Ms. Singer met privately with Reid Wood for the first time on November 19th, she recalls him beginning by saying “You need to remember who you work for,” without further explanation of the import of that comment. (*Id.* at Exh. 64, at [3].) Wood terminated Ms. Singer’s employment two weeks later. (*Id.* at Exh. 64, at [4]–[5].)

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Montezuma Creek Health Clinic clocked in on her card.” (*Id.* at 7 ¶¶ 45–46 & Exh. 30.) The resulting error came to the attention of District administrators, and on or about November 25, Ms. Singer provided a written explanation of the error. (*Id.* at Exh.32.) Ms. Singer was then given a December 1 memorandum from Reid Wood, Chief Executive Officer of the Health District, referring to allegations of “time card fraud,” and she was placed on paid administrative leave. (*Id.* at Exh. 34.) A second memorandum from Wood, dated December 2, advised Ms. Singer that “it has been alleged that you have engaged in employment related misconduct,” specifically that she had “[s]ubmitted false information regarding your hours worked on your time card for the period ending November 22, 1998 by reporting that you worked 80 regular hours when you only worked 68 regular hours,” and scheduled a “pre-disciplinary hearing” for December 4, 1998. (*Id.* at Exh. 35.)

Following his meeting with Ms. Singer on December 4, Wood prepared a “Notice of Decision” memorandum, dated December 7, advising Ms. Singer that the allegations that her “[t]ime card for the period ending November 22, 1998 was improperly reported,” and that she “also approved another employee’s time card that was incorrect” were “supported by the substantial evidence,” and that “it is my decision to terminate your employment as of 5:00 p.m. December 4, 1998.” (*Id.* at Exh. 36.)

As we discussed, as a supervisor you are held to a higher standard of conduct. Your personnel file also indicates that this is not the first time this problem has occurred. . . .

Please be advised that you have a right to appeal this decision by submitting a written notice to appeal with San Juan Health Care Services within ten days of receipt of this notice. If an

appeal is filed, your appeal will be submitted to the appeals board. If you fail to file an appeal you waive any right to contest this decision at a later date.

(*Id.*)

Her pleadings did not detail the sequence of events following December 7, 1998 (*e.g.*, her pursuit of an appeal, *see id.* at Exh. 44), but Ms. Singer did allege that at a subsequent grievance hearing on February 12, 1999, “Mr. Wood admitted that ‘time cards’ were not the problem or cause of Mrs. Singer’s discharge from her employment,” (*id.* at 7 ¶ 39 & Exh. 39), that Wood and Mary Nielson, the Health District financial officer, had made derogatory verbal remarks about her, casting doubt on her honesty and integrity, and that these remarks were published to others. (*Id.* at 7 ¶¶ 40–41, 12 ¶¶ 100–103.)

From the materials submitted by the plaintiffs, it appears that in or about April of 1999, Ms. Singer filed complaints with both the Office of Navajo Labor Relations (ONLR) and the Navajo Nation District Court in Shiprock, New Mexico, together with applications for temporary restraining orders and preliminary injunctive relief. (*See id.*; Pertinent Parts Navajo Ct. R. (“Docket,” & “ONLR App for TRO & P.I.” Tabs).) In both forums, Ms. Singer sought “[r]einstatement . . . to her merit position of employment as manager of the Montezuma Creek Health Clinic,” with back pay, benefits and seniority status, as well as compensatory and punitive damages, attorney’s fees, the retraction and expungement of all derogatory remarks and records, and a public apology. (Navajo Ct. Cmplt. at 39–41.) Ms. Singer also sought affirmative relief requiring the County and the District to implement a merit system for employees, an employee bill of rights, and the Navajo Preference in Employment Act, as well as “[p]roportionate representation on the SJHSD for An-

eth and Red Mesa chapters commensurate with the population of Navajos living in the San Juan County boundaries,” presumably referring to representation on the Health District board. (*Id.* at 40–41.) She requested appointment of a special master “to protect the employment rights of the Montezuma Creek Clinic employees and possibly the Monument Valley Clinic (also serving the Navajo Nation)” and the imposition of an unspecified “fine or sanction” against the defendants “for SJHSD’s callous disregard for the poverty stricken, down trodden, condition of health care within the Navajo Nation, an independent sovereign and federally recognized reservation, due primarily to the historical subjugation of the United States that has precipitated such long standing problems as recognized in federal law.” (*Id.* at 42, 43.) She also asked the Navajo court “for exclusion of the defendants Mr. Wood, Mrs. Nielsen and Mrs. Schafer, for all time from coming within the Navajo Nation’s territorial boundaries . . . for endangerment of the public safety and callous disregard for the health and welfare of the Navajo Nation,” and for “such further sanctions, fines, penalties as the Court feels is necessary and just to protect the health, safety and welfare of the tribal members in the areas of the Navajo Nation.” (*Id.* at 43.)¹⁶

B. Mr. Fred Riggs

Fred Riggs is an enrolled member of the Navajo Nation who resides within the boundaries of the Navajo Reservation in New Mexico, and has worked for many

years as a Physician’s Assistant at the Montezuma Creek Clinic. Like Ms. Singer, Mr. Riggs is currently employed by Utah Navajo Health Systems, Inc., the tribal contractor that has operated the Montezuma Creek Clinic since January 1, 2000.

Like Ms. Singer, Mr. Riggs also had problems with his SJHSD “time card” in November of 1998.

According to his Navajo court pleadings, by a letter dated November 2, 1998, SJHSD patient care director Laurie Schafer offered Riggs “the position of a Mid-Level Provider for San Juan Health Care Services,” with full-time work at the Montezuma Creek Clinic at a rate of pay of \$ 60,000 per year “with full benefits and \$ 1000 allowance for CME’s.” (Navajo Ct. Cmplt. at 9 ¶ 66 & Exh. 46.) The letter advised that “[y]ou will be required to use a time clock while you are working,” and that “[t]his position may require additional duties as necessary.” The District abruptly terminated his employment at the Montezuma Creek Clinic on or about November 4, 1998 as a “reduction in force,” then rehired him almost immediately, upon Riggs’ signature accepting Schafer’s offer. (*See id.* at Exh. 46.)

Riggs thus continued to work at the Montezuma Creek Clinic, but in a lesser position at a significantly reduced rate of pay—purportedly \$10,000 less per year than he had been receiving up to that time. (Navajo Ct. Cmplt. at 9 ¶ 66 & Exh. 45, at ¶¶ 8–11 (Fred Riggs Affidavit).) And for

16. Before the Office of Navajo Labor Relations, Ms. Singer sought similar relief, including an award of “\$250,000 for recompense for nearly losing my life from the stress this caused me,” the “immediate obliteration of the CIB policy implemented by Mary Nielsen and Reid Wood,” to “be taken off time cards as an legally exempt manager,” and that “[t]he same discipline I received,” *viz.*, termi-

nation of employment, “be given to Reid Wood, for any fraudulent misrepresentations Reid Wood made to the board and/or Rick Bailey,” and “be given to Mary Nielsen for not obeying the SJHSD directive to give Montezuma Creek the software it needs for billing, and for retaliation and threats against my witnesses.” (Pertinent Parts Navajo Ct. R. at (“ONLR Complaint” Tab).)

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the first time in his career, Riggs was required to keep “time cards.” (*Id.* at Exh. 45, at ¶ 18.)

Riggs recounted an incident on or about November 11, 1998, in which he had agreed to take an emergency call in Blanding later that day, outside his existing job description. He averred that when he “asked administration personnel how, and how much he was to be paid, Reid Wood threatened his job acting as if [Riggs] was lazy, uncooperative, and insubordinate and greedy.” (*Id.* at 9 ¶ 70 & Exh. 45, at ¶¶ 4–7.)

According to Riggs, his very first time card in November of 1998 reported “a day and a half of leave as 8.4 hours instead of 12 hours,” an error of which he insists he was unaware. (*Id.* at Exh. 45, at ¶ 25.) Like Singer, Wood advised Riggs in writing on December 1, 1998 that he faced allegations of “time card fraud” and placed him on administrative leave with pay (*Id.* at 10 ¶¶ 72–73 & Exh. 45, at ¶¶ 12, 25, Exh. 48.) Remarkably, the “specific conduct” alleged against Riggs was identical to the allegation made against Singer that same day, namely that Riggs had “[s]ubmitted false information regarding your hours worked on your time card for the period ending November 22, 1998 by reporting that you worked 80 regular hours when you only worked 68 regular hours.” (*Id.* at Exh. 49.)¹⁷ Wood advised Riggs that he had scheduled a “pre-disciplinary hearing” for December 4, 1998.

Following the December 4th “hearing,” Wood advised Riggs in writing that he had determined that the allegation that Riggs’ time card “for the period ending Novem-

ber 22, 1998 was improperly reported” was “supported by the substantial evidence,” and that “it is my decision to place you on 30 days probation,” meaning that Riggs’ “time card will be audited for sufficiency for that period of time.” (*Id.* at Exh. 50.) As he had done with Singer, Wood advised Riggs that he could appeal Wood’s determination within ten days of receipt of his memorandum. (*Id.* at Exh. 50.)

Riggs subsequently returned to work on thirty days’ probation. (*Id.* at 10 ¶ 74 & Exh. 50.) According to Riggs, he was kept on probation for longer than thirty days, (*id.* at 10 ¶ 75), and was given a verbal warning for placing “the time for President’s [D]ay in the wrong place on the time card.” (*Id.* at Exh. 45, at ¶ 33.)

Mr. Riggs gave written notice of his grievance concerning Wood’s disciplinary action on or about December 15, 1998, (*see id.* at Exh. 60), and a “grievance hearing” was held on February 12, 1999. (*Id.* at Exh. 45, at ¶¶ 27, 28.) Riggs asserts that the February 12th hearing panel was “tainted” by Wood’s influence (Wood had recently been appointed CEO of the Health District), and was “constituted in such a way that impartiality can not be achieved.” (*Id.* at Exh. 45, at ¶¶ 35–40.) Following that hearing, Riggs averred that the “SJHSD is refusing to take charge of the time card fraud out of [his] records though it is wholly fallacious and without foundation, and instead wish[ed] to place a letter in the file saying it was not proven and that [Riggs] had requested the charge be removed.” (*Id.* at Exh. 45, at ¶ 29.)

Riggs complained that his “reduction in force” and resulting reduction in pay did not comply with the Navajo Preference in

17. Moreover, Wood’s allegation that Ms. Singer had “also approved another employee’s time card that was incorrect”—part of the justification for her termination—appears to refer to Mr. Riggs’ November 22 time card. (Navajo Ct. Cmplt. at Exh. 36.) Yet, accord-

ing to the plaintiffs, Ms. Singer was not Mr. Riggs’ supervisor and was not responsible for approving his time cards; they allege that Reid Wood was Mr. Riggs’ supervisor and bore that responsibility. (*Id.* at 8 ¶¶ 55–58.)

Employment Act, “did not comply with a merit system,” and was discriminatory.¹⁸ (*Id.* at 9 ¶¶ 67, 68.) He alleged that the SJHSD had failed to implement a merit system as required by Utah law,¹⁹ and that Mr. Wood had treated him and other Montezuma Creek Clinic employees “differently than managers and other employees in the SJHSD system who had numerous similar time card errors on their cards, including the payroll department.” (*Id.* at Exh. 45, at ¶ 30 (Fred Riggs Affidavit).) He complains that he requested training and orientation on time cards “and was met with Reid Wood’s anger and impatience . . .” (*Id.* at Exh. 45, at ¶ 34.) “SJHSD has not disciplined Mr. Riggs with common sense or respect for him as a person.” (*Id.* at 32 ¶ 286.)

18. Mr. Riggs also alleges that Reid Wood offered Mr. Riggs the position of manager of the Montezuma Creek Clinic that had recently been vacated by Ms. Singer’s termination. (Navajo Ct. Cmplt. at 10 ¶ 77 & Exh. 45, at ¶ 14.) He recounted that Wood withdrew the offer when Riggs told Wood that the action taken against Riggs had been discriminatory. (*Id.* at 10 ¶ 80 & Exh. 45, at ¶¶ 16–17.)

19. The Part II Plaintiffs point to the Utah Special District Personnel Management Act, Utah Code Ann. § 17A–1–601 through 17A–1–604 (2004), enacted in 1992. (*See, e.g.,* Navajo Ct. Cmplt. at 16 ¶ 149 (“SJHSD does not adhere to merit system principals [sic] of the Utah Code 17A–1[–601] through 603.”).) That statute provides that “[a] merit system of personnel administration for the special districts of the state of Utah, their departments, offices, and agencies, except as otherwise specifically provided, is established,” Utah Code Ann. § 17A–1–601(2) (2004), and states that “[i]t is the policy of this state that each special district *may establish* a personnel system administered in a manner that will provide for the effective implementation of the following merit principles:”

(1) Recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment.

In both the Navajo court and ONLR proceedings, Riggs sought reinstatement to his position and rate of pay prior to the November 1998 “reduction in force,” with back pay, benefits and seniority status. Like Ms. Singer, Riggs requested a public apology, expungement of disciplinary action from his file, a “published retraction of all derogatory allegations and comments made” against him, and an award of both compensatory and punitive damages (\$ 3,000,000 each). (*Id.* at 39–40.) Like Ms. Singer, Riggs also sought sweeping affirmative relief requiring the Health District to implement a merit system, an employee bill of rights, the Navajo Preference in Employment Act, as well as proportionate representation of the Aneth and Red Mesa chapters; he requested the exclusion

(2) Provision of equitable and adequate compensation.

(3) Training of employees as needed to assure high-quality performance.

(4) Retention of employees on the basis of the adequacy of their performance, and separation of employees whose inadequate performance cannot be corrected.

(5) Fair treatment of applicants and employees in all aspects of personnel administration without regard to race, color, religion, sex, national origin, political affiliation, age, or disability, and with proper regard for their privacy and constitutional rights as citizens.

(6) Provision of information to employees regarding their political rights and prohibited practices under the Hatch Political Activities Act, 5 U.S.C. Sec. 1501 through 1508 et seq.

(7) Provision of a formal procedure for processing the appeals and grievances of employees without discrimination, coercion, restraint, or reprisal.

Utah Code Ann. § 17A–1–603 (2004) (emphasis added). As plaintiffs’ counsel now insists that Singer, Riggs and Dickson were pursuing claims before the Navajo court solely under Navajo law, this court need not address the effect of this statute upon the Health District, or its applicability to District conduct relating to the plaintiffs.

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of Wood, Nielson and Shafer from the reservation “for all time,” and the appointment of a special master to protect his employment rights and those of his fellow Montezuma Creek Clinic employees. (*Id.* at 40–43.)²⁰

C. Mr. Allison Dickson

Allison Dickson is an enrolled member of the Navajo Nation, living in Utah within the boundaries of the Navajo Reservation. Like plaintiffs Singer and Riggs, he is currently employed at the Montezuma Creek Clinic by Utah Navajo Health Systems, Inc., the tribal contractor that has operated the clinic since January of 2000.

Mr. Dickson was initially hired by the Health District in March of 1998 for six months as a full-time temporary office clerk, handling medical records and billing at the Montezuma Creek Clinic and filling in for another employee who was away on maternity leave. Dickson continued working at the Clinic after the absent employee returned to work. He applied for full-time *permanent* employment in November or December of 1998, but his request was rejected by the District.

Dickson complained that this denial of permanent full-time employment violated an established Health District policy that “mandates that a person ‘will’ become a ‘regular’ employee after 520 hours” of employment by the District. (*Id.* at 11 ¶ 88 & Exh. 55.) The excerpt from the District

personnel policies and procedures relied upon by Dickson reads as follows:

Introductory Period. Each new, transferred, or promoted full-time and part-time employee will be subject to an initial introductory period. The length of the introductory period is generally 520 working hours (the equivalent of three months of full-time work), those who are in a supervisor or exempt profession position will have a 6 month introductory period. During this time period the new employee must demonstrate the ability and willingness to perform the job. During this period, the employee’s work will be continuously evaluated by the supervisor. At the end of the period, performance will usually [sic] be reviewed by the supervisor to determine if employment should be continued. Successful completion of the introductory period will usually [sic] be documented in writing as designated in the Employee Evaluation section. An employee may either resign or be terminated during the introductory period, with neither the employee nor San Juan Health Care Services required to give the other prior written notification or explanation.

Upon successful completion of the introductory period, the new employee will become a regular employee, unless hired specifically for a short-term job. Em-

20. Before the ONLR, Mr. Riggs further requested that “[t]he same discipline Donna Singer received for ‘fraud,’”—termination of employment—“be given to Reid Wood, for any fraudulent misrepresentations Reid Wood made to the [District] Board and/or Rick Bailey,” and “[t]he immediate obliteration of the CIB policy implemented by Mary Nielsen and Reid Wood.” (Pertinent Parts Navajo Ct. R. (“ONLR Complaint” Tab).) He also asked “[t]o be taken off of time cards and put back on salary.” (*Id.*)

The “CIB policy” refers to an alleged requirement by the Health District that patients seeking non-emergency medical treatment at District facilities in 1999 furnish proof of their Medicare, Medicaid or Indian Health Service eligibility, the latter by presentation of a patient’s “certificate of Indian blood” or “CIB.” (Navajo Ct. Cmplt. at 27–30 ¶¶ 249–267.) Plaintiffs allege that under this District policy “no Indians without their ‘CIB’ on file or on their person would receive treatment,” in violation of federal regulations. (*Id.* at 27 ¶ 249, 28 ¶ 256.)

ployment as a regular employee is still “at will”, and regular employees may be terminated at any time, with or without notice, and with or without cause.

(*Id.* at Exh. 55 (emphasis added).) Dickson alleges that he “has worked over 520 hours, *in addition to* the six month temporary position,” but had still been refused “regular” permanent full-time employment. (*Id.* at 11 ¶¶ 87, 90–91, 96 (emphasis added).) Dickson also alleges that at Wood’s instance, he was denied a hearing on his grievance at about the same time that Singer and Riggs’ appeals were to be considered in February 1999. (*Id.* at 11 ¶¶ 93–94; *see id.* at Exhs. 51, 56.)

Mr. Dickson’s principal claim before the Navajo court thus depended on the construction and application of the Health District’s own personnel policies and procedures—in particular the language quoted and italicized above. That claim thus becomes a question of the terms of his contractual employment relationship with the District; if District policy is construed to create a “property” interest in his continuing or prospective employment, it becomes a question of due process as well.²¹

Dickson also complained about “racially insensitive and derogatory remarks and policies by Mr. Wood and Mrs. Nielsen,”

(*id.* at 11 ¶ 95), remarks allegedly made at a January 5, 1999 staff meeting with Montezuma Creek Clinic “P.A.R.” (patient accounts receivable?) personnel at which they discussed “the Certificate of Indian Blood in which patients need to have on file before receiving their medical care.” (*Id.* 11 ¶ 95 & Exh. 57.) Apparently, Wood asked if Certificates of Indian Blood “were like dog tags,” (*id.* at 27 ¶ 249 & Exh. 57),²² while at some point, District financial officer Mary Nielson publicly labeled the Montezuma Creek Clinic billing clerks” as “rebellious” and “insubordinate.” (*Id.* at 28 ¶¶ 257, 259 & Exh. 45, at ¶ 26 (Affidavit of Allison Dickson).) Plaintiffs alleged that when Dickson pressed his claim for full-time permanent employment, “Mrs. Nielsen told Mr. Dickson to cut his hours back to 32 and reminded him his position probably ‘wasn’t that necessary.’” (*Id.* at 12 ¶ 104.)

The relief originally sought by Dickson largely parallels that requested by Singer and Riggs: he would be made “a full time employee with all benefits”; all “non hiring action” would be expunged from his file; he would receive a public apology, a formal retraction of any derogatory remarks made about him by SJHSD administrators, and an award of \$ 3,000,000 in com-

21. In addition to the District’s written policy, Dickson joined Singer and Riggs in invoking an array of legal bases for his claims,

including but not limited to, the *Navajo Nation Bill of Rights*; the *Navajo Nation Code*; . . . *Navajo Custom and Traditions*; the *Navajo Preference in Employment Act*; including the *United Nations Declaration of Human Rights*; *United States Bill of Rights*; the *Constitution of the State of Utah*, and the *Utah Code* under 17A, 9–9–208, 9–9–209.

(Navajo Ct. Cmplt. at 5 ¶ 27 & Exhs. 2–5, 12, and 21.) At least in the referenced documents, the court finds nothing that expressly guaranties that a person hired as a “temporary” employee would be legally entitled to

the tenure and benefits of a “regular” or “permanent” employee, based upon the duration of his or her “temporary” employment, or otherwise.

22. A “dog tag” may refer either to “[a] metal identification disk attached to a dog’s collar,” or “[a] metal identification tag worn on a chain around the neck by members of the armed forces.” *The American Heritage Dictionary of the English Language* 548 (3d ed.1992); accord *Webster’s New World College Dictionary* 423 (4th ed.1999) (“an identification tag or license tag for a dog” or “a military identification tag worn about the neck”). Which connotation Mr. Wood had in mind on January 5, 1999 is unknown.

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pensatory damages and \$ 3,000,000 in punitive damages. (*Id.* at 39–41 (Prayer for Relief).)²³ Dickson also joined Singer and Riggs in seeking affirmative relief as to Health District personnel practices, including the implementation of a merit system and an employee bill of rights, compliance with the Navajo Preference in Employment Act, as well as the appointment of a special master, proportionate representation of two Navajo chapters in SJHSD governance, and the other equitable relief summarized above.²⁴

D. The Nature of Plaintiffs' Claims

The plaintiffs' original Navajo court complaint alleged that "all the captioned plaintiffs have standing to sue herein due to the intentional injurious acts the have been perpetrated upon them by the defendants," and that "all of the events herein complained of giving rise to these proceedings occurred at or near the Montezuma Creek Health Clinic and/or *in the course of the plaintiffs' employment* with the Montezuma Creek Health Clinic which is physically located within the exterior boundaries of the Navajo Nation." (*Id.* at 4 ¶ 21

(emphasis added).) They alleged that the Navajo court

has jurisdiction over the parties and subject matter pursuant to 7 NNC 253 and 7 NNC 254, and the Navajo Nation's independent and inherent sovereignty that is encouraged by federal Statute at 25 U.S.C. 450a., and is undiminished by the Treaty of 1868, and Utah Code sections 9–9–208 and 9–9–209 among others, and the United States Supreme Court "exception" in **Montana v. United States**, 450 U.S. 544 at 565, 101 S.Ct. 1245, 67 L.Ed.2d 493 to 566 (1981). See likewise the attached MEMORANDUM OF LAW, attached hereto as Attachment C.

(*Id.* at 5–6 ¶ 29 (font variations in original).)

Plaintiffs' pleaded causes of action included civil rights claims alleging the denial of freedom of speech, (*id.* at 17–18 ¶¶ 170–183); freedom to assemble, (*id.* at 19 ¶¶ 184–190); due process, (*id.* at 19–22 ¶¶ 191–214); and equal protection, (*id.* at 26–31 ¶¶ 243–280)²⁵—"as protected by the Navajo Nation, the United Nations and the United States," as well as tort claims of "wrongful hiring," (*id.* at 22–23 ¶¶ 215–220);²⁶ defamation, (*id.* at 23–24 ¶¶ 221–

23. Before the Office of Navajo Labor Relations, Mr. Dickson requested "\$25,000 for recompense for the trouble I have been put through to obtain my rights; the discrimination against me in violation of policy, and laws; and the insults to my heritage that I witnessed, and to demonstrate that discrimination is illegal and expensive." (Pertinent Parts Navajo Ct. R. at ("ONLR Complaint" Tab).)

24. Before the Office of Navajo Labor Relations, Mr. Dickson joined Ms. Singer and Mr. Riggs in seeking "[t]he immediate obliteration of the CIB policy implemented by Mary Nielsen and Reid Wood." (Pertinent Parts Navajo Ct. R. ("ONLR Complaint" Tab).)

25. Plaintiffs' "equal protection" claim presents a laundry list of grievances, beginning

with the failure of the County and the Health District to implement "a cross cultural training program for non-Indian administrators, supervisors, or managers as required by the Navajo Preference in Employment Act," (*id.* at 26 ¶ 246), and the imposition of the alleged "CIB policy," (*id.* at 27–30 ¶¶ 249–267, 269), to the promotion of Mr. Wood to CEO of the District "two months earlier than his six months initial probation period," (*id.* at 30 ¶ 268), alleged expense shifting among District facilities (*id.* at 30–31 ¶¶ 272–276), and \$ 40,000 of Utah Navajo Trust Fund money that "has not been accounted for in SJHSD public board meeting records," (*id.* at 30 ¶ 271).

26. (See, e.g., Navajo Ct. Cmplt. at 22 ¶ 217 ("But for the hiring of Mr. Wood, the employee plaintiffs may never have been harmed."))

229); “tortious interference with future contractual relations,” (*id.*);²⁷ intentional and negligent infliction of emotional distress, (*id.* at 32–33 ¶¶ 281–296); “theft,” (*id.* at 24–26 ¶¶ 230–242);²⁸ “violation of fiduciary duties,” (*id.* at 33 ¶¶ 297–300);²⁹ “misfeasance,” (*id.* at 33–34 ¶¶ 301–309); and “malfeasance in office,” (*id.* at 35–39 ¶¶ 310–348).³⁰ Most of these causes of action were footed upon factual allegations arising from the events involving plaintiffs’ employment at the Montezuma Creek

Clinic by the Health District, as summarized above. The rest, it turns out, were surplusage.³¹ Absent from the Complaint was any claim of breach of contract.

As originally pleaded, then, the plaintiffs’ claims before the Navajo Nation District Court were employment-related claims.³² They arose out of each plaintiff’s individual employment relationship with the Health District, and the plaintiffs sought compensatory legal and affirmative equitable relief that would resolve their

27. Plaintiffs plead no factual allegations in ¶¶ 221–229 pertaining to their “tortious interference” theory apart from those pertaining as to their defamation claim, though the essential elements of the two theories differ. Compare *Restatement (Second) of Torts* § 766B (1979) (intentional interference with prospective contractual relation) with *id.* § 558 (1977) (elements of defamation). Plaintiffs’ “theft” claim likewise deals with alleged injury to the same legal interest as their defamation claim. (See Navajo Ct. Cmplt. at 24 ¶ 232 (“Mrs. Singer and Mr. Riggs had their reputations taken . . .”)); W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 113, at 797 (5th ed. 1984) (under the law of defamation, “the interest protected is that of reputation”).

This court will treat all three “theories” as pleading one cause of action: defamation.

28. According to the plaintiffs, “Mrs. Singer and Mr. Riggs had their reputations taken and all the Plaintiffs had their speech taken in violation of Article 12 of the United Nations Declaration of Human Rights.” (*Id.* at 24 ¶ 232.)

29. “In Utah, a claim for breach of fiduciary duty is an independent tort that, on occasion, arises from a contractual duty. . . .” *Norman v. Arnold*, 2002 UT 81, ¶ 35, 57 P.3d 997, 1006.

30. Plaintiffs’ “malfeasance” claim presented another laundry list of more generalized allegations, (*e.g.*, *id.* at 37 ¶ 329 (“Courts have found schools and juries in San Juan County to be discriminatory”); ¶ 330 (“Government entities in San Juan County have prolonged litigation for decades in various suits”)), and legal conclusions, (*e.g.*, *id.* at 38 ¶ 338

(“SJHSD is not an at will employer”), interspersed with more fact-specific allegations (*e.g.*, *id.* at 38 ¶ 342 (“Mrs. Shafer knew Mrs. Singer was not a dishonest person and did nothing to help her”))—a few of which may even have been germane to the plaintiffs’ other legal theories (*e.g.*, *id.* at 39 ¶ 347 (“Mr. Woods [sic] refused to give Mr. Allison Dickson his full time permanent employment status”)).

31. In May of 2003, plaintiffs’ counsel advised the United States Supreme Court that

[i]n the Complaint, to the degree the state nonfeasance, malfeasance, and misfeasance claims are found, *Petitioners acknowledge the Navajo Court will have no authority to rule upon them as state claims*, but they do serve as a backdrop to understand the level of deliberateness of harm by these quasi-municipal organizations and officers. Otherwise, all tort claims are Navajo tort claims. See, 7 N.N.C. 701, *infra*.

(Petition for Writ of Mandamus and Prohibition, *In re Riggs*, Case No. 02–1774, 2003 WL 22428213 (U.S.S.Ct., filed May 28, 2003), at 5 n.12.) Viewing these claims solely as a “backdrop,” then, this Court need not address them further. *But cf.* Navajo R. Civ. P. 11.

32. *Cf.* “Findings, Opinion and Judgment at Preliminary Injunction,” dated December 28, 1999, in *Donna Singer, et. al. v. San Juan County, et al.*, Case No. SR–CV–162–99–CV (Navajo Nation District Court, Shiprock District (a copy of which is annexed to the Amended Complaint (dkt. no. 744)), at [11] (“At first glance, and without the benefit of testimony, these proceedings appeared to have been framed solely as a labor-employment issue.”)).

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existing employment disputes. Indeed, the plaintiffs asserted that “all Labor Commission and Office of Navajo Labor Relations claims of the Plaintiffs will not be prohibited from being heard in this Court, after such time as the plaintiffs’ employment claims have gone through their respective administrative process,” (*id.* at 5 ¶ 28), clearly indicating that Singer, Riggs and Dickson also had employment claims then pending before the Navajo labor agencies—claims as to which they had not yet exhausted their administrative remedies at the time they commenced the Navajo court action in April of 1999. (*See infra*, at 979–82.)

E. Plaintiffs’ Supplemental Pleading

A month after entry of the Navajo court’s December 28, 1999 Order, (*see infra* at 921–25), plaintiffs Singer, Riggs and Dickson filed “Plaintiffs’ Supplemental Pleadings to the Original Pleadings,” dated January 28, 2000, in *Donna Singer, et al. v. San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation District Court, Shiprock District) (a copy of which is annexed to the Amended Complaint (dkt. no. 744)) (“Navajo Ct. Supp. Pldg.”), with the Navajo Nation District Court. The Supplemental Pleadings purported to add claims of “Obstruction of Justice,” “Misuse of Judicial Process,” “Defamation, per se,” and “[t]he endangerment of Navajo patients at Montezuma Creek Clinic.” (Navajo Ct. Supp. Pldg. At 2 ¶ 3.) The plaintiffs’ new claims were said to be “based upon the Court’s Findings of Fact in the Court’s Preliminary Injunction Or-

der issued on the 28th day of December, 1999,” including “factual findings therein pertaining to the defendant’s counsel” and the conduct of the Navajo court litigation, and the “intentional and malicious disruption of operations and services of the Montezuma Creek Health Clinic.” (*Id.* at 2 ¶¶ 4, 5.) The Supplemental Pleading made no additional factual allegations in support of the plaintiffs’ new claims, but augmented their prayer for relief to demand that “each of the defendants, both jointly and severely [sic], be ordered to pay damages to the plaintiffs in the amount of \$18,000,000 USD (Eighteen Million Dollars);” and that

each of the defendants, both jointly and severely [sic], be ordered to pay additional damages to the plaintiffs pursuant to 7 NCC 701 in the amount of \$6,000,000 USD (Six Million Dollars) to be paid directly to Montezuma Creek Clinic to be used as the management of Montezuma Creek Clinic sees fit in the best interest of the Native American People, and not to be used for employment compensation or to take the place of the insurance payments made in behalf of the Native American patients, without express authority of this Court; . . .

(Navajo Ct. Supp. Pldg. at 3 ¶ 7(b) (emphasis added).)³³ It appears that the Navajo court granted plaintiffs leave to file their Supplemental Pleading on February 22, 2000. (*See* Order for Leave to Supplement the Pleadings, signed February 23, 2000 (a

33. The Supplemental Pleading also demanded that the defendants “and each of them, jointly and severely [sic], publicly retract all defamatory and other libelous statements made of any of the plaintiffs or other litigants or counsels herein,” to be accomplished “by publication in the local newspapers, and radio stations of local circulation . . . and the general

coverage of the Navajo Nation, . . . and issuing statements of apology which are deemed appropriate by this Court and the plaintiffs by prior review; . . .” (*Id.* at 3–4 ¶ 7(c). Compare Navajo Ct. Cmplt. at 40 ¶¶ 8–9 (demanding a “public apology” and a “published retraction”).)

copy of which is annexed to the Amended Complaint (dkt. no. 744)).³⁴

V. THE NAVAJO COURT ORDERS

The Part II Plaintiffs sought enforcement of four written orders entered by the Navajo Nation District Court for the Shiprock, New Mexico Judicial District: (1) the “Findings, Opinion and Judgment at Preliminary Injunction,” dated December 28, 1999, in *Donna Singer, et. al. v. San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation District Court, Shiprock District) (the “December 28, 1999 Order”); (2) the “Order Denying Defendants’ Motion to Dissolve or Modify the Preliminary Injunction Order,” entered March 1, 2000 (the “March 1, 2000 Order”); (3) the “Special Order in Aid to Satisfaction of Preliminary Injunction,” signed March 6, 2000 (the “March 6, 2000 Order”); and (4) the “Order Mandating

that All Defendants’ to be Bound by the Preliminary Injunction Order,” entered March 15, 2000 (the “March 15, 2000 Order”). (See Amended Complaint at 99, and the copies of three of the orders annexed thereto.)

As noted above, the court of appeals affirmed the dismissal of the Part II Plaintiffs’ claims as against defendants Truck Insurance and R. Dennis Ickes because of the Navajo court’s lack of subject-matter jurisdiction over those defendants under *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). *MacArthur v. San Juan County*, 309 F.3d at 1222-1225. Therefore, the question of enforcement of the Navajo court’s March 15, 2000 Order—which purported to bind Truck Insurance and Ickes to that court’s prior orders—is no longer before this court.³⁵

34. It appears that these plaintiffs also filed an amended complaint with the Navajo court in mid-March of 2000, subsequent to the Navajo court’s entry of the three orders now at issue in this lawsuit. (See Complaint for Damages (Modified), filed March 14, 2000, in *Donna Singer, et. al. v. San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation District Court, Shiprock District) (“Navajo Ct. Cmplt. (Modified)”), available in Pertinent Parts Navajo Ct. R. (“Complaint Modified” Tab), and as Exhibit “B” to San Juan Health District Defendants’ Memorandum Regarding Subject Matter Jurisdiction and in Support of Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 497).) The amended pleading sought to incorporate their “supplemental claims” augmenting the plaintiffs’ original causes of action, and to join Truck Insurance and Mr. Ickes as defendants. (*Id.* at 3-4 ¶ 16a, 40-41 ¶¶ 341-345, 44-45 (prayer for relief).)

Amended Complaint at 98, 114, 116-119, 120.) Apparently these references persist on the theory that “[w]hile Truck Insurance and Mr. Ickes were dismissed, they were not dismissed with prejudice and then only upon the facts as found of the District Court.” (*Id.* at 98.)

By affirmance, the dismissal of Truck Insurance and Ickes became the judgment of the court of appeals, and the “law of the case” as far as this court is concerned. See 1B James Wm. Moore, et al., *Moore’s Federal Practice* ¶ 0.404[1] at II-2—II-3 (2d ed. rev.1996) (“When a case is appealed and remanded, the decision of the appellate court establishes the law of the case, which *must* be followed by the trial court on remand.” (emphasis in original; footnote omitted)). Therefore, that judgment is not subject to further adjudication in this court, and further consideration of the dismissal of Truck Insurance and Ickes falls beyond the scope of the remand to this court under the Tenth Circuit’s mandate. (See Judgment, dated October 7, 2002 (certified copy of mandate received from the court of appeals November 20, 2002) (dkt. no. 460).) See also *Carpenter v. Rohm & Haas Co.*, 9 F.R.D. 535, 536-537 (D.Del.1950) (“The Court of Appeals having affirmed this

35. The Amended Complaint, drafted and submitted one month after the court of appeals issued its October 7, 2002 opinion, nevertheless included Truck Insurance and Mr. Ickes in the caption and makes several references to them in the body of the pleading, and still seeks enforcement of all four orders. (See

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A. The December 28, 1999 Order

The Navajo Nation District Court's December 28, 1999 "Findings, Opinion and Judgment at Preliminary Injunction" serves as the centerpiece of the Part II Plaintiffs' claims in this proceeding. Styled and written as a preliminary injunction, the December 28, 1999 Order made preliminary fact findings, (*see* December 28, 1999 Order at [3]-[11]), discussed the factors bearing upon the issuance of a preliminary injunction, (*id.* at [11]-[20]), and prescribed sweeping equitable relief in favor of Singer, Riggs and Dickson as to their specific employment disputes with the Health District, and in favor of Navajo health care recipients generally as to a litany of concerns involving the District's administration of health care services at the Montezuma Creek Clinic.³⁶ (*Id.* at [20]-[22].) The Order also anticipated that "[t]he proceedings in chief herein be and are hereby scheduled for initial pretrial conference by this court, unless these proceedings are not earlier settled and com-

promised by the parties by stipulation on the limited factual; legal; and damage issues remaining." (*Id.* at [22].)

On a preliminary basis, at least, the Navajo court made findings as to many of the transactional facts alleged by Singer, Riggs and Dickson, as summarized above. (*See supra*, at 909-17.)

1. Findings re: Mr. Riggs

As to Mr. Riggs, the Navajo court found, *inter alia*, that on or about November 11, 1998, Riggs had been terminated as a "RIF and rehired with a \$10,000 pay cut; was made to start using a time card; and lost three years of raises," (December 28, 1999 Order at [3]); that "Mr. Riggs accidentally represented 8.4 hours as a day and a half, or 12 hours," and that "as a result of this time card mistake Mr. Riggs was disciplined," even though he "never received any warning letters; any time card instruction; nor any time to correct

court without qualification, it becomes the duty of this court upon receipt of the mandate to proceed with the execution of the judgment and no more. No power exists, under Rule 60(b) or otherwise, to alter or amend a decision of the reviewing court. *Home Indemnity Co. of New York v. O'Brien*, 6 Cir., 112 F.2d 387,"), affirmed, 180 F.2d 749 (3d Cir.), *cert. denied*, 340 U.S. 841, 71 S.Ct. 30, 95 L.Ed. 617 (1950).

According to the Tenth Circuit, an "important corollary" to the law of the case doctrine "known as the 'mandate rule,' provides that a district court 'must comply strictly with the mandate rendered by the reviewing court.'" *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513, 1520-21 (10th Cir.1997) (quoting *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 962 F.2d 1528, 1534 (10th Cir.1992)), *cert. denied*, 522 U.S. 1107, 118 S.Ct. 1034, 140 L.Ed.2d 101 (1998). Strict compliance with the mandate rule in this case requires this court to give effect to the dismissal of Truck Insurance and Ickes. *See Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-415 (4th Cir.2005) ("once a

case has been decided on appeal and a mandate issued, the lower court may not deviate from that mandate but is required to give full effect to its execution. . . . Because our order stated that the district court lacked jurisdiction, the court was not free to do anything else but to dismiss the case." *Kerman v. City of New York*, 374 F.3d 93, 109-110 (2d Cir.2004) ("Where the appellate court has decided a question of law, the lower court on remand lacks discretion to decide that question to the contrary."); 18B Charles Alan Wright, Arthur B. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4478.3 (2d. ed.2002).

36. In addition to preliminary injunctive relief, the Order required the defendants "to issue full payment of attorney's fees, costs and expenses associated with these proceedings to date to be paid by cashier's check within five working days of the issuance of the injunction and to be paid not later than the 31st day of December, 1999, by and through the Registry of this Court[.]" but did not make any determination as to the amount of that award. (December 28, 1999 Order at [21].)

any alleged deficiencies, either prior to this November RIF, or the aforestated discipline,” and even though “as a bona fide professional, [he] is exempt from time card keeping requirements,” (*id.* at [4]); that Riggs was offered “a promotion to fill the position made vacant by Ms. Singer[’]s termination, as manager of the Montezuma Creek Clinic,” but that Wood “immediately withdrew the offered promotion because Mr. Riggs had accused him of discrimination” in pursuing a formal grievance as to the disciplinary action, (*id.*); that after Riggs’ grievance hearing, “he was placed on an additional 30 days[’] probation without justification,” (*id.*); and that evidence showed “similar and multiple errors on time cards throughout the” District, and in November 1998, “just one week prior to Mr. Riggs being disciplined, Reid Wood[’]s time card had ink; cross-outs; and write ins, errors for which others, notably the plaintiffs were disciplined,” but Wood “was not similarly disciplined for his time cards errors.” (*Id.* at [5]). The Navajo court also found similar errors on time cards kept by Mary Nielson, District financial officer, (*id.*); that another “caucasian physician assistant” had “time cards showing he was not required to punch in or out, either for or after the November, 1998, RIF;” (*id.*); that the November 1998 “RIF was not done in compliance with the Navajo Preference in Employment Act (NPEA) in as much as there was no written justification as to just cause for the RIF; nor was a warning of the RIF made to Mr. Riggs; nor was Mr. Riggs RIF last, as a Navajo Physician Assistant;” (*id.* at [3]); and that

The defendants offered absolutely no credible evidence of the San Juan Health Services District affording any evidence of Mr. Riggs receiving any due process; evidence of any degree of equal protection of the policies and procedures, as well as the law applicable to his employment; no evidence of any con-

sideration of the Navajo Preference in Employment Act in its actions toward Mr. Riggs; and no evidence that the San Juan Health Services District had not intentionally used the reputation of Mr. Riggs without his permission essentially to stop the time card problems throughout the San Juan Health Services District; . . .

(*Id.* at [5].) The court found that the defendants had not refuted the allegation that they had used Riggs’ case to make “an example of what happens to people who take grievance of decisions of” the Health District and “who make allegations of racial or other discrimination[.]” (*Id.*)

2. Findings re: Ms. Singer

Concerning Ms. Singer, the Navajo court found, *inter alia*, that “on the 13th day of November, 1998, Ms. Singer was unaware of another person[’]s clocking in on her Montezuma Creek Clinic time card when she was in Blanding, Utah;” “[t]hat Ms. Singer told the Chief Financial Officer of her whereabouts on the date in question;” and “[t]hat the purported time card error involved only four hours of work for which Ms. Singer was never paid, and Ms. Singer admitted to having made the time card error[.]” (*Id.* at [6].) Nonetheless, the court found that Singer had been “charged with fraud; placed on administrative leave; told not to communicate with anyone at the clinic; and then terminated;” (*id.*) that District administrator Rick Bailey had “participated in the decision to terminate Ms. Singer,” and that he “proceed[ed] as her grievance hearing officer anyway” on the advice of the County Attorney. (*Id.*) Reviewing the testimony adduced at the hearing, the Navajo court noted that plaintiffs’ accounting expert “found no pattern of fraud in Ms. Singer[’]s time cards;” that “he attributed Ms. Singer[’]s time card errors to the fact that

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she was required to be clocking in and out at three different work places and had so many responsibilities,” and that in his experience, “managers are not usually required to use time cards because of their FLSA exemption; . . .” (*Id.* at [7].) The court also noted that the “caucasian manager of the Monument Valley Clinic, also within the San Juan Health Services District, was not obliged to punch in and out on time cards,” and that other District employees whose “time cards are worse than Singer[']s” were “never disciplined; charged with fraud; or terminated.” (*Id.* at [7]-[8].)

Like Mr. Riggs, the Navajo court found that the defendants “offered absolutely no credible . . . evidence of the San Juan Health Services District affording . . . Ms. Singer . . . any due process; evidence of any degree of equal protection of the policies and procedures, as well as the law, applicable to her employment;” that the defendants offered “no evidence of any consideration of the Navajo Preference in Employment Act in its actions toward Ms. Singer;” and that, as with Riggs, the defendants did not “offer any evidence that the defendants had not administratively conspired to” use Singer’s case to “mak[e] an example . . . of what happens to people who stand up for their rights” and pursue grievances against the Health District, “who make allegations of racial or other discrimination,” or who “take any position in opposition to San Juan Health Services District or the defendants themselves[.]” (*Id.* at [8].)

3. Findings re: Mr. Dickson

The Navajo court preliminarily found that “Mr. Dickson started working for the San Juan Health Services District as a full

time temporary fill-in in March of 1998 and in November of 1998 applied for full time employment status;” that “Mr. Dickson[']s time cards and W-2 show that Mr. Dickson worked some 700 hours after his temporary fill-in position had expired;” that the District policies and procedures state “that after an employee has worked for the total of 520 hours they will be made to be regular employees of the San Juan Health Services;” and that “the defendants acknowledge that Mr. Dickson formally requested in writing to Mary Nielson on the 11th day of December, 1998, that he be given regular employment status[.]” (*Id.* at [8]-[9].) The court further found that “the time cards entered into evidence demonstrate[] the current Montezuma Creek Clinic manager’s nephew is working full time as a regular status employee and working for more hours than Mr. Dickson with less time in seniority;” and that District records “show that there is no other employee of the San Juan Health Services District with Mr. Dickson’s time in service measure[d] by regular work hours that is not a regular permanent employee with benefits of regular status employment.” (*Id.* at [9].)³⁷

4. Preliminary Relief Under the December 28, 1999 Order

Based upon the findings set forth in the December 28, 1999 Order, and “[w]ith minor adaptation from the arguments delivered to the Court,” the Navajo court “largely adopted the position of the plaintiffs to the legal reasoning of these proceedings.” (*Id.* at [11].) “[T]he Navajo court concluded that Riggs, Singer, and Dickson demonstrated a substantial likelihood of success on the merits of their NPEA claims and entered a preliminary

³⁷ The December 28, 1999 Order also noted that Mr. Dickson had attested to “the highly racially inflammatory and insensitive com-

ment of Reid Wood concerning Certificates of Degree of Indian Blood being equated with “dog tags[.]” (*Id.* at [9].)

injunction in their favor,” *MacArthur*, 309 F.3d at 1219, and sought to fashion affirmative remedies for the plaintiffs’ employment grievances, treating them as involving more than purely economic harm:

The case law of the Navajo Nation provides that an injunction is extraordinary relief that is granted when an injury is unquantifiable and when there is no adequate remedy at law. *Gudac v. Marianto*, 1 Nav. R. 385, Nav.App. Feb. 28, 1978. The United States Supreme Court has likewise found that while economic loss alone generally does not constitute irreparable injury, “cases may arise in which the circumstances surrounding an employee’s discharge, together with the resultant effect on the employee, may be so far departed from the normal situation that irreparable injury might be found.” *Sampson v. Murray*, 415 U.S. 61, 92 n. 68, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974).

(December 28, 1999 Order at [11].) In the Navajo court’s view, “all these claims raise[d] issues clearly extending well beyond the mere loss of income or loss of a job,” and went “directly into the wellbeing of the plaintiffs and Navajo Nation citizens” and “as argued by the plaintiffs, go to the soul of a person and their inalienable rights”—fundamental interests, the importance of which “exceeds monetary value.” (*Id.* at [2].)

Damages such as deprivation of rights; discrimination; denial of due process; infringements on freedom of speech; denial of dignity; and impunity of a person’s reputation are all deprivations that far exceed mere deprivation of money, or employment of embarrassment. . . . No amount of money . . . can fully compensate the plaintiffs and Native American population in the Montez-

uma Creek for these past and ongoing substantial and inestimable damages.

(*Id.* at [18].)

Besides the individual claims of Singer, Riggs and Dickson, the Navajo court made reference to evidence already received concerning “patient welfare” and “clinic operations” at the Montezuma Creek Clinic, *e.g.*, the District’s “billing of IHS eligible patients,” which discouraged those patients from seeking further treatment at the clinic, as well as “stoppage of ambulance services;” “interference with pharmaceutical services;” and “stoppage of lab services” at the clinic. (*Id.* at [13], [15]). “[T]hese plaintiffs produced testimonial evidence and documentary evidence to support their claims of violation of civil and personal rights . . . and as well the San Juan Health Services District’s *endangerment of the Native American and Navajo public*,” persuading the court that

[i]n this case, a preliminary injunction will insure the protection of overwhelming public interest by way of the restoration and preservation of patients’ welfare in the northeastern sector of the Navajo Nation; restoration of the clinic operations of the Montezuma Creek Clinic that are sensitive to Navajo needs; customs; and economic levels; . . . thereby improving adherence to the provisions, terms, and conditions of the Navajo Preference in Employment Act; . . .

(*Id.* at [12], [13] (emphasis added).) The court thus fashioned injunctive relief in the December 28, 1999 Order to vindicate not only the personal interests of the named plaintiffs, but also the interests of many Navajo patients served by the Montezuma Creek Clinic, as well as the Navajo Nation’s broader governmental interest in safeguarding “the health or welfare of the tribe.” *Montana*, 450 U.S. at 566, 101

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S.Ct. 1245. (See December 28, 1999 Order at [20].)

Though it acknowledged “that the Montezuma Creek Clinic will be removed from the control and supervision of the San Juan Health Services District beginning the 1st day of January 2000”—*four days* after the entry of the December 28, 1999 Order—the Navajo court proceeded to grant preliminary injunctive relief against the County and Health District defendants, ordering that the defendants “immediately reinstate Singer and Riggs to their previous positions of employment,”³⁸ and “immediately tender to Mr. Dickson full time status as an employee of the Montezuma Creek Clinic and that he be paid all commensurate back pay and benefits as may be due him from the occasion of being eligible for such status.” (*Id.* at [14], [20]). The December 28, 1999 Order further required the defendants to “delete and expunge all the charges and writings pertaining to the December 2nd through December 8th charges of fraud, discipline, and termination, from Mr. Riggs and Ms. Singer’s personnel file”; the defendants were ordered to “immediately pay all due income from whichever source derived within the District, including but not limited to full back pay and compensation as well as back benefits to the plaintiffs, including but not limited to retirement benefits . . . with all such compensations to be credited and/or paid immediately,” and further ordered “to issue full payment of attorney’s fees, costs and expenses associated with these proceedings to date to be paid by cashier’s check within five working days of the issuance of the injunction” and “not later than the 31st day of December,

1999,”—three days later—“by and through the Registry of this Court,” (*id.* at [21]); as to the “time card” issue, the defendants were ordered “to not put Ms. Singer, and other like managers, and Mr. Riggs, and other like Physicians Assistants, on hourly time card keeping requirements for the purposes of salary and compensations or otherwise[.]” (*Id.*)

In addition to mandating immediate relief in favor of Singer, Riggs and Dickson on their employment claims, the December 28, 1999 Order imposed a series of express prohibitions affecting the defendants’ operation of the Montezuma Creek Clinic: the court ordered the defendants “to not interfere with clinic operations or move any clinic personnel,” (*id.* at [21]); the defendants were prohibited from “[e]liminating Emergency Medical Technician services and coverage within the territorial jurisdiction of the Navajo Nation”; “[i]nterfering with the laboratory services” or “pharmaceutical services” to “the Montezuma Creek Clinic,” or “interfering with any form of patient care by, among any other matter or things, billing IHS patients,” (*id.* at [22]); the defendants were also ordered “to assist the Montezuma Creek Clinic and the local Navajo Chapters . . . by any means necessary . . . to help diabetic IHS patients to return to the Montezuma Creek Clinic for treatment,” including informing them “that as an IHS patient they do not have to pay for their health care treatment” at the clinic. (*Id.* at [22].)³⁹

As the court of appeals observed:

The Navajo court was troubled by what it perceived as a sharp drop in visits to

38. While Ms. Singer had been working as the manager of the Montezuma Creek Clinic at the time of her termination, the December 28, 1999 Order directed that “Ms. Singer be returned to her role and position as a technician” for the Health District. (*Id.* at [21].)

39. For their part, the plaintiffs were ordered to “report any such interference, harassment, or intimidation of Montezuma Creek Clinic operations, patients, and employees immediately to this Court[.]” (*Id.* at [22].)

the clinic by diabetic patients. In the court's view, "The reason these patients have not been coming in for life critical medical care is due to San Juan Health Service District's billing of IHS eligible patients, making them believe they must pay for medical services before receiving medical attention."

309 F.3d at 1219 (quoting December 28, 1999 Order at [13]).

B. The March 1, 2000 Order

The Navajo court's "Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order," dated March 1, 2000, made additional findings of fact and conclusions of law in light of the defendants' objections to the December 28, 1999 Order, explaining in some detail its rejection of the defendants' assertions that (1) they had been denied the services of a certified court reporter during the preliminary injunction hearings; and (2) they had been denied due process because of omissions in the existing transcripts of the taped proceedings caused by inaudible or garbled sections of the court's tape. (March 1, 2000 Order at 1-5.) The March 1, 1999 Order also discussed the use of evidence received during the preliminary injunction hearings as evidence for purposes of a jury trial on the merits, to which use the defendants had objected as well:

the Court is obliged by Rule of Court and in the exercise of judicial economy to receive during the proceedings on the preliminary injunction evidence which is likewise admissible in the case in chief

as though occurring during the trial on the merits, and that evidence becomes a part of the record at trial and need not be repeated at trial. See Rule 65(d)."

(*Id.* at 7 (emphasis in original); see *id.* at 5-9.)⁴⁰ The court indicated that as for the plaintiffs, the receipt of such evidence "does substantially reduce their burden of proof which has already well been met even as to the case in chief." (*Id.*)⁴¹ In contrast, "the defendants," in the court's view, "failed to put on any credible evidence to rebut the volume of testimony and evidence o[f] the plaintiffs, after having ample opportunity to do so." (*Id.* at 8.)

The March 1, 2000 Order also reaffirmed in conclusory terms the Navajo court's initial finding that it had jurisdiction over the plaintiffs' claims, and over "the defendants" as parties:

The Court has jurisdiction over the defendants partly because they are the named parties who have committed acts within the Navajo Nation[s] territorial boundaries, and as well because the defendants became plaintiffs by filing their counterclaims. In accord with *Dodge v. Nakai*, 298 F.Supp. 17 (Ariz.dist.1968) and *Clark v. Barnard*, 108 U.S. [436, 2 S.Ct. 878, 27 L.Ed. 780] (1883). This court has jurisdiction.

(*Id.* at 10.) The "legal foundations for jurisdiction in this case" included "the Navajo Nation's inherent sovereignty, the Navajo Nation Code, 25 U.S.C. § 1301 and

40. Rule 65(d) of the Navajo Rules of Civil Procedure provides that "any evidence received upon a petition for preliminary injunction, which would be admissible upon the trial on the merits, becomes part of the record at trial and need not be repeated at trial."

41. The court recounted several "examples" of "the evidence and testimony before the Court" offered during the preliminary injunc-

tion hearings, which "was overwhelmingly in favor of the plaintiffs." (*Id.* at 6, 7-8; see, e.g., *id.* at 8 ("For example, human beings being somehow seriously referred to in such a way as to make people believe because they are Native Americans they are being called dogs—is only something this Court would prefer to hear the evidence on only one time—in its life time."))

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1302, the *Montana* and *Strate* decisions, and the United States Supreme Court rulings in *Clark v. Barnard*, 108 U.S. [436, 2 S.Ct. 878, 27 L.Ed. 780] (1883), as cited approvingly in *College Savings Bank v. Florida [Prepaid] Post Secondary Education Expense Board, et al.*, [527] U.S. [627, 119 S.Ct. 2199, 144 L.Ed.2d 575] decided June 23, 1999[.]”

Id. (citing *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and *Strate v. A—1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997)).⁴²

The March 1, 2000 Order not only denied the defendants’ motion to dissolve the preliminary injunction, it recast the preliminary injunction itself, doing so in even more stringent terms: “The Preliminary Injunction as issued shall be carried out immediately, and no later than the 3rd day of March, 2000, in all respects, with written confirmation delivered to this Court on or by that date, or be subject to the contempt powers of this Court,” (*id.* at 12 (emphasis added)); the “defendants be and are hereby ordered to immediately reinstate Mrs. Singer as a x-ray and ultrasound technician making her whole to the 1st day of November 1998, not later than the 3rd day of March, 2000,” to “immediately reinstate the plaintiff Mr. Riggs to his previous position of employment and compensation” prior to the November 1998 “reduction in force,” with “written confirmation delivered to this Court on or by the 3rd day of March, 2000,” and to “immediately tender to Mr. Dickson full time status as an employee of the Montezuma Creek Clinic” with payment of “all commensurate back pay and benefits as may be due to him from the occasion of his being eligible for such status,” also with confirmation “on or by the 3rd day of

March, 2000 . . .” (*Id.* at 12.) The defendants were again ordered to “pay immediately all due income . . . including but not limited to full back pay and compensation as well as back benefits,” to be confirmed “by the 3rd day of March, 2000,” and they were again ordered to pay the plaintiffs’ attorney’s fees, costs and expenses—this time by March 31, 2000, “or each and every one of the defendants shall be subject to execution on their personnel [sic] properties, and otherwise individually subject to the contempt powers of this Court[.]” (*Id.* at 13.) The prescribed elimination of time cards for managers and physician’s assistants was also amplified by a requirement that the defendants “provide a copy of the written policy to this effect on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court;” (*id.*); the same March 3, 2000 deadline was imposed upon the required expungement of Ms. Singer’s and Mr. Riggs’ personnel files. (*Id.*)

The March 1, 2000 Order also reiterated the December 28, 1999 Order’s prohibitions affecting the operation of the Montezuma Creek Clinic, *e.g.*, the defendants were “immediately ordered to cease billing eligible IHS patients for medical services,” with the added requirement that “the defendant shall make payment of any and all current and past due billings of the Montezuma Creek Clinic occurring before the 1st day of January, 2000,” to be confirmed “on or before the 3rd day of March, 2000[.]” (*Id.* at 14.) “The Preliminary Injunction, and findings of the Court, accordingly shall remain undisturbed[;]” in the Navajo court’s view, disturbing the preliminary injunction “would continue to place Navajo employees and patients . . . in harm’s way. Navajo common law, i[t]s customs and traditions, mandate that the Court protect the

42. (See also *id.* at 10 (“And accordingly the Court cites to [the] tribal code and *Montana*

and *Strate*, to further its finding of jurisdiction.”).)

people, and this Court shall not hesitate to exercise all its powers to do so.” (*Id.* at 11 (emphasis added).)

The text of the March 1, 2000 Order concluded by setting the case for a pretrial conference on April 18, 2000. (*Id.* at 15.)

Attached to the end of the March 1, 2000 Order was an additional page, unsigned and undated, that provided: “[t]hat in the event that the defendants fail to obey the Order of this Court, commencing the 4th day of March, 2000, the defendants shall be fined at the rate of \$10,000 (Ten Thousand Dollars) per day, for each and every day the Order of this Court is not carried out in its entirety”; and further, that “each and every personal defendant and defendants['] counsel will pay \$1000 per day of the \$10,000 daily fine beginning on March 2, 2000, from their own personal assets.” (*Id.* at 16.)

By the December 28, 1999 Order, as amplified by the March 1, 2000 Order, the Navajo Nation District Court for the District of Shiprock, New Mexico had thus assumed direct supervisory authority over the day-to-day operations of San Juan Health Services District facilities located within or serving Navajo patients within the boundaries of the Navajo Reservation. The Navajo court’s obvious dismay and annoyance with the defendants’ conduct—at least as portrayed by the plaintiffs—became ever more apparent with each order it entered:

All of the above enumerated actions of the defendants and defendants’ counsel, have here constituted a pattern of be-

havior that only magnifies and exemplifies past and continued deprivations of the plaintiffs’ inalienable rights, be they tribal or federal in nature, and harm to Native American patients and community in the Montezuma Creek area . . . [S]uch actions demonstrate the arrogance of the defendants, their cultural insensitivity, and contempt and disdain in which they hold this Court; the Navajo Nation judicial system; and Native Americans in general.

(December 28, 1999 Order at [18]; *see also id.* at [15] (harm to Singer “done simply at the folly of her oppressors”).⁴³)

The defendants’ motion to dissolve the preliminary injunction lacked even so much as an apology for the harm they have done over the last nine months of billing indigent Native American patients discouraging their attendance to both emergency and routine health care. The motion of the defendants lacks even the smallest appreciation for their blatant violations of civil rights of the plaintiffs that has torn a family apart, and grossly harmed the plaintiffs, and innocent patients and families relying on the clinic for health care.

Likewise such cold, insensitive and recalcitrant attitudes on the part of the defendants further goes to illustrate the defendants['] bad faith to these proceedings and presents a foundation from which so much prejudice can grow from like a scavenging parasite of people ignorant of harm of their malignant acts, and who lack any remorse for their

43. As the court of appeals explained:

In its order granting a preliminary injunction, the Navajo court found that the defendants had engaged in a pattern of bad faith conduct toward the court, had wasted judicial resources, had engaged in “repeated misrepresentations of fact and law,” had engaged in evidence spoliation, had intimi-

dated and tampered with witnesses, had obstructed testimony, and had engaged in the sandbagging of evidence. . . . In the Navajo court’s view, the defendants had made frivolous claims against Navajo plaintiffs and subjected them “to a trial by tabloid.” . . .

309 F.3d at 1219 (record citations omitted).

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harm to plaintiffs, the patients and this Court.

(March 1, 2000 Order at 11.)

The March 1, 2000 Order made it plainly apparent that the preliminary injunctive relief mandated by the Navajo court had already ranged far beyond the original pleadings asserting the employment claims of the named plaintiffs Singer, Riggs and Dickson,⁴⁴ and deliberately so.

C. The March 6, 2000 Order

Ostensibly granting a further motion by the plaintiffs, the Navajo court's March 6, 2000 "Special Order in Aid to Satisfaction of Preliminary Injunction" decreed that the "defendants are hereby restrained from alienating any and all money, property and assets of any type until the plaintiffs are paid their relief as granted" in that court's prior orders; the order required that "a list of all assets be immediately given to the plaintiffs," together with "complete income tax return[s] for 1998 and 1999," and further, that the "defendants 'immediately list the plaintiffs *first* in order of priority as secured creditors on

the files of the County Recorder of San Juan County and any other county wherein their property is located[.]'" (*Id.* at 1 (emphasis added).)⁴⁵ "[A]ny disobedience to this Order will be viewed as contempt of the Court" and, the order continued, "warrants for the arrest of the defendants disobeying this Order will issue[.]" (*Id.* at 1–2.)

Curiously absent from the Navajo court's December 28, March 1 and March 6 Orders were any fact findings as to the specific *amount* of "all commensurate back pay and benefits as may be due to" each named plaintiff, or the "full payment of attorney's fees, costs, and expenses associated with these proceedings to date,"⁴⁶ to be "paid by cashier's check" to the plaintiffs within only a few days of the entry of the March 1, 2000 Order. (March 1, 2000 Order at 13.) Nor did those orders prescribe any procedure or mechanism by which those sums were to be quantified or liquidated.

Without actual numbers, compliance with—or enforcement of—the pecuniary

44. The plaintiffs' "Supplemental Pleadings" listed "[t]he endangerment of Navajo patients at Montezuma Creek Clinic as an addition to their claims," (Navajo Ct. Supp. Pldg. at 2), but without pleading any additional factual allegations. Instead, plaintiffs submit, "The assertions are based upon the Court's Findings of Fact in the Court's Preliminary Injunction Order issued on the 28th Day of December, 1999," (*id.*), in effect conforming their own pleadings to the court's already more expansive view of the case as reflected in its December 28, 1999 Order.

45. The legal basis for summarily granting the plaintiffs what amounted to a "superpriority" judgment lien at the expense of the defendants' existing secured creditors remains a mystery.

46. This "how much" question would seem to be one requiring findings based upon context-specific evidence. As the Navajo Supreme

Court had ruled a few weeks prior to the entry of the March 1st and March 6th orders,

The Navajo Nation Bar Association is separate and distinct from the other bars in this region. We have our own admission standards to practice law, our own standards to regulate the practice of law, and our legal economy is separate and distinct. The proper frame of reference to calculate attorney's fees is the hourly rates in the given area where the dispute arose, which here is the Tuba City judicial district. The proper standard is the fee rates of lawyers who practice there.

Manygoats v. Cameron Trading Post, No. SC–CV–50–98 (Navajo 01/14/2000), at ¶[62], available at <http://www.tribal-institute.org/opinions/2000.NANN.0000003.htm>. *Manygoats* reversed the Navajo Labor Commission's award of attorney's fees using "regional attorney fee hourly rates rather than Navajo Nation rates." (*Id.*)

terms of the Navajo court's orders would prove problematic at best. Read literally, the March 6, 2000 Order commanded that the fiscal operations of a Utah county government and a Utah special services district come to an abrupt halt unless and until those unspecified sums were disbursed to the plaintiffs. How the County and Health District defendants were to proceed, as a practical matter, in order to avoid the issuance of "warrants for the arrest of the defendants" for non-payment of those amounts was not explained.⁴⁷

Finally, the March 6, 2000 Order further provided that "the plaintiffs are granted leave to seek enforcement of this Order as appropriate in any Utah or federal Court where it will be enforce[d] pursuant to principles of comity and applicable law." (*Id.* at [2].) To that end, the plaintiffs commenced the above-captioned action in this court by filing a complaint on July 25, 2000. (*See* Complaint (Verified), filed July 25, 2000 (dkt. no. 1).)

VI. THE NATURE AND EXTENT OF NAVAJO SOVEREIGNTY

In remanding this action because "the district court should have performed a *Montana* analysis" of Navajo tribal court jurisdiction, the court of appeals noted that "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Exec-

utive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.'" *MacArthur*, 309 F.3d at 1227, 1228 (quoting *Nat'l Farmers*, 471 U.S. at 855-56, 105 S.Ct. 2447).

Defining the current scope and extent of the Navajo Nation's civil authority over non-Indians begins with Navajo inherent sovereignty, brought into sharper focus through examination of pertinent treaties and congressional legislation, which may confirm, augment or limit the Navajo Nation's inherent sovereignty; through analysis of the extent to which that sovereignty may have been diminished as a consequence of the "dependent" status of Indian tribes; and through practical consideration of how the Navajo Nation has actually exercised its powers, given the legal framework that exists.⁴⁸

A. Inherent Navajo Tribal Sovereignty

Analysis of the jurisdictional question on remand thus begins with the nature and extent of inherent Navajo tribal sovereignty.

1. "Domestic Dependent Nations"

The *MacArthur* panel delineated the original source and inherent nature of Navajo tribal sovereignty:

Long before the arrival of Europeans on this continent, tribes were self-governing political communities. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*,

47. According to the plaintiffs, "In January, 2000, Mr. Dickson's and Mrs. Singers' amount of back pay was given to SJHSD, Truck/Farmer's Insurance and others to pay," (Complaint (Verified), filed July 25, 2000 (dkt. no. 1), at 100 ¶ 326), but plaintiffs did not plead what that amount was, or whether such an amount was furnished as to Mr. Riggs, to anyone. (*See* Amended Complaint at 98-120.) One or more affidavits or "bills" containing at least estimated figures may have been pre-

sented to the Navajo court, but if so, that court made no reference to them in its orders. (*See* Tr. 2/24/2003, at 7:23-8:5 (Ms. Rose); *id.* at 17:20-19:4 (Ms. Cox); *id.* at 20:23-21:1 (Mr. Trentadue).)

48. *See* Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 Or. L.Rev. 1109 (2004).

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471 U.S. 845, 851, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). As such, the tribes possessed the full attributes of sovereignty, which included “the inherent power to prescribe laws for their members and to punish infractions of those laws.” *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Although “[t]heir incorporation within the territory of the United States, and their acceptance of its protection necessarily divested them of some aspects of the sovereignty which they had previously exercised,” *id.*, this divestiture was not absolute. Today, tribes retain sovereignty of a

unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Id.

As Felix Cohen observed in his seminal work on the subject of federal Indian law, “[T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by

express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.” Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1941); see *Wheeler*, 435 U.S. at 322, 98 S.Ct. 1079, 55 L.Ed.2d 303.

MacArthur, 309 F.3d at 1221–1222. The Supreme Court has likewise observed:

As we have often noted, Indian tribes occupy a unique status under our law. At one time they exercised virtually unlimited power over their own members as well as those who were permitted to join their communities. Today, however, the power of the Federal Government over the Indian tribes is plenary. Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes. The tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America.

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 851, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) (footnotes omitted).⁴⁹

49. The Court recently elaborated upon the plenary power of Congress in Indian affairs:

First, the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as “plenary and exclusive.” *E.g.*, *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470–471, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979); *Negonsott v. Samuels*, 507 U.S. 99, 103, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993); see *Wheeler*, 435 U.S., at 323, 98 S.Ct. 1079; see also W. Canby, *American Indian Law* [in a Nutshell] 2 (3d ed.1998) (hereinafter Canby) (“[T]he independence of the tribes is subject to exceptionally great

powers of Congress to regulate and modify the status of the tribes”).

This Court has traditionally identified the Indian Commerce Clause, U.S. Const., Art. 1, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as sources of that power. *E.g.*, *Morton v. Mancari*, 417 U.S. 535, 552, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); *McClanahan v. Arizona Tax Comm’n*, 411 U.S. 164, 172, n. 7, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); see also Canby 11–12; F. Cohen, *Handbook of Federal Indian Law* 209–210 (1982 ed.) (hereinafter Cohen) (also mentioning, *inter alia*, the Property Clause). The “central function of the Indian Commerce Clause,” we have said, “is to provide Congress with plenary power to legislate in

The unique status of Indian tribes under American law has been characterized in a variety of ways: “‘Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . [They] are a good deal more than “private voluntary organizations.”’”;⁵⁰ “Indian tribes are ‘distinct, independent political communities retaining their original natural rights’ in matters of local self-government”;⁵¹ “[T]hey are ‘a separate people’ possessing ‘the power of regulating their internal and so-

cial relations. . . .’”; Indian tribes endure as distinct “entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life.”⁵²

[1] However they may have been characterized in a particular case, in each instance the Supreme Court has acknowledged that Indian tribes still possess inherent powers of self-government rooted in their own historic sovereignty. So has our own court of appeals: “Indian tribes

the field of Indian affairs.” *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989); see also, e.g., *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N. M.*, 458 U.S. 832, 837, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982) (“broad power” under the Indian Commerce Clause); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) (same, and citing *Wheeler*, *supra*, at 322–323, 98 S.Ct. 1079).

The treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, “to make Treaties.” U.S. Const., Art. II, § 2, cl. 2. But, as Justice Holmes pointed out, treaties made pursuant to that power can authorize Congress to deal with “matters” with which otherwise “Congress could not deal.” *Missouri v. Holland*, 252 U.S. 416, 433, 40 S.Ct. 382, 64 L.Ed. 641 (1920); see also L. Henkin, *Foreign Affairs and the U.S. Constitution* 72 (2d ed.1996). And for much of the Nation’s history, treaties, and legislation made pursuant to those treaties, governed relations between the Federal Government and the Indian tribes. See, e.g., Cohen 109–111; F. Prucha, *American Indian Policy in the Formative Years* 44–49 (1962). *United States v. Lara*, 541 U.S. 193, 200–201, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004). Further, to the extent that “‘Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law,’ Cohen 208,” *Lara* would ground Congress’ authority “not upon ‘affirmative grants of the Constitution,’ but upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government,

namely powers that this Court has described as ‘necessary concomitants of nationality.’ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–322, 57 S.Ct. 216, 81 L.Ed. 255 (1936); . . .” *Id.* at 201, 124 S.Ct. 1628 (additional citations omitted).

Moreover, “Congress, with this Court’s approval, has interpreted the Constitution’s ‘plenary’ grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority.” *Id.* at 202, 124 S.Ct. 1628.

50. *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (quoting *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975)) (internal quotation omitted) (citing *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515, 557, 8 L.Ed. 483 (1832)); accord *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001); *United States v. Lara*, 541 U.S. 193, 204, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004).

51. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (quoting *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515, 559, 8 L.Ed. 483 (1832)).

52. *United States v. Mazurie*, 419 U.S. at 557, 95 S.Ct. 710 (quoting *United States v. Kagama*, 118 U.S. 375, 381–82, 6 S.Ct. 1109, 30 L.Ed. 228 (1886), and *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 173, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16, 8 L.Ed. 25 (1831) (describing Cherokee Nation as “a distinct political society, separated from others, capable of managing its own affairs and governing itself”).

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are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate.” *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir.2002) (en banc) (footnote omitted).⁵³

Felix S. Cohen’s *Handbook of Federal Indian Law* articulated the classic synthesis of the scope and extent of Indian tribal sovereignty:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States, and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of inter-

nal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

Felix S. Cohen, *Handbook of Federal Indian Law* 123 (1942) (footnotes omitted); *accord Powers of Indian Tribes*, 55 I.D. 14, 22 (1934), 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917–1974* 445, 449.

Given these fundamental principles, an Indian tribe serves as “its own source of power.”

Thus a tribe’s right to establish a court or levy a tax is not subject to attack on the ground that Congress has not authorized the tribe to take these actions; the tribe is sovereign and needs no authority from the federal government. . . . The relevant inquiry is whether any limitation exists to *prevent* the tribe from acting within the sphere of its sovereignty, not whether any authority exists to *permit* the tribe to act. . . .

William C. Canby, Jr., *American Indian Law in a Nutshell* 75 (4th ed.2004) (emphasis in original; citations omitted).⁵⁴

Since 1978, the Supreme Court has elaborated upon a theory concerning the extent to which the Indian tribes’ authority

53. Indeed, some years ago, the court of appeals explained it this way: “Indian tribes are not states. *They have a status higher than that of states.* They are subordinate and dependent nations possessed of all powers as such,” and are limited as to those powers “only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States.” *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir.1959) (emphasis added). As the *MacArthur* panel explained, “tribes are not subordinate to the states, *see Washington v. Confederated Tribes*, 447 U.S. 134, 154, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), and certainly not to counties.” 309 F.3d at 1222 (footnote omitted).

54. *Cf. Skibine, Deference Owed Tribal Courts’ Jurisdictional Determination: Towards Co-Ex-*

istence, Understanding, and Respect Between Different Judicial Norms, 24 N.M.L.Rev. 191, 191–192 (1994):

If the Court asks whether Indian tribes have sovereign rights because these rights, which have always existed, have never been relinquished in a treaty or taken away by an act of Congress, the Court is asking a legal question, the answer to which depends on statutory construction and historical interpretation. If, however, the Court asks whether a tribe’s sovereign rights still exist because they are vital to tribal self-government, it is asking a question of a more political and subjective nature. In effect, the answer to this second question will largely depend on who decides the issue.

over their “external relations” has been withdrawn “by implication as a necessary result of their dependent status.” *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *see, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), and *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), discussed *infra*. This “implicit divestiture” theory bears most heavily upon the scope of Indian tribal authority over non-Indians. Indeed, “The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.” *Wheeler*, 435 U.S. at 326, 98 S.Ct. 1079. The full extent of implicit divestiture has yet to be determined, resulting in no small amount of uncertainty and confusion as to the scope of tribes’ inherent civil authority over non-Indians, *e.g., Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001); *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989), and leading to frequent litigation of that question in cases such as this one.

Nonetheless, it still remains true that “[d]efined by Chief Justice Marshall as ‘domestic dependent nations,’ ”

Indian tribes have long been recognized under principles of federal Indian law as possessing the right to self-government, free of most state law strictures over their own territory and members. Trib-

al sovereignty thus protects and affirms the right of tribes to exercise criminal and civil jurisdictional authority over their own members. By virtue of their inherent sovereignty, tribes, as recognized and affirmed by Congress, exercise criminal jurisdiction over nonmember Indians on their reservation as well. In addition, the tribes have also been recognized as possessing a limited degree of civil jurisdictional authority over all non-members, Indian or non-Indian, who enter the reservation. . . .

David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 377–378 (5th ed.2005). “Notwithstanding various congressional restrictions and judicial limitations ‘on the right of reservation Indians to make their own laws and be ruled by them,’ ” Indian “tribal governments and law-making institutions are flourishing throughout Indian country, mainly because of the commitment of Indians to one of the fundamental principles of federal Indian law, tribal sovereignty.” *Id.* at 378 (citation omitted).

2. Inherent Tribal Powers

In practical terms, inherent sovereignty enables Indian tribes to exercise a wide range of specific powers of self-government, among them: the power to levy and collect taxes from members, and from non-members engaging in transactions involving the tribe or taking place on tribal lands,⁵⁵ the power to manage the use of

55. *See, e.g., Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 152, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) (“The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power.”); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 142, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) (“The power to tax is an essential attribute of Indian sovereignty be-

cause it is a necessary instrument of self-government and territorial management.”); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 105 S.Ct. 1900, 85 L.Ed.2d 200 (1985) (affirming Navajo Nation’s power to impose possessory interest and business activity taxes without prior approval of Interior Department); *Mustang Production Co. v. Harrison*, 94 F.3d 1382 (10th Cir.1996) (tribal

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their territory and resources by both members and nonmembers,⁵⁶ and to the power to regulate economic activity and land use within the reservation.⁵⁷ See *Duro v. Reina*, 495 U.S. 676, 687–688, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990).

In a footnote to its 1978 opinion in *United States v. Wheeler*, the Court listed three examples of powers encompassed within Indian tribes’ “right of internal self-government,” in addition to the tribes’ acknowledged authority to prosecute tribal members for criminal offenses:

Thus, unless limited by treaty or statute, a tribe has the power to determine tribe membership, *Cherokee Intermarriage Cases*, 203 U.S. 76, 27 S.Ct. 29, 51 L.Ed. 96; *Roff v. Burney*, 168 U.S. 218, 222–223, 18 S.Ct. 60, 42 L.Ed. 442; to regulate domestic relations among tribe members, *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106; cf. *United States v. Quiver*, 241 U.S. 602, 36 S.Ct. 699, 60 L.Ed. 1196; and to prescribe rules for the inheritance of property. *Jones v. Meehan*, 175 U.S. 1, 29, 20 S.Ct. 1, 44 L.Ed. 49; *United States ex rel. Mackey v. Coxe*, 18 How. 100, 15 L.Ed. 299.

taxing power extends to trust allotment lands).

56. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Montana v. United States*, 450 U.S. at 557, 101 S.Ct. 1245; *Merrion*, 455 U.S. at 137, 102 S.Ct. 894; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (tribe’s authority to regulate hunting and fishing by non-members on tribal lands preempted state jurisdiction); cf. *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 438–444, 109 S.Ct. 2994, 106 L.Ed.2d 343 (Stevens & O’Connor, JJ.); *id.* at 448–468, 109 S.Ct. 2994 (Blackmun, Brennan & Marshall, JJ.) (1989).

435 U.S. at 322 n. 18, 98 S.Ct. 1079. *Wheeler* involved a federal criminal prosecution, and nothing in Justice Stewart’s opinion for the Court in *Wheeler* even hints that these examples were thought to delineate the full extent of Indian tribes’ civil “‘power of regulating their internal and social relations.’” *Id.*

Justice Stewart, quoting at some length from his *Wheeler* opinion, reiterated this same list of examples three years later in *Montana v. United States*:

Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *Id.*, at 322, n. 18, 98 S.Ct. 1079. But 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. . . .

Montana, 450 U.S. at 564, 101 S.Ct. 1245 (citations omitted).

Montana’s restatement of *Wheeler*’s examples of tribal powers has been reiterated

57. See *Merrion*, 455 U.S. at 137, 102 S.Ct. 894 (referring to “the tribe’s general authority as sovereign, to control economic activity within its jurisdiction”); *Duro v. Reina*, 495 U.S. at 688, 110 S.Ct. 2053 (noting that zoning is “vital to the maintenance of tribal integrity and self-determination”); see also *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 152–153, 100 S.Ct. 2069 (“Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest”) (citing 23 Op. Atty. Gen. 214 (1900); 17 Op. Atty. Gen. 134 (1881); 7 Op. Atty. Gen. 174 (1855); Powers of Indian Tribes, 55 I.D. 14, 46 (1934)).

ed by the Court in more recent opinions as descriptive of the nature of inherent tribal sovereignty. *Strate v. A-1 Contractors*, 520 U.S. 438, 459, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), referred to the *Wheeler* examples as “the Court’s preface” to “the *Montana* rule’s second exception,” which is “[k]ey to its proper application[.]” *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001), in turn, elaborated upon *Strate*’s reference:

In *Strate*, we explained that what is necessary to protect tribal self-government and control internal relations can be understood by looking at the examples of tribal power to which *Montana* referred: tribes have authority ‘[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members,’ 520 U.S., at 459, 117 S.Ct. 1404 (brackets in original), quoting *Montana*, *supra*, at 564, 101 S.Ct. 1245.” These examples show, we said, that Indians have “‘the right . . . to make their own laws and be ruled by them,’” 520 U.S., at 459, 117 S.Ct. 1404, quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). See also *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 386, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976) (per curiam) (“In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on whether the state action infringed on the right of reserva-

tion Indians to make their own laws and be ruled by them” (internal quotation marks and citation omitted)). . . .

533 U.S. at 360–361, 121 S.Ct. 2304. *Hicks* treats the *Wheeler* examples as *examples* of the Indian tribes’ broader “‘right . . . to make their own laws and be ruled by them,’” giving no indication that the examples themselves should be considered all-inclusive.⁵⁸

In recent opinions defining the extent of inherent tribal sovereignty, the Court has sought guidance from “the published opinions of the Solicitor of the Department of the Interior,” among other sources. *United States v. Lara*, 541 U.S. 193, 206, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (discussing *Duro v. Reina*, 495 U.S. at 689–692, 110 S.Ct. 2053). Nathan Margold’s oft-cited Solicitor’s opinion, *Powers of Indian Tribes*, 55 I.D. 14 (1934), enumerates a number of specific tribal powers as being among those “powers vested in any Indian tribe or tribal council by existing law,” 25 U.S.C.A. § 476 (2001). In addition to the powers over criminal offenses, domestic relations, inheritance and tribal membership highlighted in *Wheeler*, Margold’s opinion detailed the legal authorities recognizing the inherent powers of Indian tribes to determine their own form of government; to lay and collect taxes; to control, manage and protect tribal property; “to adopt police regulations governing the property and contracts” of tribal members; to regulate entry into tribal territory; and to exercise “plenary civil and criminal jurisdiction” through “the judicial powers of the tribe [that] are co-extensive with its legislative or executive powers.” 55 I.D.

58. In their memorandum, the Health District defendants quote *Strate*’s reiteration of the *Montana* examples, highlighting all four examples in boldface type as the preface for their argument that “[p]laintiffs’ claims have absolutely nothing to do with internal tribal self-government, but rather address their own

treatment as individuals and the alleged treatment of certain patients. . . .” (San Juan Health District Defendants’ Memorandum Regarding Subject Matter Jurisdiction and in Support of Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 497), at 13.)

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at 30–67, 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917–1974*, at 455–476.

The earlier and more recent editions of Cohen’s *Handbook* make similar enumerations of tribal powers, but even these authoritative texts do not exhaust the subject. See Felix S. Cohen, *Handbook of Federal Indian Law* 126–149 (1942) (“*Handbook* (1942 ed.)”);⁵⁹ Felix S. Cohen’s *Handbook of Federal Indian Law* 246–257 (Rennard Strickland, et al., eds. 1982) (“*Handbook* (1982 ed.)”).

In its *Final Report* to Congress nearly thirty years ago, the American Indian Policy Review Commission observed:

The question of jurisdiction of tribal governments has grown increasingly complex in recent years. Tribal governments are emerging from an essentially dormant period forcibly imposed upon them by Federal policies directed toward their ultimate destruction. The tribes are beginning to assert those governmental powers necessary to take their proper place in the role of governments within the United States. *The powers they are seeking to assert are no*

more and no less than those of any local sovereign of these United States. The objectives they seek to attain are peace and tranquility within the reservation boundaries and economic independence which will permit them to operate free of the Federal purse strings without fear of termination.

1 American Indian Policy Review Comm’n, *Final Report* 153 (1977) (emphasis added). The Commission recommended that “[t]he long term objective of Federal–Indian policy be the development of tribal governments into fully operational governments exercising the same powers and shouldering the same responsibilities as other local governments.” *Id.* at 154.

Today, nearly three decades later, modern tribal governments routinely exercise civil governmental authority over a range of day-to-day activities, much like comparable state and local government entities. Tribal codes and ordinances govern subject matter ranging from agriculture to zoning, and tribal departments and agencies administer and deliver an expanding array of community services—from police,

59. Cohen’s *Handbook* observed that at least as of 1942, “The legal powers of an Indian tribe, measured by the decisions of the highest courts, are far more extensive than the powers which most Indian tribes have been actually permitted by energetic officials to exercise in their own right”; but the *Handbook* also anticipated that “affording statutory recognition of these powers of tribal self-government and administrative assistance in developing adequate mechanisms for such government” through the Wheeler–Howard Act (Indian Reorganization Act) of 1934 “may reasonably be expected to end the conditions that have in the past led the Interior Department and various state agencies to deal with matters that are properly within the legal competence of the Indian tribes themselves.” *Handbook* (1942 ed.) at 125, 126 (footnote omitted).

It follows that the true scope and extent of inherent tribal sovereignty cannot fairly be

measured by “historic practices” or “the experience of forerunners of modern tribal courts” during the era of enforced tribal dormancy to which the *Handbook* referred. *Lara*, 541 U.S. at 206, 124 S.Ct. 1628 (discussing *Duro v. Reina*, 495 U.S. at 689–692, 110 S.Ct. 2053.) If, as the *Lara* Court postulates, “major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty,” *id.* at 202, 124 S.Ct. 1628, then Indian tribes reasonably should anticipate a more expansive reading of those same “metes and bounds” by the Court, given the fact that the “political branches” of “the Federal Government are firmly committed to the goal of promoting tribal self-government,” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334–335, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983), and have been consistently pursuing that goal for more than 35 years. See *id.* at 335–336, 103 S.Ct. 2378.

fire, and other emergency services to education, health, housing, justice, employment assistance, environmental protection, cultural preservation, land use planning, natural resource conservation and management, road maintenance, water and public utilities. Indian tribes fit squarely within the ranks of modern American civic bodies, sharing the common duty and responsibility to provide essential services to the people of the communities they serve. *See, e.g., Meyers v. Board of Education of San Juan Sch. Dist.*, 905 F.Supp. 1544 (D.Utah 1995) (federal, state, local and tribal governments are each obligated to provide education for Navajo students).

Moreover, Congress has afforded tribal governments a significant role in federal environmental protection under legislation such as the Clean Air Act,⁶⁰ the Clean Water Act,⁶¹ and the Safe Drinking Water Act,⁶² which were amended to authorize the Environmental Protection Agency to treat Indian tribes as states for the purposes of developing and enforcing their own tribal air and water quality standards, and to grant Indian tribes primary enforcement authority over aspects of safe drinking water enforcement. Tribal authority in these matters has consistently been confirmed by the federal courts. *See, e.g., City of Albuquerque v. Browner*, 97 F.3d 415, 419 (10th Cir.1996), *cert. denied*, 522 U.S. 965, 118 S.Ct. 410, 139 L.Ed.2d 314 (1997); *Montana v. United States Environmental Protection Agency*, 137 F.3d 1135 (9th Cir.1998); *Arizona Public Ser-*

vice Co. v. EPA, 211 F.3d 1280 (D.C.Cir. 2000); *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir.2001).

[2] As noted above, Interior Solicitor Margold's Opinion on *Powers of Indian Tribes* acknowledged that "[t]he powers of an Indian tribe in the administration of justice derive from the substantive powers of self-government which are legally recognized to fall within the domain of tribal sovereignty. If an Indian tribe has the power to regulate . . . it necessarily has the power to adjudicate, through tribunals established by itself, controversies involving" the "fields of local government in which our analysis has shown that tribal authority endures. *In all these fields the judicial powers of the tribe are coextensive with its legislative or executive powers.*" *Id.*, 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, at 471 (emphasis added). "Unless this power is removed by explicit legislation or is given up by the tribe . . . exclusive tribal judicial jurisdiction over reservation affairs is retained." *Handbook* (1982 ed.) at 250 (footnote omitted); *see also Handbook* (1942 ed.) at 146.⁶³

The Supreme Court has reaffirmed that "tribal courts are important mechanisms for protecting significant tribal interests." *United States v. Wheeler*, 435 U.S. at 332, 98 S.Ct. 1079 (footnote omitted). "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adju-

60. Pub.L. No. 101-549, § 107(d), 104 Stat. 2464 (1990), *codified at* 42 U.S.C.A. § 7601(d)(1)(A) (2003).

61. Pub.L. No. 100-581, § 207, 102 Stat. 2940 (1988), *codified as amended at* 33 U.S.C.A. § 1377(e) (2001).

62. Pub.L. No. 99-339, § 302(c), 100 Stat. 666 (1986), *codified at* 42 U.S.C.A. § 300h-1(e) (2003).

63. "So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. . . . Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government." *Id.*

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dication of disputes affecting important personal and property interests of both Indians and non-Indians.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

Such recognition has been accorded tribal courts even as they continue to develop and evolve as institutions.⁶⁴ As one respected commentator has observed:

The tribal courts, while relatively young, are developing in leaps and bounds. For example, many tribes are working to revise their tribal constitutions and to codify their civil, regulatory, and criminal law to provide greater guidance and predictability in tribal justice. At the same time, tribes have expanded the use of traditional law. Many tribal codes now combine unique tribal law with adapted State and Federal law principles. The number of law-trained Native Americans has increased. Both State and Federal courts continue to recognize the tribal courts as important fora for resolution of reservation-based claims involving both Indians and non-Indians.

64. In 1970, “there were only 85 operating tribal courts.” Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* 289 (2005). By 1976, “there were 117 operative tribal courts in Indian country,” and “tribal justice systems” were seen as “evolving institutions that are capable of fair and efficient justice.” 1 American Indian Policy Review Comm’n, *Final Report* 163, 167–168 (1977). “Today, approximately 275 tribal courts and 23 CFR courts exist in the United States,” but “[t]he numbers . . . tell only part of the story of the growth and diversity of these unique and evolving institutions that are in the forefront of modern tribal efforts to define the meanings and scope of tribal sovereignty. . . .” David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 420 (5th ed.2005).

Much has changed in thirty-five years. Most of the 562 federally recognized tribes

Justice Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 1 (1997).

Tribal courts have demonstrated an exceptional capacity for growth in competence and sophistication in the last quarter century. They are currently hearing more cases of greater complexity and impact than ever before. As part of this process of significant change, tribal courts are crafting a unique jurisprudence of vision and cultural integrity. In other words, tribal courts are responding competently and creatively to federal oversight pressures and cultural values in order to synthesize the best of both traditions.

Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 *Judicature* 110 (Nov.-Dec.1995). See generally Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 *Am. Indian L.Rev.* 285 (1998); Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (1995); Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot From the*

have created courts under their own constitutions or laws. This requires considerable infrastructure. Tribal justice systems need courtrooms and office spaces, judges for both trials and appeals, prosecutors, court clerks, tribal defenders in criminal cases, counselors, child welfare workers, and jail facilities. In addition to personnel, tribal justice systems must have civil and criminal laws, rules of court procedure, law libraries, and, typically, intergovernmental agreements with federal and state agencies for child welfare, environmental regulation, and criminal law. . . .

Wilkinson, *Blood Struggle*, at 289. “Tribal court systems vary from the highly structured, multiple court system of the Navajo Nation, served by tribal prosecutors and defense advocates, to very informal single-judge courts operated on a part-time basis without supplementary services.” Canby, *American Indian Law*, at 67.

Field, 21 Vt. L.Rev. 7 (1996); Vine Deloria, Jr. & Clifford M. Lytle, *American Indians, American Justice* 110–138 (1983).

“‘Indian sovereignty’ can be defined as the exercise of the powers of self-government.”⁶⁵ No enumeration by examples of specific powers can paint a complete portrait of the inherent sovereignty of Indian tribes. This summary of fundamental principles and inherent tribal powers offers an introductory overview, giving at least some sense of the true breadth of the subject. See American Indian Policy Review Commission, *Final Report* at 103 (“The point . . . is not to enumerate all sovereign powers of Indian tribes, but simply to give examples for the purpose of showing that Indian tribes are in fact governments.”).

Tribal sovereignty today finds at least as much meaningful definition in the growth, development and day-to-day functioning of effective tribal governments as it finds in the volumes of the law library. Far from being relics of a bygone era, Indian tribal powers bear the fine burnish of everyday use.

3. Tribal Sovereignty & Federal Indian Policy

Tribal self-government cannot thrive in a jurisdictional vacuum, and for many years it has been the expressed policy of both the President and the Congress that tribal self-government should thrive. Indeed, “[o]ur cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.” *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. at 856,

105 S.Ct. 2447 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334–335, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983)) (Federal Government “firmly committed to the goal of promoting tribal self-government”); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n. 5, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) (“Through various Acts governing Indian tribes, Congress has expressed the purpose of ‘fostering tribal self-government.’”); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–144 & n. 10, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) (the “tradition of Indian sovereignty over the reservation and tribal members . . . [a]s we have repeatedly recognized, . . . is reflected and encouraged in an number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development”); *Morton v. Mancari*, 417 U.S. 535, 551–555, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (upholding 25 U.S.C. § 472 Indian employment preference as “reasonable and rationally designed to further Indian self-government”); cf. *Williams v. Lee*, 358 U.S. at 223, 79 S.Ct. 269 (“The cases in this Court have consistently guarded the authority of Indian governments over their reservations.”).

In *New Mexico v. Mescalero Apache Tribe*, decided two years after *Montana*, the Court observed that “both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes,” citing to a series of congressional acts, from the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.*,⁶⁶ through the Indian Self-Determination and Education Assistance Act of

65. Alex Tallchief Skibine, *Deference Owed Tribal Courts’ Jurisdictional Determination: Towards Co-Existence, Understanding, and Respect Between Different Judicial Norms*, 24 N.M. L.Rev. 191, 191 (1994).

66. See also Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L.Rev. 955 (1972); R. Ericson & D. Snow, Comment, *The Indian Battle for Self-Determination*, 58 Cal. L.Rev. 445 (1970).

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1975, 25 U.S.C. §§ 450 *et seq.* 462 U.S. at 334–335 & n. 17, 103 S.Ct. 2378.⁶⁷

We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." . . . In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of their territory and resources *by both members and nonmembers*, . . . to undertake and *regulate economic activity within the reservation*, . . . and to defray the cost of governmental services by levying taxes. . . .

462 U.S. at 335–336, 103 S.Ct. 2378 (emphasis added & citations omitted) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143, 100 S.Ct. 2578 (footnote omitted)). With the "successful accomplishment of the federal purpose" to further tribal autonomy clearly in mind, the Court concluded that the Mescalero Apache Tribe's regulation of non-Indian hunting and fishing on its reservation left no room for concurrent regulation by the State of New Mexico:

It is beyond doubt that the Mescalero Apache Tribe lawfully exercises substantial control over the lands and resources of its reservation, including its wildlife.

⁶⁷. Congress continues to encourage greater tribal participation in and responsibility for the administration of federal services to Indians. See, e.g., Tribal Self-Governance Act of 1994, Pub.L. 103–413, title II, 108 Stat. 4270 (1994) (*codified at* 25 U.S.C. §§ 458aa–458hh (2000)).

⁶⁸. The *New Mexico* case was before the Court in the October 1982 Term on certiorari after remand to the Tenth Circuit for remand "in light of *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)," decided during the October 1980 Term. 462 U.S. at 330, 103 S.Ct. 2378. On remand, the

As . . . conceded by New Mexico, the sovereignty retained by the Tribe under the Treaty of 1852 includes its right to regulate the use of its resources by members *as well as nonmembers*. In *Montana v. United States*, we specifically recognized that tribes in general *retain this authority*.

Moreover, this aspect of tribal sovereignty has been expressly confirmed by numerous federal statutes. . . .

Id. (emphasis added & footnotes omitted).⁶⁸

Congress remains firmly committed to supporting tribal autonomy through the effective operation of tribal courts, no less than other aspects of tribal self-government. Congress is aware that "[t]ribal courts play a vital role in tribal self-government . . . and [it] has consistently encouraged their development." *Iowa Mutual*, 480 U.S. at 14–15, 107 S.Ct. 971. In addition to legislation supporting tribal self-government generally, such as the Indian Reorganization Act of 1934, the Indian Self-Determination Act of 1975, the Tribal Self-Governance Act of 1994,⁶⁹ or the Indian Tribal Regulatory Reform and Business Development Act of 2000,⁷⁰ Congress has enacted measures specifically aimed at supporting and encouraging the development and effective functioning of Indian tribal courts and justice systems.

Tenth Circuit had "adhered to its earlier decision" affirming injunctive relief against the enforcement of state hunting and fishing laws "against any person for hunting and fishing activities conducted on the reservation," a decision which in turn was affirmed by a unanimous Court. *Id.*

⁶⁹. Pub.L. No. 103–413, Title II, 108 Stat. 4270 (1994), *codified at* 25 U.S.C.A. §§ 450 note, 458aa–458hh (2001).

⁷⁰. Pub.L. No. 106–447, 114 Stat. 1934 (2000), *codified at* 25 U.S.C. § 4301 note (2001).

The Indian Civil Rights Act of 1968, Pub.L. No. 90-284, 82 Stat. 77 (1968), *codified at* 25 U.S.C.A. §§ 1301-1303 (2001), reflected Congress' intent "to promote the well-established federal 'policy of furthering Indian self-government.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (quoting *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)).

The Indian Child Welfare Act of 1978, Pub.L. No. 95-608, 92 Stat. 3069 (1978), *codified at* 25 U.S.C.A. §§ 1901 *et. seq.* (2001), emphatically reaffirmed Indian tribal jurisdiction over child custody, adoption and child welfare issues, including the primary role of tribal courts in the exercise of tribal jurisdiction over the children of tribal members. *See* 25 U.S.C.A. § 1911. Congress further afforded tribal judicial proceedings involving Indian child custody "full faith and credit" to the same extent that federal and state entities "give full faith and credit to the public acts, records, and judicial proceedings of any other entity." 25 U.S.C.A. § 1911(d) (2001).⁷¹

71. 25 U.S.C.A. § 1911(d) reads:

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes.

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

72. 25 U.S.C.A. § 1301(2) now reads:

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and af-

Following the Supreme Court's decision in *Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990), which held Indian tribes to be divested of inherent criminal jurisdiction over non-member Indians, Congress immediately amended the Indian Civil Rights Act to reaffirm each Indian tribe's inherent power to prosecute non-member Indians for crimes committed within its jurisdiction. *See* Pub.L. No. 101-511, Title VIII, § 8077(b), (c), 104 Stat. 1892 (1990), *codified at* 25 U.S.C.A. § 1301(2) (2001).⁷² In doing so, Congress did not delegate federal criminal authority to the tribes; by exercising its power to "relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority," Congress simply "adjust[ed] the tribes' status," reviving inherent tribal sovereignty and thereby overruling the *Duro* Court's reading of the "'judicially made' federal Indian law" of inherent tribal jurisdiction. *United States v. Lara*, 541 U.S. 193, 196, 200, 205-207, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004).⁷³ Attributing the

firmed, to exercise criminal jurisdiction over all Indians; . . .

Pub.L. No. 102-137, 105 Stat. 646 (1991) repealed a time limitation on the 1990 amendments to § 1301. *See generally*, Alex Tallchief Skibine, *Duro v. Reina and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. Cal. L.Rev. 767 (1993).

73. And the statute's legislative history confirms that such was Congress' intent. *See, e.g.*, H.R. Conf. Rep. No. 102-261, pp. 3-4 (1991) ("The Committee of the Conference notes that . . . this legislation is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations"); accord, H.R. Rep. No. 102-61, p. 7 (1991); *see also* S. Rep. No. 102-168, p. 4 (1991) ("recogniz[ing] and reaffirm[ing] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians"); 137 Cong. Rec. 9446 (1991) (statement of Sen. Inouye) (the "premise [of the legisla-

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Duro ruling to the vicissitudes of federal Indian policy over the past two centuries (“Such major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty”),⁷⁴ the *Lara* Court observed that “Congressional policy . . . now seeks greater tribal autonomy within the framework of a ‘government-to-government relationship’ with federal agencies.” *Id.* at 202, 124 S.Ct. 1628 (cit-

tion] is that the Congress affirms the inherent jurisdiction of tribal governments over non-member Indians” (emphasis added)); *id.*, at 10712–10714 (statement of Rep. Miller, House manager of the bill) (the statute “is not a delegation of authority but an affirmation that tribes retain all rights not expressly taken away” and the bill “recognizes an inherent tribal right which always existed”); *id.*, at 10713 (statement of Rep. Richardson, a sponsor of the amendment) (the legislation “reaffirms” tribes’ power).

Lara, 541 U.S. at 199, 124 S.Ct. 1628.

74. *Lara* explained that “in *Duro*, the Court drew upon a host of different sources in order to reach its conclusion that a tribe does not possess the inherent power to prosecute a non-member. The Court referred to historic practices, the views of experts, the experience of forerunners of modern tribal courts, and the published opinions of the Solicitor of the Department of the Interior. 495 U.S., at 689–692, 110 S.Ct. 2053,” 541 U.S. at 206, 124 S.Ct. 1628, which largely reflected the impact of earlier federal Indian policies. *Cf. National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855–856, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) (“[T]he existence and extent of a tribal court’s jurisdiction will require a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.”).

75. Of course, in his Message from the President of the United States Transmitting Recommendations for Indian Policy, dated July 8, 1970, H.R. Doc. No. 91–363, 91st Cong., 2d Sess. (1970), President Richard M. Nixon had soundly repudiated the destructive forced “termination” policy that briefly held sway in the Congress during the 1950s, proclaiming the Indians’ right to self-determination and urging Congress to make tribal self-determi-

ing *Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies*, 59 Fed.Reg. 22951 (1994); 19 Weekly Comp. of Pres. Doc. 98 (1983) (President Reagan reaffirming the rejection of termination as a policy and announcing the goal of decreasing tribal dependence on the Federal Government);⁷⁵ 25 U.S.C. § 450a(b) (con-

nation a matter of national policy. “In many respects it was a logical culmination of all that had occurred and all that had been recommended in Indian affairs during the preceding decade. But in the full context of Indian-white relations in the United States,” wrote historian Alvin M. Josephy, “it was historic in tone and intent. . . . [I]t showed that a national administration had at last listened to the Indians and accepted *their* ideas of what they needed and wanted,” and “it pointed federal policy in a new direction and demanded new thinking and attitudes from those in the federal agencies who dealt in Indian affairs.” Alvin M. Josephy, *Red Power: The American Indians’ Fight for Freedom* 223 (1971) (emphasis in original).

The ideas in Nixon’s text were not new, but the widely cited message, with its remarkable force and specificity, served as a catalyst. Several of the proposals were adopted by Congress, in a form surprisingly close to Nixon’s guidelines. . . .

The principal legislative initiative to emerge from the Nixon proposals, the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C.A. §§ 450a–450n gives express authority to the Secretaries of the Interior and Health and Human Services to contract with, and make grants to, Indian tribes and other Indian organizations for the delivery of federal services. The Act reflects a fundamental philosophical change concerning the administration of Indian affairs: tribal programs are funded by the federal government, but the programs should be planned and administered by the tribes themselves; federal “domination” should end. . . .

David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 220 (5th ed.2005). See also Michael P. Gross, *Indian Self-Determina-*

gressional commitment to “the development of strong and stable tribal governments”); *Felix S. Cohen’s Handbook of Federal Indian Law* 78–202 (Rennard Strickland, ed.1982); William Canby, *American Indian Law in a Nutshell* 13–32 (3d ed.1998)).

Three years later, Congress enacted the Indian Tribal Justice Act of 1993, Pub.L. No. 103–176, 107 Stat. 200, *codified at* 25 U.S.C.A. §§ 3601 *et. seq.* (2001), creating an Office of Tribal Justice Support within the Bureau of Indian Affairs to provide technical assistance and training to Indian tribes for the development of tribal codes, court rules, court administration and case management systems, standards of conduct, and long-range planning, 25 U.S.C.A. § 3611; and providing funding “for the development, enhancement, and continuing operation of tribal justice systems and traditional tribal judicial practices by Indian tribal governments,” 25 U.S.C.A. § 3613,

with authorization for appropriations exceeding \$58,000,000 for each of the fiscal years 2000 through 2007. 25 U.S.C.A. § 3621.⁷⁶

Similarly, the Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub.L. No. 106–559, 114 Stat. 2778, *codified at* 25 U.S.C.A. §§ 3651 *et seq.* (2001), provides for the awarding of grants by the Attorney General to tribal justice organizations and non-profit entities for tribal justice training, technical assistance, criminal assistance and civil legal assistance to tribal courts and tribal justice systems, 25 U.S.C.A. §§ 3661–3663 (2001); it also authorizes grants and technical assistance to Indian tribes “to enable such tribes to carry out programs to support—“

(1) the development, enhancement, and continuing operation of tribal justice systems; and

tion and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy, 56 Tex. L.Rev. 1195 (1978).

The Indian Self-Determination and Education Assistance Act of 1975, Pub.L. No. 93–638, 88 Stat. 2203 (1975), in turn, has particular relevance to this case: as noted above, plaintiffs Singer, Riggs and Dickson are currently employed by Utah Navajo Health Systems, Inc., a Native American non-profit organization that has operated the Montezuma Creek Clinic under a “Pub.L. 93–638 contract” with the Navajo Nation since January 1, 2000—when it replaced the SJHSD, which had managed the clinic for several years under a prior contract with the Indian Health Service.

76. Congress enacted the Indian Tribal Justice Act based upon its findings that

- (1) there is a government-to-government relationship between the United States and each Indian tribe;
- (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;
- (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-

reliance, and inherent sovereignty of Indian tribes;

(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;

(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;

(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights;

(7) traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this chapter;

(8) tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation; and

(9) tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this chapter.

25 U.S.C.A. § 2601(1)-(9) (2001).

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(2) the development and implementation of—

- (A) tribal codes and sentencing guidelines;
- (B) inter-tribal courts and appellate systems;
- (C) tribal probation services, diversion programs, and alternative sentencing provisions;
- (D) tribal juvenile services and multidisciplinary protocols for child physical and sexual abuse; and
- (E) traditional tribal judicial practices, traditional tribal justice systems, and traditional methods of dispute resolution.

25 U.S.C.A. § 3681(a) (2001).

Each of these measures reflects Congress' firm commitment "to a policy of supporting tribal self-government and self-determination," *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. at 856, 105 S.Ct. 2447, particularly through the continued development and operation of effective tribal courts.

The Executive Branch has consistently shared that same commitment to furthering tribal self-government. *See, e.g.*, Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations, 61 Fed.Reg. 29424 (June 10, 1996), *current version available at* <http://www.usdoj.gov/otj/sovtrb.htm>; Memorandum for the Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments, dated September 23, 2004, *available at* <http://www.whitehouse.gov/news/releases/2004/09/20040923-4.html> (The Bush Administration "is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty

and self-determination for tribal governments in the United States.").

As one recent commentary suggests, "There is reason to believe that the policy of Indian self-determination is more deeply entrenched than past congressional policies. In over fifty years, Congress's power over Indian affairs has been exercised almost exclusively to further tribal sovereignty and economic self-sufficiency." David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 225 (5th ed.2005). The direct participation and input of Native Americans in shaping and implementing the policy supporting Indian self-determination through tribal self-government may have a great deal to do with the self-determination policy's stability and endurance. *See generally* Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (2005); Vine Deloria, Jr. & Clifford Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (1984); *Indian Self Rule* (Kenneth R. Philp, ed.1986); 1 American Indian Policy Review Comm'n, *Final Report* at 69-82.

[3] Since the Indian Civil Rights Act of 1968, Congress has enacted no legislation limiting, restricting or diminishing Indian tribal jurisdiction, tribal sovereignty or autonomy. To the contrary, it has expressly disclaimed any such purpose.⁷⁷ So in fashioning the federal common law of tribal civil jurisdiction over non-Indians, any judicial reading of the policies of the "political branches" of the federal government must take into account these consistent congressional and Executive policies favoring tribal self-government and the effective operation of tribal courts. "Our cases have often recognized that Congress is committed to a policy of supporting tribal

77. *See, e.g.*, 25 U.S.C.A. § 3631 (2001); 25

U.S.C.A. § 3665 (2001).

self-government and self-determination.” *National Farmers*, 471 U.S. at 856, 105 S.Ct. 2447.

B. *Oliphant, Montana* & Implied Divestiture of Tribal Sovereignty

In May of 1977, following a detailed examination of federal Indian policy, Indian tribal sovereignty and the jurisdictional interplay among federal, state, local and Indian tribal governments, the American Indian Policy Review Commission reported to Congress:

There is an established legal basis for tribes to exercise jurisdiction over non-Indians.

There has been a demonstrated need for the exercise of some tribal jurisdiction over non-Indians within Indian reservations.

The multiplicity of circumstances and variance in resources and capabilities of the tribes makes it undesirable that Congress attempt to impose a uniform solution to the jurisdictional authority of Indian tribes.

The administrative decisions, the judicial opinions and the authorities of tribes thus far asserted reflect a conservative approach to defining the parameters of jurisdiction and authority of tribal governments and that such case by case determination is preferable to attempting any legislative solution.

The provisions of the 1968 Civil Rights Act supply safeguards and remedies to persons aggrieved by actions of tribal governments which are adequate to the concerns expressed by non-Indians at this time.

In the event any substantial problem arises in the future, the Congress has ample authority to impose whatever legislative solution may be required.

1 American Indian Policy Review Comm’n, *Final Report* at 154. The Commission recommended that “[n]o legislative action be undertaken by Congress in relation to tribal jurisdiction over non-Indians at this time.” *Id.*

With the exception of the Indian Child Welfare Act of 1978, dealing with Indian child custody issues,⁷⁸ Congress did not enact general legislation addressing tribal civil or criminal jurisdiction over non-Indians, leaving the law to develop on a case-by-case basis, consistent with the Commission’s recommendation. It thus should not seem surprising that as Indian tribal self-government has flourished, and even more so in recent years, the Supreme Court “has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians.” *National Farmers*, 471 U.S. at 851, 105 S.Ct. 2447 (footnote omitted).⁷⁹

1. *Oliphant v. Suquamish Indian Tribe*

Following on the heels of the Commission’s *Final Report*—and with no small amount of irony—the Supreme Court issued an opinion in March of 1978 that propounded a sweeping general rule drastically restricting the exercise of inherent tribal authority over non-Indians. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), the Court held that all “Indian tribes do not have inherent jurisdiction to

78. Pub.L. No. 95-608, 92 Stat. 3069 (1978), *codified at* 25 U.S.C.A. §§ 1901 *et. seq.* (2001).

79. Of course, the analytical approach the Court has prescribed to define the limits of

tribal civil jurisdiction over nonmembers requires case-by-case determination of the reach of tribes’ inherent sovereignty, which in turn requires frequent recourse to the courts.

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try and punish non-Indians” for criminal offenses. *Id.* at 212, 98 S.Ct. 1011. Rewriting the legal principles defining inherent tribal sovereignty, the *Oliphant* Court asserted that Indian tribes had been completely divested of inherent criminal authority over non-Indians as an implied consequence of their “dependent” status:

Indian tribes do retain elements of “quasi-sovereign” authority after ceding their lands to the United States and announcing their dependence on the Federal Government. See *Cherokee Nation v. Georgia*, 5 Pet. 1, 15, 8 L.Ed. 25 (1831). But the tribes’ retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly

terminated by Congress and those powers “inconsistent with their status.”

Id. at 208, 98 S.Ct. 1011 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976) (emphasis supplied by the Court)).⁸⁰ Looking to historical materials largely predating the modern federal policies favoring tribal self-determination, the *Oliphant* Court found support for its conclusion in “the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians,” which albeit unwritten, “carries considerable weight.” *Id.* at 206, 98 S.Ct. 1011 (citations omitted).⁸¹

“Indian law” draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text *form the back-*

80. *Oliphant* deemed tribal jurisdiction over non-Indian offenders to be a function of Indian tribes’ “external sovereignty” that had been diminished through their submission to the “overriding sovereignty” of the United States:

Indian reservations are “a part of the territory of the United States.” *United States v. Rogers*, 4 How. 567, 571, 11 L.Ed. 1105 (1846). Indian tribes “hold and occupy [the reservations] with the assent of the United States, and under their authority.” *Id.*, at 572, 45 U.S. 567. Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. “[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.” *Johnson v. McIntosh*, 8 Wheat. 543, 574, 5 L.Ed. 681 (1823).

Id. at 208–209, 98 S.Ct. 1011.

81. The *Oliphant* Court “rested its conclusion about inherent tribal authority . . . in large part upon [this] ‘commonly shared presumption,’ ” and based “its descriptions of inherent tribal authority” in *Oliphant* and other cases

“upon the sources as they existed at the time the Court issued its decisions.” *Lara*, 541 U.S. at 205, 206, 124 S.Ct. 1628. *Oliphant*’s reliance on that presumption and treatment of those sources—indeed, its whole approach to the issue—has been the subject of vigorous on-going scholarly criticism. See, e.g., Russel L. Barsh & James Y. Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 Minn. L.Rev. 609 (1979); Peter C. Maxfield, *Oliphant v. Suquamish Indian Tribe: The Whole is Greater than the Sum of the Parts*, 19 J. Contemp. L. 391, 399–439 (1993) (a source-by-source critique); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal.L.Rev. 1137, 1161–1163 (1990); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1 (1999); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113 (2002); Symposium, 13 Kan. J.L. & Pub. Pol’y 59 (2003); see also Catherine Baker Stetson, *Decriminalizing Tribal Codes: A Response to Oliphant*, 9 Am. Indian L.Rev. 51 (1981); N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 Am. Indian L.Rev. 353 (1994).

drop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them....

....

By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." H.R.Rep. No. 474, 23d Cong., 1st Sess., 18 (1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

Id. at 206, 210, 98 S.Ct. 1011 (emphasis added).⁸²

Two weeks later, in an oft-quoted passage from its opinion in *United States v. Wheeler*, the Court gave succinct expres-

sion to *Oliphant's* reformulation of the law: "In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. *Oliphant v. Suquamish Indian Tribe*, ante, p. 191, 98 S.Ct. 1011." *Wheeler*, 435 U.S. at 323, 98 S.Ct. 1079 (emphasis added). Language this broad necessarily raised the question whether inherent tribal *civil* jurisdiction over non-Indians had been similarly withdrawn "by implication."

In *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*—cited by the court of appeals in this case—the Court expressly rejected the assertion that Indian tribes had likewise been completely divested of inherent *civil* jurisdiction over non-Indians within reservation boundaries: "For several reasons," the Court explained, "the reasoning of *Oliphant* does not apply to this case." 471 U.S. 845, 854, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985).⁸³

First, although Congress' decision to extend the criminal jurisdiction of the fed-

82. In what could almost be read as a rebuttal to the American Indian Policy Review Commission's jurisdictional analysis, the Court continued:

We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to anyone tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to conclude that Indian tribes do not have

inherent jurisdiction to try and to punish non-Indians.

435 U.S. at 212–213, 98 S.Ct. 1011 (footnote omitted).

The *Oliphant* Court's suggestion that the exercise of tribal criminal jurisdiction over non-Indians poses a fundamental conflict with the individual rights of Americans guaranteed by national citizenship echoed the dissenting views of Judge—now Justice—Anthony M. Kennedy in *Oliphant* at the court of appeals level. Compare *Oliphant v. Schlie*, 544 F.2d at 1014–1019 (Kennedy, J., dissenting) with *United States v. Lara*, 541 U.S. at 211–214, 124 S.Ct. 1628 (Kennedy, J., concurring in judgment).

83. *National Farmers Union* seemed to signal a retreat from the Court's assertion four years earlier in *Montana v. United States* that "[t]hrough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the

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eral courts to offenses committed by non-Indians against Indians within Indian Country supported the holding in *Oliphant*, there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation.

Id. (footnote omitted). “Moreover,” the Court continued, “the opinion of one Attorney General on which we relied in *Oliphant*, specifically noted the difference between civil and criminal jurisdiction. Speaking of civil jurisdiction, Attorney General Cushing wrote:”

“But there is no provision of treaty, and no statute, which takes away from

activities of nonmembers of the tribe.” *Montana*, 450 U.S. at 565, 101 S.Ct. 1245. “Rather than further extending the rule in *Oliphant* to tribal jurisdiction over civil matters, the Supreme Court concluded:”

[T]he existence and extent of a tribal court’s jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1501 (10th Cir.1997), cert. denied, 522 U.S. 1090, 118 S.Ct. 880, 139 L.Ed.2d 868 (1998) (quoting *National Farmers*, 471 U.S. at 855–56, 105 S.Ct. 2447).

The *National Farmers* opinion was authored by Justice Stevens, writing for a unanimous Court. Three years before, in *Merrion v. Jacarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982), Justice Stevens had quoted the above passage from *Montana*, this time in his dissenting opinion, joined by Chief Justice Burger and Justice Rehnquist, objecting to the imposition of a tribal severance tax on existing non-Indian lessees of tribal mineral resources. By the time of *National Farmers*, Justice Stevens had acceded to the view that “the reasoning of *Oliphant* does not apply” to the question whether a tribal court had civil jurisdiction over a law-

the Chocktaws jurisdiction of a case like this, a question of property strictly internal to the Chocktaw nation; nor is there any written law which confers jurisdiction of such a case in any court of the United States.

“The conclusion seems to me irresistible, not that such questions are justiciable nowhere, but that they remain subject to the local jurisdiction of the Chocktaws.

“Now, it is admitted on all hands . . . that Congress has ‘paramount right to legislate in regard to this question, in all

suit involving both tribal members and non-Indians that arose within reservation boundaries.

Subsequently, the Court declared that *National Farmers* and *Iowa Mutual* “do not expand or stand apart from *Montana*’s instruction on ‘the inherent sovereign powers of an Indian tribe.’ 450 U.S., at 565, 101 S.Ct. 1245.”

While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of “inherent sovereignty.” *Id.*, at 563, 101 S.Ct. 1245. Regarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise “forms of civil jurisdiction over non Indians.” *Id.*, at 565, 101 S.Ct. 1245. As to nonmembers, we hold, a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal court jurisdiction, we adhere to that understanding. Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non Indian fee lands generally “do[es] not extend to the activities of nonmembers of the tribe.” *Ibid.*

Strate v. A-1 Contractors, 520 U.S. 438, 453, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997).

its relations. *It has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters. . . . By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation.*" 7 Op. Atty. Gen. 175, 179–181(1855) (emphasis added).

Id. at 854–855, 105 S.Ct. 2447 (emphasis in original & footnote omitted). "Thus," the Court concluded, "the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require. . . ." *Id.* at 855, 105 S.Ct. 2447 (footnote omitted) (citing *Kennerly v. District Court of Montana*, 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971), and *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959));⁸⁴ accord *Handbook* (1982 ed.) at 253 ("The development of principles governing civil jurisdiction in Indian Country has been markedly different from the development of rules dealing with criminal jurisdiction").⁸⁵

Here, too, as explained below, "there is no provision of treaty, and no statute,

which takes away from the [Navajos] jurisdiction of a case like this," involving the exercise of Navajo civil jurisdiction over non-Indian litigants.

2. *Montana v. United States & its Exceptions*

Navajo civil jurisdiction over non-Indians likewise cannot be "automatically foreclosed" by *Oliphant* where the Court has expressly endorsed the exercise of tribal civil jurisdiction over non-Indians in at least two distinct sets of circumstances—the so-called "*Montana* exceptions"—even where the controversy arises on non-Indian fee land within Indian reservation boundaries:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee, supra*, at 223, 79 S.Ct. 269; *Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct. 712, 48 L.Ed. 1030; *Buster v. Wright*, 135 F. 947, 950(CA8); see *Washington v. Con-*

A leading treatise on Indian law suggests strongly that Congress has had a similar understanding:

"In the civil field, however, Congress has never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country. Furthermore, although treaties between the federal government and Indian tribes sometimes required tribes to surrender non-Indian criminal offenders to state or federal authorities, Indian treaties did not contain provision for tribal relinquishment of civil jurisdiction over non-Indians." . . .

471 U.S. at 855 n.17, 105 S.Ct. 2447 (quoting *Handbook* (1982 ed.) at 253–254).

84. Both *Kennerly* and *Williams* involved state court lawsuits by non-Indian creditors against tribal members residing on the reservation arising out of purchases transacted within reservation boundaries. In both cases, the Court held that the state courts lacked jurisdiction over those claims. "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that the respondent is not an Indian. . . ." *Williams*, 358 U.S. at 223, 79 S.Ct. 269.

85. The Court quoted from the 1982 edition of Cohen's *Handbook* on this point:

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federated Tribes of Colville Indian Reservation, 447 U.S. 134, 152–154, 100 S.Ct. 2069, 65 L.Ed.2d 10. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See *Fisher v. District Court*, 424 U.S. 382, 386, 96 S.Ct. 943, 47 L.Ed.2d 106; *Williams v. Lee*, *supra*, at 220, 79 S.Ct. 269; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128–129, 26 S.Ct. 197, 50 L.Ed. 398; *Thomas v. Gay*, 169 U.S. 264, 273, 18 S.Ct. 340, 42 L.Ed. 740. *Montana v. United States*, 450 U.S. at 565–566, 101 S.Ct. 1245 (footnote omitted).

According to the late Chief Justice William H. Rehnquist, author of the *Oliphant* opinion, the *Montana* opinion—not *Oliphant*—represents “the most exhaustively reasoned of our modern cases addressing” Indian tribes’ “retained or inherent sovereignty.” *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650, 121 S.Ct. 1825, 149

L.Ed.2d 889 (2001). In praising *Montana*’s reasoning twenty years after Justice Stewart had penned that opinion for a six-member majority, the Chief Justice was speaking for a unanimous Court. *Accord Strate v. A-1 Contractors*, 520 U.S. 438, 445, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997) (Ginsburg, J., for a unanimous Court) (“*Montana v. United States*, decided three years [after *Oliphant*] is the pathmarking case concerning tribal civil authority over nonmembers.”); *Nevada v. Hicks*, 533 U.S. 353, 358, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (“Indian tribes’ regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), which we have called the ‘pathmarking case’ on the subject, *Strate*, . . .”).⁸⁶

Atkinson Trading Co. resoundingly reaffirmed “the framework set forth in *Montana*,” which “broadly addressed the concept of ‘inherent sovereignty.’” 532 U.S. at 651, 121 S.Ct. 1825 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 453, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997)).⁸⁷

86. *Nevada v. Hicks* extended the *Montana* analysis to determine tribal regulatory and adjudicatory jurisdiction over the conduct of state game wardens in executing state-court and tribal-court search warrants at a tribal member’s residence located on tribally owned land within the boundaries of the Fallon Paiute-Shoshone Tribes’ reservation in Nevada, in the course of the investigation of an off-reservation criminal offense. The *Hicks* majority opined that “the general rule of *Montana* applies to both Indian and non-Indian land,” and that “[t]he ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is ‘necessary to protect tribal self-government or to control internal relations.’” 533 U.S. at 360, 121 S.Ct. 2304.

In this case, the Navajo court found jurisdiction over the conduct of the nonmember County and Health District defendants involv-

ing the Montezuma Creek Clinic. “The clinic and land upon which it is located was purchased by the State of Utah as part of the Utah Navajo Trust Fund,” and the property remains in State ownership. *MacArthur*, 309 F.3d at 1218. Thus, this court need not decide how *Hicks*’ application of the *Montana* analysis to what it called “Indian-fee lands,” 533 U.S. at 363, 366, 370, 121 S.Ct. 2304, may affect the Navajo Nation’s inherent civil authority over its own tribal lands.

87. In his concurring opinion, Justice Souter, joined by Justice Kennedy and Thomas, wrote that “[i]f we are to see coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians, the source of doctrine must be *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and it is in light of that case that I join the Court’s opinion.” 532 U.S. at 659, 121 S.Ct. 1825 (Souter, Kennedy & Thomas, JJ., concurring).

Although we extracted from our precedents “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,” 450 U.S., at 565, 101 S.Ct. 1245, we nonetheless noted in *Montana* two possible bases for tribal jurisdiction over non-Indian fee land. First, “[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 dealings, contracts, leases, or other arrangements.” *Ibid.* Second, “[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.*, at 566, 101 S.Ct. 1245.

532 U.S. at 651, 121 S.Ct. 1825. Referring to the Court’s opinion in *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), the *Atkinson* Court continued:

Recognizing that *Montana* “immediately involved regulatory authority,” we nonetheless concluded that its reasoning had “delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise ‘forms of civil jurisdiction over non-Indians.’” 520 U.S., at 453, 117 S.Ct. 1404 (quoting *Montana*, *supra*, at 565, 101 S.Ct. 1245). We ac-

cordingly held that *Montana* governed tribal assertions of adjudicatory authority over non-Indian fee land within a reservation. See 520 U.S., at 453, 117 S.Ct. 1404 (“Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the *civil authority* of Indian tribes and their courts with respect to non-Indian fee lands generally ‘do[es] not extend to the activities of nonmembers of the tribe’” (emphasis added) (quoting *Montana*, *supra*, at 565, 101 S.Ct. 1245)).

Id. at 652, 121 S.Ct. 1825. *Atkinson Trading Co.* applied *Montana* “straight up” in concluding that “[b]ecause Congress has not authorized the Navajo Nation’s hotel occupancy tax through treaty or statute, and because the incidence of the tax falls upon nonmembers on non-Indian fee land, it is incumbent upon the Navajo Nation to establish the existence of one of *Montana*’s exceptions.” *Id.* at 654, 121 S.Ct. 1825.⁸⁸

In this case, if we give presumptive effect to *Montana*’s “general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe” on non-Indian fee land within the reservation, 450 U.S. at 565, 101 S.Ct. 1245, as the *Atkinson* Court did, 532 U.S. at 659, 121 S.Ct. 1825, we must accord no less authoritative force to *Montana*’s two express exceptions to that “general proposition.” *Atkinson* warned that the exceptions cannot be read to “swallow the rule.” 532 U.S. at 655, 121

⁸⁸ In *Atkinson*, the Court held that the Navajo Nation had “failed to establish that the hotel occupancy tax is commensurately related to any consensual relationship with petitioner” under *Montana*’s first exception, or that the tax “is necessary to vindicate the Navajo Nation’s political integrity” under *Montana*’s second exception, which “grants nothing ‘beyond what is necessary to protect tribal self-government or to control internal relations.’” 532 U.S. at 658–659, 121 S.Ct. 1825 (quoting *Strate*, 520 U.S. at 459, 117

S.Ct. 1404 (quoting *Montana*, 450 U.S. at 564, 101 S.Ct. 1245)). *Atkinson* also cited Justice White’s opinion in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 431, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989), for the proposition that under *Montana*’s second exception, “the impact of the nonmember’s conduct ‘must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe.’” 532 U.S. at 659, 121 S.Ct. 1825.

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S.Ct. 1825. Conversely, “*Montana*’s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land,” *id.* at 654, 121 S.Ct. 1825, cannot fairly be read to swallow its “two prime exceptions.” *Strate*, 520 U.S. at 452, 117 S.Ct. 1404.⁸⁹

Following the recent guidance of *Atkinson Trading Co. v. Shirley* and taking the *Montana* Court at its word—and, of course, there should be no reason to infer that the United States Supreme Court does not mean what it says—the two *Montana* “exceptions” allowing for the exercise of inherent tribal sovereignty over non-Indians on non-Indian fee lands must be read to have some genuine substantive meaning and day-to-day practical significance in the lives of Native Americans and their tribes, bands and communities.⁹⁰

3. Civil Jurisdiction Over Non-Indians Reaffirmed

The Supreme Court, both before *Montana* and since, has repeatedly reaffirmed Indian tribes’ civil authority over non-Indians doing business on the reservation, at least to the extent necessary to safeguard the interests of the tribe and its members.

It is true that our decisions recognize broader retained tribal powers outside the criminal context. Tribal courts, for example, resolve civil disputes involving

nonmembers, including non-Indians. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65–66, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); F. Cohen, *Handbook of Federal Indian Law* 253 (1982 ed.) (hereafter Cohen) (“The development of principles governing civil jurisdiction in Indian country has been markedly different from the development of rules dealing with criminal jurisdiction”). Civil authority may also be present in areas such as zoning where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination. See, e.g., *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989). As distinct from criminal prosecution, this civil authority typically involves situations arising from property ownership within the reservation or “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Montana v. United States*, *supra*, at 565, 101 S.Ct. 1245.

Duro v. Reina, 495 U.S. at 687–688, 110 S.Ct. 2053.

Tribal authority over the activities of non-Indians on reservation lands is an

89. “*Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise ‘forms of civil jurisdiction over non-Indians.’ *Id.* at 565, 101 S.Ct. 1245.” *Strate*, 520 U.S. at 453, 117 S.Ct. 1404 (emphasis added).

90. This court has not yet grown so cynical as to infer that the *Montana* analysis was concocted merely as a device to be used to diminish Indian tribal sovereignty “one case at a time,” though some argue quite convincingly that such has been its actual effect, intended or not. See, e.g., Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 Am.

U.L.Rev. 1177 (2001); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1, 37 (1999); cf. *Nevada v. Hicks*, 533 U.S. at 360, 121 S.Ct. 2304 (opinion by Scalia, J.) (“with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land”); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997); *Ford v. Todecheene*, 394 F.3d 1170 (9th Cir.2005) (tribal courts lack jurisdiction to apply tribal tort law to non-Indians causing injury or death to tribal members).

important part of tribal sovereignty. See *Montana v. United States*, 450 U.S. 544, 565–566, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152–153, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980); *Fisher v. District Court*, 424 U.S. [382,] 387–389, 96 S.Ct. 943, 47 L.Ed.2d 106 [(1976)]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute....

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); see *Pela v. Peabody Coal Co.*, No. A–CV–18–89 (Navajo S.Ct. 09/28/1990), at ¶ [29] (“Consistent with congressional policy, tribal courts presumptively have civil jurisdiction over reservation activities unless affirmatively limited by treaty or a federal statute. [*Iowa Mutual*] at 18, 107 S.Ct. 971; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).”).⁹¹

[4] *Montana* itself acknowledged that “[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.” *Montana*, 450 U.S. at 565, 101 S.Ct. 1245. Currently, “Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them,” *Nevada v. Hicks*, 533 U.S. at 361, 121 S.Ct. 2304 (citing *Merrion*,

455 U.S. at 137, 142, 102 S.Ct. 894), as is also true of the assertion of the tribes’ corresponding “adjudicative jurisdiction” over nonmembers. *Id.* at 357–358, 121 S.Ct. 2304 (citing *Strate*, 520 U.S. at 453, 117 S.Ct. 1404).⁹² Yet as recently reaffirmed in *Atkinson* and *Hicks*, *Montana* continues to stand for the proposition that Indian tribes’ civil authority extends to regulate and adjudicate the interests of non-Indians who enter into a variety of “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,” or whose conduct or activities threaten, imperil or have “some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.” *Montana*, 450 U.S. at 565, 566, 101 S.Ct. 1245 (citations omitted). Nor can these “*Montana* exceptions” fairly be read to apply only to some singularly “exceptional” case that somehow never seems to arise.⁹³ As Justice O’Connor explains:

Montana and our other cases concerning tribal civil jurisdiction over nonmembers occupy a middle ground between our cases that provide for nearly absolute tribal sovereignty over tribe members, see generally *Williams v. Lee*, 358 U.S., at 218–223, 79 S.Ct. 269, and our rule that tribes have no inherent criminal jurisdiction over nonmembers, see *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). *Montana* recognizes that tribes

91. Available at <http://www.tribal-institute.org/opinions/1990.NANN.0000009.htm>. Cf. *Strate*, 520 U.S. at 453, 117 S.Ct. 1404 (“the *Iowa Mutual* statement . . . stands for nothing more than the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, ‘[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.’ 480 U.S., at 18, 107 S.Ct. 971.”).

92. “As to nonmembers . . . a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction. . . .” *Strate*, 520 U.S. at 453, 117 S.Ct. 1404.

93. “If this power is to be taken away from them, it is for Congress to do it.” *Williams v. Lee*, 358 U.S. at 223, 79 S.Ct. 269 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564–566, 23 S.Ct. 216, 47 L.Ed. 299 (1903)).

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retain sovereign interests in activities that occur on land owned and controlled by the tribe, and provides principles that guide our determination of whether particular activities by nonmembers implicate these sovereign interests to a degree that tribal civil jurisdiction is appropriate.

Hicks, 533 U.S. at 391–392, 121 S.Ct. 2304 (O'Connor, Stevens & Breyer, JJ., concurring).⁹⁴

C. Navajo Sovereignty & Self-Government

1. The Navajo Treaty of 1868

Concerning the authority of the Navajo Nation over its reservation—including civil jurisdiction over disputes between tribal members and non-Indians—the United States Supreme Court had long since acknowledged that “Congress recognized

this authority in the Navajos in the Treaty of 1868, and has done so ever since.” *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

In return for their promises to keep peace, this treaty “set apart” for “their permanent home” a portion of what had been their native country, and provided that no one, except United States Government personnel, was to enter the reserved area. Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. State of Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. Since then, Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts. . . .

94. Plaintiffs read the current congressional and Executive policies as creating a presumption favoring tribal jurisdiction over non-Indians, and argue that “[t]his Court can enforce the Orders based upon *Montana* that presumes against the Tribal Court jurisdiction, or it can enforce the Orders based upon Congress’ presumption for Tribal Court jurisdiction, but it can’t do both.” (“Plaintiffs’ Briefing on *Montana*,” filed February 13, 2003 (dkt. no. 492), at 5; see also “Federalism and Article III Court Limitations in Defining Navajo Tribal Court Jurisdiction” [unsigned original document submitted by plaintiffs’ counsel], filed February 24, 2003 (dkt. no. 502), at 10–17.)

For now, at least, this court declines to view the post-*Montana* law of Indian tribal civil jurisdiction over non-Indians in purely Manichaeian terms, viz., as the mixed result of an attack by the realm of darkness on the realm of light—a theme that resonates throughout plaintiffs’ briefing of the issues on remand. (See “Plaintiffs’ Briefing on *Montana*” at 6–10; “Federalism and Article III Court Limitations” at 10–17; Memorandum in Support of Plaintiffs’ Motion for Summary Judgment for Enforcement of the Navajo Court Orders under Full Faith and Credit or Comity and Response of the District and County’s Briefs and Motions for Summary

Judgment, filed February 28, 2003 (dkt. no. 504), at 9–14 (“PRO TRIBAL PRESUMPTIONS”).)

United States v. Lara establishes that Congress may exercise its plenary power over Indian affairs to redefine the federal law delimiting tribal jurisdiction, “adjusting” or “relaxing” the implied divestiture of tribal powers over nonmembers essentially as it sees fit—as it did after *Duro v. Reina* in 1990—should it again choose to do so. *Lara* teaches that Indian tribes’ external sovereignty that has been “withdrawn . . . by implication as a necessary result of their dependent status” simply lies dormant until it is reawakened at Congress’s behest. *Lara* discarded the notion that *delegation* of power would be required to restore tribal powers impliedly divested in favor of legislative “adjustment” of the extent of the divestiture. 541 U.S. at 207, 124 S.Ct. 1628. Thus, if Congress finds that the *Montana* analysis frustrates its firm policy supporting tribal sovereignty and tribal courts, it can simply overrule *Montana* through legislation redefining the limits of tribal civil jurisdiction over nonmembers.

If the jurisdictional “presumptions” are broken, as plaintiffs insist, Congress can fix them.

Id. at 221–222, 79 S.Ct. 269 (citations omitted) (quoting Treaty with the Navajo, dated June 1, 1868, articles 2, 13, 15 Stat. 667, 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 1015, 1016, 1019 (1904)).⁹⁵

The Court reaffirmed this reading of the 1868 Treaty in *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973):

The beginning of our analysis must be with the treaty which the United States Government entered with the Navajo Nation in 1868. The agreement provided, in relevant part, that a prescribed reservation would be set aside “for the use and occupation of the Navajo tribe of Indians” and that “no persons except those herein so authorized to do, and except such officers, soldiers, agents and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.” 15 Stat. 668.

95. The earlier Treaty with the Navajo, dated September 9, 1849, 9 Stat. 974, 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 583–584 (1904), acknowledged that the “tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain under the aforesaid protection and jurisdiction,” consistent with the 1848 Treaty of Guadalupe Hidalgo, but did not address Navajo territory or jurisdiction, other than to annex their territory to New Mexico, guarantee Americans “free and safe passage” through Navajo country, and promise federal punishment of citizens committing crimes against Navajos and that “the Government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries. . . .” *Id.*, arts. I, II, III, VI, VII, IX, 1 Kappler at 583–584.

411 U.S. at 173–174, 93 S.Ct. 1257. “The treaty nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes. But the document is not to be read as an ordinary contract agreed upon by parties dealing at arm’s length with equal bargaining positions.” *Id.* at 174, 93 S.Ct. 1257. Recalling the discussion of the history of the 1868 Treaty in *Williams v. Lee*,⁹⁶ the *McClanahan* Court continued: “It is circumstances such as these which have led this Court in interpreting Indian treaties, to adopt the general rule that “[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.” *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478 (1930).” *Id.*

When this canon of construction is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant *to establish the lands as*

Copies of the Navajo Treaties of 1849 and 1868, as well as the Treaty of Guadalupe Hidalgo are included as Exhibits D, E & C, respectively, in Pltfs’ 12/19/03 Compendium A/B.

96. We have had occasion in the past to describe the circumstances under which the agreement was reached. “At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promises to keep peace, this treaty ‘set apart’ for ‘their permanent home’ a portion of what had been their native country.” *Williams v. Lee*, 358 U.S. at 221, 79 S.Ct. 269.”

Id. at 174.

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within the exclusive sovereignty of the Navajos under general federal supervision. It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation. See *Warren Trading Post Co. v. Arizona Tax Comm’n*, 380 U.S., at 687, 690, 85 S.Ct. 1242; *Williams v. Lee*, *supra*, at 221–222, 79 S.Ct. 269.

Id. at 174–175, 93 S.Ct. 1257 (emphasis added).

In examining the question of subject-matter jurisdiction over non-Navajos, the Navajo Supreme Court also begins with the Navajo Treaty of 1868:

[P]rior to proceeding to the contemporary Indian affairs law rules on civil jurisdiction over non-Indians, we will first apply the Treaty of 1868 between the United States of America and the Navajo Nation. 15 Stats. 667. We do so because there are three foundations for jurisdiction in Indian law cases. Our jurisdiction comes from (1) the inherent authority of the Navajo Nation as an Indian nation, (2) the Navajo Nation’s treaties with the United States of America, and (3) federal statutes which vest jurisdiction in the Navajo Nation. We address the treaty issue first, because a treaty constitutes the United States’ recognition of our jurisdiction. We will then address contemporary Indian affairs law principles of jurisdiction over non-Indians.

Manygoats v. Cameron Trading Post, No. SC–CV–50–98 (Navajo S.Ct. 01/14/2000), at ¶ [40], available at <http://www.tribal-institute.org/opinions/2000.NANN.0000003.htm>.

Article II of the Treaty, 15 Stats. at 668, begins with a boundary description

and then says that “this reservation” is “set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them. . . .” Federal courts use this language as the basis for Navajo Nation civil jurisdiction. *Williams v. Lee*, 358 U.S. 217, 221–223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); *Littell v. Nakai*, 344 F.2d 486, 488 (9th Cir.1965); *UNC Resources, Inc. v. Benally*, 518 F.Supp. 1046, 1050 (D.Ariz. 1981).

Means v. District Court of the Chinle Judicial District, No. SC–CV–61–98 (Navajo S.Ct. 05/11/1999), at ¶ [62].⁹⁷ “While the entry of non-Indians is not specifically mentioned in the ‘set apart for the use’ article, federal courts have consistently held that this treaty language is the basis for Navajo Nation civil jurisdiction, including jurisdiction over non-Indians.” *Manygoats*, at ¶ [41].

Looking to the negotiations leading to the formation of the 1868 Treaty, the Navajo Supreme Court discerns additional support for Navajo autonomy and authority over its permanent homeland:

These preliminary discussions are important to an understanding of the Treaty of 1868. They show that the Navajo negotiators, . . . raised many questions about the power and authority of the Navajos on their return to their homeland. [General William T.] Sherman’s responses show that the Navajo negotiators raised many such questions, and while the questions may not have been written down, the replies show the Navajo concerns. Sherman guaranteed the right of political integrity for the Navajo Nation, along with full powers to main-

97. Available at <http://www.tribal-institute.org/opinions/1999.NANN.0000013.htm>.

tain territorial integrity. He expected a democratic council with a chief executive. Both that council and the chief executive would have broad powers.

Arizona Public Service Co. v. Office of Navajo Labor Relations, No. A-CV-08-87 (Navajo S.Ct. 10/08/1990), at ¶ 53.⁹⁸ In the language of the 1868 Treaty itself, the Navajo Supreme Court finds confirmation that “these are distinctly and solely Navajo lands,” and “that the benefits of the treaty lands, including employment or the fruits of industry solely belong to the Navajo People,” *id.* at ¶ [55]; that the Navajo Nation holds “the general exclusion power which is said to be the source of a great deal of tribal authority,” *id.* at ¶ [57]; that “Article XIII provides that the Navajo Reservation is the ‘permanent home’ of the Navajos, implying all that goes with a home—the right to keep it in good order,” *id.* at ¶ [58]; “[t]herefore, using the Treaty of 1868, the Navajo Nation has the power to regulate non-Indian businesses,” including those with whom it has entered into leasing or other commercial arrangements, such as Arizona Public Service Company. *Id.* at ¶ [72].

“The Treaty of 1868 did not fully define Navajo governmental power because of many reserved rights which are not enumerated in it.” *Id.* at ¶ [65]. Indeed, “no provision in the relevant treaties or statutes confers the right of self-government in general . . . upon the Tribe.” *Wheeler*, 435 U.S. at 327, 98 S.Ct. 1079. “But none of these laws created the Indians’ power to govern themselves. . . .” *Id.* at 328, 98 S.Ct. 1079 (emphasis in original). “It must always be remembered that various Indian tribes were once independent and sovereign nations, and that their claim to sov-

eignty long predates that of our own Government.” *McClanahan*, 411 U.S. at 173, 93 S.Ct. 1257.

It is an elementary foundation block of United States–Indian nation relationships that Indian nations are sovereign and derive their sovereignty from their preexistence to the United States and their dealings with the United States as independent sovereigns. When sovereign Indian nations dealt with the United States by treaty, they did so in an international law sense. Further, they did not receive their lands and powers from the United States but only ceded lands and privileges to it. That is true of the Navajo Nation and must be remembered in connection with the Treaty of 1868.

Benally v. John, 4 Nav. R. 39, No. A-CV-27-81 (Navajo Ct.App. 05/05/1983), at ¶ [34].⁹⁹

“Implicit in the Treaty of 1868,” then, “is the understanding that the internal affairs of the Navajo people are within the exclusive jurisdiction of the Navajo Nation government. *Williams v. Lee*, 358 U.S. 217, 221–222, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). And, ‘since the signing of the Navajo treaty, Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation.’ *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 175, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).” *Billie v. Abbott*, No. A-CV-34-87 (Navajo S.Ct. 11/10/1988), at ¶ [26].¹⁰⁰

Far from limiting the inherent sovereignty of the Navajo Nation, the 1868 Treaty has consistently been read to rec-

98. Available at <http://www.tribal-institute.org/opinions/1990.NANN.0000003.htm>.

99. Available at <http://www.tribal-institute.org/opinions/1983.NANN.0000042.htm>.

100. Available at <http://www.tribal-institute.org/opinions/1988.NANN.0000012.htm>.

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ognize and reaffirm Navajo autonomy and to reinforce inherent Navajo authority over their permanent homeland on the Navajo Reservation, including the exercise in specific cases of tribal civil authority over non-Navajos living or conducting activities in Navajo country.

2. Subsequent Legislation Enlarging the Navajo Reservation

Subsequent Executive Orders and congressional legislation enlarging the Navajo reservation redefined and enlarged the boundaries of the Navajo Nation's territory,¹⁰¹ but did so without diminishing "the exclusive sovereignty of the Navajos under general federal supervision" over their "permanent home" in any way. This is no less true of "An Act to Permanently Set Aside Certain Lands in Utah as an Addi-

tion to the Navajo Indian Reservation, and for Other Purposes," Act of March 1, 1933, ch. 160, 47 Stat. 1418 (1933), 5 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 326-327 (1941), as amended by Pub.L. No. 90-306, 82 Stat. 121 (1968) (the "1933 Act"), which added the Aneth Extension to the Navajo Reservation, including the lands located at Montezuma Creek where the plaintiffs' place of employment is located.¹⁰² That statute enlarged the Reservation by re-drawing its boundaries, encompassing public lands as well as lands held by others. The "vacant, unreserved and undisposed of public lands within the areas" thus bounded were "permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the

101. According to *Tiller's Guide*:

The Navajo Nation, comprised of 26,606 square miles, is the largest Indian reservation in the United States, both in terms of land base and tribal enrollment. The land base, comparable in size to the state of West Virginia, is located in northeast Arizona, northwest New Mexico, and southeast Utah....

The original Navajo Reservation, established pursuant to a treaty concluded on June 1, 1868, and ratified by Congress on July 25, 1868, contained 3,414,528 acres, only about 10 percent of the land the Navajos earlier owned and used. The original reservation was expanded by Executive Orders in 1878, 1880, 1882, 1884, 1900, 1901, 1905, 1907, and 1908. In 1911, lands in New Mexico were restored to the public domain. Minor revisions to the Navajo Reservation's size were made in 1912, 1913, 1914, 1915, and 1917. Executive Orders in 1917 and 1918 again expanded the reservation. In 1930 and 1931, the reservation was expanded by Congressional Acts. In 1933, Congress added 552,000 acres in Utah to the reservation, and in 1934 provided for some smaller additions. Minor changes to the size of the reservation in 1948, 1949 and 1958. Court decisions in 1962, 1963, and 1977 reallocated some areas of the Navajo Reservation to the Hopis.

In addition to the main Navajo Reservation, there are three satellite areas of Navajo land located in New Mexico. The Cañoncito Reservation, the present boundaries of which were established in 1960, contains 57,863 acres of trust land. The Alamo Reservation, established in 1964, contains 62,000 acres. The Ramah Reservation, established in 1931, contains 91,456 acres. Today, the total acreage of the Navajo Reservation, including the main reservation, trust lands of the Eastern Navajo, and the satellite lands of Cañoncito, Alamo and Ramah, is 16,224,896 acres.

Veronica E. Velarde Tiller, ed., *Tiller's Guide to Indian Country* 326 (2d ed.2005).

102. This case arises from that portion of the Navajo reservation that was added by Congress in 1933, within which the Montezuma Creek Clinic is located. See Act of March 1, 1933, ch. 160, 47 Stat. 1418, as amended by the Act of June 14, 1934, ch. 521, 48 Stat. 960, and Pub. L 90-306, 82 Stat. 121 (1968); *Pelt v. State of Utah*, 104 F.3d 1534, 1540 (10th Cir.1996). (Memorandum in Support of Plaintiffs' Motion for Summary Judgment for Enforcement of the Navajo Court Orders under Full Faith and Credit or Comity and Response of the District and County's Briefs and Motions for Summary Judgment, filed February 28, 2003 (dkt. no. 504), at 4 n. 1).

Interior may see fit to settle thereon.” *Id.* at § [1], 47 Stat. at 1418, 5 Kappler at 326. The State of Utah was afforded the opportunity to exchange “such tracts of school land within the areas added to the Navajo Reservation” for equivalent “in lieu” lands to be selected from among “unreserved and nonmineral public lands . . . within the State of Utah.” *Id.* at § 2, 47 Stat. at 1419, 5 Kappler at 327. Further,

Though no oil or gas was believed to be located on these lands, it was provided that should such mineral resources be produced in commercial quantities, “37 1/2 per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: *Provided, That said 37 1/2 per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.*” 47 Stat. 1418. The remaining 62 1/2% of the royalties generated by any such tribal mineral leases were, by implication, to go to the Navajo tribe.

United States v. Jim, 409 U.S. 80, 80–81, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972) (emphasis added). “To make the administration of these funds more flexible and to spread the benefits of the royalties more broadly among the Navajo community, the Congress enacted a statute in 1968 that directed the State to expend the 37 1/2% of royalties ‘for the health, education, and general welfare of the Navajo Indians residing in San Juan County.’ 82 Stat. 121.” *Id.* at 81, 93 S.Ct. 261. These provisions bear directly upon this case because “The

[Montezuma Creek C]linic and land upon which it is located was purchased by the State of Utah as part of the Utah Navajo Trust Fund.” *MacArthur*, 309 F.3d at 1218.¹⁰³

3. A Tale of Two Treaties: *Montana* & the 1933 Act

While the parcels in question are not, strictly speaking, Navajo *tribal* lands, (*see infra*, at n. 114), they likewise are not, strictly speaking, “non-Indian fee lands” in the same sense as the lands at issue in *Montana*. The 1933 Act did not create a jurisdictional “checkerboard” of Reservation land and non-tribal land holdings; it delineated a continuous Reservation boundary, bringing the lands thus encompassed “within the exclusive sovereignty of the Navajos under general federal supervision,” *McClanahan*, 411 U.S. at 175, 93 S.Ct. 1257, and within “Indian country” under 18 U.S.C.A. § 1151(a).

In *Montana*, the Court considered the 1868 Treaty with the Crow Tribe, which like the 1868 Navajo Treaty, set apart a defined reservation for “the absolute and undisturbed use and occupation” of the Crow Tribe. *Montana*, 450 U.S. at 548, 553–554, 558–559, 101 S.Ct. 1245 (quoting the Treaty with the Crows, dated May 7, 1868, art. 2, 15 Stat. 649, 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 1008 (1904)). The *Montana* Court emphasized that the non-Indian lands at issue within the Crow Reservation existed as a consequence of the subsequent allotment of lands on that reservation by Congress. *Id.* at 559, 101 S.Ct. 1245. Inherent tribal authority under the 1868 Treaty

¹⁰³. It appears that the land in question is located at Montezuma Creek Subdivision # 1, parcels 23 and 24, section 32, T. 40 S., R. 24E, Salt Lake Meridian, Utah. (See “Answer to Complaint for Damages and Counterclaim, filed June 23, 1999, in *Singer, et. al. v. San*

Juan County, et al., Case No. SR–CV–162–99–CV (Navajo Nation District Court, Shiprock District), at 31 ¶ 18, *available in* Pertinent Parts Navajo Ct. R. (“Complaint for Damages” Tab).)

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with the Crow Tribe, the Court reasoned, “could only extend to the land on which the Tribe exercises ‘absolute and undisturbed use and occupation,’”

And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. 331 et seq., and the Crow Allotment Act of 1920, 41 Stat. 751. If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.

Montana, 450 U.S. at 559, 101 S.Ct. 1245 (footnote omitted). Looking to the policy of the Allotment Acts—“the eventual assimilation of the Indian population . . . and the ‘gradual extinction of Indian reservations and Indian titles,’” the *Montana* Court asserted that “that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands.” *Id.* at 559 n. 9, 561, 101 S.Ct. 1245 (citations omitted).

The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was designed to eventually eliminate tribal relations. . . . And throughout the congressional debates on the subject of allotment, it was assumed that the “civilization” of the Indian population was to be accomplished, in part, by the dissolution of tribal relations. . . .

There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. . . . *It*

defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if feeholders could be excluded from fishing or hunting on their acquired property.

Id. at 559–560 n. 9, 101 S.Ct. 1245 (emphasis added & citations omitted).

The *Montana* Court acknowledged that “[t]he policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. 461 *et seq.* But what is relevant in this case,” the Court explained, “is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land.” *Id.* at 560 n. 9, 101 S.Ct. 1245 (emphasis added).

In contrast, the state-owned lands at the Montezuma Creek Clinic are *not* the product of “land alienation occasioned by” the allotment policy; they are lands incorporated within Reservation boundaries extended by Congress, and purchased using funds derived from tribal oil and gas leasing in the 1933 Aneth Extension, funds held in trust for the Navajo people of the area. *See Pelt v. State of Utah*, 104 F.3d 1534 (10th Cir.1996); *State of Utah v. Babbitt*, 53 F.3d 1145, 1149 (10th Cir.1995) (noting Congress’ clear intent that oil and gas development on the Aneth Extension benefit San Juan Navajos). The presumptions underlying the Allotment policy find no application here because the Montezuma Creek area was *added* to the Navajo Reservation as part of the major shift in federal Indian policy reflected in legisla-

tion such as the Indian Reorganization Act of 1934.

At that point, in the wake of the influential “Meriam Report,” (see Lewis Meriam, *The Problem of Indian Administration* (1928)), the Executive and Legislative Branches were seeking to restore, consolidate and enlarge the Indian tribal land base to encourage the reorganization and revival of effective tribal self-government. See *Handbook* (1942 ed.) at 27, 83–87; see generally S. Lyman Tyler, *A History of Indian Policy* 125–150 (1973).

The 1933 Act cannot be read in terms of the prior Allotment policy where the contrary view of the destiny of Indian tribes already held sway at the time the 1933 Act was adopted.¹⁰⁴ Likewise the rationale of *Montana* concerning the limitations on the Crow Tribe’s authority under Article 2 of the 1868 Crow Treaty because of the alienation of lands occasioned by allotment finds no application to the scope of the

Navajo Nation’s authority under Article 2 of the 1868 Navajo Treaty as to lands within its reservation boundaries as enlarged by Congress.¹⁰⁵

Consistent with the court of appeals’ mandate, this court has applied the *Montana* analysis in deciding the jurisdictional issues on remand. Yet the drastic differences in historical context and current consequence between the 1933 Act and the Crow Allotment Act necessarily raise the question whether *Montana*’s limited reading of the Crow Tribe’s authority under its 1868 Treaty has any logical bearing upon the Navajo Nation’s authority under the 1868 Navajo Treaty over the lands within its boundaries, particularly over parcels that were purchased with Navajo trust funds and are still held in trust for the Navajo people of San Juan County. *Pelt*, 104 F.3d at 1541–1542; see also Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Impor-*

104. “The New Deal for the American Indians began before the passage of the Indian Reorganization Act. . . . Soon after his appointment, Secretary Ickes issued an order that ended the sale of allotments and the issuance of fee patents.” Floyd A. O’Neil, “The Indian New Deal: An Overview,” in *Indian Self-Rule* 30, 39 (Kenneth R. Philp., ed.1986); see 54 I.D. 559 (1934). In his first annual Report in 1933, Commissioner of Indian Affairs John Collier observed:

The allotment system has enormously cut down the Indian landholdings and has rendered many areas, still owned by Indians, practically unavailable for Indian use. The system must be revised both as a matter of law and of practical effect. Allotted lands must be consolidated into tribal or corporate ownership with individual tenure, and new lands must be acquired for the 90,000 Indians who are landless at the present time. . . .

Report of Comm. of Ind. Aff., in Ann. Rept. of Sec’y of Interior, 1933, at 68, quoted in *Handbook* (1942 ed.) at 27.

105. Speaking of a similar 1934 enlargement of the Navajo Reservation in Arizona that

encompassed the non-Indian fee land of the Cameron Trading Post, the *Atkinson* Court remarked that the enlargement “did not alter the status of the property: It is, like millions of acres throughout the United States, non-Indian fee land within a tribal reservation.” 532 U.S. at 648, 121 S.Ct. 1825 (citing Act of June 14, 1934, ch. 521, 48 Stat. 960–962). But remembering that most of those “millions of acres” were alienated through various Allotment acts rather than being added through enlargement of reservation boundaries in aid of tribal self-government—or by being purchased using Indian trust funds—the lands in question at Montezuma Creek are not “like” those “millions of acres” at all.

Viewed through the lens of the relevant Indian policy of the political branches in 1934, the *Atkinson* Court may have erred by importing *Montana*’s “general principle” into the context of the Navajo Nation without examining the historical relevance of *Montana*’s rationale. See Robert N. Clinton, Carole E. Goldberg & Rebecca Tsosie, *American Indian Law: Native Nations and the Federal System* 719 (4th ed.2003) (text note re: “*Atkinson*’s Use of *Montana*”).

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tance of Limited Contextualism in Indian Law, 8 Hamline L.Rev. 543 (1985).¹⁰⁶

4. The Navajo Nation Government

Modern Navajo self-government began with the creation of the Navajo Council: The Navajo Tribal Council was first formally recognized by the federal government in 1923. The Navajo Tribe rejected the Indian Reorganization Act of 1934(IRA) and is, therefore, not recognized under that Act. Between 1936 and 1938, the Navajos attempted a constitutional government; it was refused by the Secretary of the Interior who cited factionalism among the tribal members as a reason for denial. The BIA issued federal regulations, "Rules for the Governance of the Navajo Tribal Council," in 1938, and democratic elections to the Navajo Nation Council have been held every four years since then. The rules, as amended in December 1989, are the basis for all tribal operations. . . .

106. *Montana* and its progeny address *inherent* tribal authority over nonmembers, *see Atkinson*, 532 U.S. at 649–650, 121 S.Ct. 1825, while the Navajo courts look to treaty and statutory sources of jurisdiction as well: "Our jurisdiction comes from (1) the inherent authority of the Navajo Nation as an Indian nation, (2) the Navajo Nation's treaties with the United States of America, and (3) federal statutes which vest jurisdiction in the Navajo Nation." *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo S.Ct. 01/14/2000), at ¶ [40].

107. According to the Part II Plaintiffs, "The Navajo Nation District Court Division of Shiprock, lies within the exterior borders of New Mexico, is organized by Navajo legislative authority as found in federal statutes 25 U.S.C. §§ 461–479 pursuant to federal authority found in Article I of the United States Constitution for communicating and working with Indian tribes." (Amended Complaint at 110 (emphasis added).)

This is not accurate.

As *Tiller's Guide* correctly recounts, the government of the Navajo Nation was not

The nation is headed by a council consisting of 88 members which represents the 110 local government subdivisions (chapters) that make up the Navajo Nation. Twelve standing committees conduct business between quarterly full council sessions. . . . All programs and projects are processed through the appropriate standing committee before submission to the Navajo Nation Council.

Veronica E. Velarde Tiller, ed., *Tiller's Guide to Indian Country* 327 (2d ed.2005).¹⁰⁷ *See also* David E. Wilkins, *The Navajo Political Experience* 67–112 (2003) (overview of the historical development and current framework of the Navajo government).

The Navajo Nation exercises its inherent sovereignty through independent and co-equal branches of a tripartite Navajo government, including an independent Navajo judiciary:

organized under the Wheeler–Howard Act, or Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, *codified at* 25 U.S.C.A. §§ 461–479 (2001), and does not exercise its powers of self-government under an "IRA" constitution, *see* 25 U.S.C. § 476, in contrast to many other Indian tribes, bands and communities that have adopted IRA constitutions.

Indeed, this appears to be a point of some pride:

Poorly-worded and restrictive tribal codes forced upon various tribes by the Bureau of Indian Affairs we thankfully do not have, since the Navajo Nation is not organized under the Indian Reorganization Act. *See*, American Indian Lawyer Training Program, *Manual of Indian Law*, E-4 (1976 Ed.). Since the Navajo rely upon their inherent sovereignty and not the restrictions placed upon other Indian Nations, we are able to solve problems on our own as they arise.

Deal v. Blatchford, 3 Navajo Rptr. 159, at ¶ [29] (Navajo Ct.App.1982), *available at* <http://www.tribalresourcecenter.org/opinions/opfolder/1982.NANN.0000026.htm>.

The Navajo Nation has a three-branch government, similar to that of the United States. The Navajo Nation Bill of Rights is similar in structure, as well, to that of the federal government. The executive branch is headed by a tribal president, chosen by popular election every four years. During the same election year, the 88 council delegates are elected. . . . The judicial branch, created April 1, 1959, is headed by a chief justice who is nominated by the president and confirmed by the council. The judicial branch consists of a supreme court, seven district courts, seven family courts, and traditional peacemaker courts. Peacemaker courts are alterna-

tives to typical courtroom settings, in that these courts use traditional Navajo laws and procedures in mediation to resolve disputes. . . .

Tiller's Guide at 327.

The Navajo Nation has not adopted a tribal constitution as such, relying instead upon several fundamental laws as its organic documents, in addition to the 1938 Rules for the Navajo Tribal Council: in 1967, the Navajo Nation adopted its own Bill of Rights;¹⁰⁸ the Navajo Nation Judicial Reform Act of 1985 reestablished the Navajo judiciary as a separate and independent branch.¹⁰⁹ Four years later, the 1989 "Title II Amendments"¹¹⁰ reorga-

108. Res. of the Navajo Tribal Council, CO-63-67 (Oct. 9, 1967), *codified at Navajo Nation Code*, tit. 1, §§ 1-9 (1995).

109. Navajo Nation Council Resolution No. CD-94-85 (December 4, 1985), *codified at Navajo Nation Code*, tit. 7, §§ 101 *et seq.* (1995). In a recent opinion, the Navajo Supreme Court explained:

The Navajo Nation government is comprised of three co-equal branches, each with its own area of responsibility and limitations of power. The Judicial Branch was originally created as a separate branch in 1959. Navajo Tribal Council Resolution Nos. CO-69-58, Sec. 1 (October 16, 1958) and CJA-5-59, Sec. 1 (January 9, 1959) (effective April 1, 1959 and codified at Title 7 of the Navajo Nation Code). It was later reestablished as a separate branch by the Navajo Nation Judicial Reform Act of 1985. Navajo Nation Council Resolution No. CD-94-85 (December 4, 1985) (codified as Title 7 of the Navajo Nation Code). . . .

Tuba City Judicial Dist. of the Navajo Nation v. Sloan, No. SC-CV-57-97, at ¶ [16] (Navajo 09/07/2001), available at <http://www.tribal-institute.org/opinions/2001.NANN.0000012.htm>.

110. See Navajo Nation Code, tit. 2, §§ 101-878, 931-978, 1001-1021 (1995). For many years,

the Navajo Nation government operated as a two-branch government: the Legislative and Judicial Branches. Under that scheme, the Navajo Tribal Council controlled both the legislative and executive functions of

government. The Chairman of the Navajo Tribal Council was the chief legislative officer as well as the chief executive officer. This unilateral control left no room for the exercise of checks and balances. This resulted in unchecked abuses of power and eventually to what is now known as the "1989 Crisis."

From the experiences of the 1989 Crisis and in recognition of the fundamental flaw in this two-branch design, the Navajo Nation Council undertook the Title II Amendments which separated governmental powers into three separate and equal branches. "The lack of definition of power and separation of legislative and executive functions . . . also allowed the legislative body to overly involve itself in the administration of programs thereby demonstrating the need to limit the legislative function to legislation and policy decision making and further limit the executive function to implementation of laws and representation of the Navajo Nation." Preamble of Resolution No. CD-68-89, Par. 3. The Title II Amendments redistributed governmental powers among the Legislative, Executive and Judicial Branches. 2 N.N.C. 1. The Title II Amendments, along with the Navajo Nation Bill of Rights and the Judicial Reform Act of 1985, are fundamental, organic laws, which are superior to any conflicting law. See *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319 (1990).

Tuba City Judicial Dist. of the Navajo Nation v. Sloan, No. SC-CV-57-97, at ¶ [16]-[17].

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nized the Navajo government, re-emphasized the principles of separation of powers and checks and balances between the three branches, and “redistributed governmental powers among the Legislative, Executive and Judicial Branches”:

The government of the Navajo Nation belongs to the Navajo people. A government cannot operate effectively unless the citizenry has confidence in its government. Public confidence comes when citizens believe that their government can protect them from tyranny and from violations of their rights. Even the least aware among us know that those who hold powerful government positions are not always trustworthy and honorable. Even the most honorable politician or administrator can experience lapses of sound judgment. Our legislators recognized these shortcomings in 1989. The separation of powers and checks and balances contained in our government provide mechanisms for addressing corruption, abuses of discretion, and lapses of judgment. They prevent each branch from exercising unfettered discretion.

Tuba City Judicial Dist. of the Navajo Nation v. Sloan, at ¶ [19]. “The Title II Amendments, along with the Navajo Nation Bill of Rights and the Judicial Reform Act of 1985, are fundamental, organic laws, which are superior to any conflicting law.” *Id.* at ¶ [17].

The Navajo Nation’s inherent sovereignty includes the “Power to Legislate,” *Handbook* (1982 ed.) at 248, and like other legislative bodies, the Navajo Nation Council has enacted laws on a range of subjects over the years, reflected in the various titles and chapters of the current *Navajo Nation Code*. Besides incorporating the fundamental legislation organizing the three branches of Navajo government and defining election procedures—and in addition to the laws governing tribal mem-

bership, “law and order” (criminal offenses), domestic relations, and decedents’ estates anticipated by the oft-quoted *Wheeler* footnote—the *Navajo Nation Code* includes titles and chapters addressing agriculture and livestock; environmental protection, conservation and wildlife; land and natural resources (water, mines and minerals); trade and commerce (including the Navajo version of the Uniform Commercial Code); motor vehicles; taxation and fiscal matters; public services such as education, health and welfare, public utilities, communications, and community development; and tribal parks and monuments. Of particular significance to this case, Title 15 of the *Navajo Nation Code* sets forth the current Navajo legislation governing labor and employment, and Title 7 governs Navajo courts and judicial procedure.

Of course, Navajo self-government consists of far more than words on a page or sections in a code. What emerges from an examination of the on-going evolution of Navajo self-government “is a picture of a nation hard at work, enacting its sovereignty in creative ways. The Navajo Nation’s adaptation and resistance to federal law allows a distinctly Navajo political and cultural life to continue.” Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 Or. L.Rev. 1109, 1113–1114 (2004). The law of tribal sovereignty exemplified by cases such as *Williams v. Lee* has afforded the Navajo Nation “the breathing room to develop consumer protection, employment, and other statutory laws that relate to core aspects of practical sovereignty, such as provision of jobs and protection from unfair economic practices.” *Id.* at 1139; *see also id.* at 1201 (App.A) (cross-table comparison of Navajo and Arizona state governmental functions).

D. Navajo Sovereignty & the Navajo Courts

1. Creation of the Navajo Court System

The Navajo Nation has long recognized the importance of the Navajo court system to effective self-government.

For generations, Navajos relied on their own traditional conciliatory methods of dispute resolution that emphasized the restoration of harmony, often achieved by hearing all interested parties' viewpoints and reaching a consensus among the parties. It was "a system of justice based on clan relations, harmony, mediation, leadership by reputation and respect, a focus on making victims whole, equality and freedom with responsibility." Wilkins, *The Navajo Political Experience* at 138 (quoting Jayne Wallingford, *The Role of Tradition in the Navajo Judiciary: Reemergence and Revival*, 19 Okla. City U.L.Rev. 141, 142 (1994)); see also Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L.Rev. 175 (1994).

But beginning in 1892, the federal government created an alternative to traditional means of dispute resolution on the Navajo Reservation: Courts of Indian Offenses. These courts had little real power. The judges were Navajos appointed by federal officials, few if any of the judges had formal legal education, they operated under rules promulgated by the Commissioner of Indian Affairs, and government agents reviewed their decisions. The courts primarily resolved petty criminal matters, and seldom resolved civil disputes. Underfunding made even their law and order role largely symbolic.

Michael D. Leider, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Indian Nation*, 18 Am. Ind. L.Rev. 1, 36 (1993) (footnotes omitted); see also Tom Tso, *The Tribal Court Survives in America*, Judges' J., Spring 1986, 22, 25.

Not too many years passed before the Navajos replaced the "bare-bones" Court of Indian Offenses system "with a more developed tribal system": in 1958, the Navajo Council "assumed all costs of law enforcement on the reservation and created a new court system," with "seven trial judges and a chief justice. The court of appeals consisted of the chief justice and two trial court judges..." *Id.* at 37. The Council did so "for several reasons," among them, "[a] successful tribal court system would strengthen the developing tribal government vis-a-vis the communities by making it the provider of law-and-order and the dispenser of justice." *Id.* at 37 (footnote omitted).

External relations, however, were probably even a more important spur to action. Navajo leaders feared that, if they did not have a legal system modeled on Anglo-American law, the states would assume jurisdiction on the reservation. The case of *Williams v. Lee* highlighted the threat. A reservation trader sued a Navajo couple residing on the reservation in Arizona state court to enforce a debt. The Arizona Supreme Court upheld the state court's jurisdiction, and the Navajos appealed to the United States Supreme Court.

Id. (footnotes omitted).¹¹¹ In *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), the Supreme Court reversed the judgment of the Arizona Supreme

111. Accord Stephen Conn, *Mid-Passage—The Navajo Tribe and Its First Legal Revolution*, 6 Am. Ind. L.Rev. 329, 338–339 (1978) ("The Navajos were concerned with the establish-

ment of a legal forum which would be accepted by those who would challenge the tribe's ability to govern.").

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Court, holding that the Navajo tribal courts had exclusive jurisdiction over disputes arising out of consumer credit transactions between Navajos and non-Indians on the Navajo reservation. Noting that the Navajo tribe “has in recent years greatly improved its legal system,” the Court concluded:

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. . . .

358 U.S. at 223, 79 S.Ct. 269 (citations omitted).

The fledgling Navajo courts survived the *Williams* crisis in 1959 and have matured into the leading tribal court system in the country. “Today, in the vast Navajo landscape, home to more than 220,000 people, the nation has seven district courts with 14 trial judges. Appeals can be taken to a three-judge supreme court.” Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* 290–291 (2005). Currently, “The Navajo judicial system hears about 100,000 cases a year, of which 28,000 involve criminal charges.” *Id.* It is “the most complex and sophisticated of Indian court systems,” Wilkins, *The Navajo Political Experience* at 139, and provides both “a fair and familiar forum for non-Navajo persons and a culturally coherent body of laws and procedures for tribal members.”

Krakoff, *A Narrative of Sovereignty*, at 1138 (footnote omitted).

“The Navajo courts have a distinguished history,” and “have stood firm for the principle of separation of powers in the face of various assaults on judicial independence[.]” ¹¹²

One of the basic tenets which derives from the doctrine of separation of powers is judicial independence. The judiciary’s function is to render judgments and to enforce its judgments and orders. No other branch or office of the government may legally interfere with the judiciary’s duty to render judgments and enforce judgments in any way. Likewise, no other branch, office, or entity of the government may influence a court with the intent of altering its decision. Outcomes of cases that are before the courts must be free of any form of political influence Justice for the Navajo people means the courts’ decisions must be free of influence or pressure from the Executive and Legislative Branches.

Tuba City Judicial Dist. of the Navajo Nation v. Sloan, No. SC-CV-57-97, at ¶ [23] (citations omitted).

The Navajo courts have also succeeded in incorporating more traditional methods of dispute resolution, resulting in a “unique melding of Anglo–American–style judicial systems and traditional Navajo customary law.” Krakoff, *A Narrative of Sovereignty* at 1138 (footnote omitted). See also Tom Tso, *1992 Navajo Nation Code of Judicial Conduct: Moral Principles, Traditions, and Fairness in the Navajo*, 76 *Judicature* 15, 16 (1992) (overview of Navajo courts and the re-integration of Navajo customary law); Raymond D. Austin, *ADR and the Navajo Peacemaker Court*, 32:2 *Judges’ J.* 8 (1993); Tom Tso,

¹¹². Wilkinson, *Blood Struggle*, *supra*, at 289.

The Process of Decision Making in Tribal Courts, 31 Ariz. L.Rev. 225 (1989).

2. Jurisdiction of the Navajo Courts

As to civil causes of action, the *Navajo Nation Code* provides that “[t]he District Courts of the Navajo Nation shall have original jurisdiction over . . . All civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation.” *Navajo Nation Code*, tit. 7, § 253(B) (1995). The *Code* in turn defines the “territorial jurisdiction of the Navajo Nation” as:

Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians.

Navajo Nation Code tit. 7, § 254 (1995).

These current provisions reflect the Navajo Nation Council’s 1980 amendment expanding the jurisdiction of the tribal courts. The Council Resolution adopting the amendment noted that while the United States Supreme Court had limited tribal criminal jurisdiction over non-Indians, no such limitations had been imposed on tribal *civil* jurisdiction over non-Indians “‘within Navajo Indian country.’” Krakoff, *A Narrative of Sovereignty*, at 1138 (footnote omitted) (citing Res. of the Navajo Tribal Council, CF-19-80 (1980)). The resolution also made reference to the need for expanded access to the Navajo legal system: “Many non-Indians reside or do business or conduct other activities within the Navajo Nation (Navajo Indian country)

and it is appropriate that these persons be called upon to account for their activities and the effect thereof in the courts of the Navajo Nation.” *Id.* at 1139 (footnote omitted). The 1980 resolution amended *Navajo Nation Code*, tit. 7, § 253(B) to read as it does today. *Id.* Under § 253(B),

The Navajo courts have civil jurisdiction over all persons who cause an action to occur in Navajo Indian Country. *Window Rock Mall v. Day IV*, 3 Nav. R. 58, 59 (1981); *Deal v. Blatchford*, 3 Nav. R. 159 (1982); *Billie v. Abbott*, 6 Nav. R. 66 (1988). Navajo Indian Country is “defined as all land within the exterior boundaries of the Navajo Reservation . . .” 7 N.T.C. § 254 (1985). Navajo Indian Country makes up the Navajo courts’ territorial jurisdiction.

Taylor v. Bradley, No. A-CV-14-88 (Navajo S.Ct. 08/31/1989), at ¶ [24].

3. Navajo Court Jurisdiction Over Non-Indian Defendants

“Navajo courts assert jurisdiction over disputes as broadly as permitted by federal law.” Leider, *Navajo Dispute Resolution*, at 38.

Our jurisdiction statute, 7 NTC Sec. 253 . . . provides for civil jurisdiction over all areas where the prior Navajo Tribal Courts of Indian Offenses had jurisdiction and those provided for by a resolution of the Tribal Council. Today we hold that there is *full civil jurisdiction over any person doing injury within the Navajo Nation* because of the inherent sovereignty of the Navajo Nation and because of the residual jurisdiction of the prior courts.

Deal v. Blatchford, 3 Navajo Rptr. 159, 160 ¶ [20] (Navajo Ct.App.1982) (emphasis added).¹¹³ Remembering that “the source of authority for tribal courts is the inher-

113. Available at <http://www.tribalresourcecenter.org/opinions/opfold->

[er/1982.NANN.0000026.htm](http://www.tribalresourcecenter.org/opinions/opfold-er/1982.NANN.0000026.htm).

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ent sovereignty of their respective tribes and not the United States,”¹¹⁴ and that “tribal court authority is coextensive with sovereignty of the Indian nation itself,”¹¹⁵ *Deal v. Blatchford* reasserted tribal court jurisdiction in the wake of *Oliphant* and *Montana*:

By now there should be utterly no question regarding the right of the Navajo Nation to exercise civil jurisdiction over non-Indians. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); *United States v. Mazurie*, 419 U.S. 544, 557–558, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975); *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Babbitt Ford Inc. v. The Navajo Indian Tribe*, 519 F.Supp. 418 (D.Ariz. 1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982).

[O]ur tribal courts are courts of general jurisdiction, unlike the District Courts of the United States, which are creatures of Congress. As courts of general jurisdiction, the Navajo Courts exercise all jurisdiction which is not forbidden them. Therefore we will exercise general civil jurisdiction over all matters arising within the Navajo Nation. . . .

Id. at ¶¶ [27], [28].

And as the Navajo Supreme Court recently explained:

114. According to the Navajo Supreme Court, “The jurisdiction of the Navajo courts is not derived from a federal grant of power, but rather comes from the Navajo Nation’s inherent sovereignty. *Navajo Tribe v Orlando Helicopter Airways, Inc.*, 1 Nav. R. 40 (1972).” *Pela v. Peabody Coal Co.*, No. A–CV–18–89 (Navajo S.Ct. 09/28/1990), at ¶ [20], available at <http://www.tribal-institute.org/opinions/1990.NANN.0000009.htm>.

115. On this point, the Navajo Court of Appeals quoted Cohen’s *Handbook*:

“The powers of an Indian tribe in the administration of justice derive from the substantive powers of self-government which are legally recognized to fall within the

[A] tribal court has subject matter jurisdiction over non-Indians from several sources. A tribe may exercise its broad inherent sovereignty over non-Indian conduct anywhere within its territory. *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Federal and state statutes, regulations, and intergovernmental agreements may acknowledge or delegate tribal authority over non-Indians. *E.g.* Indian Child Welfare Act, 25 U.S.C. § 1901. Treaties recognize some authority over non-Indians not otherwise within a tribe’s inherent sovereignty. *Means v. Chinle District Court*, 7 Nav. R. 383 (1999). A tribe’s authority as landowner provides additional authority over non-Indians who enter tribal lands. Cohen’s *Handbook of Federal Indian Law* 252 (1982 Ed.).

Nelson v. Pfizer, Inc., No. SC–CV–01–02 (Navajo S.Ct. 11/17/2003), at ¶ [20], available at <http://www.tribal-institute.org/opinions/2003.NANN.0000002.htm>. *Nelson* involved product liability claims against non-Navajo pharmaceutical manufacturers involving a prescription drug product that had been dispensed to and ingested by Navajos living on the reservation.

domain of tribal sovereignty. If an Indian tribe has power to regulate the marriage relationships of its members, it necessarily has power to adjudicate, through tribunals established by itself, controversies involving such relationships. So, too, with other field of local government in which our analysis has shown that tribal authority endures. In all these fields the judicial powers of the tribe are coextensive with its legislative or executive powers.”

Id. at ¶ [26] (quoting *Handbook* (1942 ed.) at 145 (footnotes omitted), and citing Margold, *Powers of Indian Tribes* 55 I.D. 14, 56 (Oct. 25, 1934)).

The Navajo Supreme Court held that the district court erred when it applied *Montana* and its exceptions to determine its jurisdiction over claims arising out of injuries suffered on tribal land.¹¹⁶ Acknowledging that “[w]e have applied these exceptions to cases involving non-Indian fee land,” *id.* at ¶[24] (citing *Mannygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-200 slip op. at 5-8 (August 12, 2003), and *In re Atkinson Trading Company, Inc.*, 7 Nav. R. 275, 282-287 (1997)), *Nelson* declined to extend *Montana* to delimit tribal jurisdiction over non-Indian conduct occurring or causing injury on Navajo tribal lands:

The implications of *Montana* for the Navajo Nation’s power over its territory are clear. A rule requiring the application of *Montana* to all land restricts judicial authority over non-Indian conduct. We take judicial notice of the fact that trust land and tribally-owned fee land comprise virtually all land within the Navajo Nation. There are many non-Indian actors who impact the Navajo Nation in various and significant ways that may escape the authority of the Navajo Nation if our courts are required to apply the *Montana* exceptions to every civil case involving non-Indians. Judicial resources would be stretched if every case brought against a non-Indian required a detailed analysis of the various consensual relationships or direct

effects on the Navajo Nation merely to establish jurisdiction. Further, application of *Montana* to every civil case with a non-Indian defendant undermines the federal policy encouraging the development of tribal courts. See *Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. 9, 15, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987) (“Tribal courts play a vital role in tribal self-government . . . and the federal government has consistently encouraged their development.”) (internal citations omitted). Finally, our responsibility to protect the sovereignty of the Navajo Nation counsels that we not surrender authority unnecessarily.

Based on these considerations, and the explicit restrictions in *Montana* and later cases, including *Hicks*, we decline to extend *Montana* to activity on tribal land. . . . *Hicks* applies *Montana* in the unique situation where the sovereign interests of a state government enforcing state criminal law are at issue, and no further. We decline to extend *Hicks* beyond the United States Supreme Court’s own limitation. . . .

Id. at ¶¶[35]-[36].¹¹⁷ “Until *Hicks*, it was clear that the *Montana* test only applied when the non-Indian activity occurred on non-Indian owned fee land or on certain types of rights-of-way considered the equivalent of fee land. . . .” *Id.* at ¶[29] (citations omitted).¹¹⁸ *Nelson* reaffirms

116. *Nelson* defined “tribal land” to include “both land held in trust by the United States, whether for the Navajo Nation or individual members, and land held in fee by the Navajo Nation or individual members.” *Id.* at n. 1 ¶[44].

117. “While *Hicks* applied *Montana* to a certain type of non-Indian activity on trust land, the U.S. Supreme Court explicitly restricted its holding and left open the issue of general civil authority. It stated that “[o]ur holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing

state law.” *Id.* at 358 n. 2, 121 S.Ct. 2304. Therefore, according to the court, the holding “leave[s] open the question of tribal-court jurisdiction over nonmember defendants in general.” *Id.* *Id.* at ¶[33] (footnote omitted).

118. “See *Montana; Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997) (right-of-way owned by State of North Dakota subject to *Montana*); *Atkinson* (fee parcel within Navajo Reservation); see also *El Paso Nat’l Gas v. Neztosie*, 526 U.S. 473, 483 n. 4, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999) (stating that *Montana* test not nec-

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that, with the exception of *Hicks*' "unique situation," *Montana* applies only to "non-Indian fee lands," not tribal lands.¹¹⁹

4. *Montana* & the NPEA in the Navajo Courts: the *Manygoats* Case

With the Navajo Nation's inherent sovereignty and provisions of the 1868 Treaty clearly in mind, the Navajo Supreme Court "proceed[s] to the contemporary test for civil jurisdiction over non-Indians, taken from *Montana v. United States*, 450 U.S. 544 at 565-566, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and applied in *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997)," in deciding ques-

tions of civil jurisdiction over non-Indian conduct on non-tribal lands. *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo S.Ct. 01/14/2000) ("*Manygoats I*"), at ¶ [43], available at <http://www.tribal-institute.org/opinions/2000.NANN.0000003.htm>.

For example, the *Manygoats* case applied the *Montana* analysis in deciding "whether the Navajo Nation has civil regulatory and adjudicatory jurisdiction over the employment practices of a New Mexico corporation conducting business on fee land within the territory of the Navajo Nation," (*id.* at ¶ [40]), specifically wheth-

essary because activity occurred on trust land within Navajo Reservation); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-31, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (same on Mescalero Apache Reservation)." *Id.*

119. *Dale Nicholson Trust v. Chavez*, No. SC-CV-69-00 (Navajo 01/06/2004), available at <http://www.tribal-institute.org/opinions/2004.NANN.0000004.htm>, carved out an exception to *Nelson*'s limitation of the application of *Montana* to non-Indian owned fee lands:

State officials are a special category of non-Indians for jurisdictional purposes. State officials are not, however, outside Navajo courts' subject matter jurisdiction merely because they are acting as agents of a state government. *Office of Navajo Labor Relations ex rel. Jones v. Central Consolidated*, No. SC-CV-13-98 (Nav.Sup.Ct June 5, 2002) (rejecting Eleventh Amendment state sovereign immunity and other jurisdictional defenses based on status as state officials). In *Jones* we stated that the legal doctrine of "intergovernmental immunity" barring authority over officials of other governments no longer exists. *Id.*, slip op. at 5-6. The district court's legal conclusion in this case was incorrect, as our courts do not lack subject matter jurisdiction over state officials merely because they are agents of a state.

....

Though we rejected an automatic bar to jurisdiction over state officials in *Jones*, su-

pra, we suggested such jurisdiction depends on fulfilling *Montana*, even where, as in *Jones*, the state activity is on tribal land. We authorized a remand in *Jones* to consider jurisdiction in light of *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001), to allow the Office of Navajo Labor Relations to establish more evidence on the two *Montana* exceptions. No. SC-CV-13-98, slip op. at 8. If *Jones* applies to this case, the Trust must affirmatively establish one of the two *Montana* exceptions against the state defendants, even if the actions of the state officials to seize the Trust's property were to have occurred on tribal land.

Id. at ¶ [35], [39] (footnote omitted). "The anomaly in treatment of state official defendants," the court explains, "arises from the U.S. Supreme Court's decision in *Hicks*. In that case the court applied *Montana* to state official activity on tribal land, there a trust allotment. *Hicks*, 533 U.S. at 358, 121 S.Ct. 2304." *Id.* at ¶ [40].

Whether defendant Wood, as an officer of a local special services district, would be deemed a "state official" under *Dale Nicholson Trust* is not clear. Consistent with the court of appeals' mandate, this court's reading of *Montana* and subsequent cases, and a reading of *Dale Nicholson Trust* that embraces District officials among the "state officials" in "a special category of non-Indians for jurisdictional purposes" to whom *Montana* would always apply, this court has determined the Navajo court's subject-matter jurisdiction over Wood by applying *Montana*.

er the civil jurisdiction of the Navajo courts encompassed a wrongful discharge claim pleaded under the Navajo Preference in Employment Act by a Navajo plaintiff who had been fired from her job at the Cameron Trading Post.¹²⁰

Did the Trading Post enter into consensual relationships with the Navajo Nation or its members, through commercial dealing, contracts, leases, or other arrangements, or does the Trading Post's activities affect the Navajo Nation's political integrity, economic security, health, or welfare?

In the case of *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943, 111 S.Ct. 1404, 113 L.Ed.2d 459 (1991), the court upheld Indian nation jurisdiction over a business because of a variety of consensual commercial relationships, including mining leases and contracts, recognition of the Tribe's taxing power, royalty agreements, employment of members, and the location of a business facility within reservation boundaries. The same principles apply here.

Manygoats I, at ¶ [40].

As to *Montana's* first exception, *Manygoats I* found that "[t]he 'consensual relationship' with Navajos is an employer-

employee one, and employment is a contract. The Trading Post does business with Navajos, another form of consensual relationship, and despite disclaimers at the Commission hearing about the volume of business, it is clear that the Trading Post does have such consensual relationships." (*Id.* at ¶ [45].)¹²¹

Manygoats I also found that *Montana's* second exception applied to extend the Navajo Nation's civil authority over employment relationships involving Navajos at the Cameron Trading Post:

[T]he Navajo Nation retains the right and the duty to protect its members, the public at large, and its territory. The Navajo Nation Council recognized that the regulation of employment relations and the protection of workers are essential when it adopted the Navajo Preference in Employment Act. See, 15 N.N.C. § 602(A)(6). Those are among the most important government powers generally, and it would be nonsense to assert that such authority is not an essential part of the Navajo Nation's powers. See, LITTLEFIELD & KNACK, NATIVE AMERICANS AND WAGE LABOR (1996).

Id. at ¶ [47].¹²² Exercise of jurisdiction over the Cameron Trading Post likewise

exception by arguing that Cameron Trading Post hires Navajo employees against its will. The Navajo court rejected this: "We do not buy Atkinson's assertion that the practice of hiring Navajos is involuntary, given their obvious importance to the very business of the establishment (as reflected in its website pages)." *Manygoats*, at ¶ [45].

122. See also *Arizona Public Service Co.*, No. A-CV-08-87, at ¶¶ [102], [104], [108] (Navajo Nation retains the "police" power to protect the health, welfare and safety of its citizens," and "[a]mong the purposes of NPEA is the protection of the health, safety and welfare of Navajo workers. 15 N.T.C. § 602(a)(6).").

120. The non-Indian defendant in *Manygoats* is actually the Atkinson Trading Co., the same litigant as was before the United States Supreme Court in *Atkinson Trading Co. v. Shirley*, discussed *supra*, doing business as the "Cameron Trading Post." *Id.* at ¶ [13]. According to *Manygoats*,

The Trading Post is the area's major employer, and during the period from April through September, it employs approximately 130 people, 85% of whom are Navajo. The Trading Post employs approximately 80 people during the winter, and 70 to 75% of those employees are Navajos.

Id. at ¶ [15].

121. Apparently the Atkinson company tried to evade *Montana's* "consensual relationship"

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comported with the uniform application of Navajo labor laws within the Navajo reservation, and specifically, within the Cameron community:

Aside from the treaty and “*Montana* test” considerations, it would be senseless to conclude that the Navajo Nation cannot regulate labor relations at the Trading Post, when it clearly can regulate the employment practices of businesses just a few yards away near the Cameron Chapter House, all of which employ Navajos and are within Navajo Nation territory.

Id. at ¶ [48]. *Manygoats I* concluded that the “Navajo Nation does have civil regulatory and quasi-judicial adjudicatory jurisdiction over the employment practices of Cameron Trading Post when it conducts business on fee land within the Navajo Reservation,” *id.* at ¶ [49], at least to the extent that the Trading Post employs Navajos.

On a second appeal after remand in the *Manygoats* case, the Navajo Supreme Court held that

[t]he Navajo Nation’s regulation of Cameron’s employment practices easily falls within the first exception, for Cameron has clearly entered consensual relationships with members of the Navajo Nation through employment contracts, by employing tribal members to provide services in exchange for mutually agreed upon wages. Its employment practices are, therefore, subject to the Navajo Nation’s employment regulations.

Manygoats v. Atkinson Trading Co., Inc., No. SC-CV-62-2000 (Navajo S.Ct. 08/12/2003) (“*Manygoats II*”), at ¶ [35].¹²³ The court rejected the trading post’s assertion that its employment of Navajos was not “consensual” because it was not free to discriminate against Navajos under

Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e-1 *et seq.*, and because “there are simply not enough non-Navajos in the area to permit Cameron not to employ Navajo workers,” *id.* at ¶ [36]:

These rules and conditions may limit the range of choices available to contracting parties, but they do not negate the voluntary or consensual nature of otherwise legal contractual relationships. Since Cameron’s employment relationships with its Navajo workers *are* consensual, the Navajo Nation’s regulation of Cameron’s employment practices falls within the first *Montana* exception.

Id. at ¶ [40] (emphasis in original; footnote omitted).

In *Atkinson Trading Co. v. Shirley*, the United States Supreme Court pointed out that “*Montana*’s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.” 532 U.S. at 656, 121 S.Ct. 1825. The *Manygoats II* court addressed this requirement:

Moreover, the Navajo Nation’s exercise of regulatory and adjudicatory jurisdiction over Cameron’s employment practices satisfies the nexus requirement recently articulated by the U.S. Supreme Court in *Atkinson v. Shirley*, 532 U.S. 645, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001). According to *Atkinson*, “*Montana*’s consensual relationship exception requires that the . . . regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.” *Id.* at 656, 121 S.Ct. 1825. Such a nexus clearly exists here. The regulation at issue is the NPEA, which governs the terms and conditions of *employment* of Navajo workers on the Nation’s territory. The relevant consensual relation-

¹²³. Available at <http://www.tribal-institute.org/opinions/2003.NANN.0000016.htm>.

ship is an *employment contract* between Cameron and its Navajo workers; therefore, the nexus requirement is met. *Manygoats II*, at ¶ [41] (emphasis in original). The *Manygoats II* court again held the second *Montana* exception to apply as well:

We take judicial notice of the fact that Navajo Nation unemployment rates are very high. The Navajo Nation Council enacted the NPEA to ensure the economic growth of the Nation and the economic well being of the Navajo workforce. 15 N.N.C. § 602(A). Cameron is the major employer in the area sur-

rounding the trading post, with 7% to 13% of the area's Navajo population working for Cameron at any given time. Most families living in the area rely either directly or indirectly on Cameron for their livelihood. Thus, Cameron's employment practices have a great, and potentially devastating, impact upon the welfare of the local community and economy. Therefore, they properly come within the scope of the Navajo Nation's civil authority.

Id. at ¶ [44] (footnote omitted).¹²⁴

The trading post's consensual employer-employee relationship with Navajo mem-

124. Atkinson challenged the Navajo Supreme Court's *Manygoats II* ruling in federal district court on jurisdictional grounds, and that court granted summary judgment *in Atkinson's favor*. *Atkinson Trading Co. v. Manygoats*, Civil No. CIV 02-1556-PCT-SMM (D. Ariz., decided March 17, 2004). That court acknowledged that the Navajo Nation Labor Commission was "correct that the regulation they have attempted to impose on Atkinson (the NPEA) is directly related to Atkinson's employment of Navajo Nation members, the precise relationship at issue here." *Id.*, slip op. at 13. Yet in order to avoid upholding Navajo enforcement of the NPEA's "just cause" and prior notice requirements, the district court (1) engrafted a new element onto *Montana's* first exception requiring the "consensual relationship" to include the nonmember's explicit or implicit consent to *tribal jurisdiction*—admittedly forsaking the plain meaning of the English language in doing so; and (2) found that "[w]hile employment matters concerning tribal members are certainly related to the economic security and welfare of the tribe, they do not have a *substantial* impact on the tribe as a whole" and thus fall outside of *Montana's* second exception. *Id.*, slip op. at 13-18 (emphasis in original). Ignoring the NPEA's express language limiting its application to "[a]ll employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation," Navajo Nation Code tit. 15, § 604(A) (1995), the federal district court asserted that if "a consensual relationship was formed when the Plaintiff hired a member of the

Navajo Nation as an employee," then "[u]nder this analysis, every employer in the nation would consent to tribal jurisdiction by hiring a tribal member," and this "would yield a result exactly opposite of the general proposition articulated by the Supreme Court; that generally Indian tribes lack civil authority over the conduct of nonmembers. . . ." *Atkinson*, slip op. at 14-15; see also *id.* at 17 ("if the termination of a Navajo employee were to trigger the second *Montana* exception, every employer nationwide that terminated such an employee would be subject to tribal jurisdiction").

To sustain these conclusions, *Montana* must be read to implicitly overrule *Williams v. Lee*—a precedent cited by *Montana* in support of both of its exceptions. See *Montana*, 450 U.S. at 565-566, 101 S.Ct. 1245 (citing *Williams v. Lee*, 358 U.S. at 220, 223, 79 S.Ct. 269). It seems likely that Hugh Lee's Ganado Trading Post did not explicitly or implicitly consent to Navajo jurisdiction when it sold goods on credit to the Williams family and then used state court process to attach and unlawfully sell their sheep for non-payment. See generally *Williams v. Lee*, 83 Ariz. 241, 319 P.2d 998, 1002-1003 (1958), *reversed on other grounds*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). See also *Strate*, 520 U.S. at 457, 117 S.Ct. 1404 ("Montana's list of cases fitting within the first exception . . . indicates the type of activities the Court had in mind: *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reserva-

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bers in *Manygoats* plainly satisfies the *Atkinson* “nexus” requirement, in contrast to the relationship between the non-Indian hotel enterprise and its “nonmember hotel guests” that was subject to the Navajo hotel occupancy tax at issue in the *Atkinson* case. See Krakoff, *A Narrative of Sovereignty*, at 1158 (“The tribal member’s employment claim against *Atkinson* appears to fall squarely within the first *Montana* exception, which allows for tribal jurisdiction over contracts with tribal members, even in the post-*Strate* world of extremely narrow readings of this exception.” (footnote omitted)).

The *Manygoats* opinions also grounded the assertion Navajo civil jurisdiction in the tribe’s essential interest in the growth and regulation of employment on the reservation as activity having “some direct effect on . . . the economic security, or the health and welfare of the tribe.” The development of the Navajo court system itself occurred in part as a response to the fundamental shift in emphasis in Navajo economics from livestock agriculture to a

wage-earning economy since the 1950s. With “a total of 800 employers in Navajoland, including various BIA and governmental sectors,” *Tiller’s Guide* at 328, the need for some degree of local regulation of employment practices and protection of Navajo employees becomes readily apparent.

The *Manygoats* opinions bear directly upon the issues on remand in this case because they reflect the Navajo courts’ view of the extent of Navajo regulatory and adjudicative jurisdiction to apply Navajo employment law to non-Indian employers who employ Navajos within the boundaries of the reservation,¹²⁵ both at the time when the three preliminary orders at issue in this case were entered (*Manygoats I* was decided January 14, 2000), and at the present time.

E. The Navajo Preference in Employment Act (NPEA)

As the *Manygoats* court recognized, “Certainly, the Nation has an interest in

tion sales transaction between non-member plaintiff and member defendants); . . .”) If “*Montana* requires consent to jurisdiction” to be bargained for in “consensual relationships,” where *Williams v. Lee* clearly did not, then *Montana* could easily have said that. It did not, and this court declines to read *Montana* as though it does.

The federal district court ruling in *Manygoats* is currently on appeal to the Ninth Circuit, though it appears that a settlement of the action may be pending. See *Atkinson Trading Co. v. Manygoats*, Case No. 04-15854 (9th Cir., appeal docketed May 4, 2004).

125. *Manygoats II* noted a possible exception to the application of the NPEA to non-Indian employers:

Significantly, this case is distinguishable from *Montana Department of Transportation v. King*, a recent 9th Circuit Court case in which the court held that absent a state or federal statute or treaty, a tribe does not have jurisdiction to regulate the employ-

ment practices of state employees working to maintain a right-of-way through their territory. 191 F.3d 1108 (1999). The issue in *King* was narrowly limited to whether a tribe has jurisdiction over the employment practices of a state—another sovereign—when the state is engaged in performing one of its sovereign duties, namely the maintenance of the highway. *Id.* at 1114. *King* did not deal with whether a tribe may impose employment regulations on private employers doing work on fee land within a Nation’s territory and therefore has no bearing on the case before us.

Id. at ¶ [42] (emphasis in original). *King* involved the State’s non-compliance with a tribal hiring preference ordinance in performing state highway maintenance, rather than any adverse employment action taken against an employee who is a tribal member, and may be distinguishable from *Manygoats* for that reason as well. See *id.* at ¶ [41] (“The regulation at issue is the NPEA, which governs the terms and conditions of employment of Navajo workers on the Nation’s territory.”)

fair employment practices, and it is one which we find to be essential to Navajo Nation government.” *Id.* at ¶ [59]. Safeguarding employment relationships becomes even more critical when jobs are scarce:

Indian reservations usually have the highest rates of unemployment in the nation. Economic development on Indian reservations is therefore a high priority for Indian tribal governments and the federal government. In 1974, Congress passed the Indian Financing Act, 25 U.S.C.A. § 1451 et seq., “to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources” and improve their standard of living. Pub.L. No. 93-262, § 2.

David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 223 (5th ed.2005) (emphasis added).

As *Manygoats I* explains, the Navajo Preference in Employment Act (“NPEA”) was adopted because “the Navajo Nation Council found that the NPEA was needed to protect ‘the health, safety, and welfare of Navajo workers,’ 15 N.N.C. § 602(A)(6),” *Manygoats I*, at ¶ [57]; the Council expressly “recognized that the regulation of employment relations and the protection of workers are essential when it adopted the Navajo Preference in Employment Act. See, 15 N.N.C. § 602(A)(6). Those are among the most important government powers generally....” *Id.* at ¶ [47]. The stated purposes of the NPEA are “to provide employment opportunities and training, promote economic development; lessen the Navajo Nation’s dependence upon off-reservation sources of employment and income; foster economic

self-sufficiency; protect the health, safety, and welfare of Navajo workers; and to foster cooperative efforts with employers to expand employment opportunities. 15 N.T.C. § 2.A. 1-7 (1990).” *Charles v. Furniture Warehouse*, No. A-CV-18-93 (Navajo S.Ct. 07/12/1994), at ¶ [18], available at <http://www.tribal-institute.org/opinions/1994.NANN.0000004.htm>.

In *Arizona Public Service Co.*, the Navajo Supreme Court upheld the validity of the NPEA as an exercise of tribal powers:

We hold that the cited provisions of the 1985 Navajo Preference in Employment Act are valid exercises of the treaty powers, inherent powers, and police power of the Navajo Nation. The Navajo Nation has the power to enact legislation to regulate labor and employment, including provisions to protect the civil rights of workers.

Arizona Public Service Co. v. Office of Navajo Labor Relations, No. A-CV-08-87 (Navajo S.Ct. 10/08/1990), at ¶ [31], available at <http://www.tribal-institute.org/opinions/1990.NANN.0000003.htm>.

1. “At-Will” Employment vs. “Just Cause” Tenure

Under Navajo labor policy as it existed prior to the enactment of the NPEA in 1985, it appears that the Navajo courts applied “the American rule, as harsh as it may be, . . . that an employee at will has no remedy for firing unless:”

- (1) The employee is tenured by contract;
- (2) The employee is tenured by practice of employment (i.e. the custom of the workplace);
- (3) The employee is protected by civil rights legislation or a constitutional guarantee;
- (4) The employee’s firing violates protected speech policies;

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(5) Public policy has been violated (e.g. firing for refusing sexual advances by a supervisor or firing for filing a worker's compensation claim); or,

(6) There is some other identifiable legal protection which has been breached.

Davis v. Navajo Tribe, 4 Nav. R. 50, at ¶¶ [15]-[21] (Navajo Ct.App. 05/12/1983), available at <http://www.tribal-institute.org/opinions/1983.NANN.0000062.htm>; see *id.* at ¶ [23] (plaintiff "is an employee at will, who could be fired for any reason.").

The NPEA was adopted on August 1, 1985, by Navajo Tribal Council Resolution CAU-63-85, and is currently codified at *Navajo Nation Code* tit. 15, §§ 601-619 (1995). The scope of the NPEA is considerably broader than its name might suggest:

NPEA is a general labor code, and it supplanted the Navajo Nation labor policy adopted in 1958 (15 N.T.C. §§ 601-612 (repealed 1985)). The NPEA contains requirements that employers exercise preferential hiring practices in favor of Navajos, employment procedures, *just cause employment tenure*, health and safety guarantees, and training requirements. 15 N.T.C. § 604(b).

Arizona Public Service Co., No. A-CV-08-87, at ¶ [20] (emphasis added). NPEA's "just cause" provision requires that "[a]ll employers shall not penalize, discipline, discharge, nor take any adverse action against any Navajo employee without just cause. A written notification to the employee citing such cause for any of the above actions is required in all cases." *Navajo Nation Code* tit. 15, § 604(B)(8) (1995).

In supplanting prior Navajo labor policy, the NPEA deliberately abandoned the "American rule" presuming at-will employment in favor of a rule establishing employment tenure based upon a "just cause"

standard. As the Navajo Supreme Court recently explained:

The purpose of the NPEA is clearly stated in the statute: "to protect the health, safety, and welfare of Navajo families." 15 N.N.C. § 602(A)(6). *The requirement of just cause for firing springs from this purpose, as it seeks to prevent wrongful terminations and maintain the welfare of Navajo families by keeping wage earners employed.* The Council reinforced and gave further weight to their intent with the following statement: "It is the intention of the Navajo Nation Council that the provisions of this Act be construed and applied to accomplish the purposes set forth above." 15 N.N.C. § 602(B). The broad principles of family welfare written into NPEA by the Council, and the stated desire for the NPEA to accomplish these goals, means that Council intended to provide broad coverage to employees on the Navajo Nation, including necessary power for the Commission to set wrongful firings right through enforcement of back pay awards against employers not specifically excluded.

Tso v. Navajo Housing Authority, No. SC-CV-10-02, at ¶ [32] (Navajo S.Ct. 08/26/2004), available at <http://www.tribal-institute.org/opinions/2004.NANN.0000013.htm> (emphasis added).

Like its other mandatory terms, the NPEA "just cause" requirement applies to "all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the services of any person for compensation, whether as employee, agent, or servant." *Navajo Nation Code* tit. 15, § 603(C) (1995). All contractual "transaction documents" involving work "to be performed within the territorial jurisdiction of the Navajo Nation" are required to include

a provision that the employer or contractor “affirmatively agree to strictly abide by all requirements of this Act[;]” as to contracts in which such express language is absent, “the terms and provisions of this Act are incorporated therein as a matter of law.” Navajo Nation Code tit. 15, § 609(A) (1995). In the event of inconsistency or conflict between a contractual provision and the NPEA’s requirements, the contractual provision “shall be legally invalid and unenforceable and the Act shall prevail and govern the subject of the inconsistency or conflict.” Navajo Nation Code tit. 15, § 609(A) (1995).

The Navajo Supreme Court has held the NPEA to apply to a wide spectrum of employers, both Navajo and non-Navajo, including an Arizona public utility,¹²⁶ a local school district,¹²⁷ a historic Indian trading post,¹²⁸ an Indian Health Service contractor,¹²⁹ as well as the Navajo Nation itself, including the Navajo courts.¹³⁰

From and after its adoption of the NPEA on August 1, 1985, the Navajo Nation struck a new bargain with employers—itsself included—for the benefit of Navajos working within the Nation’s boundaries, guarantying each covered employee a greater degree of employment security than mere employment “at will.”

As interpreted by the Navajo Supreme Court,

At the very least, “‘just cause’ implies that the employer must have fair rea-

sons for taking adverse actions against an employee and that those reasons are supported by the facts of the case.” *Dilcon* at 9. Indeed,

[n]ot all employee misconduct will meet the standard for just cause. . . . The misconduct must be *substantial*. Thus, a minor neglect of duty, an excusable absence, a minor misrepresentation, rudeness, and even filing a defamation action against the employer have been held not to establish just cause.

Rothstein, et al., 2 Employment Law § 8.8 (2d ed., 2003) (emphasis in original; internal citations omitted).

Manygoats II, at ¶¶ [66]-[68] (quoting *Dilcon Navajo Westerner/True Value Store v. Jensen*, No. SC-CV-52-98, slip op. at 9 (Navajo S.Ct.2000)). The NPEA also requires “written notification to the employee citing such cause for any” adverse employment action involving a covered employee “in all cases.” Navajo Nation Code tit. 15, § 604(B)(8) (1995).

The just cause and notice requirements of NPEA reflect the obvious exercise of the Navajo Nation’s acknowledged power to “make their own laws and be ruled by them,” *Williams v. Lee*, even with respect to relationships with non-Navajo employers. There can be no meaningful conceptual difference between Navajo jurisdiction over the rights of individual Navajos as consumers of goods sold by non-Navajos—jurisdiction expressly vindicated by the Su-

126. *Arizona Public Service Co.*, No. A-CV-08-87.

127. *Office of Navajo Labor Relations ex rel Bailon v. Central Consolidated School District No. 22*, No. SC-CV-37-00 (Navajo 06/23/2004), available at <http://www.tribal-institute.org/opinions/2004.NANN.0000008.htm>.

128. *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98; *Manygoats v. Atkinson Trading Co.*, No. SC-CV-62-2000.

129. *Staff Relief, Inc. v. Polacca*, No. SC-CV-86-98 (Navajo 08/18/2000), available at <http://www.tribal-institute.org/opinions/2000.NANN.0000006.htm>.

130. *Tuba City Judicial Dist. of the Navajo Nation v. Sloan*, No. SC-CV-57-97.

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preme Court in *Williams v. Lee*—and Navajo jurisdiction over the rights of individual Navajos as employees of non-Indian employers working within the Navajo reservation boundaries. 358 U.S. at 220–223, 79 S.Ct. 269.

2. NPEA Protection for Non-Navajo Spouses

Besides the tribal members covered by the Act, the NPEA also extends its protections to cover “non-Navajo spouses” of Navajo members:

When a non-Navajo is legally married to a Navajo, he or she shall be entitled to preference in employment under the Act. Proof of marriage by a valid marriage certificate shall be required. In addition, *such non-Navajo spouse shall be required to have resided within the territorial jurisdiction of the Navajo Nation for a continuous one-year period immediately preceding the application for Navajo preference consideration.*

Navajo Nation Code, tit. 15, § 614(A) (1995) (emphasis added). In addition to preference coverage, eligible non-Navajo spouses “shall also have and enjoy *all other employment rights granted to Navajos under the Act*, it being understood that Navajos retain a priority right with respect to provisions of the Act concerning preferential treatment in employment opportunities.” Navajo Nation Code, tit. 15, § 614(C) (1995) (emphasis added). “All other employment rights” would encompass, *inter alia*, the “just cause” and notice requirements. *See* Navajo Nation Code, tit. 15, § 604(B)(8) (1995).

3. Administrative Enforcement of the NPEA

Direct enforcement of the NPEA begins with the Office of Navajo Labor Relations (ONLR): “When a violation of the NPEA

occurs, a claimant can file a charge with ONLR. 15 N.T.C. § 10.B.1, 3 (1990),” or the ONLR may initiate an enforcement action on its own. *Charles v. Furniture Warehouse*, No. A-CV-18-93 (Navajo S.Ct. 07/12/1994), at ¶ [19], *available at* <http://www.tribal-institute.org/opinions/1994.NANN.0000004.htm>. “In this process, an investigation is then conducted by ONLR to determine whether there is probable cause to believe a violation of the NPEA has occurred. 15 N.T.C. § 10.C.1 (1990). A hearing will then be held by the Navajo Nation Labor Commission (NNLC). 15 N.T.C. § 11.C. (1990).” *Id.* at ¶ [20].

The Navajo Nation Labor Commission “has primary jurisdiction to determine compliance with the Act in a wrongful termination matter.” *Office of Navajo Labor Relations v. West World*, No. A-CV-22-92, at ¶ [33] (Navajo S.Ct. 4/18/1994), *available at* <http://www.tribal-institute.org/opinions/1994.NANN.0000005.htm>. Generally, then, NPEA claims must first be brought before the Navajo Nation Labor Commission (NNLC) before being filed in the Navajo district courts. Section 612(C) of the NPEA provides that “[t]he person or party *in whose favor a Commission’s decision providing for remedial action is entered* shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation *to enforce the remedial action; . . .*” Navajo Nation Code tit. 15, § 612(C) (1995) (emphasis added).

The “NNLC and ONLR have the authority to remedy NPEA violations. But these administrative agencies do not have the authority to redress violations of statutory law beyond the NPEA.” *West World* at ¶ [21]. “The question of whether a complainant is required to bring a claim before the NNLC implicates the doctrine of ex-

haustion of administrative remedies.” *Id.* at ¶ [22].

“[E]xhaustion of administrative remedies is the concept that administrative agencies should complete [their] procedures before the courts interfere.” *Id.* NPEA enforcement is “a process which has been committed to the agency by the legislature and it should be allowed to run its course”; the exhaustion doctrine “prevents confusion that may arise if a party seeks relief in two forums; and requires parties to address their grievances without going to court.” *Id.* at ¶ [22] (citing *Navajo Skill Center v. Benally*, 5 Nav. R. 93, 96 (1986)).

Exhaustion of administrative remedies “is, however, not always required.”

It is not required if the administrative remedy is inadequate, which includes an unreasonable delay, inability to come to a decision, or lack of authority to grant the relief the party is entitled to. . . . Also, exhaustion of administrative remedies is not required if irreparable injury is imminent or the agency is acting in excess of its authority. . . . Thus, if the complainant alleges one of these exceptions, the complainant is not required to exhaust the agency’s remedies.

When the complainant is not required to exhaust the agency’s remedies, he or she may file with a district court because those courts have general civil jurisdiction, which includes jurisdiction to hear claims raised under applicable federal laws. 7 N.T.C. §§ 204, 253 (1985).

Id. at ¶¶ [23]-[24] (citations omitted). The Navajo district courts “can hear NPEA claims if the parties have exhausted their administrative remedies or fall under one of the exceptions to the rule.” *Id.* at ¶ [26].

As to which forum, the district court or the NNLC, should determine whether the

complainant’s allegations fall under one of the exceptions to the exhaustion of remedies rule, the Navajo Supreme Court held in *Charles* that “[t]he NNLC must make that determination.” *Id.* at ¶ [27].

Under the NPEA, the ONLR is given the specific responsibility of monitoring and enforcing the Act, 15 N.T.C. § 10.A. (1990), and to perform that duty, it must work closely with the NNLC—the administrative hearing body under the NPEA. The ONLR is also required to investigate and attempt to conciliate charges in which it finds that there is probable cause to believe the NPEA has been violated. 15 N.T.C. §§ 10.C., 10.F. (1990). To permit persons with employment claims to bypass this investigation and conciliation process and proceed directly to the courts would defeat one of the principle goals of the NPEA: “To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.” 15 N.T.C. § 2.A.7 (1990).

There are considerations of judicial efficiency and economy as well. To allow complainants to immediately bring their claims to the district courts would overload an already overburdened Navajo Nation Court System. See, *PC & M Construction Co. v. Navajo Nation et al.*, No. A-CV05-93 (decided August 26, 1993). Furthermore, it would open the flood gates and encourage complainants to concoct claims outside the NPEA, in an attempt to circumvent the administrative process. Thus, the NNLC, the agency with expertise on NPEA matters, must initially determine whether the complainant is alleging valid claims of statutory violations outside of the NPEA.

Id. at ¶¶ [27]-[28].

Where complainants have initiated NPEA enforcement proceedings through

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the Office of Navajo Labor Relations, it is for the Navajo Nation Labor Commission to decide in the first instance whether the complainants are somehow excused from the exhaustion requirement, before an action seeking to enforce the NPEA may be brought in the Navajo district courts.

4. *Singer, et al. v. San Juan County, et al. and the NPEA's Exhaustion Requirement*

As the Navajo Supreme Court explained in *Charles v. Furniture Warehouse*,

There needs to be a starting point in this process of determining the different aspects of employer-employee relationships. It is only reasonable to begin with the appropriate agency charged with the responsibility to oversee these matters. The Navajo Nation has a comprehensive and detailed plan that has regulations analogous to the National Labor Relations Board and covers the areas of concern to the working Navajo public similar to any federal and state employment statute, if not better. The Navajo Nation Council has charged the ONLR and NNLC with the responsibility to assure compliance with those laws. Thus, the process must be initiated with the ONLR and NNLC.

Charles, No. A-CV-18-93 (Navajo 07/12/1994), at ¶ [30], available at <http://www.tribal-institute.org/opinions/1994.NANN.0000004.htm>. The Navajo Supreme Court reiterated the same point a year later in *Raymond v. Navajo Agricultural Products Industry* in affirming the dismissal of a Navajo employee's wrongful discharge lawsuit:

Raymond should have sought an administrative remedy under the Navajo Preference in Employment Act (NPEA). According to the NPEA, "[a]ll employers shall not penalize, discipline, discharge nor take any adverse action

against any Navajo employee without just cause." 15 N.T.C. § 604B(8) (1990). A potential claimant can file a charge with the Office of Navajo Labor Relations, the agency responsible for the monitoring and enforcement of the NPEA. 15 N.T.C. §§ 610A and B (1990). NPEA provides for full enforcement and remedy in sections 10 through 12 (codified at 15 N.T.C. §§ 610-612 (1990)). Remedies available to plaintiffs are both prospective and retrospective. Appeal to the Navajo Nation Supreme Court is available to any party under the NPEA. 15 N.T.C. § 613A (1990). Raymond should have exhausted her administrative remedies before seeking relief in the courts. *Begay v. Board of Election Supervisors*, 2 Nav. R. 120, 125 (1979).

No. SC-CV-26-94 (Navajo S.Ct. 07/20/1995), at ¶ [39], available at <http://www.tribal-institute.org/opinions/1995.NANN.0000013.htm>. It thus appears that by the time Riggs and Dickson's disputes with the Health District arose in 1999, the NPEA exhaustion requirement had become settled law in the Navajo courts.

In this case, while it appears that Singer, Riggs and Dickson each filed a complaint with the ONLR in early 1999, (see Pertinent Parts Navajo Ct. R. ("ONLR Complaint" & "ONLR App. For TRO" Tabs)), there does not appear to have been any disposition of those complaints by the Navajo Nation Labor Commission prior to the commencement of *Singer, et al. v. San Juan County, et al.*, in April of 1999, or prior to the entry of the three orders now at issue in December of 1999 and March of 2000. The three orders make no reference to either the dismissal of the plaintiffs' ONLR proceedings or the entry of any Commission "decision providing for remedial action" based upon their complaints. And like the original Navajo court Com-

plaint, the plaintiffs' "Complaint for Damages (Modified)," filed March 14, 2000, in *Donna Singer, et. al. v. San Juan County, et al.*, pleads that "all Labor Commission and Office of Navajo Labor Relations claims of the Plaintiffs will not be prohibited from being heard in this Court, *after such time as the plaintiff's employment claims have gone through their respective administrative process*," (*id.* at 4 ¶ 18 (emphasis added)), suggesting that even after all three of the Navajo court orders had been entered, the plaintiffs' NPEA claims were still pending before the ONLR and the Labor Commission.

Keeping in mind that the NPEA vests "primary jurisdiction to determine compliance with the Act in a wrongful termination matter" in the Navajo Nation Labor Commission, *Office of Navajo Labor Relations v. West World*, No. A-CV-22-92 (Navajo S.Ct. 4/18/1994), at ¶ [33], including the question whether the exhaustion of the NPEA's ONLR/NLCC administrative remedies will be required, *Charles v. Furniture Warehouse*, No. A-CV-18-93 (Navajo S.Ct. 07/12/1994), at ¶ [27], the silence of the December 28, 1999 Order and the March 1, 2000 Order leaves unresolved the question whether that court had jurisdiction under Navajo law to hear and determine the plaintiffs' NPEA claims.

The record now before this court suggests that it did not.

F. Navajo Tort Law

As summarized above, in the Navajo court proceeding, the Part II Plaintiffs

pleaded tort claims of "wrongful hiring," defamation, "tortious interference with future contractual relations," intentional and negligent infliction of emotional distress, "theft," "violation of fiduciary duties," "misfeasance," and "malfeasance in office," at least three of which have been recognized as a basis for relief in the Navajo courts. As courts of general jurisdiction,¹³¹ the Navajo district courts have subject matter jurisdiction over civil claims arising out of employment grievances, including causes of action for defamation,¹³² infliction of emotional distress, interference with contractual relations, and denial of civil rights. *See, e.g., Manuelito v. Kellogg*, No. WR-CV-217-87 (Navajo S.Ct. 08/22/1989), at ¶¶ [13], [14], [17]-[20], [53] (citing Navajo Nation Code, tit. 7, § 253(2)), available at <http://www.tribal-institute.org/opinions/1989.NANN.0000024.htm>.

And "the Navajo courts have jurisdiction 'over any person doing injury within the Navajo Nation....' *Deal v. Blatchford*, 3 Nav. R. 159, 160 (1982); Accord, *Keith v. Allred*, 3 Nav. R. 191 (Chinle Dist. Ct.1981)." *Billie v. Abbott*, No. A-CV-34-87 (Navajo S.Ct. 11/10/1988), at ¶ [48], available at <http://www.tribal-institute.org/opinions/1988.NANN.0000012.htm>.

Indeed, "The Navajo Nation inherently has the authority to protect its members from fraud, deceit, undue influence, overreaching, unconscionable conduct, torts and the other kinds of personal conduct the civil law is designed to regulate."

131. "Our district courts are courts of general jurisdiction under the Navajo Nation Code, 7 N.N.C. § 253, but their jurisdiction is limited by federal statutes and by United States Supreme Court case law." *Nelson v. Pfizer, Inc.*, No. SC-CV-01-02 (Navajo S.Ct. 11/17/2003), at ¶ [20], available at <http://www.tribal-institute.org/opinions/2003.NANN.0000002.htm>.

132. *See Davis v. Navajo Tribe*, 4 Nav. R. 50, at ¶ [22] (Navajo Ct.App. 05/12/1983), available at <http://www.tribal-institute.org/opinions/1983.NANN.0000062.htm> ("Defamation actions are fashionable in the employment law field these days, and they may or may not relate to employment, depending upon the circumstances.").

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Benally v. John, 4 Nav. R. 39, No. A-CV-27-81 (Navajo Ct.App. 05/05/1983), at ¶ [45].¹³³ “Our courts have the authority to declare that a wrong has been committed and, in equity cases, to give an individual an order to correct the wrong. . . .” *Id.*

[5] The question now before this court is whether on the facts in this case, Navajo adjudicative jurisdiction properly extended to reach the non-Navajo County and Health District defendants for purposes of these tort claims in light of *Montana* and more recently, *Strate v. A-1 Contractors*. As noted above, where “tribes possess authority to regulate the activities of non-members, ‘[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.’” *Strate*, 520 U.S. at 453, 117 S.Ct. 1404 (quoting *Iowa Mutual*, 480 U.S. at 18, 107 S.Ct. 971).

The Navajo Nation’s inherent civil authority over employment relationships involving Navajo members includes the power to prescribe both statutory and common-law standards of conduct for employers and employees. Thus, as *Strate* indicates, we presume that the Navajo courts have civil jurisdiction over disputes arising out of those employment relationships. See *Manuelito v. Kellogg*, No. WR-CV-217-87 (Navajo S.Ct. 08/22/1989), at ¶ [53].

As part of the acknowledged inherent power of Navajos “to make their own laws and be ruled by them,” *Williams v. Lee*, 358 U.S. at 220, 79 S.Ct. 269; *Nevada v. Hicks*, 533 U.S. at 361, 121 S.Ct. 2304, the Navajo Nation may also adopt legal standards of conduct that apply within its territorial jurisdiction to protect the interests of Navajo members in their persons, property and relationships generally. The recent cases acknowledge this. *Nevada v. Hicks* noted that “there was little doubt that the tribal court had jurisdiction over

such tort claims,” 533 U.S. at 368, 121 S.Ct. 2304, referring to *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999), a case involving Navajo plaintiffs’ claims of injuries suffered as a result of the Uranium mining operations of non-Navajo companies. And the Navajo Nation’s “right of self-government includes the right to decide what conduct on the reservation will subject the Indians living there to civil liability in the Tribal court,” in relation to non-Indian as well as tribal member plaintiffs. *Enriquez v. Superior Court*, 115 Ariz. 342, 343, 565 P.2d 522, 523 (Ct.App. 1977) (holding that a tribal court had exclusive jurisdiction in tort cases involving actions brought by a non-member against a tribal member resulting from an accident occurring on the Papago Reservation) (citing *Williams v. Lee*, 358 U.S. at 220, 79 S.Ct. 269, and *Fisher v. District Court of Sixteenth Judicial District*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976)).

The Navajo courts have been developing their own body of Navajo common-law tort law, drawing upon both mainstream and traditional Navajo remedial concepts. See, e.g., J.R. Mueller, *Restoring Harmony through Nalyeeh: Can the Navajo Common Law of Torts be Applied in State and Federal Forums?* 2 Tribal L.J. 3 (2001/2002), available at http://tlj.unm.edu/articles/volume_2/mueller/index.php; Robert Yazzie, “Life Comes From It”: Navajo Justice Concepts, 24 N.M. L.Rev. 175 (1994); Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: the Navajo Experience, 1969-1992*, 18 Am. Indian L.Rev. 379 (1993). The Navajo Nation Council has also undertaken to incorporate traditional Navajo legal principles in its statutory codification. See Kenneth Bobroff, *Diné Bi Beenahaz’áanii: Codifying Indigenous*

133. Available at <http://www.tribal-institute.org/opinions/1983.NANN.0000042.htm>.

Consuetudinary Law in the 21st Century, 5 Tribal L.J. (2004/2005), at http://tlj.unm.edu/articles/volume_5/_dine_bi_beenahazaanii_codifying_indigenous_consuetudinary_law_in_the_21st_century/index.php.

Though the reported cases are few, it appears that where non-Indian defendants are involved, the Navajo courts assert the full extent of Navajo civil jurisdiction over conduct that “cause[s] an action to occur” or that results in an injury to Navajo members on tribal land, (*see supra*, note 116 & accompanying text),¹³⁴ and they apply *Montana* to determine their jurisdiction over non-Indian defendants involving conduct or injuries occurring on non-tribal, non-Indian fee lands within Navajo boundaries.

This approach comports with the Tenth Circuit case law applying the *National Farmers* exhaustion requirement to tort claims against non-Indians for conduct and injuries on tribal lands. In *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1508 (10th Cir.1997), *cert. denied*, 522 U.S. 1090, 118 S.Ct. 880, 139 L.Ed.2d 868 (1998), the court of appeals affirmed the district

court’s ruling requiring non-Indian defendants to exhaust tribal judicial remedies as to wrongful death and injury claims brought by tribal members in tribal court:

We agree that strong tribal interests are implicated by these claims. The mill that allegedly produced the toxic and radioactive waste was located on the reservation pursuant to a lease with the tribe, and the alleged victims of the tort are tribal members residing on the reservation. *The tribal nexus is strong, as is the interest of the tribe as a sovereign in protecting and vindicating the rights of its residents*, as well as its interest as lessor of the land for the mill.

Id. at 1508. *See also Navajo Nation v. Intermountain Steel Bldgs., Inc.*, 42 F.Supp.2d 1222 (D.N.M.1999) (reading *Kerr-McGee* as recognizing “that tribes retain a core sovereign interest in regulating the health and welfare of tribal members” through adjudication of tort claims in tribal court); *McDonald v. Means*, 309 F.3d 530 (9th Cir.2002) (amended opinion); *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1072 (9th Cir.1999).¹³⁵

134. Of course, as *Nelson* reminds us, the exercise of Navajo court jurisdiction remains subject to due process considerations. *Nelson v. Pfizer, Inc.*, at ¶ [40] (“Our courts, like other courts, must have both subject matter jurisdiction and personal jurisdiction to properly hear a case. *Yazzie v. Yazzie*, 5 Nav. R. 66, 68 (1985). Though, as we hold today, our subject matter jurisdiction over matters occurring on tribal land is broad, that does not mean our courts may hear any case with some impact on tribal members. Personal jurisdiction over the defendant is still required. *Sells v. Espil*, 6 Nav. R. 195, 197 (1990).”) (also citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)).

135. A recent Ninth Circuit case has taken a different approach. In *Ford Motor Co. v. Todecheene*, 394 F.3d 1170 (9th Cir.2005). “Esther Todecheene, an on-duty law enforce-

ment officer employed by the Navajo Department of Public Safety, died when her Ford Expedition patrol vehicle rolled over while she was driving on a dirt road within the Navajo Nation. . . . The road is a reservation road, maintained by the Tribe. There is no federal or state right-of-way, and the road is not located on non-Indian fee land.” 394 F.3d at 1172 (citation omitted). Officer Todecheene’s parents sued the manufacturer in Navajo tribal court, alleging that Officer Todecheene’s death resulted from a defective seat belt mechanism in her Ford vehicle—one of a fleet of Ford vehicles purchased by the Navajo Nation for use by its officers. Ford rushed the litigation into the federal courts, challenging the Navajo court’s jurisdiction.

Choosing to “confront the issue . . . whether the Tribe may assert jurisdiction over a nonmember for conduct on tribal land,” and following the trend it perceived in cases such as *Atkinson* and *Hicks*, the panel ruled 2–1

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That analysis bears upon this case for this reason: Riggs' defamation claim against Wood involves allegations of "fraud" that damaged Riggs' reputation among co-workers and others, causing injury to Riggs *on the Navajo Reservation*. *Nelson* indicates that the Navajo courts' civil jurisdiction applies to provide a Navajo tort remedy for this injury.

VII. ENFORCEMENT OF THE NAVAJO COURT ORDERS IN THIS FORUM

In remanding this case, the court of appeals stated:

We are unwilling to enforce judgments of tribal courts acting beyond their au-

thority, especially where defendants have a federal right "to be protected against an unlawful exercise of Tribal Court judicial power," *Nat'l Farmers*, 471 U.S. at 851, 105 S.Ct. 2447, 85 L.Ed.2d 818; *see Wilson*, 127 F.3d at 810 (holding that "federal courts must neither recognize nor enforce tribal judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law").

that *Montana* applies to the jurisdictional issue regardless of the status of the land. *Id.* at 1174–1179. Applying *Montana* to the facts, *Ford* concluded that

Although the tribe does have an interest in protecting the lives of its police officers on tribal roads, unfortunately that interest does not fit within the parameters of the self-government *Montana* exception. That exception has been narrowly defined as *encompassing events that interfere with a Tribe's ability to enact or be governed by its own laws*. *See Hicks*, 533 U.S. at 360–61, 121 S.Ct. 2304, 150 L.Ed.2d 398.

Id. at 1182–1183 (emphasis added). According to the *Ford* majority, then, the Navajo Nation has an insufficient interest in protecting the safety of its own police officers—one of whom died in the line of duty while patrolling tribal lands on tribal roads using a tribal vehicle purchased by the Navajo Nation for her use—to justify the exercise of tribal civil jurisdiction over her parents' wrongful death claim against the party who allegedly caused her death.

What *does* it mean to have the "ability to enact and be governed by its own laws" if the Navajo Nation cannot extend the scope of its own laws to protect the very lives of its own police officers on its own lands, and in its own courts? When *does* the exception for "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe" apply?

Ford expresses concern that "if *Montana*'s second exception requires no more'" than

actually causing injury or death to tribal members, "'the exception would severely shrink the rule,'" *id.* at 1181 (quoting *Strate*, 520 U.S. at 458, 117 S.Ct. 1404), and then attempts to preserve the sanctity of the second *Montana* exception by narrowing it to the point of absolute abstraction, never to be applied in the real world. If *Ford* is correct, then as a matter of federal law the Navajo Nation *cannot* make and enforce its own tort law protecting its members against the dangerously defective products of others—clearly "prevent[ing] the Tribe from enacting or being governed by its laws." *Id.* at 1183. And *Ford* would necessarily subject claims of Navajo plaintiffs arising on the reservation "to a forum other than the one they have established for themselves." *Fisher v. District Court of the Sixteenth Judicial District*, 424 U.S. 382, 387–388, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); *see Iowa Mutual*, 480 U.S. at 16, 107 S.Ct. 971 ("Adjudication of such matters by any nontribal court also infringes on tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.").

Years ago, one discerning critic framed the essential query in these words: "If, Indians reasoned, justice is for society's benefit, why isn't our justice accepted?" Vine Deloria, Jr., *Custer Died for Your Sins: An Indian Manifesto* 9 (1969). A fair question, certainly, and one to which *Ford v. Todecheene* offers no satisfactory answer.

County and Health District defendants for the purpose of adjudicating the Part II Plaintiffs' claims, and if so, whether and with what degree of recognition that court's orders must now be enforced against these defendants in this forum.

A. Theories re: the Navajo Court's Subject-Matter Jurisdiction in *Singer, et al. v. San Juan County, et al.*

"Key" to the Tenth Circuit's ruling in this case was "the question whether the courts of the Navajo Nation may exercise jurisdiction over a case brought by private individuals against a Utah county alleging violations of Navajo law"; according to the panel, "resolution of this question lies in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) (defining the scope of tribes' inherent sovereignty)." 309 F.3d at 1218.

1. Navajo Court Jurisdiction as a Federal Question

[6] Generally, the scope of tribal court's jurisdiction over non-Indian litigants presents a federal question over which federal district courts have jurisdiction. See *National Farmers*, 471 U.S. at 853, 105 S.Ct. 2447; *MacArthur*, 309 F.3d at 1224. In contrast to cases such as *National Farmers* and *Iowa Mutual*, this case was commenced in this forum by the tribal court *plaintiffs* rather than the tribal court defendants—a distinction the court of appeals thought may be significant:

Although a tribal court *defendant* may bring a federal cause of action for an injunction where the basis of the claim is assertion of "a right to be protected against an unlawful exercise of Tribal Court judicial power," *Nat'l Farmers*, 471 U.S. at 851, 852, 105 S.Ct. 2447, 85 L.Ed.2d 818, this right to be free from tribal court interference does not necessarily support a federal claim seeking

enforcement of a tribal decree. Although the sovereign powers of the Navajo Nation are held "only at the sufferance of Congress," *Wheeler*, 435 U.S. at 323, 98 S.Ct. 1079, 55 L.Ed.2d 303, these powers are rooted in Navajo, not federal, law. "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (en banc) (footnote omitted). To the extent appellants' complaint anticipates a defense arising under federal law, it runs up against the well-pleaded complaint rule. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908).

309 F.3d at 1224–1225. The court of appeals also noted that "[b]ecause we recognize a federal right to be free from tribal court interference, it stands to reason that an action for a mere declaration that a tribal court defendant has no such right might be permitted as well." *Id.* at 1224 n. 7 (citing Fed.R.Civ.P. 57; 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2767, at 650 (3d ed.1998)). But the *MacArthur* panel declined to decide "whether such relief is available at this interlocutory stage of the parties' tribal court litigation." *Id.*

Since remand, the Part II Plaintiffs have asked that this court enforce the three Navajo court orders essentially "as issued," but they have also asserted that this court lacks jurisdiction under Article III of the Constitution to determine the subject-matter jurisdiction of the Navajo court that entered them:

If Tribal Court jurisdiction is one of 'inherent sovereignty' under a Treaty,

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the supreme law of the land, (U.S. Constitution Article VI) under common law, then Congress is the one who defines jurisdiction. If Tribal Court jurisdiction is based upon a delegation of powers, then Article III courts have the say. (Plaintiffs' Briefing on *Montana*, filed February 13, 2003 (dkt. no. 492), at 6.)

The scope of the subject-matter jurisdiction of tribal courts does not present a non-justiciable "political question" committed to the policy discretion of the Legislative or Executive Branches. Much of the existing legal authority defining the subject-matter jurisdiction of Indian tribal courts over non-Indian litigants such as the County and Health District defendants consists of "'judicially made' federal Indian law," that is, federal case law precedent representing a species of "federal common law"—"which 'common law' federal courts develop as 'a "necessary expedient" when Congress has not "spoken to a particular issue."'" *Lara*, 541 U.S. at 207, 124 S.Ct. 1628 (quoting *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 233–237, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (quoting *Mihwaukee v. Illinois*, 451 U.S. 304, 313–315, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981)) (emphasis supplied by Court)). As such, Congress, in the exercise of its "plenary and exclusive" power in Indian affairs remains free to "change 'judicially made' federal Indian law through . . . legislation," but unless and until Congress acts, this "intricate web of *judicially made* Indian law" remains among the "laws . . . of the United States" under which a "federal question" may arise within the meaning of 28 U.S.C.A. § 1331. *Lara*, 541 U.S. at 206, 124 S.Ct. 1628 (quoting *Oliphant*, 435 U.S. at 206, 98 S.Ct. 1011 (emphasis supplied by Court)); *National Farmers*, 471 U.S. at 857, 105 S.Ct. 2447 ("§ 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction").

As to the question "whether an Indian tribe retains the power to compel a non-Indian [litigant] to submit to the civil jurisdiction of a tribal court," the federal courts likewise remain empowered and duty-bound under Article III to answer that question "by reference to federal law." *National Farmers*, 471 U.S. at 852, 105 S.Ct. 2447 (tribal jurisdictional question "is one that must be answered by reference to federal law and is a 'federal question' under § 1331"); *Iowa Mutual*, 480 U.S. at 16–20, 107 S.Ct. 971 (same jurisdictional query in case in § 1332 diversity jurisdiction).

[7] That "federal question" is raised no less by an attempt to enforce a tribal court order in a federal forum than it is by an attempt to avoid its enforcement by resort to a federal forum, *National Farmers*, 471 U.S. at 852, 105 S.Ct. 2447; *Iowa Mutual*, 480 U.S. at 16–20, 107 S.Ct. 971; *Strate*, 520 U.S. at 443–445, 117 S.Ct. 1404; *Atkinson Trading Co.*, 532 U.S. at 648–649, 121 S.Ct. 1825; *Nevada v. Hicks*, 533 U.S. at 356–357, 121 S.Ct. 2304, particularly where, as here, plaintiffs seek declaratory relief establishing that the orders are enforceable. (See Amended Complaint at 99 (citing 28 U.S.C. §§ 2201, 2202).) Implicit in the recognition of tribal court judgments by federal or state courts as a matter of comity or full faith and credit is the question whether the tribal court had subject-matter and personal jurisdiction to render an enforceable judgment—which necessarily implicates the federal question identified in *National Farmers*. Though a plaintiff seeking enforcement of a tribal court judgment does not plead a cause of action created by federal law, the action nonetheless is one "arising under" federal law because it "turn[s] on substantial questions of federal law." See *Grable & Sons Metal Products, Inc. v. Darue Engineer-*

ing & Manufacturing, — U.S. —, 125 S.Ct. 2363, 2367, 162 L.Ed.2d 257 (June 13, 2005);¹³⁶ cf. Kaighn Smith, Jr., *Federal Courts, State Power, and Indian Tribes: Confronting the Well-Pleaded Complaint Rule*, 35 N.M.L.Rev. 1 (2005).

2. Subject-Matter Jurisdiction Over the County and Health District Defendants Under the *Montana* Exceptions

The parties express drastically different views of the subject-matter jurisdiction of the Navajo Nation and the Navajo courts over the County and Health District defendants based upon the facts found—at least preliminarily—by the Navajo Nation District Court.

(i) Plaintiffs' Theory re: Jurisdiction

The Part II Plaintiffs submit that a series of congressional enactments beginning with the Indian Civil Rights Act of 1968 and “post dating *Montana v. United States*” create a “presumption OF tribal jurisdiction over non-Indians within Indian Country, without variation between Navajo and non-Indian . . .” (Pltfs’ Summ. Judg. Mem. (504), at 9.)

Under . . . the clear and unambiguous language of statutes, this Court can sustain, under principals [sic] of full faith and credit, the Navajo Court Orders as an exercise of ‘inherent sovereign’ rights

(25 U.S.C. § 1301(2)) to ‘enact and enforce laws’ (25 U.S.C. § 3665) within the confines of due process and equal protection to ‘any person’ (25 U.S.C. § 1302) in ‘Indian lands’ the Tribes are ‘responsible’ for governing, as the ‘most appropriate’ Courts for resolving civil disputes in ‘suits at law’ (25 U.S.C. § 1351), based upon the Navajo Nation’s right to enact and enforce their laws (25 U.S.C. § 3665(1), 3601, 3602), for Indians and non-Indians alike. If the intent of Congress is clear and unambiguous, judicial inquiry stops . . .

(*Id.* at 9–10 (emphasis in original; footnotes omitted) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 & n. 21, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)).) And any statutory ambiguity in this regard should be resolved by liberal construction, with “‘doubtful expressions being resolved in favor of the Indians.’” (*Id.* at 11 (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 63 L.Ed. 138 (1918)). According to the plaintiffs, “Congress has determined [that] the Tribe’s are responsible for the governance of Indian lands, and their courts are the ‘most’ appropriate forums for doing so.” (*Id.* (citing 25 U.S.C.A. §§ 3601, 3602, 3651, 3665).)¹³⁷

Plaintiffs’ presumption thus becomes essentially irrebuttable—the cited statutes

¹³⁶. There is, however, another longstanding, if less frequently encountered, variety of federal “arising under” jurisdiction, this Court having recognized for nearly 100 years that in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues. *E.g.*, *Hopkins v. Walker*, 244 U.S. 486, 490–491, 37 S.Ct. 711, 61 L.Ed. 1270 (1917). The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of unifor-

mity that a federal forum offers on federal issues, see ALI, Study of the Division of Jurisdiction Between State and Federal Courts 164–166 (1968).

125 S.Ct. at 2367.

¹³⁷. Plaintiffs also point to excerpts from the legislative history of the Tribal Justice Support Act of 1993. *See id.* at 11 n. 6 (quoting S.Rep. No. 88, 103d Cong., 1st Sess. 8 (1993); H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993); “Plaintiffs’ Briefing on *Montana*,” filed February 13, 2003 (dkt. no. 492), at 9 (same).)

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create the presumption either by their plain meaning or by liberal construction of any ambiguous terms, allowing for no contrary result. Plaintiffs assert as much, arguing that the presumption favoring tribal jurisdiction forecloses further judicial inquiry as to the extent of tribal jurisdiction:

Since Congress has the authority over defining Tribal sovereignty, and has affirmatively acted to define the Tribal Court's jurisdiction over 'Indians and non-Indians alike,' and not affirmatively restricted the jurisdiction to only Indians, *the Court is bound to presume the jurisdiction* and enforce the Navajo Court orders as being within the Navajo Court's jurisdiction.

("Plaintiffs' Briefing on *Montana*," filed February 13, 2003 (dkt. no. 492), at 10; *see also* Pltfs' Summ. Judg. Mem. (504), at 20 ¶ 19 (same).)

Given this congressionally mandated presumption favoring tribal jurisdiction, plaintiffs openly dispute *Montana*'s "general proposition" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," 450 U.S. at 565, 101 S.Ct. 1245; "This presumption," plaintiffs contend, "is opposite Congress' presumption of Tribal Court jurisdiction" found in post-*Montana* legislation and "case law prior to the *Oliphant* 'inherent divestiture' theory..." (*Id.* at 2-3.)¹³⁸ According to the plaintiffs, "[T]his Court has no subject matter jurisdiction over a *Montana* briefing, since

Congress has altered the presumptions under *Montana*, based upon inherent sovereignty and federal common law, placing the Navajo Orders in a position of being fully enforced within the fiduciary duty of the United States." (*Id.* at 5.)¹³⁹

Plaintiffs' assertion that this court lacks subject-matter jurisdiction to determine the Navajo court's jurisdiction appears to be grounded in a misapprehension of the reasoning of *United States v. Enas*, 255 F.3d 662 (9th Cir.2001) (en banc), *cert. denied*, 534 U.S. 1115, 122 S.Ct. 925, 151 L.Ed.2d 888 (2002). Plaintiffs read *Enas* to say that "Tribal Courts' exercise of inherent sovereignty is not a 'Constitutional' issue where the *Courts* have the ability to restrict a Tribe[']s inherent sovereign authority, but one of federal common law wherein "*Congress [not the Courts] had the power to expand and contract the inherent sovereignty that Indian tribes possess because it has legislative authority over federal common law.*" *Enas*, at 669-71." (Pltfs' Cert. Pet. at 14 (emphasis in original).)

Enas considered whether the implicit divestiture of tribal criminal jurisdiction over nonmember Indians found in *Duro v. Reina* is a matter of constitutional interpretation not to be altered by subsequent legislation, or is a matter of federal common law, well within the power of Congress to change as it sees fit. *Enas* adopted the latter view, as did *United States v. Lara* three years later.¹⁴⁰ Noth-

138. Plaintiffs pressed the identical argument in their Petition for a Writ of Certiorari, *Riggs v. San Juan County*, No. 02-1253 (U.S.S.Ct., filed February 6, 2003), at 12. As noted above, certiorari was denied on June 2, 2003. *See* 539 U.S. 902, 123 S.Ct. 2246, 156 L.Ed.2d 110 (2003).

139. Plaintiffs also assail *Oliphant* as being "unmoored from any Congressional affirmative diminishment of Tribal Court jurisdic-

tion," (*id.* at 8), a statement that is essentially accurate, as far as it goes. (*See supra*, at 946-48 & n. 951.)

140. In *United States v. Lara*, 324 F.3d 635, 639 (8th Cir.2003) (en banc), the Eighth Circuit held that "the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court.... Once the federal sovereign divests

ing in *Enas*—or for that matter, in *Lara*—puts the question of the scope of Indian tribal jurisdiction over nonmembers out of the jurisdictional reach of the federal courts under Article III. It remains the justiciable “federal question” that *National Farmers* says it is. *Enas* and *Lara* simply indicate that if Congress is dissatisfied with the Court’s delineation of the limits of tribal jurisdiction as a matter of federal common law, it may adjust those limits through further legislation, as it did in reviving tribal jurisdiction over nonmember Indians after *Duro v. Reina* in 1990.

Congress may “change ‘judicially made’ federal Indian law,” and within constitu-

a tribe of a particular power, it is no longer an inherent power and it may only be restored by delegation of Congress’s power.” The Supreme Court reversed. *United States v. Lara*, 541 U.S. 193, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004).

141. As it turns out, then, the Court’s contemporary formulation of the implied divestiture of inherent tribal sovereignty in *Oliphant*, et al., merely reflects the Court’s transitory reading of the policies of the “political branches” of the federal government, gauged at a particular point in time. Through the exercise of its “plenary and exclusive” power in Indian affairs, Congress remains free to “adjust” the legal status of Indian tribes and “relax restrictions on tribal sovereignty previously imposed by the political branches,” essentially as Congress sees fit, thereby supplanting the Court’s “judicially-made” limitations on inherent tribal sovereignty. *United States v. Lara*, 541 U.S. 193, 200, 204–205, 207, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004).

It thus becomes possible for the Court to say of the 1990 legislative restoration of tribal criminal jurisdiction over nonmember Indians that “the tribes’ possession of this additional criminal jurisdiction” over nonmember Indians “is consistent with our traditional understanding of the tribes’ status as ‘domestic dependent nations’”—after having previously held the tribes to have been *divested of that same jurisdiction* by reason of their “depen-

tional limits, at least, the courts would be constrained to give effect to the legislative adjustment.¹⁴¹

The question raised by plaintiffs’ “presumption” argument that this court must decide is whether such an “adjustment” has indeed occurred, displacing *Montana* as the governing law regarding Indian tribal civil jurisdiction over non-Indians.

(ii) San Juan County’s Theory re: Jurisdiction

The San Juan County defendants assert that as to them, “the Navajo Tribal Court merely claims jurisdiction without any analysis or other support.” (San Juan County Defendants’ Memorandum Re-

dent” status. *Lara*, 541 U.S. at 204–205, 124 S.Ct. 1628 (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831)). “True, the Court held in those cases that the power to prosecute nonmembers was an aspect of the tribes’ external relations and hence part of the tribal sovereignty that was divested by treaties and by Congress,” *id.* at 205, 124 S.Ct. 1628—or by “implication as a necessary result of their dependent status,” according to the Court’s opinions at the time. See *Duro v. Reina*, 495 U.S. 676, 686–689, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990).

But these holdings reflect the Court’s view of the tribes’ retained sovereign status as of the time the Court made them. They did not set forth constitutional limits that prohibit Congress from changing the relevant legal circumstances, *i.e.*, from taking actions that modify or adjust the tribes’ status.

....

The Court in these cases based its descriptions of inherent tribal authority upon the sources as they existed at the time the Court issued its decisions. Congressional legislation constituted one such important source. And that source was subject to change.

....

Consequently we do not read any of these cases as holding that the Constitution forbids Congress to change “judicially made” federal Indian law through this kind of legislation....

Lara, 541 U.S. at 205, 206, 207, 124 S.Ct. 1628 (citations omitted).

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garding Tribal Court Jurisdiction, filed February 20, 2003 (dkt. no. 499) (“Cnty.Juris.Mem.”), at 5 ¶ 13 (citing December 28, 1999 Order).)

As to *Montana*’s “consensual relationship” exception, the County defendants submit that they did not enter into a consensual relationship with the Navajo Nation or its members: the IHS contract was between a federal agency and the Health Services District, not San Juan County. The land on which the clinic sits is fee land, owned by the State of Utah. It is not owned by San Juan County. San Juan County did not hire or employ the two tribal members left in this lawsuit, Riggs and Dickson. San Juan County did not hire Singer, a non-Indian. The only connection San Juan County Defendants have with the Health Services District, as pertaining to this specific lawsuit, is the creation of the San Juan Health Services District pursuant to *Utah Code Ann.* §§ 17A-2-130, *et seq.* in order to facilitate the delivery of medical care to residents of remote San Juan County. Once created, San Juan Health Services District became an independent entity. . . .

(*Id.* at 10.)

Concerning *Montana*’s second exception, the County defendants submit that there was “no conduct by the San Juan County Defendants at issue in this matter which would threaten or have a direct effect on the political integrity, the economic security, or the health and welfare of the tribe, [*Montana*, 450 U.S. at 565, 101 S.Ct. 1245,] because San Juan County Defendants did not operate the Montezuma Creek Clinic nor did they contract with anyone to provide Health Services to the Navajo Tribe.” (*Id.*) They argue that they can be considered as “state actors” within the rationale of *Nevada v. Hicks*, and that “the Indians’ right to make their own laws

and be governed by them does not exclude all state regulatory authority on the reservation,” including the County’s creation of the San Juan Health Services District pursuant to Utah law. (*Id.* at 11.) They also emphasize the non-tribal ownership of “the land on which the dispute arose”: “[T]he absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction.[’]” (*Id.* (quoting *Hicks*, 533 U.S. at 360, 121 S.Ct. 2304 (emphasis supplied by County defendants).))

Concerning the County defendants sued individually, they argue that under *Nevada v. Hicks*, “it does not matter whether San Juan County Defendants were sued in both their personal and official capacity,” because if tribal jurisdiction was to apply, ““the operations of the [state] government may at any time be arrested at the will of the [tribe],” ’” ostensibly an undesirable result. (*Id.* at 12 (quoting *Hicks*, 533 U.S. at 365, 121 S.Ct. 2304 (quoting *Tennessee v. Davis*, 100 U.S.(10 Otto) 257, 263, 25 L.Ed. 648 (1879))); *see also Hicks*, 533 U.S. at 365, 121 S.Ct. 2304 (“We think . . . that the distinction between individual and official capacity suits is irrelevant.”).)

The County defendants thus count themselves among those who can enter a reservation to enforce State laws without being subjected to the jurisdiction of the tribal courts for having done so, consistent with *Nevada v. Hicks*. *See Hicks*, 533 U.S. at 365–366, 121 S.Ct. 2304 (“Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation”); *id.* at 358 n. 2, 121 S.Ct. 2304 (“Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law.”).

The Navajo Tribe cannot regulate . . . the actions of the San Juan County Defendants when they act pursuant to Utah law or federal law. If the tribe cannot regulate these actions then, under *Nevada [v. Hicks]*, the tribe certainly does not possess jurisdiction over San Juan County Defendants for claims stemming from their performance of their duties under state law.”

(Cnty. Juris. Mem. at 13.) Concerning defendant Halls, in particular, the County defendants submit that “[t]ribal courts lack jurisdiction over state officials for causes of action related to the performance of official duties.” (Cnty. Juris. Mem. at 14.) “In *Nevada [v. Hicks]*, the Supreme Court stated that ‘state officials . . . are properly held accountable for misconduct and civil rights violations in either State or Federal Court, but not in Tribal Court,’ and Halls is a State official.” (*Id.*) (citing *Hicks*, 533 U.S. at 364, 121 S.Ct. 2304, and *Arnold v. McClain*, 926 F.2d 963 (10th Cir.1991)).¹⁴²

(iii) The Health District’s Theory re: Jurisdiction

The Health District defendants assert that “[p]laintiffs cannot overcome the overwhelming presumption *against* the existence of subject matter jurisdiction in the Navajo Tribal Court,” and that “contrary to plaintiffs’ arguments, this Court has authority to determine the subject matter jurisdiction of the Navajo Tribal Court, and *Montana* continues to govern the subject matter analysis.” (San Juan Health District Defendants’ Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 496), at 2, 4.)

Beginning with *Montana*’s first exception, the Health District defendants argue

that the plaintiffs cannot identify a “consensual relationship” within the scope of that exception: plaintiff Singer’s employment with the District was not “with the Tribe or its members” because Singer is not a Navajo member; and as to Riggs and Dickson, “the consensual relationship is inapplicable because” according to *Nevada v. Hicks*, “the exception covers only private commercial relationships, and it cannot be extended to the official actions of governmental officials and employees.” (San Juan Health District Defendants’ Memorandum Regarding Subject Matter Jurisdiction and in Support of Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 497) (“Dist. Summ.Judg. Mem.”), at 10 (citing *Hicks*, 533 U.S. at 359 n. 3, 121 S.Ct. 2304).)

And the District relies on *Montana Dept. of Transp. v. King*, 191 F.3d 1108 (9th Cir.1999), which held that a tribe lacked jurisdiction to enforce its employment preference requirements against a state agency that had detailed crews of its existing employees to perform highway maintenance on state rights-of-way traversing the reservation. The State right-of-way did not involve a consensual relationship under *Montana*, the Ninth Circuit concluded, because “transfers of property interests between governmental entities create property rights; they generally do not create continuing consensual relationships.” 191 F.3d at 1113 (citations omitted). The second *Montana* exception also did not apply because tribal control of state highway maintenance “was not necessary to preserve the right of the tribe to ‘make their own laws and be ruled by them.’”

The Community agreed to the right of way, and the State of Montana became

¹⁴² The County defendants also noted that *Hicks* held that tribal courts lack jurisdiction to entertain lawsuits under 42 U.S.C.A.

§ 1983. (Cnty. Juris. Mem. at 13 (citing *Hicks*, 533 U.S. at 366–367, 121 S.Ct. 2304).)

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responsible to maintain the road at its own expense. Thus, the Community's assertion of authority over the State's own employees goes beyond the "internal functioning of the tribe and its sovereignty" and instead impinges on one of the State of Montana's sovereign responsibilities—maintaining Highway 66 and the right of way at its own expense. *Id.* at 1114. The Health District defendants argue that "[l]ike the highway in *King*, the Health District's Montezuma Creek Clinic was located on non-Indian land and was operated as a service to County residents." (Dist. Summ. Judg. Mem. at 12.)

As to *Montana*'s second exception, the Health District defendants submit that the exception requires more than "a showing that the safety of tribal members has been jeopardized," citing *Strate*, 520 U.S. at 458–459, 117 S.Ct. 1404, and that "[p]laintiffs' claims have absolutely nothing to do with internal tribal self-government"—as exemplified by *Montana*'s examples of tribal powers—"but rather address their own treatment as individuals and the alleged treatment of certain patients at the Clinic." (*Id.* at 13.)

B. Analysis & Conclusions re: the Navajo Court's Subject-Matter Jurisdiction in *Singer, et al. v. San Juan County, et al.*

1. *Montana* & the Plaintiffs' "Congressional Presumption"

The Part II Plaintiffs would reconcile the existing case precedent concerning tribal jurisdiction over non-Indians with the current federal policies encouraging tribal self-determination by simply discarding the case law and keeping the policies.

In *Lara*, the Supreme Court validated the essential premises underpinning the

plaintiffs' "congressional presumption" theory, *viz.*, that Congress may rewrite the federal law of Indian tribal jurisdiction over nonmembers through simple legislation, and may "remov[e] the restrictions on the tribes' inherent authority" without any need to delegate federal authority to the tribes. *Lara*, 541 U.S. at 207, 124 S.Ct. 1628. "*Oliphant* and *Duro* make clear that the Constitution does not dictate the metes and bounds of tribal autonomy, nor do they suggest that the Court should second-guess the political branches' own determinations." *Id.* at 205, 124 S.Ct. 1628. *Lara* did not read *Montana*, *Duro* or other cases "as holding that the Constitution forbids Congress to change 'judicially made' federal Indian law through this kind of legislation." *Id.* at 207, 124 S.Ct. 1628.

The question pressed upon this court by plaintiffs' argument is whether Congress through more recent legislation has in fact "relax[ed] the restrictions imposed by the political branches on the tribes' inherent [civil] authority" articulated in *Montana* and its progeny, as plaintiffs now insist.

The post-*Montana* legislative acts cited by plaintiffs include the Indian Tribal Justice Act of 1993, the Indian Tribal Justice Technical and Legal Assistance Act of 2000, and Pub.L. No. 101–511's amendment to 25 U.S.C.A. § 1301(2) (2001), relaxing the implied restrictions on tribal criminal jurisdiction over nonmember Indians delineated in *Duro*. As we have already seen, these examples of recent legislation are framed in terms firmly supportive of tribal self-government and effective tribal court systems. (*See supra* at 942–46.) The legislative history of the 1993 Act cited by plaintiffs reflects this policy, *see* H.R.Rep. No. 103–205, at 5–31 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 2425–2452; H.R. Conf. Rep. No. 103–383, at 9–14 (1993); *see also*

S.Rep. No. 103-88 (1993); so does the legislative history of the 2000 Act. *See* S.Rep. No. 106-219 (1999); H.R.Rep.No. 106-819, Part 1 (2000). For example, in its 1993 Report, the Senate Committee on Indian Affairs observed:

Tribal justice systems are critical to the maintenance and enhancement of the inherent and delegated sovereignty of tribal governments. Except when the Congress has established that federal jurisdiction is exclusive, tribal courts hear cases on virtually all aspects of governmental and private activity. The scope of tribal court jurisdiction is now becoming better understood, as several Supreme Court rulings and numerous federal court decisions have acknowledged by holding that exhaustion of tribal court remedies is required before appeals involving the exercise of jurisdiction by a tribal court can be made to federal court. In addition, when federal courts do review decisions of tribal courts, they employ the same standard of review that is applied in reviewing federal district court decisions. *FMC v. Shoshone Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir.1990).

It is the Committee's view that strong tribal justice systems are necessary both as a function of the exercise of tribal sovereignty and as a means to assure the fair and just administration of the laws enacted by tribal governing bodies and laws enacted by the Congress that require implementation by tribal governments

143. It does not appear that the issue of tribal civil jurisdiction over non-Indians under *Montana* was even on the table at that time. *See generally* Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 Am. Indian L.Rev. 109 (1992) (describing process leading to the enactment of the permanent amendment to § 1301(2)); Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdic-*

S.Rep. No. 103-88, at 3, 1993 WL 304728 (1993).

Yet these Acts do *not* enact into positive law any language explicitly reviving inherent tribal civil authority over non-Indians beyond the limits now set by *Montana*, *Strate*, *Atkinson*, and *Hicks*.

The 1990 amendment to 25 U.S.C.A. § 1301(2) enlarged the definition of tribal “powers of self-government” to mean “the inherent power of Indian tribes, hereby recognized and affirmed, *to exercise criminal jurisdiction over all Indians*,” but it did not add the phrase “to exercise civil jurisdiction over all *persons*,” or “over all members and nonmembers,” or the like—which plainly would have achieved the result that plaintiffs now urge. 25 U.S.C.A. § 1301(2) (2001) (emphasis added).¹⁴³

Neither did the 1993 Act or the 2000 Act.

This may explain why the Court did not address these statutes in deciding *Atkinson* or *Hicks*, and why no federal court of appeals to date, at least, has held that either or both of these Acts impliedly limited or overruled *Montana* and *Strate*. Nor does the legislative history suggest that Congress intended to “adjust” or “relax” the limitations on tribal civil jurisdiction over non-Indians prescribed by *Montana* or *Strate*. The committee reports say nary a word on the subject, and several make no reference to either *Montana* or *Strate*. *See* H.R.Rep. No. 103-205, at 5-31 (1993), as reprinted in 1993 U.S.C.C.A.N. 2425-2452; H.R. Conf. Rep. No. 103-383,

tion of Tribal Courts Over Non-Member Indians, 38 Fed. B. News & J. 70 (1991); *see also* H.R.Rep. No. 102-61, at 7 (1991); S.Rep. No. 102-168 at 4 (1991) (describing amendment as “recogniz[ing] and reaffirm[ing] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians”); H.R. Conf. Rep. No. 102-261 (1991).

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at 9–14 (1993); S.Rep. No. 103–88 (1993); S.Rep. No. 106–219 (1999); H.R.Rep.No. 106–819, Part 1(2000).

In Section 2 of the Indian Tribal Justice Act of 1993, Congress made express findings concerning the importance of tribal courts:

(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;

(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights; . . .

25 U.S.C.A. § 3601 (2001). The Senate Committee on Indian Affairs explained the significance of these findings:

Finding (5) was added to reflect the decision of the United States Supreme Court in the case of *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), with regard to the authority of Indian tribal governments to provide for the protection of the health and safety of reservation residents and the political integrity of the tribe. From all of the testimony presented to the Committee, it is clear that tribal justice systems are an integral part of the efforts of Indian tribal governments to exercise that authority.

Finding (6) was added to emphasize that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals. The language tracks similar language of the Supreme Court in its ruling in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56

L.Ed.2d 106 (1978), in which the Court stated that “[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians,” *Id.* at 65, 98 S.Ct. 1670.

This recognition of tribal court jurisdiction and authority is found in numerous other rulings of the Supreme Court and the federal courts, See e.g., *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10, (1987):

“although the criminal jurisdiction of the tribal courts is subject to substantial limitation, their civil jurisdiction is not similarly restricted.” *Id.* at 15, 107 S.Ct. 971;

adjudication of reservation affairs “by any non-tribal court * * * infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.” *Id.* at 17, 107 S.Ct. 971; . . .

S.Rep. No. 103–88, at 8, 1993 WL 304728 (1993). Given this reading of *Montana*, *Martinez* and *Iowa Mutual*, Congress likely saw no need to alter the legal framework established by those cases.

The 2000 Act incorporated Findings 5 and 6 in its own legislative findings, nearly verbatim, without further explanation. See 25 U.S.C. § 3651(5), (6) (2001).¹⁴⁴ In discussing “Civil Legal Matters,” the Senate Committee on Indian Affairs made no reference to jurisdictional questions. S.Rep. No. 106–219, at Part B (1999). The House Committee Report was silent on the subject as well. H.R.Rep. No. 106–819 Part 1 (2000).

appropriate forums for the adjudication of disputes affecting personal and property rights on Na-

¹⁴⁴. Finding 6 of the 2000 Act amplifies the 1993 Act’s Finding by noting the recognition of “tribal justice systems as the *most* appro-

Some scholarly commentary has suggested a legislative “fix” for the implied divestitures by *Oliphant* and *Montana*,¹⁴⁵ but this court has yet to find any commentary asserting that such a fix has already been accomplished by the existing legislation.

Lara certainly “gives the green light” to further consideration of such legislative “adjustment” by the Congress, and clearly indicates that if Congress “enact[s] a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes,” then “that fact makes all the difference.” 541 U.S. at 207, 124 S.Ct. 1628. But absent a new statute, this court must follow the law as propounded by controlling Supreme Court precedent, consistent with the court of appeals’ mandate in this case, and exercise its jurisdiction over “federal questions” under Article III to determine the reach of Navajo tribal civil jurisdiction over the defendants in this case.

2. The Defendants’ Reading of *Montana*

The County defendants’ reading of *Montana*—and even more so, *Nevada v. Hicks*—suggests at least some yearning for the relative simplicity of a “bright line” test for the reach of tribal civil jurisdiction, such as land status,¹⁴⁶ or status as a State or local government official.¹⁴⁷ In a simi-

tive lands.” 25 U.S.C.A. § 3651(6) (emphasis added).

145. See, e.g., Frank Pommersheim, *Is There a Little (or Not So Little) Constitutional Crisis Developing in Federal Indian Law?: A Brief Essay*, 5 U. Pa. J. Const. L. 271, 284–285 (2003); L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 New Eng. L.Rev. 669, 674–675 (2003).

146. See Cnty Juris. Mem. at 11 (absence of tribal ownership has been “[v]irtually conclusive of the absence of tribal civil jurisdiction.”) (quoting *Hicks*, 533 U.S. at 360, 121

lar vein, the Health District defendants read *Hicks* to say that *Montana*’s “consensual relationship” exception “covers only private, commercial relationships, and cannot be extended to the official actions of governmental (Health District) officials and employees,”¹⁴⁸ but this seems to read *Hicks* more broadly that *Hicks* read itself: “Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law,” thus leaving open “the question of tribal-court jurisdiction over nonmember defendants in general,” *Hicks*, 533 U.S. at 358 n. 2, 121 S.Ct. 2304 (emphasis added), and likewise leaving open the question of tribal jurisdiction over state officials not directly engaged in law enforcement activity: “We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis.” *Id.* at 373, 121 S.Ct. 2304. *Hicks* expressly stops short of insulating any general category of nonmember conduct from tribal civil jurisdiction beyond its deliberately narrow holding as to state law enforcement officers executing search warrants in investigating an off-reservation offense.

Both Justices Ginsburg and Souter (joined by Justices Kennedy and Thomas)

S.Ct. 2304 (emphasis supplied by County defendants)); but cf. *Hicks*, 533 U.S. at 382 & n. 4, 121 S.Ct. 2304 (Souter, Kennedy & Thomas, JJ. concurring) (“It is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact,” but “[l]and status, for instance, might well have an impact under one (or perhaps both) of the *Montana* exceptions.” (citations omitted)).

147. (Cf. Cnty. Juris. Mem. at 11–14.)

148. (San Juan Health District Defendants’ Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 496), at 3.)

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recognized this limitation of the *Hicks* Court's holding in their concurring opinions, 533 U.S. at 375–76, 121 S.Ct. 2304 (Souter, Kennedy & Thomas, JJ. concurring); *id.* at 386, 121 S.Ct. 2304 (Ginsburg, J. concurring), with Justice Ginsburg penning a separate concurrence to make this precise point:

I join the Court's opinion. As the Court plainly states, and as Justice Souter recognizes, the "holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law." *Ante*, at 358, n. 2, 121 S.Ct. 2304 (opinion of the Court); *ante*, at 376, 121 S.Ct. 2304 (Souter, J., concurring). The Court's decision explicitly "leave[s] open the question of tribal-court jurisdiction over nonmember defendants in general," *ante*, at 358, n. 2, 121 S.Ct. 2304, including state officials engaged on tribal land in a venture or frolic of their own, see *ante*, at 19, 121 S.Ct. 2304 (a state officer's conduct on tribal land "unrelated to [performance of his law-enforcement duties] is potentially subject to tribal control").

I write separately only to emphasize that *Strate v. A–1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), similarly deferred larger issues.

Strate concerned a highway accident on a right-of-way over tribal land. For nonmember governance purposes, the accident site was equivalent to alienated, non-Indian land. *Id.*, at 456, 117 S.Ct. 1404. . . . But we "express[ed] no view on the governing law or proper forum" for cases arising out of nonmember conduct on tribal land." *Id.*, at 442, 117 S.Ct. 1404. The Court's opinion, as I understand it, does not reach out definitively to answer the jurisdictional questions left open in *Strate*.

533 U.S. at 386, 121 S.Ct. 2304 (Ginsburg, J., concurring). Nor was the point lost on our own court of appeals. *MacArthur*, 309 F.3d at 1227 n. 9.¹⁴⁹

An administrator's decision to discipline a skilled Physician's Assistant of long tenure for an erroneous entry on his first-ever time card in an agency where time-card errors seemingly ran rampant, or to retain a clinic office clerk as a "temporary" employee in perpetuity may be characterized in a number of ways, but cannot fairly be termed the "performance of . . . law enforcement duties." 533 U.S. at 373, 121 S.Ct. 2304. *Hicks* expressly left questions as to tribal control of such unrelated conduct to "the outcome of *Montana* analysis." *Id.*¹⁵⁰

149. Footnote 9 of *MacArthur* reads:

In another telling passage, the Court in *Hicks* stressed the narrowness of its holding: "We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis." *Id.* at 373, 121 S.Ct. 2304.

In light of *Hicks*, then, *Montana Dept. of Transp. v. King*, 191 F.3d 1108 (9th Cir.1999), cannot compel the conclusion that the Navajo Nation lacks the subject-matter jurisdiction to enforce the NPEA and other laws against non-Indian employers who, like the Health District, have satisfied *Montana* by entering

into consensual relationships with employee tribal members on the Reservation.

150. *Montana*'s first exception speaks of "non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," 450 U.S. at 565, 101 S.Ct. 1245. Footnote 3 of *Hicks* commented that the action of a state game warden in obtaining a tribal court search warrant did not qualify "as an 'other arrangement' within the meaning of this passage," because when "[r]ead in context, an 'other arrangement' is clearly another *private consensual* relationship, from which the official actions at issue in this case are far removed." *Hicks*, 533

Strate, *Atkinson* and *Hicks* leave essentially no room for doubt that *Montana*—with its “two prime exceptions” still intact—governs the issues now before this court on remand.

3. The Navajo Court’s Findings of Jurisdictional Facts

[8] In *Manygoats I*, the Navajo Supreme Court aptly observed that “jurisdiction is highly-factual. Jurisdictional deci-

sions in contemporary Indian affairs law are largely based upon facts going to the relationship of non-Indians with Indian nations and their members, and where certain activities took place.” *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo 01/14/2000), at ¶ [23], available at <http://www.tribal-institute.org/opinions/2000.NANN.0000003.htm>.¹⁵¹ According to our own court of appeals, “when reviewing tribal court decisions on jurisdictional is-

U.S. at 359 n. 3, 121 S.Ct. 2304 (emphasis in original).

The Health District defendants read this footnote as expanding *Hicks*’ narrow holding into a general rule immunizing “the official actions of governmental officials and employees” from tribal jurisdiction—a reading of *Hicks*’ holding that plainly did not command the views of a majority of the Justices on the Court that decided the case, if anyone at all.

Nor does it persuade the court in this case.

151. More recently, the Navajo Supreme Court announced a higher pleading standard for jurisdiction over non-Navajos on fee land within the reservation:

The facts the plaintiff must allege for jurisdiction over a non-Indian generally depend on the status of the land where the cause of action arose. If the case concerns tribal land the plaintiff needs only to allege specific facts showing that the cause of action arose on tribal land. See *PacifiCorp v. Mobil Oil Corp.*, No. SC-CV-27-01, slip op. at 6 (Nav.Sup.Ct. November 24, 2003); *Pfizer*, No. SC-CV-01-02, slip op. at 8.

If the cause of action arises on non-Indian owned fee land within the Navajo Nation the plaintiff has a higher burden. The plaintiff must fulfill one of the two exceptions set forth in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). *Manygoats v. Cameron Trading Post*, No. SC-CV-62-00 (Nav.Sup.Ct. August 12, 2003). Under *Montana* the plaintiff must allege specific facts showing that the defendant either (1) has a consensual relationship with the Navajo Nation or its members that has a nexus to the dispute, or (2) that the defendant’s conduct has a direct effect on the political integrity, economic

security, or health or welfare of the Navajo Nation. *Pfizer*, No. SC-CV-01-02, slip op. at 4–5. A bare statement that one or both of the exceptions is met, without more, is not enough.

The high threshold of *Montana* requires, however, that district courts allow further fact finding when the plaintiff requests it. In some cases, the plaintiff might not have the evidence available to it to properly allege fulfillment of one of the *Montana* exceptions without discovery or an evidentiary hearing on the jurisdictional issues. A plaintiff might be unable to establish the fact-intensive exceptions without the ability to seek evidence from the defendant through litigation. Some evidence, such as relationships between the Nation or its members and the non-Indian defendant, or information concerning the harm the defendant’s activities have on the Nation, might be in the sole possession of the defendant. We therefore instruct the district courts that they must allow discovery or an evidentiary hearing, when properly requested, in cases concerning the *Montana* exceptions where the defendant or the court questions jurisdiction.

Because the factual allegations necessary for jurisdiction vary depending on the status of the land, it is important that the plaintiff, at the outset, allege specific facts concerning whether the cause of action arose on tribal land or non-Indian owned fee land. A statement that the dispute occurs within “the Navajo Nation,” or in “the territorial jurisdiction of the Navajo Nation” is no longer enough. Plaintiffs must affirmatively plead the status of the land. *Dale Nicholson Trust v. Chavez*, No. SC-CV-69-00 (Navajo 01/06/2004) at ¶¶ [26]–[29], <http://www.tribal-institute.org/opin->

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sues, district courts should review tribal courts' findings of fact for clear error and conclusions of law de novo." *Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir.1996), *cert. denied sub nom. Mustang Fuel Corp. v. Hatch*, 520 U.S. 1139, 117 S.Ct. 1288, 137 L.Ed.2d 364 (1997);¹⁵² *accord Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir.1997), *cert. denied*, 522 U.S. 1090, 118 S.Ct. 880, 139 L.Ed.2d 868 (1998); *Atkinson Trading Co. v. Shirley*, 210 F.3d 1247 (10th Cir.2000), *reversed on other grounds*, 532 U.S. 645, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001).¹⁵³ This court thus gives considerable deference to the Navajo court's findings of fact concerning its own jurisdiction, and has

not conducted a *de novo* reconsideration of the evidence presented in that forum.

The Navajo Nation District Court in *Singer, et al. v. San Juan County*, Case No. SR-CV-162-99-CV, made at least a few findings as to facts supporting the exercise of the Navajo court's jurisdiction. The December 28, 1999 Order began with territorial contacts and tribal relationships, specifically, that "the area in which the subject health care facility is located is within the territorial jurisdiction of the Navajo Nation," that "two of the three plaintiffs are members of the Navajo Tribe of Indians, the third is married to an enrolled member; and they ALL have significant contact with the Navajo Nation, as

ions/2004.NANN.0000004.htm (footnotes omitted).

152. *Mustang Production Co. v. Harrison* adopted the standard articulated by the Ninth Circuit in *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (9th Cir.1990), which requires deference to a tribal court's findings of fact and de novo review of its conclusions of law.

In *FMC*, the Ninth Circuit relied on the Supreme Court's decision in *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57, 105 S.Ct. 2447, 2454, 85 L.Ed.2d 818 (1985), to determine the appropriate standard of review. Pointing to the Supreme Court's statement that "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court," *id.* at 856, 105 S.Ct. at 2454, the *FMC* court reasoned that a tribal court's factual findings should be reviewed for clear error, 905 F.2d at 1313. The Supreme Court further stated in *National Farmers Union* that mandatory exhaustion of tribal court remedies is helpful because it provides other courts with the "benefit of their expertise." 471 U.S. at 857, 105 S.Ct. at 2454. The Ninth Circuit interpreted this to mean that while federal courts may be guided by a tribal court's expertise, they have no obligation to defer to a tribal court's decision, and thus legal questions should be reviewed *de novo*. *FMC*, 905 F.2d at 1313-14.

We are persuaded by the Ninth Circuit's analysis....

94 F.3d at 1384. In *Smith v. Salish Kootenai College*, 378 F.3d 1048 (9th Cir.2004), *rehearing en banc granted*, 407 F.3d 1267 (9th Cir. May 13, 2005), the Ninth Circuit elaborated upon this standard: "However, the application of the facts to governing law is reviewed de novo as a mixed question of law and fact. See *Suzy's Zoo v. Comm'r of Internal Revenue*, 273 F.3d 875, 878 (9th Cir.2001)." 378 F.3d at 1051 n. 1. And, according to *Smith*, "The party asserting that the tribal court had jurisdiction has the burden of proving the facts necessary to support jurisdiction." *Id.* (citing *Strate v. A-1 Contractors*, 520 U.S. at 456, 117 S.Ct. 1404). *But see* Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determination: Towards Co-Existence, Understanding, and Respect Between Different Judicial Norms*, 24 N.M. L.Rev. 191 (1994) (tribal court findings on mixed questions of fact and law should be reviewed under clearly erroneous standard).

153. As the Tenth Circuit explained in *Atkinson*, the *National Farmers* case generally requires exhaustion of tribal remedies on jurisdictional issues in part because "the rule would encourage tribal courts to explain 'the precise basis for accepting jurisdiction' and 'provide other courts with the benefit of their expertise ... in the event of further judicial review.'" *Id.* at 857, 105 S.Ct. 2447." *Atkinson*, 210 F.3d at 1250-1251 (quoting *National Farmers*, 471 U.S. at 857, 105 S.Ct. 2447).

does the clinic itself as a major health care provider to the Navajo and other local Native Americans. . . .” (*Id.* at [1]).¹⁵⁴ Opining that plaintiffs’ claims “raise[d] issues clearly extending well beyond the mere loss of income or loss of a job,” and went “directly into the wellbeing of the plaintiffs and Navajo Nation citizens” and “as argued by the plaintiffs, go to the soul of a person and their inalienable rights” which “exceeds monetary value,” (*id.* at [2]), the Navajo court identified “financial harm suffered by the plaintiffs which has injured their families” as well as “harm to their reputations” as a consequence of the defendants’ conduct. (March 1, 2000 Order at 9.)

Besides causing irreparable injury to important personal interests of the individual plaintiffs, the Navajo court found that the Health District’s conduct implicated important considerations of Navajo public policy concerning the welfare of Navajos in the workplace, and threatened to have a “chilling effect” on Navajos who assert employment rights protected by Navajo law. (*Id.* at [14], [15].)

The December 28, 1999 Order explained that the plaintiffs had “also raise[d] claims that the Native American, and in particular, *Navajo patients of Montezuma Creek Clinic, have likewise been and are being harmed* by the San Juan Health Services District[’s] conduct, by way of: stopping emergency and routine ambulance and EMT service; stopping laboratory services; and billing of IHS patients,” that resulted in “effectively turning away many patients, including diabetic patients” from the Montezuma Creek Clinic “for fear of

their inability to pay for their care.” (*Id.* at [2] (emphasis added).) The court noted that the District had contracted with the Indian Health Service to provide health care services for Navajo tribal members, (*id.* at [12]), and found that the Health District’s conduct in managing the clinic— involving factual allegations well beyond the plaintiffs’ pleaded employment grievances—was endangering the health and welfare of Navajo patients, “in violation of IHS contracts and regulations” and likewise implicating key Navajo public policy concerns. (*Id.* at [16] (“the defendants have placed at risk numerous patients”).)

Applying the “*Montana* exceptions,” the Navajo court concluded that (1) the Health District’s conduct in “seeking out and entering into contracts with Navajo citizens, within the Navajo Nation boundaries,” and then violating “the Navajo Nation’s customs and traditions, Bill of Rights; the Navajo Preference in Employment Act;” among others, “all with impunity,” in relation to those consensual relationships, satisfied *Montana*’s first “consensual relationships” exception; and (2) “the injury sustained by the plaintiffs so specifically directly effects [sic] the health and welfare of the Navajo Nation chapters and their residents,” satisfying the second “*Montana* exception.” (*Id.* at [19]-[20]).

The balance of the Navajo court’s factual findings focused on the Health District’s conduct toward the plaintiffs as employees and toward Navajo patients seeking medical care at the clinic. Almost all of the Navajo court’s findings of fact and conclusions of law that serve as the basis for the

¹⁵⁴ According to plaintiffs, the Navajo court found that Mrs. Singer enjoyed “a unique ‘in-law’ status within the Tribe,” and thus comes within the scope of protection afforded by the Navajo Preference in Employment Act, *Navajo Nation Code*, title 15, §§ 601 *et seq.* (1995). (Amended Complaint at 104.) However, the

court made no specific findings concerning Ms. Singer’s compliance with the NPEA’s residency requirement, *see Navajo Nation Code*, title 15, § 614(A), nor did it address the requirement that she first exhaust her administrative remedies under the NPEA before coming into court. (*See supra* at 979–82.)

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granting of preliminary injunctive and other equitable relief were framed solely in terms of the Health District.

The Navajo court made no specific findings of jurisdictional fact concerning San Juan County, or by name, any of the individual County or Health District defendants, with the exception of Reid Wood. Instead, as recounted above, the March 1, 2000 Order reduced the matter to a single conclusion:

The Court has jurisdiction over the defendants partly because they are the named parties who have committed acts within the Navajo Nation territorial boundaries, and as well because the defendants became plaintiffs by filing their counterclaims. In accord with *Dodge v. Nakai*, 298 F.Supp. 17 (Ariz.dist.1968) and *Clark v. Barnard*, 108 U.S. [436, 2 S.Ct. 878, 27 L.Ed. 780] (1883). This court has jurisdiction.

(March 1, 2000 Order at 10.)

Perhaps court and counsel assumed that all could be tarred using the same brush.

Yet Due Process—Navajo and Federal—requires much more.

(i) Fred Riggs

Mr. Riggs is a Navajo living and working on the Navajo Reservation. He enjoys all of the protections afforded by Navajo law, including the guaranties of Navajo Preference in Employment Act, and there can be no genuine doubt that he may invoke the jurisdiction of the Navajo courts to resolve disputes and remedy injuries affecting him that arise or occur within Navajo country.

(ii) Allison Dickson

Like Riggs, Mr. Dickson is a Navajo living and working on the Navajo Reservation, well within the civil authority and

protection of the Navajo Nation and the jurisdiction of the Navajo courts.

(iii) Donna Singer

In contrast to Riggs and Dickson, Ms. Singer is not a Navajo, and at all times pertinent to the Navajo court proceeding, it remains uncontroverted that she resided outside of the Navajo Reservation. Singer is married to a Navajo, and worked as the manager of the Montezuma Creek Clinic, located within the boundaries of the Navajo Reservation, until her employment was terminated by the Health District in December of 1998. She has since returned to work at the clinic under new management.

Of the three plaintiffs, her jurisdictional status quickly proves to be the most problematic.

Navajo culture and Navajo law affords a special status to nonmember spouses of Navajo members. According to *Means v. District Court*,

While there is a formal process to obtain membership as a Navajo, see 1 N.N.C. §§ 751–759 (1995), that is not the only kind of “membership” under Navajo Nation law. An individual who marries or has an intimate relationship with a Navajo is a *hadane* (in-law). The Navajo People have *adoone’e* or clans, and many of them are based upon the intermarriage of original Navajo clan members with people of other nations. The primary clan relation is traced through the mother, and some of the “foreign nation” clans include the “Flat Foot–Pima clan,” the “Ute people clan,” the “Zuni clan,” the “Mexican clan,” and the “Mescalero Apache clan.” See, Saad Ahaah Sinil: Dual Language Navajo–English Dictionary, 3–4 (1986). The list of clans based upon other peoples is not exhaustive. A *hadane* or in-law assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is

conducted within the Navajo Nation, there are reciprocal obligations to and from family and clan members under Navajo common law. . . .

Means v. District Court of the Chinle Judicial District, No. SC-CV-61-98 (Navajo S.Ct. 05/11/1999), at ¶ [73]. *Means* held that Russell Means, a non-Navajo “in-law” or *hadane* residing with his Navajo wife on the Navajo Reservation had

by reason of his marriage to a Navajo, longtime residence within the Navajo Nation, his activities here, and his status as a *hadane*, consented to Navajo Nation criminal jurisdiction. This is not done by ‘adoption’ in any formal or customary sense, but by assuming tribal relations and establishing familial and community relationships under Navajo common law.

Id. at ¶ [74]. See generally, Paul Spruhan, *Case Note: Means v. District Court of the Chinle Judicial District and the Hadane Doctrine in Navajo Criminal Law*, 1 Tribal L.J. (2000/2001), at <http://tlj.unm.edu/articles/volume1/spruhan/index.php>.

In this case, the Navajo court referred to “Mrs. Singer in her tribal in-law status,” and observed that “[t]he Navajo clan system, applicable to in-laws through their spouses, demonstrates the unique bonding of Navajo’s to other Tribal members or non-tribal members as family, and the familial duties inherent to care for other members of the Tribal family,” ostensibly as a basis for its conclusion that Singer, Riggs and Dickson had standing to raise claims alleging injury to the interests of Navajo patients of the Montezuma Creek Clinic, none of whom had been joined as parties to the lawsuit. (December 28, 1999 Order at [12].)

155. The term *hadane* is generally understood to be a masculine reference; *hazha’aad* is the

As outlined above, the NPEA extends the protection of its provisions to non-Navajo spouses of Navajo members, but requires that they reside “within the territorial jurisdiction of the Navajo Nation for a continuous one-year period immediately preceding the application for Navajo preference consideration” and coverage by the NPEA’s protections. Navajo Nation Code, tit. 15, § 614(A) (1995). On the present record, it appears that Ms. Singer had not satisfied this requirement by the time of the termination of her employment by the Health District in December of 1998. Thus, the scope of the law’s protection under the NPEA, including the “just cause” requirement, did not extend to Ms. Singer’s employment as manager of the Montezuma Creek Clinic.

Whether the protection of Navajo common-law tort law encompasses Singer because of her *hazha’aad* (“in-law”) status,¹⁵⁵ even though she did not reside within the Navajo Nation at times relevant to her claims, remains unclear under the existing reported Navajo case law, *viz.*, *Means v. District Court*. But even assuming that it does, Navajo court jurisdiction over her claims as a non-Indian plaintiff against non-Indian defendants arising from conduct on non-Indian fee lands within and beyond the boundaries of the Navajo Nation appears to be foreclosed by controlling Supreme Court precedent.

Concerning litigation arising on non-Indian fee land within reservation boundaries where neither the tribe nor its members are involved as parties, *Strate v. A-1 Contractors* held that the “general principle” of *Montana* applies, rather than its exceptions, and a tribal court does not have jurisdiction to adjudicate the dispute between non-Indian parties. In *Strate*,

corresponding feminine reference.

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Gisela Fredericks, the non-Indian spouse of a tribal member, filed suit in tribal court against non-Indian defendants arising out of a traffic accident on a state highway right-of-way within the boundaries of the Fort Berthold Reservation in Montana. The Supreme Court held that the state right-of-way was the jurisdictional equivalent of non-Indian fee land, that *Montana* applied, and that because the lawsuit did not directly involve the tribe or its members, or any “consensual relationship” with the tribe or its members, the tribal court lacked jurisdiction over the dispute. *Strate* also concluded that requiring a non-Indian plaintiff to pursue her claim against non-Indian defendants in state court rather than tribal court did not threaten the tribe’s political integrity or self-government sufficiently to trigger *Montana*’s second exception.

[9] *Strate v. A-1 Contractors* stands for the proposition that civil actions between non-Indian litigants arising from events occurring on non-Indian land within reservation boundaries “fall within state or federal regulatory and adjudicatory governance,” and that absent express authorization by federal treaty or statute, “tribal courts may not entertain claims against nonmembers arising out of” such circumstances. 520 U.S. at 442, 117 S.Ct. 1404. In the *Strate* Court’s view, neither of *Montana*’s exceptions applied to a dispute arising from a highway motor vehicle accident that “is ‘distinctly non-tribal in nature.’” *Id.* at 457, 117 S.Ct. 1404 (quoting *Strate*, 76 F.3d 930, 940 (8th Cir.1996) (en banc)). The dispute itself did not arise from a

“consensual relationship” with an Indian tribe or its members, and did not implicate “the right of reservation Indians to make their own laws and be ruled by them,” *id.* at 457, 117 S.Ct. 1404:

Gisela Fredericks may pursue her case against A-1 Contractors and Stockert in the state forum open to all who sustain injuries on North Dakota’s highway. Opening the Tribal Court for her optional use is not necessary to protect tribal self-government; and requiring A-1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to “the political integrity, the economic security, or the health and welfare of the [Three Affiliated Tribes].”

Id. at 459, 117 S.Ct. 1404 (quoting *Montana*, 450 U.S. at 566, 101 S.Ct. 1245) (footnotes omitted).

[10] Based upon the Navajo court’s factual findings, and even taking as true the well-pleaded factual allegations of the Amended Complaint and the “Statement of Material Fact” set forth in plaintiffs’ summary judgment memorandum,¹⁵⁶ this court concludes that the Navajo Nation District Court did not have subject-matter jurisdiction over the Health District with respect to the employment-related claims pleaded by plaintiff Donna Singer, a non-Indian and a non-resident of the Navajo Nation. To avail herself of the protections of the Navajo Preference in Employment Act, she must first satisfy its residency requirement affecting non-Indian spouses of tribal members,¹⁵⁷ and the Navajo court made no

156. (See Pltfs’ Summ. Judg. Mem. (504), at 2–8 ¶¶ 1–27.)

157. As written, “the Navajo Preference in Employment Act (“NPEA”) included spouses of Navajos and Indians from other Indian nations in the protected classifications of the Act, but provided that only Navajos could file labor complaints with the Commission. 15

N.N.C. §§ 610(B), 614 (1995).” *Staff Relief, Inc. v. Polacca*, No. SC-CV-86-98 (Navajo S.Ct. 08/18/2000), at ¶ [21], available at <http://www.tribal-institute.org/opinions/2000.NANN.0000003.htm>; see Navajo Nation Code, tit. 15, § 610(B) (“Any Navajo may file a charge . . . claiming a violation of his or her rights under the Act.”). The Nava-

specific factual findings that Ms. Singer had satisfied that requirement as of the time she commenced and prosecuted her action in the Navajo court.

As to Ms. Singer's common-law tort claims (*e.g.*, defamation, infliction of emotional distress) against the non-Indian County and Health District defendants, controlling Supreme Court precedent indicates that the Navajo court lacked subject-matter jurisdiction of her claims against those defendants. *See Strate*, 520 U.S. at 456–459, 117 S.Ct. 1404. Ms. Singer's *hazha'aad* (“in-law”) status under Navajo common law does not alter her status as a “non-Indian” under federal law, and where the question is whether tribal jurisdiction extends to non-Indian litigants in a particular case, federal law governs. Therefore, with the possible exception of her claim against one Health District Board member, Roger Atcity, who is an enrolled Navajo tribal member living within Navajo Nation boundaries (*see* Amended Complaint at 106), *Strate* denies Ms. Singer the option of pursuing her employment-related claims in the courts of the Navajo Nation because the Navajo courts lack the subject-matter jurisdiction required to adjudicate them. As a nonmember suing nonmember defendants located in Utah, her remedy would lie in the Utah State courts, and if she asserts federal claims, in federal district court.

jo Supreme Court made short work of that anomaly: “We rectify that shortcoming by ruling that under basic principles of equal protection of law, any person who is injured by a violation of NPEA may file a claim with the Commission,” including plaintiff Polacca, the non-Navajo spouse of a tribal member:

The Navajo Nation may, at its option, deny certain benefits or privileges to non-Navajos without offending equal protection of the law, but as we have noted before, the NPEA is a general labor code. *Arizona Public Service Co. v. Office of Navajo Labor Relations*, 6 Nav. R. 246, 248 (1990). As such, it must be read to protect all employ-

(iv) San Juan County

Named as a defendant “as governing authority over the San Juan Health District and in its own right,” (Navajo Ct. Cmplt. at 2 ¶ 2), San Juan County was not alleged to have directly engaged in any of the conduct resulting in Ms. Singer's termination, Mr. Riggs' diminishment in status and pay, or Mr. Dickson's continuation as something less than a full-time, permanent regular employee of the Health District. Instead, plaintiffs allege that “San Juan County Commissioner's took steps to purposefully avoid taking responsibility for the SJHSD's acts,” (*id.* at 35 ¶ 311), even though the County purportedly “can withdraw powers from any District governance board member or employee at any time under Utah Code 17A–2–1326(6).” (Petition for Writ of Mandamus and Prohibition, *In re Riggs*, Case No. 02–1774, 2003 WL 22428213 (U.S.S.Ct., filed May 28, 2003), at ii.) Other allegations appear to be quite innocuous, *e.g.*, Navajo Ct. Cmplt. at 12 ¶ 107 (“San Juan County has given SJHSD money.”); *id.* at ¶ 108 (“San Juan County has expanded the number of board members from five to six and then to seven.”). The gist of plaintiffs' claim is that at the time their claims arose, the County exercised complete control over the Health District. (*See generally* Pltfs' Summ. Judg. Mem. (504), at 2–3 ¶¶ 2–10.)

ees within the Navajo Nation where NPEA provides protection in employment. Accordingly, we hold that on remand, Polacca has standing to pursue his claim against SRI.

Id. at ¶ [22]. *Polacca* did not discuss the residency requirement of § 614(A) of the NPEA, and it does not appear that the Navajo Supreme Court has addressed § 614(A) in the five years since *Polacca* was decided. Absent clear Navajo case authority to the contrary, this court assumes that § 614(A) continues to define when “NPEA provides protection in employment” for non-Navajo spouses of tribal members.

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The Navajo court made very few findings concerning San Juan County itself, even then largely recounting witness testimony: “San Juan County Commissioner Mark Maryboy testified that San Juan County has a deliberate pattern of not treating the Navajo people equally; violating the rights of Navajo and other Native American employees, and retaliation and discrimination against Navajo and other Native Americans that has continued for generations.” (December 28, 1999 Order at [15].)

Assertions such as this may provide some background and context for the plaintiffs’ claims, and perhaps for the court’s findings concerning the Health District’s conduct, but by themselves they fail to provide a viable factual predicate for the exercise of Navajo civil jurisdiction over the County in relation to these plaintiffs’ claims,¹⁵⁸ even apart from the application of *Montana* and its “two prime exceptions.”

(v) San Juan County Commissioners

Similar deficiencies weaken the Navajo court’s findings of fact concerning the San Juan County Commissioners. Plaintiffs assert that “[t]he facts of the Commissioners sitting on the District’s board, financing the District, setting policy for the district, making appointments, being Directed by the County’s administrator, advised by the County Attorney, all were fully resolved in Navajo Court.” (Pltfs’ Summ. Judg. Mem. (504), at 3 ¶ 10.) Assuming this is so, the Navajo court made very few findings to that effect, and nowhere in the three orders did it find that “[i]n actuality, the County and District were alter egos of

each other,” as plaintiffs themselves assert. (*Id.*)

The Navajo Court focused on the employment relationships between Singer, Riggs and Dickson and the Health District, and on the District’s conduct adversely affecting those relationships to the detriment of these plaintiffs; it also addressed actions by the District that allegedly had adverse effects on Navajo patients of the Montezuma Creek Clinic. But it made virtually no findings concerning the actions of any County Commissioner, beyond global references to “the defendants” as a whole.

The Part II Plaintiffs have failed to point to facts bringing the individual San Juan County Commissioners within the subject-matter jurisdiction of the Navajo courts under either of the *Montana* exceptions, or for that matter, under Navajo tort law or the NPEA. *See* Navajo Nation Code tit. 7, § 253(B) (1995).

(vi) San Juan County Attorney Craig Halls

Apparently, defendant Craig Halls, the San Juan County Attorney, was named as a defendant because he gave legal advice—or failed to give legal advice—to County and Health District officials on a range of subjects, and “held himself out as SJHSD’s legal representative on January 19, 1999,” at or about the time of Singer and Riggs’ grievance hearings. (*See* Navajo Ct. Cmplt. (Modified) at 12–13 ¶¶ 109–122; *id.* at 37 ¶¶ 313–316.) Plaintiffs allege that Halls “had a responsibility to ensure that the San Juan Personnel and

¹⁵⁸. The Navajo court made no finding that the Health District was “at all times herein and throughout this legal action, San Juan County’s alter ego,” or that “San Juan County is responsible for all of SJHSD’s actions” (Navajo Ct. Cmplt. at 2 ¶ 3, 33 ¶ 301’); nor

did the plaintiffs or the court articulate any viable legal theory under which the County could be held vicariously liable under Navajo, state, federal or international law for the Health District’s employment actions.

Policies adhered to the NPEA and Utah Code 17A-2-601 [through] -603,” and to “inform the San Juan Service District’s trustees of SJHSD’s noncompliance with NPEA and the Utah Special District Personnel Management employment laws,” (*id.* at 12-13 ¶¶ 115-116), but “purposely avoided any responsibility for SJHSD’s actions after being appraised [sic] of their violations of statutes on January 19, 1999.” (*Id.* at 37 ¶ 315.)

The December 28, 1999 Order recites that District administrator Rick Bailey testified “that he relied on Craig Halls’ advice to proceed as her grievance hearing officer anyway,” even though Bailey “had actually participated in the decision to terminate Ms Singer.” (December 28, 1999 Order at [6].) The Navajo court makes no further findings concerning Halls, other than the global reference to “the defendants.” Plaintiffs do not point to any facts in the Navajo court record that would serve as a basis for the exercise of tribal civil jurisdiction over Halls either under Navajo law or the *Montana* exceptions. (See Pltfs’ Summ. Judg. Mem. (504), at 2-8 ¶¶ 1-27.)

(vii) County Administrator Richard “Rick” Bailey

Plaintiffs alleged that as San Juan County administrator and “San Juan Health District CEO,” Bailey committed “Malfeasance in Office” by failing to inform the Health District Board that defendant Reid Wood had “made material misrepresentations to him,” and that “by doing little or nothing to rectify the claims of the plaintiffs,” Bailey “has endangered the financial well being of SJHSD, and the public safety, health and welfare of the Navajo Nation surrounding Montezuma Creek Clinic.” (Navajo Ct. Cmplt. (Modified) at 38-39 ¶¶ 321-322, 327.) They further allege that “Mr. Bailey issued grievance decision letters for Mrs. Singer and Mr. Riggs a).

without clear charges, b). without clearly identified evidence to justify Mr. Woods’ actions, c). without mentioning NPEA; and, d). without referencing the mandates of Utah’s Special District Personnel Management Act among other acts.” (*Id.* at 38 ¶ 326.)

In addition to the reference to Bailey’s testimony quoted above, the Navajo court found that “Rick Bailey told Ms. Singer that she was viewed as an ‘enemy to the hospital’ (December 28, 1999 Order at [7]); and in the March 1, 2000 Order, the court recounts that “the person who initiated the termination process, was also the grievance hearing officer (unbeknown to Singer) and admitted he had a problem with being so[,] thinking that it was improper for him to proceed by his own judgment[,] but did nonetheless,” with apparent reference to Bailey. (March 1, 2000 Order at 7.) But the court makes no other findings as to Bailey, and offers no explanation of the basis for exercising Navajo civil jurisdiction over Bailey individually, in contrast to the Health District itself.

(viii) Summary re: the County Defendants

[11] As summarized above, the Navajo court orders are essentially devoid of findings of jurisdictional fact as to San Juan County, its named defendant Commissioners, the County Attorney, or Mr. Bailey. Plaintiffs’ counsel hotly disputes the County defendants’ characterization of the County’s role in the Health District’s affairs, but the plaintiffs fail to marshal the evidentiary facts that would vindicate the Navajo court’s conclusion that it had subject-matter jurisdiction over the County defendants, in contrast to the plaintiffs’ former employer, the Health District. (See Pltfs’ Summ. Judg. Mem. (504), at 2-10 ¶¶ 1-27.) Nor does *subject-matter* jurisdiction over the *County* defendants

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arise from the filing of a counterclaim solely against a non-Indian litigant by “the defendants”—a counterclaim that is pleaded solely in terms of injuries to and relief sought by the Health District alone. (See Answer to Complaint for Damages and Counterclaim, filed June 23, 1999, in *Singer, et. al. v. San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation District Court, Shiprock District), at 28-42 ¶¶ 1-70, available in Pertinent Parts Navajo Ct. R. (“Complaint for Damages” Tab).)¹⁵⁹

While this court declines to adopt the County defendants’ view of the governing law after *Nevada v. Hicks*, it does not require a strained reading of the controlling precedents to conclude that the Navajo court lacked subject-matter jurisdiction over San Juan County, the County Commissioners, the County Attorney, and County administrator Bailey, based upon the limited fact findings made by that court. The Navajo court did not identify any consensual relationship between any County defendant and the Navajo Nation and its members that would satisfy *Montana’s* first exception. Nor did it find facts showing conduct on the part of any County defendant that threatened or had some direct effect on the political integrity,

the economic security, or the health or welfare of the Navajo Nation.¹⁶⁰

Remembering that “[t]he District Courts of the Navajo Nation shall have original jurisdiction over . . . [a]ll civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation,” *Navajo Nation Code*, tit. 7, § 253(B) (1995), the Navajo court made no findings of fact as to individual residence or any specific conduct on the part of the named individual County defendants that “has caused an action”—or any injury to plaintiffs Riggs or Dickson—“to occur within the territorial jurisdiction of the Navajo Nation.”

The same cannot be said for the San Juan Health Services District.

(ix) San Juan Health Services District

[12, 13] “[S]ued as the employer of the plaintiffs and, at all time herein and throughout this legal action, San Juan County’s alter ego,” (Navajo Ct. Cmplt. at 2 ¶3), the Health District stands out as the primary target of the plaintiffs’ claims, the Navajo court’s factual findings, and the

¹⁵⁹. Filing of pleadings asserting affirmative claims may reflect a litigant’s submission to the *in personam* jurisdiction of the forum court, but it cannot confer *subject-matter* jurisdiction that the court would not otherwise have. Cf. *Finley v. United States*, 490 U.S. 545, 559, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989) (“A party beyond the reach of a federal court’s process may voluntarily submit to its jurisdiction over his person, but he cannot create subject-matter jurisdiction—by waiver, estoppel, or the filing of a lawsuit—over a non-Article III case.”); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) (parties cannot confer subject-matter jurisdiction on federal court by consent, estoppel, or waiver, but “[n]one of this is true with respect to personal jurisdic-

tion.”). “One of the most basic principles of our jurisprudence is that subject-matter jurisdiction cannot be conferred upon a court by consent of the parties.” *Gosa v. Mayden*, 413 U.S. 665, 707, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973) (Marshall, Brennan & Stewart, JJ., dissenting).

¹⁶⁰. The plaintiffs have failed to sustain their burden to establish the requisite jurisdictional facts. See, e.g., *Smith v. Salish Kootenai College*, 378 F.3d 1048, 1051 n. 1 (9th Cir.2004) (“The party asserting that the tribal court had jurisdiction has the burden of proving the facts necessary to support jurisdiction.” (citing *Strate v. A-1 Contractors*, 520 U.S. at 456, 117 S.Ct. 1404)), *rehearing en banc granted*, 407 F.3d 1267 (9th Cir. May 13, 2005).

relief granted to plaintiffs in the three orders now at issue.

In its December 28, 1999 Order, the Navajo court found that the Health District was an “employer” covered by the NPEA; that the District had violated the NPEA’s requirements in several respects by the actions it had taken with respect to Singer and Riggs, and otherwise; that the District had denied Dickson full-time permanent status in violation of its own policies; that the District’s wrongful conduct was causing irreparable injury to plaintiffs Singer, Riggs and Dickson and to their relationships with their families and community; that other conduct by the District unrelated to plaintiffs’ employment threatened serious injury to the interests of Navajo patients seeking health care at the Montezuma Creek Clinic, to whom the District was legally obligated to provide services under its contract with the Indian Health Service; and that plaintiffs had presented sufficient evidence to warrant issuance of preliminary injunctive and other equitable relief. (December 28, 1999 Order, *passim*.)

The Navajo court found both *Montana* exceptions to have been satisfied by the Health District’s conduct: (1) the conduct of the District in “seeking out and entering into contracts with Navajo citizens, within the Navajo Nation boundaries,” and then violating “the Navajo Nation’s customs and traditions, Bill of Rights; the Navajo Preference in Employment Act;” among others, “all with impunity,” comes within *Montana*’s “consensual relationships” exception, and (2) that “the injury sustained by the plaintiffs so specifically directly ef-

fects [sic] the health and welfare of the Navajo Nation chapters and their residents pursuant to the *Montana* exceptions.” (*Id.* at [19]-[20].) The Navajo court thus found that the District entered into “consensual relationships with the tribe[’s] . . . members, through . . . contracts, . . . or other arrangements,” *Montana*, 450 U.S. at 565, 101 S.Ct. 1245, by employing the Navajo plaintiffs, Riggs and Dickson, during its reign at the Montezuma Creek Clinic. (See December 28, 1999 Order at [20].¹⁶¹)

In this setting, “The ‘consensual relationship’ with Navajos is an employer-employee one, and employment is a contract.” *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo S.Ct. 01/14/2000), at ¶ [45]. Remembering that *Atkinson* “requires that the . . . regulation imposed by the Indian tribe have a nexus to the consensual relationship itself,” 532 U.S. at 656, 121 S.Ct. 1825, “Such a nexus clearly exists here. The regulation at issue is the NPEA, which governs the terms and conditions of *employment* of Navajo workers on the Nation’s territory. The relevant consensual relationship is an *employment contract* between Cameron and its Navajo workers; therefore, the nexus requirement is met.” *Manygoats v. Atkinson Trading Co., Inc.*, No. SC-CV-62-2000 (Navajo S.Ct. 08/12/2003), at ¶ [41] (emphasis in original).

Indeed, “Regardless of the selection criteria or method used to create it, the employer-employee relationship is a contractual relationship.” 1 Mark A. Rothstein, et al., *Employment Law* § 1.27, at

¹⁶¹. According to that court, “[t]he defendants” failed to show how the District

can benefit itself . . . by voluntarily seeking out and entering into contracts with Navajo citizens, within the Navajo Nation boundaries, and then treat the Navajo Nation’s customs and traditions; Bill of Rights; the

Navajo Preference in Employment Act; the Utah merit system requirements, and [IHS] contract obligations, all with impunity, and believe that the district is somehow immune from claims injury; . . .

(*Id.* at [20] (emphasis added).)

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112 (2d ed.1999). Like Navajo law, Utah law recognizes the contractual nature of employment relationships, including employment “at will”: “Under Utah law, an employment relationship entered into for an indefinite period of time is presumed to be at-will and gives rise to a *contractual arrangement* where the employer or the employee may terminate the employment for any reason, except as provided by law.” *Rackley v. Fairview Care Centers, Inc.*, 2001 UT 32, ¶ 12, 23 P.3d 1022, 1026 (emphasis added) (citing *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 400 (Utah 1998); *Fox v. MCI Communications Corp.*, 931 P.2d 857, 859 (Utah 1997); *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 53–55 (Utah 1991); *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1044 (Utah 1989); *Bihlmaier v. Carson*, 603 P.2d 790, 792 (Utah 1979)).

[W]hen a contract for employment or personal services does not recite a fixed term, the law in Utah does not call for the judicial reformation of the contract to impose a term, especially where, as here, neither party disputes the contract was of indefinite duration. Indeed, in a case in which we traced the historical development of the law associated with employment contracts, we specifically noted that courts long ago repudiated a common law rule under which a term was implied when an employment contract did not specify a duration. *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1040–41 (Utah 1989). In its place, courts in Utah and elsewhere adopted the *at-will employment rule*, under

which employment contracts that did not specify a duration were generally presumed to be terminable at will. *Id.* at 1041. In time, Utah recognized an exception under which an employee could rebut the at-will presumption associated with indefinite-length contracts by showing the parties intended the contract be terminable for cause. *Johnson*, 818 P.2d at 1000–01 & n. 9; see also *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 54 (Utah 1991). Significantly, nothing in *Johnson*, *Brehany*, or *Berube* suggests that a court should sua sponte impose a term on an indefinite-length employment contract that provides for termination for cause.

Uintah Basin Medical Center v. Hardy, 2002 UT 92, 54 P.3d 1165, 1170 (emphasis added & footnote omitted).¹⁶² See, e.g., *Francisconi v. Union Pacific R. Co.*, 2001 UT App 350, ¶ 9, 36 P.3d 999, 1002 (“Because Francisconi’s *employment contract* with Union Pacific did ‘not have a specified term of duration,’ it is presumed to be an at-will arrangement.”) (emphasis added)).¹⁶³

In Utah, “An at-will employee may overcome the at-will presumption by showing, among other things, that: ‘*a statute or regulation restricts the right of an employer to terminate an employee under certain conditions;*’” *Rackley v. Fairview Care Centers, Inc.*, 2001 UT 32, at ¶ 13, 23 P.3d at 1026 (quoting *Burton v. Exam. Ctr. Indus. & Gen. Med. Clinic, Inc.*, 2000 UT 18, ¶ 6, 994 P.2d 1261 (quoting *Fox*, 931

¹⁶². The *Hardy* opinion noted that “[a]lthough *Berube* was a plurality opinion, a majority of the court concurred in the portion of the opinion that traced the historical development of the common law of employment contracts.” 2002 UT 92, at ¶ 21 n. 8, 54 P.3d at 1170 n. 8.

¹⁶³. It appears that the Health District has resisted this concept in the past, as reflected

in their written employment policies. (See Navajo Ct. Cmplt. at Exh. 18 (“5.6 *At Will Termination*. The hiring of an employee (whether full-time, part-time, or short-term) is not a contractual relationship between San Juan Health Care Services and the employee, and either party may terminate the employment relationship at will.”).)

P.2d at 859)) (emphasis added).¹⁶⁴ The NPEA may be just such a statute, because its effects are at least two-fold: the NPEA imposes specific regulatory restrictions on employer conduct, enforceable by the ONLR and the Labor Commission; it also writes “the requirements of the Act” into all employment contracts “as affirmative contractual obligations of the contracting parties.” Navajo Nation Code, tit. 15, § 609(A) (1995). Riggs and Dickson’s employment contracts would thus include the NPEA’s “just cause” and formal notice requirements, among other terms defining their relationships with the District.

Montana reaffirms that the Navajo Nation has inherent civil authority over contractual relationships between non-Indians and tribal members, even as to activities on non-Indian fee land within its boundaries. Employment contracts simply represent one species of “consensual relationship” within *Montana*’s first exception. So the employment of Riggs and Dickson satisfies *Montana*’s first exception and establishes the subject-matter jurisdiction of the Navajo Nation and the Navajo courts over Riggs and Dickson’s employer, the San Juan Health Services District, as to the District’s conduct of those contractual employment relationships—at least as to cognizable civil claims arising from those relationships.¹⁶⁵ See *United States ex rel.*

Morongo Band of Mission Indians v. Rose, 34 F.3d 901 (9th Cir.1994).

Under the Navajo Supreme Court’s reasoning in the *Manygoats* opinions, the District’s employment of Navajo members—here, plaintiffs Riggs and Dickson—also implicates the exercise of tribal power “necessary to protect tribal self-government or to control internal relations,” *Montana*, 450 U.S. at 564, 101 S.Ct. 1245. The protection of tribal members’ interests in continuing employment finds its place among those core interests well within the scope of the Navajos’ right “to make their own laws and be governed by them,” *Hicks*, 533 U.S. at 361, 121 S.Ct. 2304. That right must include the tribe’s sovereign “police” power to protect the health, safety and welfare of its constituents. See *Arizona Public Service Co. v. Office of Navajo Labor Relations*, No. A-CV-08-87 (Navajo S.Ct. 10/08/1990), at ¶¶ [102], [104] (“The Navajo nation, as a sovereign, at all times retains the power to protect the health, welfare and safety of its citizens, using police power,” and the NPEA “is traditional employment and civil rights legislation well within the police power of the Navajo Nation.”); *id.* at ¶ [108] (“Among the purposes of NPEA is the protection of the health, safety and welfare of Navajo workers. 15 N.T.C.

¹⁶⁴ Utah cases have consistently held that there is “an implied covenant of good faith and fair dealing in either at-will or other sorts of employment contracts.” *Dubois v. Grand Central*, 872 P.2d 1073, 1078 (Utah Ct.App. 1994). As is true of other contracts, implied covenants of good faith and fair dealing cannot create “new, independent rights or duties not agreed upon by the parties”; nor can implied covenants “change an indefinite term, at-will employment contract into a contract that requires an employer to have good cause to justify a discharge.” *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991). Thus, any “just cause” requirement must arise from some other legal source.

¹⁶⁵ It is unclear, *e.g.*, that Navajo law recognizes a common-law cause of action for “wrongful hiring,” (see Navajo Ct. Cmplt. at 22–23 ¶¶ 215–220), that would hold the District liable to the plaintiffs because “[b]ut for the hiring of Mr. Wood, the employee plaintiffs may never have been harmed.” (*Id.* at 22 ¶ 217.) *Hicks* clearly holds that Indian tribal courts lack jurisdiction to entertain claims under 42 U.S.C.A. § 1983, 533 U.S. at 366–369, 121 S.Ct. 2304, but the import of that ruling for the claims of Riggs and Dickson remains unclear. Cf. *MacArthur*, 309 F.3d at 1218 n. 2.

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§ 602(a)(6).”). *Montana*’s second exception for conduct that “threatens or has some direct effect on . . . the economic security, or the health or welfare of the tribe” echoes these same police power concerns.¹⁶⁶

The Navajo Supreme Court has declared that “the overriding authority of the Navajo Nation to protect its workers is essential to the economic interests of the Navajo Nation Employment is a vital right, and the power to regulate employment relations is essential to the Navajo Nation’s economic interests.” *Staff Relief, Inc. v. Polacca*, No. SC-CV-86-98 (Navajo S.Ct. 08/18/2000), at ¶¶ [23], [24], available at <http://www.tribal-institute.org/opinions/2000.NANN.0000003.htm>. “[T]he Navajo Nation retains the right and the duty to protect its members, the public at large, and its territory,” and the Navajo Nation Council “recognized that the regulation of employment relations and the protection of workers are essential when it adopted the Navajo Preference in Employment Act. See, 15 N.N.C. § 602(A)(6).” *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo S.Ct. 01/14/2000), at ¶ [47]. In the Navajo Supreme Court’s view, “Those are among the most important government powers generally,” *id.*, a view that would find widespread acceptance well beyond the Navajo Nation’s boundaries.

In a tribal community that depends so heavily on the wage economy, regulation of the terms and conditions of Navajo employment and protection of the employment security of tribal members finds its footing in governmental interests certainly no less significant than the tribe’s interest in regulation of consumer credit transactions—and the Supreme Court vindicated *exclusive* Navajo jurisdiction over consumer credit transactions between tribal members and non-Indians in *Williams v. Lee*, decided in 1959. *Williams v. Lee* and more recently, *Iowa Mutual* recognized that “[a]djudication of such matters by any non-tribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.” *Iowa Mutual*, 480 U.S. at 16, 107 S.Ct. 971.¹⁶⁷ This is no less true of tribal employment laws today than it was of tribal consumer credit laws in 1959, or now.

This court is satisfied that the Navajo Nation and the Navajo courts have inherent civil authority and adjudicative jurisdiction over the Health District under *Montana*’s second exception as well.

Based upon the inherent authority of the Navajo Nation as an Indian nation, the recognition of its authority in the Navajo Nation’s 1868 Treaty with the United States of America, and the 1933 Act enlarging the boundaries of the Navajo Res-

¹⁶⁶. The Senate Committee on Indian Affairs reads *Montana* this way. 25 U.S.C.A. § 3601(5) reflects “the decision of the United States Supreme Court in the case of *Montana v. United States*, . . . with regard to the authority of Indian tribal governments to provide for the protection of the health and safety of reservation residents and the political integrity of the tribe. From all of the testimony presented to the Committee, it is clear that tribal justice systems are an integral part of the efforts of Indian tribal governments to exercise that authority.” S.Rep. No. 103-88, at 8, 1993 WL 304728 (emphasis added).

¹⁶⁷. See *Winer v. Penny Enterprises, Inc.*, 2004 ND 21, 674 N.W.2d 9 (2004) (state court lacks subject matter jurisdiction over non-Indian motorist’s action against Indian motorist to recover for injuries sustained in automobile accident on state highway within exterior boundaries of Indian reservation; “If *Strate* signals a drastic departure from the state court jurisdictional principles enunciated in *Williams v. Lee* and its progeny, it is well hidden in the *Strate* decision.” ¶ 18, 674 N.W.2d at 16).

ervation to include, *inter alia*, the land on which the Montezuma Creek Clinic now sits, this court concludes that the Navajo Nation District Court had subject-matter jurisdiction of plaintiffs Riggs and Dickson's claims against the San Juan Health Services District arising from their respective employment relationships at that facility. *See Montana v. United States*, 450 U.S. at 565–566, 101 S.Ct. 1245; *Manygoats v. Cameron Trading Post*, No. SC–CV–50–98 (Navajo S.Ct. 01/14/2000), at ¶ [40]; *Manygoats v. Atkinson Trading Co., Inc.*, No. SC–CV–62–2000 (Navajo S.Ct. 08/12/2003) at ¶¶ [41], [43]–[44]; Navajo Nation Code, tit. 7, § 253(B) (1995).

(x) Health District Board Members

[14] Besides naming the Health District as a defendant, plaintiffs joined the individual members of the District's governing board, either in their official capacity or in both their official and individual capacities.¹⁶⁸ The Navajo court's orders do not discuss the individual Board members at all, apart from the global reference to “the defendants.” Nor do plaintiffs point to any facts in the Navajo court record that would serve as a basis for the exercise of civil jurisdiction under *Navajo Nation Code* § 253(B) over those non-Navajo Board members who were sued in their individual capacity. (*See* Pltfs' Summ. Judg. Mem. (504), at 2–8 ¶¶ 1–27; cf. Navajo Ct. Cmplt (Modified) at 13–15 ¶¶ 123–125, 128–129, 148; *id.* at 35–37 ¶¶ 308–309(a)–(h); *id.* at 39 ¶ 336.)

The relevant provisions of the Navajo Preference in Employment Act may govern the conduct of plaintiffs' *employer*, the Health District, but the NPEA says noth-

ing about extending liability under its remedial provisions to individual directors or trustees governing an “employer” entity. *See* Navajo Nation Code, tit. 15, §§ 603(C) (“employer” defined); *id.* at § 604(8) (“All employers shall not penalize, discipline, discharge or take action against any Navajo employee without just cause.”). Nor have plaintiffs identified any other cognizable claim for which the non-Navajo Board members may be haled into tribal court under § 253(B).

The controlling case authority in this Circuit counsels that district courts should give considerable deference to a tribal court's findings of fact on jurisdictional issues, but such deference becomes purely academic where no findings were made. Plaintiffs offer no assistance in this regard, leaving this court with no basis to conclude otherwise than that the Navajo court lacked subject-matter jurisdiction over the non-Indian Board member defendants.

(xi) Roger Atcitty

[15] The court also concludes that the Navajo court had exclusive subject-matter jurisdiction over plaintiffs' claims against defendant Roger Atcitty based upon his tribal membership and his residence. The Navajo court's subject-matter jurisdiction over Roger Atcitty, an enrolled Navajo tribal member living within Navajo Nation boundaries, (*see* Amended Complaint at 106), raises no *Montana* issue, and would clearly be established by § 253(B) of Title 7 of the *Navajo Nation Code*—had the court made specific factual findings to that effect. Navajo Nation Code, tit. 7, § 253(B) (1995) (“The District Courts of

¹⁶⁸ The original defendant Board members included Commissioner Bill Redd, Commissioner J. Tyron Lewis, Roger Atcitty, Karen Adams, John Lewis, Commissioner Mark Maryboy (official capacity only), and Patsy Shumway (official capacity only). (*See* Nava-

jo Ct. Cmplt. at 2–3 ¶¶ 4–7, 12–14, 16; Petition for Writ of Mandamus and Prohibition, *In re Riggs*, Case No. 02–1774, 2003 WL 22428213 (U.S.S.Ct., filed May 28, 2003), at iii–iv.)

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the Navajo Nation shall have original jurisdiction over . . . [a]ll civil actions *in which the defendant is a resident of Navajo Indian Country*, . . .” (emphasis added)). Absent such findings, it nevertheless appears that the requisite jurisdictional facts concerning Atcitty are uncontroverted. Thus, this court concludes that the Navajo court had *exclusive* subject-matter jurisdiction of the claim(s) of Singer, Riggs and Dickson against him, insofar as the claim(s) arose within the boundaries of the Navajo Reservation, and insofar as the claim(s) actually exist. *See Fisher v. District Court of the Sixteenth Jud. Dist.*, 424 U.S. 382, 386–389, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); *Williams v. Lee*, 358 U.S. 217, 220–223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

(xii) Lauren “Laurie” Schafer

Plaintiffs sued Lauren (“Laurie”) Schafer as “SJHSD Personnel Director of Nursing,” (Navajo Ct. Cmplt. (Modified) at 3 ¶ 11), apparently on the theory that “Mrs. Schafer acted in concert with Mr. Woods and Mrs. Nielsen to harm the defendants,” in three alleged particulars:

342. Mrs. Schafer knew Mrs. Singer was not a dishonest person and did nothing to help her.
343. Mrs. Schafer knew Mr. Wood’s charge of fraud for Mr. Riggs and Mrs. Singer was false.
344. Mrs. Schafer could have helped provide a pre-discharge and pre-discipline hearing for Mrs. [Singer] and Mr. Riggs, but did not.

169. Apparently plaintiffs’ notion—unhampered by bothersome concepts of duty, breach of duty, and causation—was that Ms. Schafer should be held jointly and severally liable to all three plaintiffs for \$18,000,000 in compensatory and punitive damages for failing to intervene on Ms. Singer’s behalf in the adverse employment action taken by other

(*Id.* at 40 ¶¶ 342–2–345; *see id.* at 6 ¶ 39 (“Mrs. Schafer knew Mrs. Singer had many serious and weighty matters to attend to at Montezuma Creek Clinic as part of her employment position and yet did nothing to put the time card mistake into the perspective of a reasonable person, and did nothing to prevent her discharge.”).)

The Navajo court orders discuss none of this, referring instead to “[a] letter from Lauren Schafer critical of Ms. Singer” that had been kept in a file in the District CEO’s office, and to Schafer’s testimony that “after a ‘scrupulous examination’ of Singer’s record for over nine months, Ms. Schafer had not discovered one piece of evidence as to Ms. Singer’s intent to commit fraud.” (December 28, 1999 Order at [10]; *accord* March 1, 2000 Order at 7 (same).)

It remains a mystery what Schafer did that purportedly “caused an action to occur within the territorial jurisdiction of the Navajo Nation,” *Navajo Nation Code*, tit. 7, § 253(B), bringing her within the civil jurisdiction of the Navajo court as a defendant sued in her individual capacity—particularly with respect to the claims of plaintiffs Riggs and Dickson. For their part, plaintiffs offer little or no assistance in resolving that question. (*See* Pltfs’ Summ. Judg. Mem. (504), *passim*.)¹⁶⁹

It appears that the few facts bearing upon Ms. Schafer’s relationship to *Singer, et al. v. San Juan County, et al.*, that may be gleaned from the orders and plaintiffs’ memoranda had to do with plaintiff *Singer*’s wrongful discharge claims. And if Ms.

Health District administrators that led to Singer’s termination from employment. (*See* Navajo Ct. Cmplt. (Modified) at 42–45 (“Prayer for Relief”).) Plaintiffs offer *no* explanation why Ms. Schafer should be held liable to Riggs or Dickson for \$1.00, let alone \$12,000,000.00. *See* Navajo R. Civ. P. 11.

Singer was not properly before the Navajo court, then the plaintiffs' allegations concerning Schafer are entirely irrelevant. Absent factual findings bringing Schafer within the jurisdiction of the Navajo court under *Navajo Nation Code*, tit. 7, § 253(B), there is no need to apply the *Montana* exceptions before concluding that the Navajo court lacked subject-matter jurisdiction over Ms. Schafer.

(xiii) Reid Wood

[16] Named as a defendant in his capacity as "interim" and then "permanent" Health District CEO, Reid Wood was a central character in the events recounted above that form the factual basis for plaintiffs Singer, Riggs and Dickson's employment-related claims. (*See supra*, at 908–17.) It was Wood who took adverse action against Singer and Riggs based upon the "time card" errors that occurred in November of 1998, terminating Singer and disciplining Riggs by placing him on "probation." It was Wood who allegedly made various comments that the plaintiffs found to be demeaning. And it is Wood who was the one individual defendant about whose conduct the Navajo court made findings as to culpability, *viz.*, that he had denied the plaintiffs due process and equal protection in taking adverse action based upon "the phony fraud charge that still maliciously clouds Mr. Riggs' and Ms. Singer's name," ostensibly resulting in actual, even "irreparable injury" to the plaintiffs. (December

28, 1999 Order at [15].) Wood is also the one to whom a remark comparing Navajo Certificates of Indian Blood to "dog tags" was attributed—a comparison the Navajo court found to be reprehensible. (*See* March 1, 2000 Order at 8 ("something this Court would prefer to hear the evidence on only one time—in its life time").)

It seems apparent that the Navajo court concluded that Wood was properly before that court, at least on plaintiffs' civil rights claims and on Singer and Riggs' defamation claims arising from the "time card" controversies. (*See also* March 1, 2000 Order at 9 (defendants failed to "recognize, much less rectify, the harm to [plaintiffs'] reputations").) The legal and factual basis for asserting tribal civil jurisdiction over Wood's alleged "dog tag" remark is far less apparent.¹⁷⁰

Based upon the record now before this court, the court is not persuaded that the Navajo court's preliminary finding concerning Wood's "phony fraud charge," (*viz.*, that his "malicious" characterization of Riggs and Singer's time-card errors as "fraud" may constitute actionable defamation that caused injury to plaintiff Riggs' reputation), is "clearly erroneous." To that extent, at least, this court concludes that the Navajo Nation District Court had subject-matter jurisdiction over defendant Wood for the purpose of plaintiff Riggs' defamation claim.

170. The potential imposition of civil damages liability on Wood for what Dickson described as "racially insensitive remarks" (ONLR Complaint of Allison Dickson at 1, *available in* Pertinent Parts Navajo Ct. R. ("ONLR Complaint" Tab)), itself raises questions under the free speech clause of the Indian Civil Rights Act, 25 U.S.C.A. § 1302(1) (2001) ("No Indian tribe in exercising powers of self-government shall—(1) make or enforce any law . . . abridging the freedom of speech"). In contrast to a defamatory statement, Wood's

remark published no false statement of fact to others concerning Dickson or any other person. *See generally* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Liability for intentional infliction of emotional distress may also require more than proof of "insensitivity" or tastelessness of the speech at issue in order to overcome the free speech guaranty. *Cf. Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

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The Navajo court's findings concerning Dickson's employment status claims afford no discernable basis for asserting subject-matter jurisdiction over Wood as an individual defendant for purposes of adjudicating those claims; in essence, Dickson's employment claim amounts to contractual dispute with the District itself. (See December 28, 1999 Order at [8]-[9].)¹⁷¹

(xiv) Summary

Based largely upon the findings of jurisdictional fact made by the Navajo Nation District Court in its orders in *Singer, et al. v. San Juan County, et al.*, this court concludes that the Navajo court had subject-matter jurisdiction over the San Juan Health Services District for the purposes of adjudicating at least some of plaintiffs Riggs and Dickson's employment-related claims against the District as their employer, consistent with the *Navajo Nation Code* and controlling Supreme Court precedent. This court concludes that the Navajo court likewise had subject-matter jurisdiction of Riggs' defamation claim against the District and Wood, (see Navajo Ct. Cmplt. at 23-24 ¶¶ 222-223, 228), and of Singer, Riggs and Dickson's claims against defendant Atcitty.

C. Navajo Court Judgments in the Federal Courts**1. Comity vs. Full Faith and Credit**

In their Amended Complaint, by motion—and at one point, by petition for a writ of mandamus—the Part II Plaintiffs have raised the question of what degree of recognition should be afforded to orders of the Navajo courts. As the court of appeals explained, they

seek enforcement of the Navajo court injunction under Full Faith and Credit Clause of the Constitution or, in the alternative, comity principles. Under the Full Faith and Credit Clause,

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1. Full faith and credit principles are also in place as a matter of statute:

Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738. According to appellants, tribes historically have been viewed as territories of the United States. In fact, Supreme Court cases point in opposing directions. *Compare United States ex rel. Mackey v. Cox*, 59 U.S. (18 How.) 100, 103, 15 L.Ed. 299 (1855) (holding that the Cherokee Nation was a "territory" for purposes of a federal letters of administration law), with *New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 474-75, 29 S.Ct. 190, 53 L.Ed. 286 (1909) (citing, with approval, *Ex Parte Morgan*, 20 F. 298, 305 (W.D.Ark.1883), which held that the Cherokee Nation was not a "territory" within the meaning of the federal extradition statute). See generally *Wilson v.*

¹⁷¹ The Navajo court made no findings of jurisdictional fact concerning any other claim Riggs or Dickson may have had against Wood

personally, as distinguished from their claims against the District, that would satisfy Navajo Nation Code, tit. 7, § 253(B).

Marchington, 127 F.3d 805, 808–09 (9th Cir.1997) (discussing the issue at length and ultimately holding that neither the Full Faith and Credit Clause nor 28 U.S.C. § 1738 is applicable to tribal judgments).

309 F.3d at 1225. The court of appeals did not decide the merits of this issue because the Part II Plaintiffs had not raised it before this court prior to the filing of their interlocutory appeal. *Id.* Instead, it proceeded upon “the assumption that the Navajo Nation injunction is enforceable in federal court as a matter of comity.” *Id.*

Following remand to this court, plaintiffs Singer, Riggs and Dickson amended their pleadings to say that they “now seek to have the orders enforced under principals [sic] of full faith and credit, or in the alternative, comity,” (Amended Complaint at 115), and urge that of the two approaches, full faith and credit should apply.¹⁷² They subsequently filed a Rule 56 motion to that same effect,¹⁷³ as well as a petition for a writ of mandamus filed first with the court of appeals,¹⁷⁴ and later, with the United States Supreme Court. (See Petition for Writ of Mandamus and Prohibition, *In re Riggs*, Case No. 02–1774, 2003 WL 22428213 (U.S.S.Ct., filed May 28,

2003), at 22 (“WHY FULL FAITH AND CREDIT IN FEDERAL COURTS SHOULD APPLY”).¹⁷⁵ The defendants, in turn, have responded that “to the extent the tribal court’s orders can be enforced in federal court, it is only through principles of comity.” (San Juan Health District Defendants’ Memorandum Regarding Subject Matter Jurisdiction and in Support of Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 497), at 28.)

As the court of appeals indicated, the existing case law on the degree of recognition to be afforded Indian tribal court judgments by the federal courts seemingly “points in opposing directions.” Cohen’s *Handbook* originally took the position that “[t]he decisions of Indian tribal courts, rendered within their jurisdiction and according to the forms of law or custom recognized by the tribe, are entitled to full faith and credit in the courts of the several states,” relying primarily on two Eighth Circuit cases, *Standley v. Roberts*, 59 F. 836, 845 (8th Cir.1894), *appeal dismissed*, 17 S.Ct. 999, 41 L.Ed. 1177 (1896), and *Raymond v. Raymond*, 83 F. 721, 722 (8th Cir.1897). Cohen, *Handbook* (1942 ed.) at 145 & nn. 209–210; *id.* at 275 & nn. 73–74

172. (See Plaintiffs’ Briefing on *Montana*, filed February 13, 2003 (dkt. no. 492), at 10–11; “Federalism and Article III Court Limitations in Defining Navajo Tribal Court Jurisdiction” [unsigned original document submitted by plaintiffs’ counsel], filed February 24, 2003 (dkt. no. 502), at 16–17 & n.21.)

173. (See Plaintiffs’ Motion for Summary Judgment for Enforcement of the Navajo Court Orders under Full Faith and Credit or Comity and Response of the District and County’s Briefs and Motions for Summary Judgment [& Memorandum in Support], filed February 28, 2003 (dkt. no. 504).) Among other things, plaintiffs point to references to “territory” or “territories” in the *Revised Statutes of the United States* dealing with Indian tribes. (See Exh. J in Pltfs’ 12/19/03 Compendium A/B,

excerpting 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 3–20 (2d ed.1904), available at http://digital.library.okstate.edu/kappler/Vol1/HTML_files/AFF0003A.html.)

174. (See Pltfs’ Mandamus Pet.)

175. In their Supreme Court mandamus petition, Plaintiffs asserted that “Full Faith and Credit will allow Tribal injunctions for emergencies and endangerment to life, to be rapidly carried out”; otherwise, “[a]ll Tribal rulings in conformity with limits of the statutes, as obligated by Treaty and BIA-judicial program contract, and official Executive agency action, are *ipso facto*, worthless in a non-Indian Utah Federal Court, as shown by this case.” (*Id.* at 22, 23 (footnote omitted).)

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(same). But the 1982 revision of that work explained that the question whether 28 U.S.C.A. § 1738 “includes Indian tribes has resulted in conflicting decisions of state courts,” citing *Jim v. CIT Financial Services Corp.*, 87 N.M. 362, 533 P.2d 751 (1975) (§ 1738 includes Indian tribes), *In re Buehl*, 87 Wash.2d 649, 555 P.2d 1334 (1976) (citing *Jim*), and *Brown v. Babbitt Ford*, 117 Ariz. 192, 571 P.2d 689 (Ct.App. 1977) (§ 1738 does not include Indian tribes); that “[t]he Supreme Court construed the term territory in an earlier statute to include Indian tribes,” and that “other federal decisions have reached the same conclusion,” citing *United States ex rel. Mackey v. Cove*, 59 U.S. (18 How.) 100, 103, 15 L.Ed. 299 (1856), and three Eighth Circuit cases circa 1984, including *Standley v. Roberts*. *Handbook* (1982 ed.) at 385 & nn. 47–49.¹⁷⁶ But the treatise does not take a decisive stance: “Tribal laws in matters within a tribe’s jurisdiction are entitled to recognition outside reservation boundaries either as a matter of comity or full faith and credit.” *Id.* at 246 (footnotes omitted).

¹⁷⁶ See also *Mehlin v. Ice*, 56 F. 12, 19 (8th Cir.1893); *Exendine v. Pore*, 56 F. 777 (8th Cir.1893); *Cornells v. Shannon*, 63 F. 305 (8th Cir.1894); *Raymond v. Raymond*, 83 F. 721 (8th Cir.1897). As one recent commentary explains:

[T]he Eighth Circuit decided several similar cases, each involving collateral attacks to tribal court judgments. These included *Mehlin v. Ice*, *Exendine v. Pore*, *Standley v. Roberts*, and *Cornells v. Shannon*. In *Mehlin* and *Exendine*, which were argued in the same term and decided in 1893, the Eighth Circuit concluded that judgments of the Cherokee Nation “are on the same footing with the proceedings and judgments of the courts of the territories of the Union, and are entitled to the same faith and credit.” In *Cornells*, a Muscogee (Creek) Nation judgment was also construed equivalent to judgments of the territorial courts, to be afforded the same respect and the same

Standley does not reflect what now appears to be the prevailing view:

The majority of the state and tribal courts that have considered the question have concluded that Indian tribes do not constitute “Territories” or “Possessions” within the meaning of the Full Faith and Credit Act. As for the states, only two—Idaho and New Mexico—have held that the term “Territories,” as used in the Full Faith and Credit Act, is “broad enough to include Indian tribes.” In these states, the judgments of tribal courts must be accorded full faith and credit by state courts, and vice versa. However, most states decline to accord full faith and credit to tribal court judgments, except when required to do so by federal law. Indeed, a “majority of state courts that have considered the question have opted for comity,” finding that tribes are not territories for the purposes of full faith and credit.

Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L.Rev. 297, 303 (2004) (footnotes omitted). As Judge Canby recently explained:

faith and credit. Likewise, the *Standley* decision recognized the validity of a Choctaw quiet title action. Curiously, none of these early cases pursues the analogy of tribes to territories so as to reach the precise question of whether full faith and credit was due tribal court judgments under the general full faith and credit statute, 28 U.S.C. § 1738. These opinions nonetheless indicate that by the turn of the last century, federal courts treated tribal court judgments with the same respect as those of any other court within the federal union.

Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: a Tribal Court Perspective*, 76 N.D. L.Rev. 311, 319–320 (2000) (footnotes omitted); see also *Raymond v. Raymond*, 83 F. 721, 722 (8th Cir. 1897) (judgment of Cherokee courts “entitled to all the faith and credit accorded to the judgments and decrees of territorial courts”).

Some state courts have simply given full faith and credit. E.g., *In re Buehl*, 87 Wash.2d 649, 555 P.2d 1334 (1976). Others, while denying the applicability of the full faith and credit clause, have nevertheless given full effect to tribal judgments or decrees as a matter of “comity.” E.g., *In re Lynch’s Estate*, 92 Ariz. 354, 377 P.2d 199 (1962); *Matter of Marriage of Red Fox*, 23 Or.App. 393, 542 P.2d 918 (1975); *Wippert v. Blackfeet Tribe*, 201 Mont. 299, 654 P.2d 512 (1982). Federal courts have done the same. See, e.g., *AT & T Corp. v. Coeur d’Alene Tribe*, 295 F.3d 899, 903 (9th Cir.2002). A few states have legislated or adopted court rules on the subject; South Dakota, for example, permits recognition of tribal judgments as a matter of comity if a list of conditions is met, including impartiality of the tribal proceedings. S.D. Cod. Laws 1–1–25; see *Red Fox v. Hettich*, 494 N.W.2d 638 (S.D.1993). Other state statutes or rules vary greatly in the degree to which the condition recognition of tribal court judgments. . . .

William C. Canby, Jr., *American Indian Law in a Nutshell* 227 (4th ed.2004).

New Mexico and Idaho have addressed the question fairly recently, adopting the view that Indian tribes are “territories” or “possessions” within the meaning of 28 U.S.C.A. § 1738. See *Halwood v. Cowboy*

Auto Sales, Inc., 124 N.M. 77, 79–82, 946 P.2d 1088, 1090–1093 (Ct.App.1997) (Navajo court “award of punitive damages against a non-Indian for conduct occurring on a Navajo reservation is entitled to full faith and credit in New Mexico courts”), *cert. denied*, 123 N.M. 626, 944 P.2d 274 (1997); *Jim v. CIT Financial Services Corp.*, 87 N.M. 362, 363, 533 P.2d 751, 752 (1975);¹⁷⁷ *Sheppard v. Sheppard*, 104 Idaho 1, 655 P.2d 895 (1982) (adopting full faith and credit approach to tribal court orders). Several state courts have expressly declined to extend full faith and credit to tribal orders, judgments and decrees. See *In re Day*, 272 Mont. 170, 900 P.2d 296, 301 (1995); *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689, 694 (Ct.App.1977) (holding that the “word ‘territory’ as used in 28 U.S.C. § 1738 was not intended to apply to [Indian tribal governments]”); *Desjarlait v. Desjarlait*, 379 N.W.2d at 144 (holding that Full Faith and Credit Clause applies only to states, not tribes); *Fredericks v. Eide-Kirschmann Ford*, 462 N.W.2d 164 (N.D.1990) (same); *Lohnes v. Cloud*, 254 N.W.2d 430, 433 (N.D.1977) (same).

“Numerous states have, by case law, statute, or court rule, expressly adopted comity as their policy for the recognition and enforcement of tribal court decisions. Among these states are Arizona, Connecti-

177. In *Jim*, the New Mexico Supreme Court announced its agreement “with the dissenting opinion of Judge Hernandez” of the New Mexico Court of Appeals “insofar as he held that the laws of the Navajo Tribe of Indians are entitled by Federal Law, 28 U.S.C. § 1738, to full faith and credit in the courts of New Mexico because the Navajo Nation is a ‘territory’ within the meaning of that statute. Cf. *Mackey et al. v. Coxe*, 59 U.S. (18 How.) 100, 15 L.Ed. 299 (1855); . . .” 87 N.M. at 363, 533 P.2d at 752. Citing *Standley*, Judge Hernandez had concluded that the Navajo code provisions governing repossession of consumer goods

were a legitimate exercise of the authority residing in the Navajo Tribe to which we should accord full faith and credit. To do so would not only constitute compliance with § 1738, *supra*, but would also constitute compliance with those authorities that have given full faith and credit to the judgments and orders of the courts of several of the Indian Tribes. See *Standley v. Roberts*, 59 F. 836 (8th Cir.1894); *Mehlin v. Ice*, 56 F. 12 ([8th Cir.] 1893); *Cornells v. Shannon*, 63 F. 305 (8th Cir.1894).

Jim v. CIT Financial Services Corp., 86 N.M. 784, 792, 527 P.2d 1222, 1230 (Ct.App.1974) (Hernandez, J., dissenting).

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cut, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Washington, Wisconsin, and Wyoming.” Gunn, *Compacts, Confederacies, and Comity*, at 303 n.43.¹⁷⁸

Congress has enacted legislation mandating the “full faith and credit” recognition of tribal court judgments and orders in very specific contexts.¹⁷⁹ As noted above, the Indian Child Welfare Act of 1978, Pub.L. No. 95–608, Title I, § 101, 92 Stat. 3069, 3071 (1978), *codified at* 25 U.S.C.A. § 1911(d) (2001), requires the “United States, every State, every territory or possession of the United States, and every Indian tribe” to “give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings

to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.” The Utah courts have acknowledged this, at the same time that they indicate that full faith and credit recognition does not generally apply to tribal court judgments:

Although Indian tribes and nations *are not states whose judgments are entitled per se to full faith and credit*, ICWA specifically directs that “every State . . . shall give full faith and credit to the . . . judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the . . . judicial proceedings of any other

178. See, e.g., Okla. Stat. tit. 12, § 728 (permitting the Supreme Court of the State of Oklahoma to extend full faith and credit to tribal court judgments); Wis. Stat. § 806.245 (granting full faith and credit to judgments of Wisconsin Indian tribal courts); Wyo. Stat. Ann. § 5–1–111 (granting full faith and credit to judicial decisions of the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation); *Desjarlait v. Desjarlait*, 379 N.W.2d 139 (Minn.Ct.App.1985); *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985); *Wippert v. Blackfeet Tribe*, 201 Mont. 299, 654 P.2d 512 (1982); *Malaterre v. Malaterre*, 293 N.W.2d 139 (N.D.1980); *Red Fox v. Red Fox*, 23 Or.App. 393, 542 P.2d 918 (1975); *In re Lynch's Estate*, 92 Ariz. 354, 377 P.2d 199 (1962).

Plaintiffs cite to Utah Code Ann. 9–9–209 (2003) as having some bearing upon the question:

9–9–209. Tribal ordinance or custom given full force and effect.

Any tribal ordinance or custom adopted by an Indian tribe, band, or community in the exercise of any authority that it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action.

But this provision, read in context, governs in situations in which the State of Utah has assumed jurisdiction over Indian country pursuant to Public Law 280, Pub.L. No. 83–280,

67 Stat. 588 (1953), as amended by the Indian Civil Rights Act of 1968 to require tribal consent. See Utah Code Ann. §§ 9–9–201 through 9–9–213 (2003); Pub.L. No. 90–284, Title IV, §§ 401–406, 82 Stat. 78–80 (1968), *codified at* 25 U.S.C.A. § 1321–1326 (2001). Utah has never assumed jurisdiction over the portion of the Navajo Reservation in Utah, so the provisions of Utah Code Ann. §§ 9–9–201 *et seq.* have no relevance to this case.

179. See Maine Indian Claims Settlement Act of 1980, Pub.L. No. 96–420, § 6, 94 Stat. 1785 (1980), *codified at* 25 U.S.C.A. § 1725(g) (2001); Indian Land Consolidation Act, Pub.L. No. 97–459, § 208, 96 Stat. 2517 (1983), *codified at* 25 U.S.C.A. § 2207 (2001); National Indian Forest Resources Management Act, Pub.L. No. 101–630, Title III, § 307, 104 Stat. 4532, 4537 (1990), *codified at* 25 U.S.C.A. § 3106(c) (2001); American Indian Agricultural Resource Management Act, Pub.L. No. 103–177, Title I, § 103, 107 Stat. 2011, 2015 (1993), *codified at* 25 U.S.C.A. § 3713(c) (2001); Violence Against Women Act, Pub.L. No. 103–322, Title IV, § 40221a, 108 Stat.1930 (1994), *codified at* 18 U.S.C.A. § 2265 (2000 & Supp.2005) (full faith and credit for tribal court domestic violence protection orders); Full Faith and Credit for Child Support Orders Act, Pub.L. No. 103–383, 108 Stat. 4063 (1994), *codified at* 28 U.S.C.A. § 1738B (Supp.2005).

entity.” 25 U.S.C.A. § 1911(d) (West 2001). Accordingly, *as required by statute*, the child custody orders rendered by the Tribal Court *are entitled to full faith and credit*, so long as they comply with the requirements of the [Utah] Foreign Judgment Act.

Searle v. Searle, 2001 UT App 367, ¶ 24, 38 P.3d 307, 314–315 (2001) (emphasis added & footnote omitted).

In *Wilson v. Marchington*, 127 F.3d 805 (9th Cir.1997), *cert. denied*, 523 U.S. 1074, 118 S.Ct. 1516, 140 L.Ed.2d 669 (1998), the Ninth Circuit reasoned that these congressional enactments granting “full faith and credit” recognition in specific contexts indicate that Indian tribal court judgments or tribal laws do not routinely command such recognition under 28 U.S.C.A. § 1738: “Because Indian nations are not referenced in the statute, the question is whether tribes are ‘territories or possessions’ of the United States under the statute. The United States Supreme Court has not ruled on the precise issue and its pronouncements on collateral matters are inconclusive. . . .” 127 F.3d at 808. “In our view,” the *Wilson* court explained, “the decisive factor in determining Congress’s intent was the enactment of subsequent statutes which expressly extended full faith and credit to certain tribal proceedings.”

If full faith and credit had already been extended to Indian tribes, enactment of the Indian Land Consolidation Act, the Maine Indian Claims Settlement Act, and the Indian Child Welfare Act would not have been necessary. Further, the separate listing of territories, possessions and Indian tribes in the Indian Child Welfare Act provides an indication

that Congress did not view these terms as synonymous. Thus, we conclude that Congress did not extend full faith and credit to the tribes under 28 U.S.C. § 1738.

Further, if Congress had specifically intended to include Indian tribes under the umbrella of 28 U.S.C. § 1738, it could have easily done so either by specifically referencing them in the 1804 amendments, or by further amending the statute once ambiguous judicial constructions appeared. It chose not to, but rather elected to create a special exception in cases of Indian child custody determinations and land trusts.

127 F.3d at 809. “Given this history,” the Ninth Circuit concluded, “it would be imprudent of us to now construe the phrase ‘territories and possessions’ in the 1804 statute to assume the meaning of the language Congress used in the Indian Child Welfare Act (‘every territory or possession of the United States, *and every Indian tribe*’) (emphasis added). . . .” *Id.* at 809.

Certainly, there are policy reasons which could support an extension of full faith and credit to Indian tribes. Those decisions, however, are within the province of Congress or the states, not this Court. Full faith and credit is not extended to tribal judgments by the Constitution or Congressional act, and we decline to extend it judicially.

Id. (footnote omitted).

“Like their state court counterparts,” and the Ninth Circuit in *Wilson*, “most tribal courts have concluded that the full faith and credit doctrine is not applicable in Indian country.” Gunn, *Compacts, Confederacies, and Comity*, at 304.¹⁸⁰

180. *But see Eberhard v. Eberhard*, 24 Indian L. Rptr. 6059 (Cheyenne River Sioux Tribal Ct.App.1997) (§ 1738’s reference to “any court of any such State, Territory or Posses-

sion” is “a geographic, rather than political, designation”), *excerpted in* Robert N. Clinton, Carole E. Goldberg & Rebecca Tsosie, *Ameri-*

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In particular, the “Navajo Nation Court of Appeals articulated the prevailing tribal view when it stated that Indian tribes ‘stand beyond the bounds of [the] rule of [full faith and credit], such as it presently exists and governs the constitutional relationships of the states of the United States.’” *Id.* (quoting *In re Guardianship of Chewiwi*, 1 Navajo Rptr. 120, 125 (Navajo Ct.App.1977)). In 1977, the Navajo Court of Appeals wrote:

It should not be necessary for this court to remind anyone that Indian nations and tribes were not signatories to the United States Constitution and were not intended to be included within the scope of the mandate of Article IV, Section 1. Nor does Title 28, United States Code, Section 1738, which was written to effectuate the mandate of Article IV, Section 1, provide a clear guide to the relationship between Indian courts.

....

It is our opinion that 28 U.S.C. 1738 does not purport to govern the relationship between Indian courts. The constitutional provision upon which it is based did not envision Indian courts being in existence nor did the act itself. The status of the decisions of Indian courts is generally determined not in relation to “full faith and credit”, but to the concept of the exclusive jurisdiction of each Indian court over certain matters, sanctioned by federal law and United States Supreme Court decisions.

can Indian Law: Native Nations and the Federal System 269–83 (4th ed.2003).

181. The Navajo court distinguished *Jim* on the ground that “the real issue presented by the facts of that case related to the conflicts of law doctrine. The Supreme Court determined that, under New Mexico’s Uniform Commercial Code, parties to a contract may determine which law, given the applicability of more than one, shall govern.” *Id.* at ¶ [39].

182. “The Navajo Nation law of recognition of foreign court decisions, statutes or acts of

We think, rather, that the issue presented when the decision of any state or Indian court is presented to the courts of the Navajo Nation for enforcement is one of comity. Navajo court will honor and enforce foreign judgments upon consideration of the right of the foreign court to issue the judgment, of the propriety of the proceeding, and of any relevant public policy of the Navajo Nation.

In re Guardianship of Chewiwi, 1 Navajo Rptr. 120 (Navajo Ct.App.1977), at ¶¶ [38], [41]–[42], available at <http://www.tribal-institute.org/opinions/1977.NANN.0000003.htm>;¹⁸¹ accord *Yazza v. Smith*, No. SC–CV–21–99 (Navajo 2001), available at <http://www.tribal-institute.org/opinions/2001.NANN.0000004.htm> (applying principles of comity, not full faith and credit, to enforcement of state court order); *Rough Rock Community School v. Navajo Nation*, No. SC–CV–06–94 (Navajo 1996) (same),¹⁸² available at <http://www.tribal-institute.org/opinions/1996.NANN.0000014.htm>; *Anderson Petroleum Servs., Inc. v. Chuska Energy & Petroleum Co.*, 4 Navajo Rptr. 187 (Navajo D. Ct.1983) (same). These cases make it plainly apparent that the Navajo courts have rejected the view now urged by Singer, Riggs and Dickson, *viz.*, that the Navajo Nation is a “territory” of the United States within the meaning and

state (also known as “public acts”) is comity, *in re Guardianship of Chewiwi*, 1 Nav. R. 120, 126 (1977); *Anderson Petroleum Serv., Inc. v. Chuska Energy & Petroleum Co.*, 4 Nav. R. 187, 189–91 (W.R.Dis.Ct.1983); *Pela v. Peabody Coal Co.*, No. A–CV18–89, slip op. at 16–17 (decided September 28, 1990). Under the Navajo Nation doctrine of comity, a foreign statute, court decision or public act must comply with Navajo Nation public policy.” *Id.* at ¶ [21].

scope of § 1738 and subject to “full faith and credit” recognition.¹⁸³

The question of recognition of tribal court judgments in state, federal and other tribal courts has been the subject of considerable academic analysis, criticism and debate.¹⁸⁴ More recently, a 2004 symposium presented by the *University of New Mexico Law Review* (Volume 34, No. 2, Spring 2004) addressed enforcement of tribal court judgments from several perspectives.¹⁸⁵ Consensus among scholars and judges on this question seems a distant prospect at best. Those advocating full-faith-and-credit recognition emphasize the enforcement of tribal court judgments in state and federal courts; “most of the scholarship advocating adoption of a comity model focuses on the obligation of tribal courts to enforce federal or state judgments.” Robert N. Clinton, Carole E.

Goldberg & Rebecca Tsosie, *American Indian Law: Native Nations and the Federal System* 293 (4th ed.2003).

In this case, the *MacArthur* panel assumed (without deciding) that the view reflected in the Navajo precedents and a majority of the other jurisdictions that have considered it is the correct one. For their part, the defendants have aligned themselves with that view, citing *Wilson*.

The “Indian Territory” cases like *Standley* did not construe § 1738, and if extended beyond their specific historical context, they may be read too broadly—illustrating the perils of generalization in a field in which history so often proves decisive.¹⁸⁶ Nevertheless, these cases remain matters of some consequence in this circuit: because the Eighth Circuit Court of Appeals of the 1890s handled appeals from the District of Utah and nearby districts that

183. The plaintiffs’ argue that “this Court can sustain, under principals [sic] of full faith and credit, the Navajo Court Orders as an exercise of ‘inherent sovereign’ rights,” because the Navajo Nation is a federal “territory” under § 1738 by virtue of Congress’ plenary power over Indian affairs. (Plaintiffs’ Motion for Summary Judgment for Enforcement of the Navajo Court Orders under Full Faith and Credit or Comity and Response of the District and County’s Briefs and Motions for Summary Judgment [& Memorandum in Support], filed February 28, 2003 (dkt. no. 504), at 10; “Plaintiffs’ Briefing on *Montana*,” filed February 13, 2003 (dkt. no. 492), at 10–11.)

These propositions appear to be contradictory only because they really are contradictory.

184. See, e.g., Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: a Tribal Court Perspective*, 76 N.D. L.Rev. 311 (2000); Robert N. Clinton, *Comity & Colonialism: the Federal Courts’ Frustration of Tribal <—> Federal Cooperation*, 36 Ariz. St. L.J. 1 (2004); Philip S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 Ga. L.Rev. 365 (1994); Paul E.

Frye, *Lender Recourse in Indian Country: a Navajo Case Study* 21 N.M. L.Rev. 275, 314–318 (1991); William V. Vetter, *Of Tribal Courts and “Territories”: Is Full Faith and Credit Required?*, 23 Cal.W.L.Rev. 219 (1987); Note, *Recognition of Tribal Decisions in State Courts*, 37 Stan. L.Rev. 1397, 1414 (1985); Fred Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M.L.Rev. 133 (1977).

185. See, e.g., Gunn, *Compacts, Confederacies, and Comity*; Robert Laurence, *Tremors: Justice Scalia and Professor Clinton Re-shape the Debate over the Cross-boundary Enforcement of Tribal and State Judgments*, 34 N.M. L.Rev. 239 (2004); Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path That Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders*, 34 N.M. L.Rev. 381 (2004); among others.

186. See Vine Deloria, Jr., *Indian Law and the Reach of History*, 4 J. Contemp. L 1 (1978); Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 Ariz. L.Rev. 203 (1989).

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were later incorporated into the Tenth Circuit, its cases have binding precedential effect in this District, unless and until they are overruled by the Tenth Circuit. *See, e.g., 1st Nat. Credit Corp. v. Von Hake*, 511 F.Supp. 634, 641 n. 7 (D.Utah 1981).¹⁸⁷ Neither the Tenth Circuit nor the Eighth Circuit have expressly overruled *Standley* or the other 1890s “Indian Territory” cases on this point.

This court has explored the question in some detail, first because the plaintiffs have pressed the issue since the remand,¹⁸⁸ but even more so to indicate that resolution of the full faith and credit vs. comity issue in this circuit will require something more than the rote application of *Wilson v. Marchington*’s reading of § 1738.

Though the Part II Plaintiffs have now raised the question of enforcement of the three orders at issue both as a matter of full faith and credit or comity, this court need not decide *which* of these doctrines govern recognition of Navajo court judgments. Under either approach—and absent specific legislative mandate to the contrary—this court is *not* required to enforce interlocutory, non-“final” orders of the Navajo courts.

2. Full Faith and Credit, Comity & the Problem of Non-Final Judgments

[17, 18] According to the second *Restatement of Conflict of Laws*, “A judg-

ment will not be recognized or enforced in other states insofar as it is not a final determination under the local law of the state of rendition.” *Restatement (Second) of Conflict of Laws* § 107 (1971). This general rule “applies to non-final judgments, whether at law or in equity,” and “judgments where the amount of recovery is uncertain,” *id.* § 107 cmt. a, concerning which the *Restatement* says this: “A judgment for the payment of money will not be enforced in other states unless the amount to be paid has been finally determined under the local law of the state of rendition.” *Id.* § 108.

The rationale for this rule is simple and straightforward:

A judgment will not be given greater effect abroad than it enjoys at home. A judgment will not have the force of res judicata in the state of rendition as to issues that remain subject to final determination. The judgment should neither be recognized nor enforced in other states as to such issues. . . .

Id. § 107 cmt. b.

[19] The rule of §§ 107 and 108 applies between jurisdictions under the Full Faith and Credit Clause: “While not explicit in Article IV, section 1, only judgments that are both valid and final generally are entitled to full faith and credit.” *Matter of*

¹⁸⁷. In *Von Hake*, this court noted that under the Evarts Act, or Circuit Court of Appeals Act of 1891, Act of March 3, 1891, [c. 517,] 26 Stat. 826, federal courts of appeals were established in nine designated circuits. Utah was located in the Eighth Circuit under that scheme. In 1929, Utah was transferred to the newly created Tenth Circuit pursuant to the Act of February 28, 1929, c. 363, 45 Stat. 1346, where it has since remained. This Court is, as a general rule, required to follow the decisions of the Court of Appeals for this Circuit, 1B Moore’s Federal Practice P 0.402(1) at 61–

62 & nn. 28–30 (2d ed. rev.1980), whatever its numerical designation may be or have been.

Id.

¹⁸⁸. Plaintiffs’ counsel has pressed the issue here and elsewhere. (*See, e.g.,* Petition for Writ of Mandamus and Prohibition, *In re Riggs*, Case No. 02–1774, 2003 WL 22428213 (U.S.S.Ct., filed May 28, 2003), at 22; Reply Brief to Respondent San Juan Health Services District’s Brief in Opposition, filed July 30, 2003, 2003 WL 22428215, at *3–*6.)

Estate of Jones, 858 P.2d 983, 985 (Utah 1993) (citing *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 614, 67 S.Ct. 903, 91 L.Ed. 1133 (1947)).

To be “valid,” for purposes of full faith and credit, a judgment must have been rendered by a court with competent jurisdiction and in compliance with the constitutional requirements of due process.

....

The second requirement for full faith and credit is that the judgment be final according to the laws of the state of rendition. See *Halvey*, 330 U.S. at 614, 67 S.Ct. at 906; *Thorley v. Superior Court*, 78 Cal.App.3d 900, 144 Cal.Rptr. 557, 561 (1978) (citing Restatement (Second) of Conflicts of Laws, § 107 (1971)); *Andre*, 106 Idaho at 462, 680 P.2d at 1362.

Id. at 985, 986.

The *Restatement* view has found general acceptance and recent application, including application to foreign judgments for which recognition was sought under principles of comity. See, e.g., *Rash v. Rash*, 173 F.3d 1376, 1380 (11th Cir.1999); *Korea Water Resources Corp. v. Lee*, 115 Cal. App.4th 389, 402, 8 Cal.Rptr.3d 853, 862 (4th Dist.2004); *Cahaly v. Benistar Property Exchange Trust Co., Inc.*, 268 Conn. 264, 275, 842 A.2d 1113, 1120 (2004). For example, in *Bianchi v. Savino Del Bene Intern. Freight Forwarders*, 329 Ill.App.3d 908, 925, 264 Ill.Dec. 379, 393, 770 N.E.2d 684, 698 (2002), an action brought by a former employee seeking to discover the employer’s assets in aid of enforcement of an Italian judgment for wrongful termination was dismissed because the Italian judgment did not determine the actual amount of money owed to the former employee as damages, and was therefore unenforceable in Illinois under the *Restatement* rule.

In federal courts, preliminary injunctions are inescapably interlocutory: “The grant or denial of a preliminary or temporary injunction does amount to an adjudication of the ultimate rights in controversy and is not conclusive on the parties or the court in subsequent proceedings.” 19 Fed. Proc. L.Ed. *Injunctions and Restraining Orders* § 47:34 (footnote omitted) (citing *Williams v. Eaton*, 443 F.2d 422 (10th Cir.1971), among others.) “‘The preliminary injunction was by its very nature interlocutory, tentative and impermanent.’” *United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1512 (10th Cir. 1988) (quoting *Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141, 144 (2d Cir.1977)).

And a finding of a “likelihood of success on the merits” under either Fed.R.Civ.P. 65 or Navajo Rule 65 does not equate with the conclusive determination of the merits reflected in a final judgment. Even the statement that the plaintiffs “stand more than an excellent prospect of success in prevailing on the merits in these proceeding[s] given the presentation and testimony to date” proves to be tentative and inconclusive, particularly where “the plaintiffs need ‘only show that they have raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation’....” (December 28, 1999 Order at [16], [18] (quoting *Tri-State Generation and Transmission Ass’n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 358 (10th Cir.1986))).

“As the term is used in the *Restatement*, ... a judgment is not a final judgment if further judicial action by the court rendering the judgment is required to resolve the matter litigated.” *Restatement (Second) of Conflict of Laws* § 107 cmt. a. The *Restatement* prescribes that “[t]he local

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law of the state of rendition determines whether or not a judgment is final and, if not, what issues remain subject to final determination.” *Id.* § 107 cmt. c.

3. Final Judgments Under Navajo Law

[20] Rule 65 of the Navajo Rules of Civil Procedure governs preliminary injunctions, and largely parallels the corresponding Federal Rule 65. Neither Rule contemplates the entry of a final order or final judgment under its provisions for “preliminary” relief; that subject is covered elsewhere. *See* Fed.R.Civ.P. 54, 58; Navajo R. Civ. P. 54, 58(a).¹⁸⁹

The *Navajo Nation Code* defines a “judgment”:

In all civil cases, judgment shall consist of an order of the court awarding money damages to be paid to the injured party, or directing the surrender of certain property to the injured party, or the performance of some other act for the benefit of the injured party or a declaration of rights of the moving party.

189. Navajo R. Civ. P. 54 reads:

54(a) Judgment. Except for default judgments, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled. A default judgment shall not be different in kind or exceed the amount requested in the prayer for relief.

54(b) Multiple Claims or Multiple Parties. During a lawsuit the court may enter judgments that dispose of fewer than all of the parties or claims. Unless specifically excepted by other rules or by caselaw these are not final judgments from which an appeal lies. Unless a stay is granted pursuant to Rule 62(e) such judgment can be enforced after entry.

54(c) Costs. In the judgment the court may order one or more of the parties to pay the costs. Costs include filing fees, costs of service, jury, and witness costs.

Navajo R. Civ. P. 58(a) reads:

58(a) Entry. All judgments shall be in writing and signed by the judge who heard the

Navajo Nation Code, tit. 7, § 701(A) (1995). It also directs that “[t]he judge shall render judgment in accordance with the verdict of the jury and existing law.” Navajo Nation Code, tit. 7, § 702 (1995). Appeals in the Navajo courts are taken from “final judgments” and “final orders.” Navajo Nation Code, tit. 7, § 801 (1995).¹⁹⁰

None of the three orders now at issue meet that description. Under Navajo law, “it is the substance, not the title of the document which determines whether a final judgment has been made.” *Litzin v. Farmington Motors, Inc.*, No. SC-CV-20-99 (Navajo S.Ct. 05/28/1999), at ¶18, available at <http://www.tribal-institute.org/opinions/1999.NANN.0000005.htm>. *Litzin* explains that—however it may be captioned—a document “is a final judgment because the document disposes of the case. ‘[A] final order results after all the substantial rights of the parties have been litigated and decided on the merits by the district court.... [T]he entry of the final decision must preclude further proceedings in the lower tribu-

case. The signing of the judgment constitutes entry of judgment. The clerk of the court must make every attempt to forward the judgment to the parties immediately after entry. The judgment is not effective before entry, except that for circumstances and on notice as justice may require, the court may enter a judgment nunc pro tunc, and the reasons shall be entered of record.

190. Navajo Nation Code, tit. 7, § 801(A) reads in part:

Every person aggrieved by any final judgment or other final order of a District Court of the Navajo Nation, or such other final administrative orders as provided by law and desiring to appeal shall within 30 days after the day such judgment or order is rendered appeal to the Supreme Court stating fully the grounds for appeal.

“Interlocutory appeals are not allowed within the Navajo court system.” *Billie v. Abbott*, 5 Nav. R. 201, 203 (1987).

nal.' *Billie v. Abbott*, 5 Nav. R. 201, 203 (1987)." *Id.* at ¶ [22].¹⁹¹

That seems pretty clear.

And far from disposing of the case or precluding further proceedings, the first page of the December 28, 1999 Order recited that, having before it "the matter of the application of the plaintiffs for a preliminary injunction pursuant to Rule 65(c) of the Navajo Nation Rules of Civil Procedure, *pending trial in chief* in the matter of the initial complaint drawn by the plaintiffs," the application was "ripe for decision." (December 28, 1999 Order at [1] (emphasis added).) The December 28, 1999 Order, at page [22], and the March 1, 2000 Order, at page 15, expressly contemplated an "initial pretrial conference" to be held "on the limited factual; legal; and damage issues remaining." (*Id.* at [22]; March 1, 2000 Order at 15 (same, to be scheduled in April of 2000).) Clearly, "all the substantial rights of the parties" had not yet "been litigated and decided on the merits by the district court"; nor had further proceedings been precluded by the termination of the litigation. *Billie v. Abbott*, 5 Nav. R. 201, 203, No. A-CV-29-87 (Navajo S.Ct. 07/29/1987), at ¶ [19], *avail-*

able at <http://www.w.tribal-institute.org/opinions/1987.NANN.0000019.htm>.¹⁹²

These three Navajo court orders "as issued" were not final under the law of the Navajo Nation—"the local law of the state of rendition"—and need "not be recognized or enforced" by this court, either as matter of full faith and credit or as a matter of comity. *Restatement (Second) of Conflict of Laws* § 107.

4. Preliminary Injunctive & other Equitable Relief in the *Singer, et al. v. San Juan County, et al.* Navajo Court Orders

The soundness of the *Restatement* view declining recognition and enforcement of interlocutory orders from another jurisdiction seems apparent when considered in the context of this case. Besides a lack of requisite finality, enforcement of the three Navajo court orders "as issued" run into additional difficulty because of the nature of the relief granted.

The preliminary *injunctive* relief ordered as against the County and Health

191. In *Litzin*, "actual, statutory, and punitive damages and costs were awarded to Litzin, which are clear indicators that the substantial rights of the parties were litigated and the merits were decided. In essence, the very fact that the District Court awarded damages concludes that the substantial rights of the parties were litigated and decided on the merits. Therefore, the District Court has disposed of the case and reached a final judgment." *Id.* at ¶ [22].

192. *Billie v. Abbott* (1987) elaborated upon the question of finality:

We took the opportunity to touch upon the concept of finality of district court orders in the context of appellate jurisdiction in *Chuska Energy Company v. The Navajo Tax Commission*, 5 Nav. R. 98 (1986). There we recognized that a final court order results after all the substantial rights of

the parties have been litigated and decided on the merits by the district court. *Chuska Energy Company, Id.* We further said that, "the entry of the final decision must preclude further proceedings in the lower tribunal." *Id.* at 102.

In effect, an order that precludes further proceedings on the merits will terminate a case. Thus, an order that terminates a case is final for purposes of appealability, even where it does not determine the merits of a case. In this case, the order denying the motion to dismiss did not terminate the case. We hold that an order denying a motion to dismiss is interlocutory and not final for purposes of appealability.

Interlocutory appeals are not allowed within the Navajo court system. *Chuska Energy Company, Id.* . . . *Id.* at ¶¶ [19]-[21] (footnote omitted).

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District defendants by the Navajo court in each of the three orders now at issue was rendered moot by reason of factual circumstances that had changed before this action was even commenced. At this point, it remains uncontroverted that *none* of the defendants retained any authority over the administration or management of the Montezuma Creek Clinic or over employment decisions at the clinic *after January 1, 2000*. The Navajo Nation had made its own contractual arrangements with Utah Navajo Health Systems to assume responsibility for that facility as of that date, and Utah Navajo Health Systems currently employs all of the Part II Plaintiffs—Singer, Riggs and Dickson—at the Montezuma Creek Clinic.

As the court of appeals recently explained,

“[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). “A case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979). “The crucial question is whether ‘granting a present determination of the issues offered . . . will have some effect in the real world.’” *Davidson*, 236 F.3d at 1182, quoting *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1266 (10th Cir.1999).

Utah Animal Rights Coalition v. Salt Lake City Corp., 371 F.3d 1248, 1256 (10th Cir.2004). In *Utah Animal Rights Coalition*, the court of appeals held that the plaintiff’s request for preliminary injunc-

tive relief involving city permits for protests that had been planned for the 2002 Winter Olympics was moot: “The alleged violation took place in 2001, the Olympics have come and gone, and neither temporary restraining order, preliminary injunction, nor permanent injunction could have any present-day effect.” *Id.* at 1257.

[21, 22] A claim is moot when there is no reasonable expectation that the alleged violation of law will recur and interim relief or events have eradicated the effects of the violation in question. *See, e.g., Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1524 (10th Cir.1992) (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979)). “‘Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.’” *F.E.R. v. Valdez*, 58 F.3d 1530, 1534 (10th Cir. 1995) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 495–96, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)). There must be an actual, ongoing dispute. If the movant is no longer in harm’s way, injunctive relief becomes moot. *See McAlpine v. Thompson*, 187 F.3d 1213, 1218 (10th Cir.1999) (release on parole moots an inmate’s request for injunctive relief regarding prison conditions and regulations); *Bauchman for Bauchman v. West High School*, 132 F.3d 542, 548 (10th Cir.1997) (graduation from high school moots student’s request for injunctive relief concerning content of high school course curriculum); *cf. Honig v. Students of Cal. Sch. for the Blind*, 471 U.S. 148, 105 S.Ct. 1820, 85 L.Ed.2d 114 (1985) (appeal from preliminary injunction order vacated when propriety of that relief was rendered moot by subsequent events).¹⁹³

193. Even if neither party raises mootness as

an issue, the court has “an affirmative obli-

[23] A preliminary injunction represents an award of extraordinary relief, and its enforcement is not justified if there is no likelihood that the complained of behavior will continue. *See, e.g., Securities and Exchange Comm'n v. Pearson*, 426 F.2d 1339, 1343 (10th Cir.1970). The court of appeals has explained that

[a]n exception to the mootness doctrine arises in cases which are “capable of repetition, yet evading review.” *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 377, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608 (1979) (quoting *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911)). . . . To meet this exception, two conditions must be satisfied: “(1) the challenged action . . . [must be] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there . . . [must be] a reasonable expectation that the same complaining party . . . [will] be subjected to the action again.” *Id.*

Fischbach v. New Mexico Activities Ass'n, 38 F.3d 1159, 1161 (10th Cir.1994).¹⁹⁴ But as was the case in *Fischbach*, “[n]either

requirement of this exception is met in this case.” *Id.*

[24] Singer, Riggs and Dickson are no longer employed by the Health District; they continue to work at the Montezuma Creek Clinic, but at the behest of another employer. They no longer have any direct concern with whether the District complies with the NPEA or other requirements of Navajo law, or whether it adopts a merit system for its employees, or engages in nepotism. The portions of the Navajo court orders affecting plaintiffs’ future status as Health District employees cannot “have any present-day effect” in “the real world,” *Utah Animal Rights Coalition*, 371 F.3d at 1256, 1257; neither can the portions of the order addressing the Health District’s administration of health care services and its advertising of employment opportunities at the clinic. Even as to the billing of IHS-eligible Navajo patients, counsel have long since advised this court that those billing practices have ceased. As to those matters, “This controversy is over, and it will not recur.” *Utah Animal Rights Coalition*, 371 F.3d at 1257.¹⁹⁵

gation to consider this [jurisdictional] issue *sua sponte*.” *Moongate Water Co., Inc. v. Dona Ana Mutual Domestic Water Consumers Ass’n*, 420 F.3d 1082, 1088 (10th Cir.2005) (citing *Tandy v. City of Wichita*, 380 F.3d 1277, 1290 n. 15 (10th Cir.2004)).

194. *See Riley v. INS*, 310 F.3d 1253, 1257 (10th Cir.2002) (exceptions to mootness include cases in which “(1) secondary or collateral injuries survive after resolution of the primary injury; (2) the issue is deemed a wrong capable of repetition yet evading review; (3) the defendant voluntarily ceased an allegedly illegal practice but is free to resume it at any time; or (4) it is a properly certified class action.” (internal quotation marks omitted)).

195. Nor may plaintiffs avoid the mootness issue by pressing for *declaratory* relief that the Navajo court orders were enforceable.

It is well settled that mootness principles “govern[] cases brought . . . under the Declaratory Judgment Act.” *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1348 n. 3 (10th Cir.1994), superseded by statute on other grounds as stated in *Walker v. UPS Inc.*, 240 F.3d 1268, 1278 (10th Cir.2001); *Esparza*, 862 F.2d at 791–92 (claims for prospective declaratory and injunctive relief mooted by Colorado Supreme Court decision). Otherwise, a declaratory judgment could be an improper advisory opinion. *Cox*, 43 F.3d at 1348. “[W]ith respect to declaratory relief, we look beyond the initial controversy which may have existed at one time and decide whether the facts alleged show that there is a substantial controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Beattie v. United States*, 949 F.2d 1092, 1094 (10th Cir.1991) (internal quotation marks, brackets, and ellipses omitted).

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Of the preliminary injunctive relief granted in the December 28, 1999 Order, only the requirement that the Health District “delete and expunge all the charges and writings pertaining to the December 2nd through December 8th charges of fraud, discipline, and termination, from Mr. Riggs and Ms. Singer’s personnel file” addressed a matter that still remained within the Health District’s purview after it relinquished control over the Montezuma Creek Clinic in January of 2000, and that was not resolved by subsequent events. It may well be that as to expungement of plaintiffs’ Health District files, “the passage of time ha[s] rendered the injunction superfluous,” *Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215, 1219 (10th Cir. 2004), but in this regard, the record now before this court is unclear.

The other equitable relief ordered by the Navajo court in favor of Singer, Riggs and Dickson, *viz.*, the award of back pay, back benefits, and similar monetary relief, was and is wholly unliquidated as to amounts. That relief remains interlocutory and provisional in nature, notwithstanding the brief time frame mandated by that court in its March 1st and March 6th Orders within which the defendants were required to comply.

Absent real numbers, all this court could do is “declare” that the Navajo court made a preliminary finding of liability for back pay, etc., pending a trial on the merits—which would add nothing to the Navajo orders themselves and would afford no relief of any substance in favor of the Part II Plaintiffs in this forum.

Whatever the merit of the Navajo court’s preliminary findings of liability may be, this court cannot sit as a Navajo district court to complete that tribunal’s

work in making final determinations as to amount. Nor may this court exercise its own judicial power to compel the Health District defendants to pay to these plaintiffs an unknown and undetermined amount of money, particularly in advance of the trial on the merits that was still pending before the tribal forum at the time these three orders were entered. *See* 25 U.S.C.A. § 1302(8) (2001)

Ironically, the Part II Plaintiffs commenced this action seeking enforcement of the Navajo court orders, but at this point they have placed little or nothing before this court that it may now enforce.

D. Attorney’s Fees Awards Under Navajo Law

In the Navajo courts, “The general rule for awarding attorney’s fees is set forth in *Yazzie v. Herrick*, 5 Nav. R. 129, 131 (1987)[:]”

The attorney’s fees rule within the Navajo Nation is that each party in litigation is responsible for their own attorney’s fees.... Recognized exceptions are (1) when a statute provides for attorney’s fees ...; (2) when a case presents a special set of circumstances ...; and (3) if a pleading or document is not submitted in good faith, or it contains material misstatements of fact or law, or is not made upon adequate investigation or research.

Thus, a party must prove that his case is an exception to the rule before he is entitled to attorney’s fees.

Largo v. Gregory & Cook, Inc., No. A-CV-11-93 (Navajo 02/17/1995), at ¶¶ [68]-[70], available at <http://www.tribal-insti->

Moongate Water Co., Inc. v. Dona Ana Mutual Domestic Water Consumers Ass’n, 420 F.3d

1082, 1088 (10th Cir.2005).

tute.org/opinions/1995.NANN.0000001.htm.

In granting “attorney’s fees, costs and expenses associated with this proceeding” to Singer, Riggs and Dickson in its December 28, 1999 Order, the Navajo court did not cite or discuss *Yazzie v. Herrick*, or any other precedent; nor did it identify which of the “recognized exceptions” to the Navajo Nation’s general rule it was relying on in making its award. The court simply remarked that “[o]ne way irreparable injuries may be partially compensated for is by the payment of accrued legal fees and costs, and all expenses necessary for the plaintiffs to defend their rights as the Court will order herein.” (December 28, 1999 Order at [16].)

As for a statutory basis for a fee award, the Navajo Preference in Employment Act provides for an award of attorney’s fees to a prevailing claimant. Section 612(A) of the NPEA states, “[i]f, following notice and hearing, the Commission finds that respondent has violated the Act, the Commission shall: . . . (2) In the case of an individual suit initiated pursuant to § 610(H), award costs and attorney’s fees if the respondent’s position was not substantially justified.” Navajo Nation Code, tit. 15, § 612(A)(2) (1995). Like the rest of the NPEA’s enforcement provisions, the question of attorney’s fees is first committed to the discretion of the Navajo Nation Labor Commission, not to the district courts.¹⁹⁶ The December 28, 1999 Order gives no indication that it is enforcing a Labor Commission award, or indeed, that the Labor Commission had made any find-

ing of an NPEA violation before that order was entered.

Apart from the NPEA, the Navajo common law rule regarding attorney’s fees appears wholly consistent with the general rule of most American jurisdictions that “damages in a tort action do not ordinarily include compensation for attorney’s fees or other expenses of the litigation.” *Restatement (Second) of Torts* § 914(1) (1979). The Navajo court’s passing reference to partial compensation for “irreparable injuries” sheds little light on the basis in Navajo law for the preliminary relief awarding attorney’s fees, costs and expenses in the December 28, 1999 and March 1, 1990 Orders.

E. Plaintiffs’ Standing re: Navajo Patients

Much of the preliminary injunctive relief granted in the Navajo court’s December 28, 1999 and March 1, 2000 Orders involved alleged injury to the interests of Navajo patients seeking medical care at the Montezuma Creek Clinic—none of whom were before that court as plaintiffs. The December 28, 1999 Order touched upon the question of the standing of Singer, Riggs and Dickson seek relief on behalf of those patients:

As in the case of *Halona v. Navajo Nation*, 1 Nav. R. 189, the key to this case lies “not in non-Indian analysis” as to any matter of standing. *Id.* at 199. The fact that makes this case most distinguishable . . . is that the plaintiffs have a privilege and a duty under Nava-

¹⁹⁶. In *Largo*, there was a dispute as to whether the Navajo Nation Labor Commission correctly applied the “substantially justified” standard in awarding attorney’s fees. The court articulated the proper standard of review for an award under the NPEA:

Section 12 of the NPEA leaves to the Commission the task of evaluating whether

a respondent’s position is “substantially justified.” On appeal, our review is limited to determining whether the Commission’s decision was arbitrary, capricious, or not supported by the evidence. Only if the decision was clearly an abuse of the Commission’s discretion will it be overturned.

Largo, at ¶ [76].

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jo custom and tradition for Mrs. Singer in her in-law status and Mr. Riggs and Mr. Dickson in their enrolled status, to look out for the welfare of their fellow Navajo “citizens”. In Halona, this tribal status raises issues “peculiar to Navajo tradition and law.” The Navajo clan system, applicable to in-laws through their spouses, demonstrates the unique bonding of Navajo’s to other tribal members or non-tribal members as family, and the familial duties inherent to care for other members of the Tribal family as demonstrated by the plaintiffs in this case and by the common nature of Navajo custom and tradition, and not dissimilar from the familial duties as found among other tribes that remain likewise in their nearest to original condition in respect to their customs or traditions.

(December 28, 1999 Order at [12].) The Navajo court thus expressed an expansive view of the plaintiffs’ standing to assert the interests of the clinic’s Navajo patients, based upon Navajo clan, familial and community obligations.

Plaintiffs cite to *Judy v. White*, No. SC-CV-35-02 (Navajo S.Ct. 08/02/2004), concerning “how standing differs in the Navajo Nation when public concerns are involved.”¹⁹⁷ *Judy* involved a lawsuit challenging two Navajo Nation Council resolutions increasing council delegate and presidential compensation for lack of compliance with the Title II Amendments, and seeking to enjoin the Navajo Nation’s chief financial officer from complying with those resolutions. Asserting its power of judicial review,¹⁹⁸ the Navajo Supreme Court discussed the issue of plaintiffs’ standing:

197. (Letter to the Court from Susan Rose, Esq., dated September 24, 2004.)

198. “The Navajo Courts have the power to determine the validity of resolutions passed

The doctrine of standing has its origins in federal law. For more than 200 years, federal courts have interpreted whether cases are properly before them through the development of doctrines of justiciability including standing, ripeness, and mootness. These doctrines are derived from, and intertwined with, the “case and controversy” language within the Constitution. In its theoretical form, justiciability considers whether the dispute sought to be adjudicated can be presented in an adversarial context, in a form historically viewed as capable of judicial resolution by English/American courts. See *Halona v. MacDonald*, 1 Nav. R. 189 (Nav.Ct.App.1978); *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). The history of the U.S. Constitution and federal courts’ justiciability considerations is vast and remarkable, and in its review we are once again sharply reminded that it is not our Diné history, nor that of our own tripartite government.

Id. at ¶ [24] (footnote omitted). Acknowledging that “[o]ur judicial system mimics the American adversarial system in some ways,” the court stated that “we will not interpret unintended limitations on the district courts based on federal court case law or inapplicable U.S. legislation.”

That is not to say that we do not recognize the doctrine of standing, but that we do so pursuant to our own common values of substantial justice rather than as the term is understood in federal courts. Navajo courts will take their own path in judicial review, as required by the “Navajo higher law in fundamental customs and traditions, as well as substantive rights found in the Treaty of

by the Navajo Tribal Council.’ *Thompson v. Navajo Nation*, 6 Nav. R. 181, 183 (Nav.Sup.Ct.1990), citing *Halona v. MacDonald*, 1 Nav. R. 189 (Nav.Ct.App.1978)” *Judy* at ¶ [18].

1868, the Navajo Nation Bill of Rights, the Judicial Reform Act of 1985, and the Title Two Amendments of 1989.” *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319, 324 (Nav.Sup.Ct. 1990).

Standing may become an issue in any matter before the courts, and *we limit our discussion today to standing as it relates to public-law matters and the judicial review of government action*. We have considered standing on numerous occasions without articulating a specific test for the district courts to follow. We undertake no such effort today, because we believe that absent specific legislative limitations, *anyone may bring a public-law dispute to the Navajo Nation courts*. For our courts to close their doors to legislative review based on standing, either as a matter of convenience or to avoid considering sensitive political issues, is an abrogation of our judicial responsibilities and abhorrent to Diné concepts of participatory governance and due process. “One of the major differences between Western principles of adjudication and Navajo legal procedure as participatory democracy is that it is essentially egalitarian.

Egalitarianism is the fundamental principle of participatory democracy. The egalitarian principle is the ability of the people as a whole to make law.” *Downey v. Bigman*, 7 Nav. R. 176, 177 (Nav.Sup.Ct.1995). It is not for us to

choose who may request judicial review. We have never held otherwise.

Id. at ¶¶ [26]-[27] (emphasis added). *Judy v. White* thus expands upon *Halona v. McDonald*¹⁹⁹ and stands for the proposition that *anyone* has standing to challenge the validity of any legislative action of the Navajo Nation Council in the Navajo courts.²⁰⁰

Even so, the Navajo Supreme Court has taken a less expansive view of the standing of litigants to assert the interests of third parties not before the court. *Manygoats*, for example, denied Atkinson Trading Company standing to assert equal protection claims on behalf of its non-Navajo employees:

We summarily dismiss the Trading Post’s contention that it is denied equal protection of the law because only Navajos can bring claims under the NPEA. We cannot address that claim in this case, because the Trading Post has no standing to assert the rights of its non-Navajo employees. There is no case or controversy on that issue, and there would be one only if a non-Navajo employee attempted to make a claim under the NPEA and it was rejected.

Manygoats I at ¶¶ [51]; *accord Manygoats II* at ¶ [46]. Years earlier, the Navajo Court of Appeals reached a similar conclusion as to claims of third party creditors who were not parties to *Hall v. Arthur*, 3 Nav. R. 35 (Navajo Ct.App. 12/16/1980):

199. As the *Judy* court explains:

White suggests that *Halona* precludes standing. He argues that *Halona* limits suits by private citizens to matters for which legislative acts intend improper expenditures of the public treasury. . . . [W]e view *Halona* from a different perspective. While the practical aspects of *Halona* pointed to public expenditures for private purposes, we believe the reasoning behind the decision is most instructive here. The

Court’s ultimate holding was not that a private citizen was entitled to challenge the expenditure of public monies for private purposes, but that a private citizen had standing to challenge the legitimacy of public acts.

Id. at ¶ [22].

200. But here, no action of the Navajo Nation Council was at issue.

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To provide guidance for the future we hold that in cases such as this, in which there are obligations to third parties, it is not appropriate for the Courts of the Navajo Nation to award damages based upon the amount owed to persons, or corporations, or governments which are not a party to the litigation. All that a District Court could properly do under such circumstances would be to determine the relative rights of the parties before it.

Not only is it inappropriate for a District Court to determine the amount owed to a person not a party to the litigation, it is also not appropriate for a court to determine which of two parties is liable to such person not a party to the court

Id. at ¶¶ [52]-[53].

[25, 26] This court need not decide whether these plaintiffs had standing in the Navajo court to assert the interests of the non-party Navajo patients under Navajo law, because the preliminary relief granted for their benefit by the Navajo court has by now been rendered moot. Nevertheless, the court has raised the question, in part to emphasize the importance of reading cases like *Judy v. White* and *Halona v. McDonald* in their essential context, but also to emphasize that in the context of a federal district court, invoking *this* court's power to recognize and enforce judgments of a Navajo court raises questions of standing *in this forum*, particularly where litigants call upon this court to use its power to enforce injunctive relief for the benefit of persons not before the court. In federal court a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge Christian College*

201. The court reached the same conclusion as to the County defendants, but this court's current ruling on the jurisdictional question

v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). When a party invokes the jurisdiction of this court, he or she does so subject to the constitutional and prudential constraints that govern this court's exercise of its own judicial power.

F. Governmental Immunity & The Health District Defendants

Early in these proceedings, Judge Kimball of this court entered a Memorandum Decision and Order, filed October 30, 2000 (dkt. no. 81) ("October 30, 2000 Decision"), dismissing the claims of Singer, Riggs and Dickson against the County and Health District defendants on sovereign immunity grounds. See *MacArthur, et al. v. San Juan County, et al.*, Civil No. 2:00-CV-584DAK, 2000 U.S. Dist. LEXIS 16859 (D. Utah, decided October 30, 2000).

Having decided that the Navajo court has subject-matter jurisdiction over Riggs and Dickson's claims against the San Juan Health Services District and defendants Wood and Atcitty, this court must now determine whether the adjudication of those claims in the Navajo court was barred by sovereign immunity, as Judge Kimball previously ruled. His initial Memorandum Decision held that the District, as a political subdivision of the State of Utah, was immune from suit in the Navajo court because the State had not waived the common-law immunity of its subdivisions from suit in tribal courts, and that the individual Health District defendants were likewise immune from suit in tribal court under Utah law.²⁰¹

1. The October 30, 2000 Decision & Law of the Case

[27] The Health District defendants now submit that the court's prior Decision

renders further consideration of their sovereign immunity defense unnecessary.

was the correct one, and that the “law of the case” doctrine precludes relitigation of that issue following remand, relying on *Arizona v. California*, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983), and *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979),²⁰² as authority. (Dist. Summ. Judg. Mem. at 14.)

As the Court explained in *Arizona v. California*, “Unlike the more precise requirements of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” 460 U.S. at 618, 103 S.Ct. 1382 (citing 1B J. Moore & T. Currier, *Moore’s Federal Practice* ¶ 0.404 (1982)) (footnote omitted). But as the Court pointed out, “Law of the case directs a court’s discretion, it does not limit the tribunal’s power.” *Id.* (citing *Southern R. Co. v. Clift*, 260 U.S. 316, 319, 43 S.Ct. 126, 67 L.Ed. 283 (1922) and *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912)).²⁰³

The Tenth Circuit recently expressed essentially the same understanding:

The law of the case doctrine sets forth the fairly straightforward legal and pragmatic principle of certainty throughout the proceedings of a case: “[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent

stages in the same case.” *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). However, courts are quick to recognize the flexibility of the rule and are permitted to overturn erroneous rulings as the underlying policy of the rule is one of efficiency, *Major v. Benton*, 647 F.2d 110, 112 (10th Cir.1981) (citations omitted), not restraint of judicial power, *Messinger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912). Indeed, the presence of new evidence or subsequent contradictory precedent or a determination that the previous ruling was clearly erroneous are legitimate bases for not applying the law of the case doctrine. *Major*, 647 F.2d at 112.

Prairie Band of Potawatomi Nation v. Wagnon, 402 F.3d 1015, 1018 (10th Cir. 2005).

Until it becomes embodied in a final judgment, a legal ruling remains interlocutory and subject to revision by the court that made it. See, e.g., *United States v. LoRusso*, 695 F.2d 45, 53 (2d Cir.1982) (“A district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment. . . .”); *Collins v. State*, 60 F.3d 837 (Table), 1995 WL 405112, at *1 (10th Cir.1995) (unpublished disposition) (“All orders prior to the district court’s final order . . . were interlocutory; that is, subject to change while the case was ongoing.”). Fed.R.Civ.P. 54(b) spells this out as to rulings that may be dispositive of claims:

202. This *Montana* case held that collateral estoppel barred the United States from relitigating in federal district court the validity of a State gross receipts tax on public contractors that had previously been upheld in Montana state court litigation—litigation over which the United States had exercised direct control. 440 U.S. at 153–164, 99 S.Ct. 970. It thus proves inapposite to the issue at hand

203. If “law of the case” is the “doctrine holding that a decision rendered in a former appeal of a case is binding in a later appeal,” *Black’s Law Dictionary* 893 (7th ed. Bryan A. Garner, ed.1999), then the doctrine would have no application here because, as the Health District defendants point out, the court of appeals “declined to review the Court’s decision on sovereign immunity,” and thus rendered no decision in the former appeal. See *MacArthur*, 309 F.3d at 1227–1228.

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any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and *the order or other form of decision is subject to revision at any time before the entry of judgment* adjudicating all the claims and the rights and liabilities of all the parties. [Emphasis added.]

The *MacArthur* panel vacated the prior order of this court dismissing the claims of plaintiffs Singer, Riggs and Dickson and the matter was remanded for further proceedings. 309 F.3d at 1228. The court's Rule 54(b) certification of that dismissal order²⁰⁴ no longer has any force or effect, and the October 30, 2000 Decision continues to be interlocutory. At most, then, as to prior rulings of this court, "law of the case" serves as a guide for the exercise of the court's discretion in departing from the prior rulings.

At the trial court level, the doctrine of the law of the case is little more than a management practice to permit logical progression toward judgment. Prejudgment orders remain interlocutory and can be reconsidered at any time, but efficient disposition of the case demands that each stage of the litigation build on the last, and not afford an opportunity to reargue every previous ruling. In the end, however, the doctrine of the law of the case does not require or encourage a trial court to render a judgment erroneous in law.

1B James Wm. Moore, et al., *Moore's Federal Practice* ¶ 0.404[1] at II-3 (2d ed. rev.1996) (footnotes omitted).

2. State Sovereign Immunity & Tribal Courts

[28] As to the merits of their sovereign immunity defense, the Health District de-

fendants submit that "Utah and its political subdivisions are immune from suit in the Tribal Court. 'Sovereign immunity is a common law doctrine which precludes litigation against an unconsenting government.'" (Dist. Summ. Judg. Mem. at 15 (quoting *Montana v. Gilham*, 932 F.Supp. 1215, 1219 (D.Mont.1996), *aff'd*, 133 F.3d 1133 (9th Cir.1997)).) "As independent sovereigns, states enjoyed this immunity before the Constitution was ratified, and they retain it today 'except as altered by the plan of the Convention or certain constitutional Amendments.'" (*Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 713, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999)).) In the context of the Constitutional Convention, the Supreme Court has "found a surrender of immunity against particular litigants in only two contexts: suits by sister States, *South Dakota v. North Carolina*, 192 U.S. 286, 318, 24 S.Ct. 269, 48 L.Ed. 448 (1904), and suits by the United States, *United States v. Texas*, 143 U.S. 621, 12 S.Ct. 488, 36 L.Ed. 285 (1892)." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991). "We have not found a surrender by the United States to suit by the States, *Kansas v. United States*, 204 U.S. 331, 342, 27 S.Ct. 388, 51 L.Ed. 510 (1907); . . . nor . . . a surrender by the States to suit by foreign sovereigns, *Monaco [v. Mississippi]*, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934)]," *id.* at 782, 54 S.Ct. 745 (citation omitted); nor did the Court find a surrender of immunity by the States to suit by Indian tribes, as was attempted in *Blatchford*:

Respondents argue that Indian tribes are more like States than foreign sovereigns. That is true in some respects: They are, for example, domestic. The relevant difference between States and foreign sovereigns, however, is not do-

²⁰⁴. (See Order, filed March 6, 2001 (dkt. no. 168).)

mesticity, but the role of each in the convention within which the surrender of immunity was for the former, but not for the latter, implicit. *What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession.* There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States . . . as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Id. (emphasis added & citation omitted). In relation to Indian tribes, then, the original sovereign immunity of the States stands undiminished.

In *Montana v. Gilham*, 133 F.3d 1133 (9th Cir.1997), the plaintiff sued the State of Montana in the Blackfeet tribal court for injuries suffered in an auto accident on a state highway within the reservation boundaries, seeking to hold Montana liable for its governmental decisions concerning highway design. Rejecting the State's assertion of sovereign immunity, the tribal court entered judgment against it, and Montana challenged the tribal court judgment in federal court. The Ninth Circuit framed the immunity issue in two parts: "Whether the State of Montana is immune from suit in tribal court involves two questions: (1) whether Montana has sovereign immunity from suit in the tribal courts, and (2) if so, whether Montana waived this immunity. . . ." 133 F.3d at 1135 (footnote omitted).

As Hamilton famously observed: "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general prac-

tice of mankind; and the exemption as one of the attributes of sovereignty is now enjoyed by the government of every state in the union." The Federalist No. 81, p. 548-49 (J. Cooke ed.1961). As Chief Justice John Marshall more colloquially put it: "[i]t is not rational to suppose that a sovereign power should be dragged before a court." 3 Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 555 (2d ed. 1863).

The States and Indian tribes, as co-existing sovereigns with significant and complex commercial, governmental and property interrelationships, often require a mechanism to determine their respective rights and interests. Finding a forum to resolve disputes is problematic, for each sovereign naturally defends the jurisdictional reach of its own courts and resists being "dragged before" the courts of the other. See, e.g., *Wippert v. Blackfeet Tribe*, 260 Mont. 93, 859 P.2d 420 (1993).

Id. (footnote omitted). After considering the nature of sources of State and tribal sovereignty, the *Gilham* panel "conclude[d] that the States have retained their historic sovereign immunity from suits by individuals and that nothing in the inherent retained powers of tribes abrogates that immunity." *Id.* at 1137 (footnote omitted).

This result is consistent with immunity decisions in other contexts. For example, the United States, as a superior sovereign, is absolutely immune from unconsented suit in tribal court. *United States v. Yakima Tribal Court*, 806 F.2d 853, 858-60 (9th Cir.1986). Further, tribes have retained their sovereign immunity even from claims raised in a compulsory counterclaim by a State to an action filed by the tribe. *Oklahoma Tax Com'n v. Citizen Band Potawatomi*

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Indian Tribe of Okla., 498 U.S. 505, 509–10, 111 S.Ct. 905, 909–10, 112 L.Ed.2d 1112 (1991).

Id. at 1137 n. 1. Finding that Montana had not waived its sovereign immunity from suit in tribal court, *Gilham* dismissed the action on relatively narrow grounds:

In reaching our conclusions about Montana's immunity from *Gilham*'s tort action in tribal court, we do not intend to paint with too broad a stroke. The jurisdictional reach of tribal courts is an important and vital matter. Development of tribal court systems is a critical component of tribal self-government, one which courts have encouraged. See, e.g., *Iowa Mut. Ins. Co.*, 480 U.S. at 14–15, 107 S.Ct. at 975–76; *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856–57, 105 S.Ct. 2447, 2453–54, 85 L.Ed.2d 818 (1985).

Immunity from tort actions by individuals is also a crucial constituent of sovereignty, both for the tribes and the States. It is consistent with the recognition of sovereignty that both the tribes and the States are immune from unconsented tort actions by individuals in each other's courts. "A real sovereign, a state, a nation is always sovereign. In none of its activities is it ever subject to a higher human will, individual or collective." *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 568, 46 S.Ct. 611, 70 L.Ed. 1088 (1926). In the absence of congressional action or compact between State and tribe, we do best by respecting the sovereignty of both the Blackfeet Nation and Montana.

Id. at 1140 (footnote omitted).²⁰⁵

In the October 30, 2000 Decision, the court agreed with the reasoning of *Gilham* that absent an express waiver of immunity,

a State cannot be sued in tribal court. The court also found that the same reasoning applied to the State's political subdivisions, including counties and special services districts. Finding no waiver of that immunity by the State of Utah, the court concluded that political subdivisions of the State of Utah remained immune from suit in tribal court because "Utah law is clear that political subdivisions enjoy the same immunity possessed by the State of Utah. See Utah Code Ann. § 60–3–2, –3." (*Id.* at 14.)

Five years later, that analysis remains sound.

3. The Utah Governmental Immunity Act

Historically, the ability to sue the State of Utah or one of its political subdivisions rested on a determination of whether the governmental entity was protected by the common law doctrine of sovereign immunity. That changed in 1965, when the Utah Legislature enacted the Utah Governmental Immunity Act (the "Act"), which barred all causes of action against the state and its political subdivisions unless expressly authorized by statute. Specifically, the Act provided that "all governmental entities," including school districts, "are immune from suit for any injury which results from the exercise of a governmental function." Utah Code Ann. §§ 63–30–2(3), (7),—3(1) (1997 & Supp. 2000) . . .

Tindley v. Salt Lake City School Dist., 2005 UT 30, ¶9, 116 P.3d 295, 298 (Utah 2005). As a special service district created under Utah Code Ann. § 17A–2–1304, the Health District is a "governmental entity"

²⁰⁵ *Gilham* expressly "decline[d] to address whether agents of a State may be sued in tribal court or whether States may be subject to a contract suit in tribal court. Our hold-

ing," the panel emphasized, "is limited to the facts presented by this case: an individual filing a tort action against Montana in Blackfeet tribal court." *Id.* at 1140 n. 8.

within the meaning of the Act. *See* Utah Code Ann. § 63–30–2(4) & (7) (Supp.1999) (repealed 2004)²⁰⁶ (“‘Governmental entity’ means the state and its political subdivisions” and includes “any county, . . . *special improvement* or *taxing district*, or other governmental subdivision or public corporation.” (emphasis added)).

Ledfors v. Emery County Sch. Dist., 849 P.2d 1162, 1163–64 (Utah 1993), “established a three-step analysis for determining whether a governmental entity is entitled to immunity under the Act[.]”

First, was the activity the entity performed a governmental function and therefore immunized from suit by the general grant of immunity contained in section 63–30–3? [Utah Code Ann. § 63–30–3(1).] Second, if the activity was a governmental function, has some other section of the Act waived that blanket immunity? Third, if the blanket immunity has been waived, does the Act also contain an exception to that waiver which results in a retention of immunity against the particular claim asserted in this case?

Ledfors, 849 P.2d at 1164.

The first question in this case, then, is whether the District’s operation of the Montezuma Creek Clinic was a “governmental function,”²⁰⁷ which was defined by a 1987 amendment to mean:

206. As *Tindley* notes,

In 2004, the legislature repealed the Governmental Immunity Act, codified at Utah Code Ann. §§ 63–30–1 to –38 (1997 & Supp.2003). In its place, the legislature enacted the Governmental Immunity Act of Utah, codified at Utah Code Ann. §§ 63–30d–101 to –904 (2004). Pursuant to the provisions of the new act, all injuries alleged to have been caused by a governmental entity before July 1, 2004, are governed by the former act.

2005 UT 30, ¶ 1 n.1, 116 P.3d at 297 n. 1. Plaintiffs’ claims in this case are thus governed by the older version of the statute.

any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

Utah Code Ann. § 63–30–2(4)(a) (repealed 2004). According to *Tindley*,

The 1987 amendment substantively expanded the scope of immunity established by the Act, providing immunity for activities that were once deemed proprietary and, therefore, had not been covered by immunity under the common law. *See Laney*, 2002 UT 79 at ¶ 53, 57 P.3d 1007 (“By defining a governmental function as any act of a governmental entity, whether or not the activity is characterized as governmental or proprietary, the 1987 amendment effectively grants immunity protection for some activities that were formerly considered proprietary and were not entitled to immunity.”).

Tindley, 2005 UT 30, at ¶ 21, 116 P.3d at 301. Defined this broadly, “governmental function” appears to encompass the operation of hospitals and clinics by Utah special

207. “This inquiry [was] mandated by section 63–30–3(1), which establishes the general principle of governmental immunity subject to certain exceptions. Except as may be otherwise provided in this chapter, *all governmental entities are immune from any injury which results from the exercise of a governmental function*,” *Lyon v. Burton*, 2000 UT 19, 2000 UT 55, ¶ 14, 5 P.3d 616, 621 (Utah 2000) quoting Utah Code Ann. § 63–30–3(1) (repealed 2004) (emphasis in original).

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services districts. See *Carter v. Milford Valley Memorial Hosp.*, 2000 UT App 21, ¶ 14, 996 P.2d 1076, 1079 (2000).

The second issue under *Ledfors* is whether the Act has provided an exception to that immunity through an express waiver:

Scattered sections of the Act waive immunity under particular circumstances. Thus, the Act permits claims against governmental entities that involve contract obligations, see Utah Code Ann. § 63-30-5 (1997); property, see id. §§ 63-30-6, -10.5; defective public buildings and improvements, see id. § 63-30-9; and negligent acts and omissions of public employees. See id. § 63-30-10. The Act specifically waives immunity for injuries caused by dangerous or defective highways. See id. § 63-30-8. When immunity is waived, the “liability of the [governmental] entity [is] determined as if the entity were a private person.” Id. § 63-30-4(1)(b).

Trujillo v. Utah Dept. of Transp., 1999 UT App 227, ¶ 16, 986 P.2d 752, 757. Of possible consequence here is the express waiver “as to any contractual obligation,” Utah Code Ann. § 63-30-5(1) (1997) (repealed 2004), and as to “injury proximately caused by the negligent act or omission of an employee within the scope of employment,” Utah Code Ann. § 63-30-10 (Supp. 2003) (repealed 2004).

The next question is whether the Act contains an exception to that waiver. Section 63-30-10 had several subsections that exclude certain activities from the waiver and thereby retain immunity.

For certain kinds of claims, however, such waivers of immunity are restricted by a number of exceptions. See Utah Code Ann. § 63-30-10 (1997). Thus, although the Act waives immunity for liability from injuries caused by defective conditions of public buildings and highways, and by the negligence of public

employees, immunity is retained “if the injury ar[ose] out of, in connection with, or result[ed] from” one of nineteen enumerated circumstances. Id. For example, immunity is retained if an injury resulted from a failure to revoke a permit, see id. § 63-30-10(3), or make an inspection. See id. § 63-30-10(4). Immunity is also retained with respect to injuries caused by natural conditions on public land. See id. § 63-30-10(11). Of particular significance in this appeal, immunity is retained for injuries that arise out of “the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused.” Id. § 63-30-10(1).

Trujillo, 1999 UT App 227, at ¶ 17, 986 P.2d at 757-758.

Through such an exception to its general waiver, the Act expressly immunizes the State and its political subdivisions against claims of “abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights,” Utah Code Ann. § 63-30-10(2) (Supp.2003) (repealed 2004)—covering most if not all of plaintiffs’ tort claims pleaded in the Navajo court proceeding. See *Oliver v. Woods*, 21 F.Supp.2d 1325, 1332 (D.Utah 1998) (“claims for intentional infliction of emotional distress are barred by § 63-30-10(2) (barring claims for ‘infliction of mental anguish’)”), *reversed on other grounds*, 209 F.3d 1179 (10th Cir.2000); *Petersen v. Board of Education*, 855 P.2d 241, 242 (Utah 1993) (section maintains immunity for assault, even where liability is alleged to arise from the Board’s negligence in hiring and supervising the assailant).

The Act provides that with very limited exceptions, an action brought under its provisions “against a governmental entity or its employee for an injury caused by act

or omission that occurs during the performance of the employee's duties, within the scope of employment, or under color of authority is a plaintiff's exclusive remedy," Utah Code Ann. § 63-30-4(3)(a) (Supp.2003) (repealed 2004) (emphasis added),²⁰⁸ and that "[t]he district courts shall have exclusive original jurisdiction over any action brought under" the Act. Utah Code Ann. § 63-30-16(1) (Supp.2003) (repealed 2004).²⁰⁹

The Tenth Circuit reads the latter provision as "a positive expression of policy against suits against Utah in United States courts," and one that could not be waived by the State merely entering an appearance and litigating in a case in federal court. *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1235 (10th Cir.1999) (quoting *Richins v. Industrial Constr., Inc.*, 502 F.2d 1051, 1055 (10th Cir.1974)). In the face of that provision, only an "extraordinarily effective waiver" of the State's immunity would be effective to subject the State to the jurisdiction of a forum other than its own. *Id.*

4. Counterclaims & the Waiver of State Immunity

[29] In *Sutton*, the court of appeals found such a waiver of Eleventh Amendment immunity in the State's removal of a state court action to federal court, where it proceeded to litigate the merits:

[T]he Eleventh Amendment bar to suit against Utah was effectively waived by the Office of the Attorney General of Utah. That office not only caused the removal of the case from state to federal court; the Attorney General's Office for

the State has also litigated the merits of the case following its October 17, 1996, removal. The Attorney General's Office filed in federal court on October 25, 1996, its motion to dismiss with prejudice under Fed.R.Civ.P. 12(b)(6) (failure to state a claim for relief), App. at 76-77, and its supporting memorandum for dismissal, *id.* at 78-91, and its reply memorandum of November 18, 1996, on the lack of merit of the amended complaint, *id.* at 142-151.

Id. In the Tenth Circuit's view, "an unequivocal intent to waive immunity seems clear when a state, facing suit in its own courts, purposefully seeks a federal forum." *Id.* at 1234 (citing *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 393-398, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) (Kennedy, J., concurring)).

By contrast, in *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379 (10th Cir. 1997), the court of appeals held that the fact that the State filed a counterclaim in a federal court proceeding in which it had raised its Eleventh Amendment immunity did not amount to a waiver:

"A state may waive its Eleventh Amendment immunity and consent to suit in federal court." *Johns v. Stewart*, 57 F.3d 1544, 1553 (10th Cir.1995). However, we apply "a stringent test" to determine if such a waiver has occurred. *Id.* The waiver must be "unequivocal" which means "only where stated 'by the most express language or by such overwhelming implication from the text [of a state statutory or constitutional provision] as [will] leave no room for any other rea-

²⁰⁸. The Act makes an exception for actions against the government employee "whose act or omission gave rise to the claim" where "the employee acted or failed to act through fraud or malice," who may be held personally liable. Utah Code Ann. § 63-30-4(3)(b)(i), (4)(a) (Supp.2003) (repealed 2004).

²⁰⁹. Utah law mandates strict compliance with the requirements of the Utah Governmental Immunity Act. See, e.g., *Hall v. Utah State Dept. of Corrections*, 2001 UT 34, ¶ 14, 24 P.3d 958, 963; *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 19, 977 P.2d 1201, 1203-1204.

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sonable construction.”’” *Id.* (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239–40, 105 S.Ct. 3142, 3146, 87 L.Ed.2d 171 (1985) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1360–61, 39 L.Ed.2d 662 (1974))). We conclude that the State did not waive its Eleventh Amendment immunity by filing a counterclaim in the circumstances of this case. See *Santee Sioux Tribe of Nebraska v. Nebraska*, 121 F.3d 427, 431 (8th Cir.1997) (“[T]he Nebraska assistant attorney general’s conduct in answering the complaint and filing a counterclaim does not constitute a waiver of Nebraska’s Eleventh Amendment immunity.”); *American Fed’n of State, County and Mun. Employees v. Corrections Dep’t*, 783 F.Supp. 1320, 1327 (D.N.M.1992) (holding that state did not waive Eleventh Amendment immunity by removing case to federal court); see also *National R.R. Passenger Corp. v. Rountree Transp. and Rigging, Inc.*, 896 F.Supp. 1204, 1206–07 (M.D.Fla. 1995) (noting that courts which find waiver by filing and prosecuting counterclaims still require state defendants to “announce their waiver of Eleventh Amendment immunity unequivocally.”). The State has continued to assert Eleventh Amendment immunity, which is hardly consistent with the kind of unequivocal waiver necessary to waive that immunity.

131 F.3d at 1385 n. 4.

Relying on the analogy of *Mescalero Apache Tribe v. New Mexico*, the Health District defendants argue that “[b]ecause the Health District continued to assert its immunity while asserting a counterclaim, it did not waive its sovereign immunity from suit.” (Dist. Summ. Judg. Mem. at 21.)

The Navajo court rejected this argument, (see March 1, 2000 Order at 10 (“the defendants waived any rights of immunity when they filed counterclaims and fully participated in the Court proceedings”)), and plaintiffs insist that under the analogy of *Sutton*, the District waived its sovereign immunity “when it freely chose to bring Navajo legal violations into Navajo court.” (Pltfs’ Summ. Judg. Mem. (504), at 19 ¶ 16.)

5. The Health District’s Counterclaim

Of the two Tenth Circuit cases, *Mescalero Apache Tribe v. New Mexico* appears to correspond more closely to this case. The Health District did not “purposefully seek a [tribal] forum” when “facing suit in its own courts,” in contrast to the State of Utah in *Sutton*. Like the State of New Mexico in *Mescalero Apache Tribe*, the District continued to assert its sovereign immunity defense to plaintiffs’ claims in tribal court, even after it filed its counterclaim against plaintiff Singer.

Plaintiffs’ waiver theory is further complicated by this court’s determination that the Navajo court lacked subject-matter jurisdiction over Ms. Singer’s claims against the District; Singer was the sole defendant named in the District’s counterclaim.²¹⁰ If the Navajo court had no subject-matter jurisdiction over Singer’s claims against the District because of her status as a non-Indian litigant, it follows that it had no subject-matter jurisdiction over the District’s counterclaim against her. Any waiver of sovereign immunity occasioned by the filing of the counterclaim would be ineffectual because matters pertaining to Singer were not properly before the Navajo court in the first place.

²¹⁰. (See “Answer to Complaint for Damages and Counterclaim, filed June 23, 1999, in *Singer, et. al. v. San Juan County, et al.*, Case

No. SR-CV-162-99-CV, at 28–42, available in Pertinent Parts Navajo Ct. R. (“Complaint for Damages” Tab).)

6. Sovereign Immunity & Reciprocity

The Health District defendants also suggest that “[t]he fact that Indian tribes enjoy immunity from suit in state courts also supports the conclusion that states retain sovereign immunity from suit in tribal court,” citing *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). (Dist. Summ. Judg. Mem. at 17.) “Given that tribes are immune from suit,” they continue, “this lack of ‘mutuality of concession’ supports a finding that states are not subject to suit in tribal court.” (*Id.* at 18 (quoting *Blatchford*, 501 U.S. at 782, 111 S.Ct. 2578).) This argument echoes the court’s earlier observation that “there has been no mutuality of concession with Indian tribes, as there was when the states surrendered some of their immunity to the federal government.” (October 30, 2000 Decision at 16.)

[30, 31] Tribal immunity applies to activities of the tribe whether on or off the reservation, and whether the activity is deemed governmental or commercial. *Kiowa Tribe*, 523 U.S. at 756, 118 S.Ct. 1700. The immunity embraces tribal agencies, see *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir.2000), tribal housing authorities, see *Snowbird Constr. Co., Inc. v. United States*, 666 F.Supp. 1437, 1441 (D.Idaho 1987), and “subordinate economic organizations,” see *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104, 1108 (1989); *White Mountain Apache Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654, 656 (1971). At least in the absence of some “mutuality of concession” between State and tribal governments, why would it make sense to hold a political subdivision of the State to be subject to tribal court jurisdiction when corresponding tribal entities remain immune from suit in state or federal court?

Again, Navajo case law proves to be instructive.

In *Billie v. Abbott*, the Navajo Supreme Court outlined the Navajo courts’ view of the sovereign immunity of state governments:

Abbott also claims that under Utah’s sovereign immunity statute, UTAH CODE ANN. § 63-30-3 (Supp.1979), Billie is barred from suing a Utah official in Navajo court. This would be true if Billie is strictly a resident of Utah suing in Utah state court and not a resident of the Navajo Reservation. A suit against a state in its own court is governed by the state’s own laws. The question remains whether the Navajo court should recognize Utah’s defense of sovereign immunity.

Although Abbott has not argued that any federal law may have limited the power of the Navajo Nation over a state official, we feel obligated to make that inquiry. Our review of the Treaty of 1868 has not disclosed any such limitation on Navajo sovereignty. And we have not found any federal statute with such limitation. The fact is suits against state political sub-divisions in tribal courts are not unknown. See, e.g., *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) (question of whether tribal court has jurisdiction over state school); *Hubbard v. Chinle School Dist. Nos. 24/25*, 3 Nav. R. 167 (1982).

Billie v. Abbott, No. A-CV-34-87 (Navajo S.Ct. 11/10/1988), at ¶¶ [41]-[42], available at <http://www.tribal-institute.org/opinions/1988.NANN.0000012.htm>. *Billie* read *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), to hold that “when a state is sued in another sovereign’s court, the rule governing state suability in its own court is not controlling because ‘[s]uch a claim necessarily impli-

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icates the power and authority of a second sovereign.’ *Id.* at 416, 99 S.Ct. 1182. And “if a state’s sovereign immunity is to be recognized by the second sovereign, then ‘its source must be found in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.’ *Id.* at 416, 99 S.Ct. 1182.” *Id.* at ¶ [43].

The Navajo Nation does not grant immunity from suit to any state as a matter of comity. We have also not found any agreement, express or implied, between the Navajo Nation and Utah which would require this Court to recognize Utah’s defense of sovereign immunity. We have previously said that the states of the Union are foreign governments in relation to the Navajo Nation. *Hubbard*, 3 Nav. R. at 169. In *Hubbard* we further ruled that the Navajo Nation courts have jurisdiction over suits against a state. *Id.* at 170. The reverse, however, a suit against the Navajo Nation in Utah court, would be barred by tribal immunity from suit, not as a matter of comity, but based upon federal pre-emption.

Id. at ¶ [44].

While *Billie* rejected a blanket rule of intergovernmental immunity in favor of a State, state agencies, subdivisions or officers, *Hubbard v. Chinle School Dist. Nos. 24/25*, 3 Nav. R. 167 (Navajo Ct.App.1982),

211. As to whether the Navajo Nation court should entertain actions against the state of Arizona; this has been answered in the Navajo Court of Appeals (now Navajo Supreme Court) ruling in *Hubbard v. Chinle School District, et. al.*, 3 Nav. R. 167 (1982). *Hubbard* involved a suit by Arizona state school district employees against the Chinle school district in Chinle District Court. The district court ruled that it had jurisdiction, but exercised discretion under the doctrine of comity and declined jurisdiction. On appeal, Navajo Na-

had already indicated that Navajo courts may decline to exercise tribal jurisdiction over another governmental entity, by agreement or as a “‘voluntary decision . . . to respect the dignity of the [other] as a matter of comity’ ” in particular cases. In *Hubbard*, the Navajo Court of Appeals affirmed the district court’s dismissal of an action against a local school district brought by two Navajo former employees, and did so on the basis of comity between sovereigns. *Hubbard* found that the Navajo court had jurisdiction over the school district as a State instrumentality,²¹¹ but counseled restraint in the exercise of that jurisdiction.

More recently, in *Office of Navajo Labor Relations ex rel Jones v. Central Consolidated School District No. 22*, the Navajo Supreme Court again considered the question of jurisdiction over a local school district. As to sovereign immunity, the court stated:

[C]urrent analysis has moved beyond its prior focus on intergovernmental immunity. As for the arguments about bilateral relations, deference to other sovereigns, mutuality, reciprocity, and comity, the New Mexico Supreme Court ruled that Indian nations and their entities can be sued in the New Mexico court system when doing business outside the Indian nation, but not when an action arises within Indian country. Compare *Padilla v. Pueblo of Acoma*, 107 N.M. 174,

tion Court of Appeals ruled that Navajo Nation courts do indeed have jurisdiction over suits against a foreign sovereign, using international law as the basis for its rationale. Accordingly, the appeals court ruled that the State of Arizona is a foreign government and it should be recognized as such. The jurisdiction of Navajo Nation courts is inherent and existed prior to the creation of the State of Arizona.

Tracy v. Yazzie, No. WR-CV-313-85 (Navajo S.Ct. 09/16/1986) at ¶ [14], available at

754 P.2d 845 (1988) (an Acoma Pueblo construction company, owned by the Pueblo, could be sued for off-reservation activities) with *DeFeo v. Ski Apache Resort*, 120 N.M. 640, 904 P.2d 1065 (App. 1995) (no jurisdiction over an Indian nation where the personal injury took place within Indian country). Principles of reciprocity, comity and bilateral relations would prompt us to rule that we will treat the State of New Mexico and its instrumentalities the same way it treats Indian nations and their instrumentalities.

No. SC-CV-13-98 (Navajo S.Ct. 06/05/2003), at ¶ [25], available at <http://www.tribal-institute.org/opinions/2003.NANN.0000007.htm>.

The common thread connecting the reasoning of *Billie*, *Hubbard*, and *Central Consolidated School District No. 22* appears to be an evolving *reciprocity* between the Navajo courts and the State courts. See also *Alden v. Maine*, 527 U.S. at 749, 119 S.Ct. 2240 (“the immunity of one sovereign in the courts of another has often depended in part on comity or agreement”). In light of *Hubbard*, *Billie*, and *Central Consolidated School District No. 22*, it would appear that at least in the absence of a specific agreement with the State of Utah, the Navajo courts would “treat the State of [Utah] and its instrumentalities” as Utah “treats Indian nations and their instrumentalities” within and beyond reservation boundaries. But the Utah courts have not yet addressed the immunity of Indian tribes and instrumentalities with any degree of specificity.

As the *Billie* court pointed out, “a suit against the Navajo Nation in Utah court, would be barred by tribal immunity from suit, not as a matter of comity, but based upon federal pre-emption.” Indeed,

<http://www.tribal-institute.org/opinions/1986.NANN.0000009.htm>.

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), so held: “Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.” 523 U.S. at 760, 118 S.Ct. 1700. *Kiowa* thus extended “the judge made doctrine of sovereign immunity to pre-empt the authority of the state courts to decide for themselves whether to accord such immunity to Indian tribes as a matter of comity.” *Id.* at 760, 118 S.Ct. 1700 (Stevens, Thomas & Ginsburg, dissenting).

In light of *Kiowa*, the Utah courts would be constrained to recognize the Indian nations’ sovereign immunity as a matter of federal law,²¹² and of course, this court anticipates that the Utah courts would follow the law. If reciprocity and comity are the guiding principles, the Navajo courts would likewise be constrained to recognize the sovereign immunity of the State of Utah, its agencies and subdivisions as a matter of comity under Navajo law. *Central Consolidated School District No. 22*, at ¶ [25].

In this case, the Navajo Nation District Court did not address considerations of comity between sovereigns in assuming jurisdiction over San Juan County and the San Juan Health Services District and granting preliminary injunctive relief; instead, it rejected the defendants’ assertions of sovereign immunity on the grounds that State sovereign immunity does not extend to local political subdivisions, and that the defendants had waived any immunity by filing counterclaims and fully participating in the Navajo court proceeding. (See December 28, 1999 Order at [19]; March 1, 2000 Order at 10–11.) As

212. “Like foreign sovereign immunity, tribal immunity is a matter of federal law.” *Kiowa*, 523 U.S. at 759, 118 S.Ct. 1700.

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explained above, neither of these grounds have substantive merit.

Given the United States Supreme Court's recent reaffirmation of the scope of tribal immunity under federal law, and given the Navajo Supreme Court's recent elaboration upon Navajo principles of comity and reciprocity between governments, it appears reasonable to infer that, given the opportunity, the Utah courts would respect Navajo tribal immunity as to Navajo agencies and subdivisions, and that the Navajo Supreme Court would give deference to the State of Utah's sovereign immunity and its limited statutory waiver of that immunity, allowing claims against its subdivisions to be brought exclusively in the Utah district courts.²¹³ The Navajo Supreme Court has long been familiar with limited waivers of sovereign immunity, such as the Navajo Sovereign Immunity Act, *Navajo Nation Code*, tit. 1, §§ 553, 554 (1995), with its exclusive forum provisions. See, e.g., *Raymond v. Navajo Agricultural Products Industry*, No. SC-CV-26-94 (Navajo S.Ct. 07/20/1995), available at <http://www.tribal-institute.org/opinions/1995.NANN.0000013.htm> (employee's wrongful discharge claims did not fall within the Navajo Sovereign Immunity Act's four express exceptions to tribal immunity from suit).

As the Ninth Circuit concluded in *Montana v. Gilham*, "In the absence of congressional action or compact between State and tribe, we do best by respecting the sovereignty of both the [Navajo] Nation and [Utah]," 133 F.3d at 1140, by acknowledging the limitations that exist, and giving deference to considerations of

comity and reciprocity in respecting the immunity of sovereigns.

7. Plaintiffs' Claims & the Utah Governmental Immunity Act

Riggs and Dickson's employment-related claims against the District involve a contractual relationship, and arguably come within Utah's waiver of immunity "as to any contractual obligation." Utah Code Ann. § 63-30-5(1) (1997) (repealed 2004). This seems particularly true of Dickson's claim that his retention as a "temporary" employee violated the District's own written employment policy, rather than Navajo law. But the Utah Governmental Immunity Act's exclusive remedy provision still applies, as does the Act's specification that "[t]he district courts shall have exclusive original jurisdiction over any action brought under" the Act, Utah Code Ann. § 63-30-16(1) (Supp.2003) (repealed 2004). This "'positive expression of policy against suits against Utah in United States courts,'" would seem to apply equally against suits in Indian tribal courts—indeed, as against *any* forum save the designated one, the Utah state district courts. *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d at 1235 (quoting *Richins*, 502 F.2d at 1055).

(i) Contractual Claims

[32] The State of Utah's waiver of sovereign immunity to allow claims as to "any contractual obligation" may permit employment-related contractual claims against subdivisions such as the Health District, but Riggs and Dickson would need to pursue those claims against the District in the designated state forum. Utah Code Ann. § 63-30-5(1) (1997) (re-

²¹³ The Navajo Supreme Court acknowledges that "[o]rdinarily, a legislative body must waive sovereign immunity through explicit language in the statute. See, e.g., *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 23

L.Ed.2d 52 (1969)." *Tso v. Navajo Housing Authority*, No. SC-CV-10-02, at ¶ [32] (Navajo S.Ct. 08/26/2004), available at <http://www.tribal-institute.org/opinions/2004.NANN.0000013.htm> (emphasis added).

pealed 2004). Remembering that the NPEA writes “the requirements of the Act” into all employment contracts “as affirmative contractual obligations of the contracting parties,” *Navajo Nation Code*, tit. 15, § 609(A), Riggs and Dickson’s employment contracts included the NPEA’s “just cause” requirement, among others, overcoming the “at-will” presumption under Utah law. See *Rackley v. Fairview Care Centers, Inc.*, 2001 UT 32, at ¶ 13, 23 P.3d at 1026. Federal and state courts likely would apply Navajo law to relationships that are governed by Navajo law under traditional choice of law rules. See, e.g., *United States v. Jarvison*, 409 F.3d 1221, 1225 (10th Cir.2005) (“Navajo law is the appropriate law under which to evaluate the validity of the marriage” between “two Navajo tribal members who live completely within the boundaries of the Navajo Reservation.”).²¹⁴ The NPEA expressly provides that “[i]n addition to the sanctions prescribed by the Act, violation of the

Act shall also provide grounds for the Navajo Nation to invoke *such remedies for breach* as may be available under the transaction document or applicable law,” *Navajo Nation Code*, tit. 15, § 609(A) (emphasis added), suggesting that Riggs and Dickson could pursue claims against the District in Utah state court for breach of contract, and avoid the bar of the District’s governmental immunity.²¹⁵ Concededly, that would submit their dispute “to a forum other than the one [Navajos] have established for themselves,” *Fisher v. District Court*, 424 U.S. at 387–388, 96 S.Ct. 943, but Navajo principles of comity and reciprocity between sovereigns would appear to sanction that result.

(ii) Intentional Tort Claims

The Utah Governmental Immunity Act shielded the Health District defendants from liability for most intentional torts. Utah Code Ann. § 63–30–10(2) (Supp.2003) (repealed 2004).²¹⁶

214. Navajo law governs legal relationships within the scope of its powers of self-government. “[B]ecause the Navajo Nation retains sovereign authority to regulate domestic relations laws, including marriage of its Indian subjects, Navajo law is dispositive as to the validity of the marriage in question. See *Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) (‘Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members’).” *United States v. Jarvison*, 409 F.3d at 1225. As explained above, the Navajo Nation possesses the inherent civil authority to regulate employment contracts involving Navajo members within Navajo boundaries.

215. No cause of action for breach of contract was pleaded in either the original or amended Navajo court complaints, and from the Navajo court’s orders, it appears that no contractual theory had been asserted by Riggs or Dickson, at least as of March of 2000. Instead Dickson’s claim concerning the District’s alleged failure to abide by its written employment policy concerning job tenure was

wedged into two of the plaintiffs’ civil rights claims (free speech, due process), and at least one paragraph of the “malfeasance in office” claim. (See Navajo Ct. Cmplt. at 18 ¶ 175 (“SJHSD refuses to hire Mr. Dickson as a regular employee”); 18 ¶ 180 (“Mr. Dickson spoke out about the CIB policy and Mr. Wood[’s] reference liking [sic] it to a ‘dog tag’ and has not been given his full time status.”); 22 ¶¶ 213–214 (denial of “any type of a fair and impartial hearing to be given his permanent full time status”); 39 ¶ 347 (“Mr. Woods [sic] refused to give Mr. Allison Dickson his full time permanent employment status”).)

216. Section 63–30–10(2) was intended to protect the State from tort liability for the intentional tortious conduct of its own agents and employees. That, of course, is a legitimate purpose consistent with the general law of agency. As a general rule, masters and principals are not liable for the intentional torts of agents or employees unless the tort is committed within the scope of employment. See *Hodges v. Gibson Products Co.*, 811 P.2d 151, 156 (Utah 1991); *Birkner v. Salt Lake County*, 771 P.2d 1053, 1056–59 (Utah 1989); W. Page

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[33] This is no less true as to defendant Atcitty. Adjudication of the plaintiffs' claims in the Navajo Nation District Court against defendant Atcitty personally, arising from his conduct as a member of the Health District's governing board, is likewise barred by the Utah Governmental Immunity Act, absent a finding that Atcitty acted due to fraud or malice. Utah Code Ann. § 63-30-4(3)(b)(i), (4)(a) (Supp. 2003) (repealed 2004). The term "employee" was defined by the Act to include "a governmental entity's officers, employees, servants, *trustees*, commissioners, *members of a governing body*, *members of a board*, members of a commission, members of an advisory body," among others. Utah Code Ann. § 63-30-2(2)(a) (Supp. 2003) (repealed 2004) (emphasis added).²¹⁷ The Act plainly included all members of the Health District board.

Though the Navajo court had subject-matter jurisdiction over the territory, and over parties and conduct causing injury within that territory, that court could not proceed to adjudicate the liability of the Health District or its officials acting within the scope of their employment, absent an effective waiver of their immunity from suit in tribal court.

[34] The single exception to this conclusion involves plaintiff Riggs' defamation claim against defendant Wood. As outlined

above, the Utah Governmental Immunity Act in force in 2000 excepted claims of libel and slander, *i.e.*, defamation, from the Act's more general waiver of immunity as to actions involving injuries caused by government employees. Utah Code Ann. § 63-30-10(2) (Supp. 2003) (repealed 2004). The Act insulated individual employees from personal liability for such injuries unless "the employee acted or failed to act due to fraud or malice." Utah Code Ann. § 63-30-4(4)(a) (Supp. 2003) (repealed 2004). The Act also excepted actions or proceedings against "the employee . . . whose act or omission gave rise to the claim" from the Act's exclusive remedy provision if "the employee acted or failed to act through fraud or malice." Utah Code Ann. § 63-30-4(3)(b) (Supp. 2003) (repealed 2004). Thus, a plaintiff asserting a fraud-based or malice-based claim may bring a civil action directly against an individual employee, independent of the remedies provided by the Act, and in effect, sovereign immunity no longer shields the employee against personal liability as adjudged in a forum of the plaintiff's choosing.

In this case, the Navajo court found that Wood likely had published "the phony fraud charge that still maliciously clouds Mr. Riggs' . . . name," resulting in injury to Riggs' reputation. (December 28, 1999 Order at [15]; *see also* March 1, 2000 Order, at 9.)²¹⁸ As explained above, this

Keeton et al., Prosser and Keeton on the Law of Torts § 70, at 505 (5th ed. 1984). It is also a general rule that intentional torts such as assault and battery are not within the scope of employment. *See Birkner*, 771 P.2d at 1056-59; *Hodges*, 811 P.2d at 156-57.

S.H. By and Through R.H. v. State, 865 P.2d 1363, 1366 (Utah 1993) (Stewart, J., dissenting).

²¹⁷ Atcitty's immunity would apply regardless of whether the conduct in question occurred within or outside the Navajo Reservation boundaries.

²¹⁸ From the Navajo court's orders at issue, this court could glean no similar finding of malice pertaining to plaintiffs' other tort claims (*e.g.* intentional infliction of emotional distress, violation of civil rights), so the Act's exception of such claims from its waiver of immunity would still apply to bar plaintiffs' claims. Utah Code Ann. § 63-30-10(2) (Supp. 2003) (repealed 2004); *see Apffel v. Huddleston*, 50 F.Supp.2d 1129, 1141 (D.Utah 1999) "plaintiffs fail to allege any *well-pleaded facts* that defendants acted with 'malice', *i.e.*, that defendants acted with any 'ill will' toward Mr. Apffel. . . . Thus, plaintiffs' claims are barred under the Utah Governmental Im-

court has given deference to that finding as not “clearly erroneous,” justifying the exercise of Navajo civil jurisdiction over Wood for purposes of that claim. That court’s preliminary finding that Wood’s conduct was “malicious” likewise excepts Wood from the immunity otherwise afforded him by the Utah Governmental Immunity Act, and plaintiff Riggs may pursue his defamation claim in the Navajo courts.

(iii) Civil Rights Claims

Under controlling Supreme Court precedent, the Navajo Nation District Court lacked subject matter jurisdiction under 42 U.S.C.A. § 1983 of any of these plaintiffs’ claims arising from the alleged deprivation of a right guaranteed by the Constitution and laws of the United States. *See Nevada v. Hicks*, 533 U.S. at 366–369, 121 S.Ct. 2304.

munity Act and should be dismissed.” (emphasis in original; citation omitted).

219. The free assembly claim pleaded in their Navajo court Complaint appears to be asserted solely on behalf of Ms. Singer. (See Navajo Ct. Cmplt. at 19 ¶¶ 184–190) (“Freedom to Assemble as Protected by the Navajo Nation, the United Nations, and the United States.”).

220. Had they brought § 1983 claims in a federal or state district court, the Health District would have been unable to raise its sovereign immunity as a bar to the claims, even in the state court. *See Howlett by and through Howlett v. Rose*, 496 U.S. 356, 361–383, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) (states cannot apply sovereign immunity rules to bar § 1983 claims against local governments in state court); *Martinez v. California*, 444 U.S. 277, 284, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980) (“it is clear that the California immunity statute does not control this [§ 1983] claim even though the federal cause of action is being asserted in the state courts”).

Section 1983’s “history and purposes . . . together with the way it has been interpreted, render it a powerful legislative sword.” 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*

[35] Riggs and Dickson did not invoke § 1983 in their pleadings as the basis for their freedom of speech, due process, and equal protection claims,²¹⁹ based upon rights “as protected by the . . . the United States,” so the jurisdictional footing for those claims remains unclear.²²⁰

[36] If pleaded as direct claims under the federal constitutional provisions they invoke,²²¹ those claims would not lie against the Health District or its officials in their official capacity, *see Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994); *Simmatt v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1231 (10th Cir.2005) (“a *Bivens* claim lies against the federal official in his individual capacity—not, as here, against individuals in their official capacity”),²²² and in this Circuit, would not lie against local officials in their *individual* capacity.²²³

§ 1:1 (4th ed. Rev.2004). Here, the plaintiffs cast aside the sword of § 1983 in favor of the untested steel of civil rights litigation against subdivisions of a State in a tribal court.

221. *See, e.g., Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (permitting employment discrimination claim against a member of Congress under Due Process Clause); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (permitting implied action under Fourth Amendment against federal narcotics agents).

222. *See* 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 6:59 (4th ed. Rev.2004) (“the Court’s message is clear: § 1983 plaintiffs are to pursue only their § 1983 damages remedies against local governments, and cannot rely on Fourteenth Amendment damages remedies.”); *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 712, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (Powell, J., concurring) (discussing whether the Court should “imply cause of action directly from the Fourteenth Amendment”).

223. This Circuit takes the position that a *Bivens*-style action implied directly under the Fourteenth Amendment will not lie against state or local employees in their individual

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Moreover, the concerns expressed in *Nevada v. Hicks* concerning tribal court jurisdiction over § 1983 actions would also seem to apply to causes of action implied directly under the Fourteenth Amendment. If “a tribe’s inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction,” as augmented by specific federal legislation, the Navajo Nation did not adopt the Fourteenth Amendment in the exercise of its legislative jurisdiction, and “no provision in federal law provides for tribal-court jurisdiction over” actions implied directly under the Fourteenth Amendment. 533 U.S. at 367, 368, 121 S.Ct. 2304. A *Bivens*-style claim under the Fourteenth Amendment would prove no more removable to federal court than the § 1983 actions addressed in *Hicks*.

See id. at 368, 121 S.Ct. 2304. The *Hicks* Court’s reasoning as to § 1983 actions seems equally applicable to any cause of action implied directly under the United States Constitution.

[37] Plaintiffs invoke the Indian Civil Rights Act, 25 U.S.C.A. § 1302, as a basis for their civil rights claims against the District. ICRA guides the exercise of the powers of tribal self-government, but does not apply to constrain the conduct of the State of Utah or its subdivisions. The Health District thus cannot violate that statute, and may not be haled into court on allegations of ICRA violations.²²⁴ The same is true of the Navajo Bill of Rights, Navajo Nation Code, tit. 1, §§ 1–9 (1995), which serves as a fundamental organic document of the Navajo Nation, but does not bind the United States or the States.²²⁵

capacities where § 1983 is available, *see Stan-ko v. Maher*, 419 F.3d 1107, 1110 (10th Cir. 2005) (“*Bivens* creates a remedy for violations of constitutional rights committed by federal officials acting in their individual capacities. Mr. Maher is a state brand inspector. Therefore, this action arises, if at all, pursuant to 42 U.S.C. § 1983 rather than *Bivens*.”), joining other circuits that have reached the same conclusion. *See, e.g., Baxter by Baxter v. Vigo County School Corp.*, 26 F.3d 728, 732 n. 3 (7th Cir.1994); *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir.1992), *cert. denied*, 506 U.S. 1081, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993); *Pauk v. Board of Trustees of the City Univ. of New York*, 654 F.2d 856, 865 (2d Cir.1981) (“when § 1983 provides a remedy, an implied cause of action grounded on the Constitution is not available.”); *Turpin v. Mailet*, 591 F.2d 426, 427 (2d Cir.1979) (en banc) (per curiam), *cert. denied sub nom. Turpin v. City of West Haven*, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980). *Cf. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) (“The question of whether . . . we should, by analogy to our decision in *Bivens* . . . imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983, is one which has never been decided by this Court.”).

224. The argument that the Navajo court must exercise its adjudicative authority over the District in order to assure the Navajo people “equal protection of the laws” misapprehends that court’s duty under the Act, *viz.*, to assure Navajo people the equal protection of Navajo laws in the Navajo Nation’s exercise of its powers of self-government.

225. *See* Navajo Nation Code, tit. 1, §§ 3, 4 (1995):

Life, liberty and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex nor shall any person within its jurisdiction be denied equal protection in accordance with the laws of the Navajo Nation, nor be deprived of life, liberty or property, without due process of law. . . .

The Navajo Nation Council shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Navajo Nation government for a redress of grievances.

Id. (emphasis added.)

[38] Plaintiffs' reliance on the United Nations' Universal Declaration of Human Rights as a legal footing for their civil rights claims against the Health District also proves to have been misplaced. (*See* Navajo Ct. Cmplt. at 5 ¶ 27 & Exh. 4; *id.* at 26 ¶¶ 242, 244 (equal protection).) The Supreme Court recently observed that "the Declaration does not of its own force impose obligations as a matter of international law," and by itself it cannot support creation of cause of action that a federal district court could hear under the applicable jurisdictional statutes. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 2767, 159 L.Ed.2d 718 (2004).²²⁶ The Navajo courts may take a different view of the status of the Declaration under international law, but this court remains constrained by the Supreme Court's view that "a claim under the 'present-day law of nations' as an element of common law is circumscribed to 'norm[s] of international

character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized," namely violation of safe conduct, infringement of the rights of ambassadors, and piracy, and that those norms must be "specific, universal and obligatory," *id.*, 124 S.Ct. at 2761–2762, 2765, and its view that the Universal Declaration of Human Rights is not quite universal enough. *Id.* at 2767 (plaintiff "cannot say that the Declaration . . . establish[es] the relevant and applicable rule of international law").²²⁷

Assuming that plaintiffs' assertion here and at the court of appeals that "[t]hey brought only Navajo law claims before the Navajo tribunal" is in fact correct,²²⁸ then Riggs and Dickson's claims as to rights of free speech, due process and equal protection "as protected by the Navajo Nation" would need to find a footing in either the Navajo Preference in Employment Act²²⁹

226. *Sosa* cites to Humphrey, "The UN Charter and the Universal Declaration of Human Rights," in *The International Protection of Human Rights* 39, 50 (E. Luard ed.1967) (quoting Eleanor Roosevelt calling the Declaration "'a statement of principles . . . setting up a common standard of achievement for all peoples and all nations'" and "'not a treaty or international agreement . . . impos[ing] legal obligations'").

227. *Sosa* concedes that the Declaration "has nevertheless had substantial indirect effect on international law." *Id.* (quoting Ian Brownlie, *Principles of Public International Law* 535 (6th ed.2003) (calling the Declaration a "good example of an informal prescription given legal significance by the actions of authoritative decision-makers")).

228. 309 F.3d at 1218 n. 2. (*See also* Tr. 2/24/2003, at 40:19–25, 41:14–20 (the "Navajo court orders address Navajo law issues, Navajo torts, Navajo denial of rights and harm to Navajo patients" (Ms. Rose)).) Plaintiffs' counsel made essentially the same representation to the United States Supreme Court in 2003. (*See* Petition for Writ of Mandamus and Prohibition, *In re Riggs*, Case No. 02–1774, 2003 WL 22428213 (U.S.S.Ct., filed

May 28, 2003), at 1 ("The *Navajo injunction and subsequent orders cite to no relief beyond Navajo law relief.*") (emphasis in original); *id.* at 5 n. 12 ("all tort claims are Navajo tort claims"); Reply Brief to Respondent San Juan Health Services District's Brief in Opposition, filed July 30, 2003, 2003 WL 22428215, at *7 ("The Relief sought here, is purely Navajo law/Indian civil rights relief within the Navajo Court's *exclusive* jurisdiction.") (emphasis in original); Petitioner's Rule 15 Supplemental Brief, filed September 14, 2003, 2003 WL 22428219, at *1 ("This case involves this Court enforcing Navajo Court orders under 28 U.S.C. 1738 full faith and credit, against all respondents as listed in the petition, for Navajo law violations, harming two Navajo enrolled members and the spouse of a Navajo enrolled member, within Navajo borders.'").

229. Of the four civil rights claims, only the equal protection claim makes explicit reference to the NPEA. (*See* Navajo Ct. Cmplt. at 26 ¶ 244; Navajo Ct. Cmplt. (Modified) at 26–27 ¶ 244 (same).) Otherwise, the plaintiffs' pleadings refer to the NPEA in one introductory paragraph listing several bases for the plaintiffs' pleadings. (*See id.* at 5 ¶ 27)

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or an as-yet-unspecified common-law cause of action under Navajo law that protects “Navajo civil rights as defined within Navajo custom and traditions.”²³⁰ (December 28, 1999 Order at [19].)

But like other intentional torts, the Utah statute excepts injuries resulting from “vi-

olation of civil rights” from its general waiver as to injury claims. Utah Code Ann. § 63–30–10(2) (Supp.2003) (repealed 2004). *Seare v. University of Utah School of Medicine*, 882 P.2d 673, 679 (Utah Ct. App.1994) (“the state has expressly declared that it maintains its immunity from civil rights claims. Utah Code Ann. § 63–30–10(2) . . .”).²³¹ The Health District

(“That these proceedings are brought under Navajo law, including but not limited to . . . the *Navajo Preference in Employment Act*, . . .”); Navajo Ct. Cmplt. (Modified) at 4 ¶ 17 (same). The plaintiffs’ “Memorandum of Law” annexed as “Attachment C” to the original Complaint advised the Navajo court that it “may look to the (1) *Navajo Preference in Employment Act* (‘NPEA’), (2) contractual fiduciary responsibilities; (3) the Navajo Nation Bill of Rights; (4) common law and customs and traditions; (5) United Nations Declaration of Human Rights, and, in certain respects (6) Utah law, for its jurisdiction.” (“Attachment C” to Navajo Ct. Cmplt. at 3, available in Pertinent Parts Navajo Ct. R. (“Memorandum SMJ” Tab).) The Memorandum argues the applicability of the NPEA for four pages, even quoting Navajo Nation Code, tit. 15, § 610(K), empowering the *Navajo Nation Labor Commission* to grant “preliminary relief in the form of an injunction or other equitable remedy,” but without any reference to the Labor Commission’s primary jurisdiction and the corresponding exhaustion requirement. It also refers to § 614’s coverage of non-Navajo spouses, but without mention of its one-year residency requirement. (*Id.* at 4.)

230. (See Navajo Ct. Cmplt. at 17–22 ¶¶ 170–214; *id.* at 26–31 ¶¶ 243–280; *cf. id.* at 39 ¶ 347 (“Mr. Woods [sic] refused to give Mr. Allison Dickson his full time permanent employment status”)) This appears to be particularly crucial to Dickson because he pleaded no claim of breach of contract before the Navajo court, and apart from the free speech and due process claims, no other cognizable pleaded claim addresses the dispute over his “temporary” employment status. (See *id.* at 17–33 ¶¶ 170–300 (“PLAINTIFFS’ CLAIMS” [excluding plaintiffs’ “backdrop” pleading as to “misfeasance and malfeasance,” see *supra* n. 31]); Navajo Ct. Cmplt. (Modified) at 18–35 ¶¶ 170–300 (same); *id.* at 40–42 ¶¶ 349–352 (“Supplemental Claims”).)

231. The Navajo court argued with this: “The defendants have . . . [f]ailed to show how a service district, a minor political subdivision is an “arm of the state” with immunity under *Alden*, et al. v. Maine, . . . when *Alden* exempts minor political subdivisions from immunity, and [f]ailed to show how civil rights violations were given immunity, when *Alden* v. Maine exempts those types of injuries from immunity, and *Alden* did not address Navajo civil rights as defined within Navajo custom and traditions. . . .” (December 28, 1999 Order at [19] (citing *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999)).)

Alden’s reference to immunity as an “arm of the State,” alluded to in the December 28, 1999 Order, pertains to the States’ Eleventh Amendment immunity from suit in federal court, not common-law sovereign immunity from suit without its consent. To that extent, the Navajo court was correct in noting that Eleventh Amendment immunity did not extend to political subdivisions, including special service districts. See 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3524, at 130 (2d ed. 1984) (“If the defendant is a county, municipality, municipal agency, or an officer thereof, the general rule is that the Eleventh Amendment will not bar the action since these entities are not considered arms of the state.” (footnote omitted).) But Eleventh Amendment immunity does not apply in tribal court.

Alden held that the States’ sovereign immunity from private suit *in their own courts* is beyond congressional power to abrogate by Article I legislation, just as the States’ Eleventh Amendment immunity from suit in federal court had been held to be beyond Congress’ Article I powers in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), and *Blatchford v. Native Village of Noatak*. *Alden* observed that “sovereign im-

thus remains immune from liability on those claims, even if brought in the designated forum.

8. Summary

Having reviewed the court's prior ruling concerning the sovereign immunity of the Health District defendants in light of subsequent developments and this court's examination of plaintiffs' claims and the Navajo court orders, this court concludes that adjudication of Riggs and Dickson's claims against the San Juan Health Services District and defendant Atcitty in the Navajo Nation District Court was barred by the Utah Governmental Immunity Act. Adjudication in the Navajo court of Riggs' defamation claim against Wood in his individual capacity was not barred by the Utah Governmental Immunity Act, based upon that court's preliminary finding that Woods' conduct was "malicious," which exempts him from coverage under the Act, *see* Utah Code Ann. § 63-30-4(3)(b), (4)(a) (Supp.2003) (repealed 2004).

SUMMARY & CONCLUSION

The Tenth Circuit's mandate in this case "require[d] a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and

administrative or judicial decisions" in addressing the issues on remand concerning the extent of the Navajo court's jurisdiction. 309 F.3d at 1228 (quoting *National Farmers*, 471 U.S. at 855-856, 105 S.Ct. 2447 (footnote omitted)). As detailed herein, admittedly at some length, this court has sought to abide by that mandate in reaching its conclusions on those issues.

This court has examined with care each treaty, statute, regulation and reported court opinion cited by any party as bearing upon the issues on remand. This court has also perused the extensive legal literature discussing Indian tribal sovereignty; federal Indian policy; the allocation of jurisdiction among federal, state and tribal governments in the context of our federal system; and more specifically, the exercise of Indian tribal jurisdiction over non-Indians in light of *Montana* and its progeny. Some of the references shed more light on these subjects than others, but all have proven instructive in some respect.

This court has undertaken to make the best sense it can of the Supreme Court case law on the subject—including precedent that several Justices have already conceded is seemingly inconsistent, *see Nevada v. Hicks*, 533 U.S. 353, 376, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (Souter, Kennedy & Thomas, JJ., concurring)²³²—and

munty derives not from the Eleventh Amendment but from the structure of the original Constitution itself." 527 U.S. at 728, 119 S.Ct. 2240. The Eleventh Amendment "confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Id.*

As the court explained in its initial decision in this case, "*Alden* is relevant only to the extent that it provides a comprehensive history of sovereign immunity and the presuppositions behind the Eleventh Amendment." (October 30, 2000 Decision at 17-18.)

232. "Justice Souter wrote, 'Petitioners are certainly correct that '[t]ribal adjudicatory jurisdiction over nonmembers is . . . ill-defined,' since this Court's own pronouncements on the issue have pointed in seemingly opposite directions.'" 533 U.S. at 376, 121 S.Ct. 2304 (comparing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), and *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975), with *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978)). *See also id.*, 533 U.S. at 387, 121 S.Ct. 2304 (O'Connor, Stevens & Breyer, JJ. concurring in judgment) ("Part II of the Court's decision [in *Hicks*] is unmooored from our precedents").

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in so doing, has sought to give due deference to the policies of the Congress and the Executive Branch, recognizing that those policies have shaped “the metes and bounds of tribal sovereignty.” *Lara*, 541 U.S. at 202, 124 S.Ct. 1628. The court has detailed its reasoning in that regard, in part because this court’s reading of the relevant legal authority differs from that of counsel on all sides of this case. As best it can, the court has made explicit the specific reasons for that difference.

The court has also made the best sense it can out of a chaotic record, attempting to find order and sequence amidst shotgun pleadings rife with strident characterizations and prolix, meandering stream-of-consciousness argumentation. The preceding pages serve as the official record of that earnest effort.

So often, many claims are pleaded and many theories are argued, where one good claim or one sound theory would do. Labels too often displace facts, and characterization so often fails to perform the essential functions of description and sequence. Important issues are obfuscated by disjoint plaintiffs, unconnected defendants and obtuse allegations. Rule 8 speaks volumes in its simple requirement that a pleading set forth “a short and plain statement of the claim showing that the pleader is entitled to relief.”

And any argument—particularly any legal argument—finds its true force in the soundness and clarity of its reasoning, not the depth and persistence of its animus.

For the reasons set forth in some detail above, this court concludes that based upon the findings of fact reflected in the Navajo court’s December 28, 1999 and March 1, 2000 Orders, the Navajo Nation and the Navajo Nation District Court for the District of Shiprock, New Mexico, had civil regulatory authority and adjudicative subject-matter jurisdiction, respectively, over the San Juan Health Services District

with respect to its employment of plaintiffs Fred Riggs and Allison Dickson, and jurisdiction of at least some of the employment-related claims pleaded by those plaintiffs under *Navajo Nation Code* § 253(B), consistent with *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). Non-Navajos and non-tribal entities who enter into employment relationships with Navajo members within the boundaries of the Navajo Nation have “enter[ed] consensual relationships with . . . its members” within the meaning of *Montana*’s first exception, and the Navajo courts have subject-matter jurisdiction of disputes between Navajos and nonmember employers arising out of those relationships. Employer-employee relationships involving tribal members likewise have a “direct effect on the . . . the economic security, or health or welfare of the tribe” within the meaning of *Montana*’s second exception, bringing those relationships within the limited scope of the Navajo Nation’s inherent civil authority over non-Indians conducting activities on non-Indian fee lands within the reservation boundaries for that reason as well. In extending the coverage of the Navajo Preference in Employment Act to those relationships, the Navajo Nation exercised its lawful civil regulatory authority, an aspect of the Navajos’ long-acknowledged power to “make their own laws and be ruled by them,” *Williams v. Lee*, 358 U.S. at 220, 79 S.Ct. 269, reflecting its inherent sovereignty as recognized and enlarged by treaty and Acts of Congress. Plaintiffs Riggs and Dickson are entitled to declaratory relief, at least to that extent. *See* 28 U.S.C.A. §§ 2201–2202 (1994).

The Navajo court also had subject-matter jurisdiction of plaintiffs’ employment-related claims against defendant Roger Atcity, a Navajo tribal member residing on

the Navajo Reservation.²³³ For Riggs and Dickson, their claims against Atcitty reflect a dispute arising among tribal members, over which tribal court subject-matter jurisdiction is exclusive. See *Fisher v. District Court of the Sixteenth Jud. Dist.*, 424 U.S. 382, 386–389, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976). The Navajo court also has exclusive subject-matter jurisdiction over Singer's claim against Atcitty, at least to the extent that her claim arose within Reservation boundaries. See *Williams v. Lee*, 358 U.S. 217, 222–223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

Of Riggs and Dickson's claims against their employer, the San Juan Health Services District, it appears that those claims which seek directly to enforce the Navajo Preference in Employment Act were not properly before the Navajo Nation District Court at the time the three orders at issue were entered. The NPEA assigns the Office of Navajo Labor Relations and the Navajo Nation Labor Commission primary jurisdiction over alleged violations of its requirements. In its December 28, 1999 and March 1, 2000 Orders, the Navajo court made no findings invoking any exception to the requirement under Navajo law that plaintiffs must first exhaust their administrative remedies under the NPEA before seeking relief under that law in the Navajo courts.²³⁴ Nor does it appear that plaintiffs had been dismissed by the Labor Commission, or that they were seeking to enforce any order of the Labor Commission in their Navajo court proceeding. The Navajo court's preliminary findings in its December 28, 1999 and March 1, 2000 Orders do not establish a basis for exercising its jurisdiction over plaintiffs Riggs and Dickson's NPEA claims absent proof

of exhaustion of the prescribed administrative remedies.

Aside from claims arising directly under the NPEA, the Navajo Nation District Court correctly concluded that it had subject-matter jurisdiction over plaintiffs Riggs and Dickson's employment-related common-law tort claims, particularly Mr. Riggs' defamation claim against the Health District and defendant Wood, alleging injury to his reputation—what amounts to an injury to Riggs' relationship with his peers and co-workers at the Montezuma Creek Clinic and members of his community on the Reservation.

Under controlling Supreme Court precedent, the Navajo Nation District Court did not have subject-matter jurisdiction over the claims of plaintiff Donna Singer, a non-Indian non-resident of the Navajo Reservation, against the Health District and the non-Indian defendants. *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). Nor did that court have subject-matter jurisdiction over San Juan County, the named San Juan County Commissioners, the San Juan County Attorney, County administrator Bailey, or the non-Navajo members of the Health District's governance board under *Navajo Nation Code*, tit. 7, § 253(B), based upon the limited preliminary factual findings set forth in that court's December 28, 1999 and March 1, 2000 Orders.

This court need not decide whether Navajo court's conclusion that plaintiffs Riggs and Dickson had standing to assert claims on behalf of the past, present and future Navajo patients of the Montezuma Creek Clinic—*none* of whom appeared as plaintiffs in the Navajo court proceeding—was

233. See Navajo Nation Code, tit. 7, § 253(B) (1995) ("The District Courts of the Navajo Nation shall have original jurisdiction over . . . [a]ll civil actions in which the defendant is a resident of Navajo Indian Country").

234. As discussed above, this exhaustion requirement may initially embrace the plaintiffs' non-NPEA claims against the District as well. (See *supra*, at 979–81.)

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correct, or whether the question of standing may or must be reexamined in this action as part of the jurisdictional analysis, because subsequent events have rendered moot the preliminary injunctive relief granted by the Navajo court on the patients' behalf in December of 1999; the County and Health District defendants had no participation in, or authority or control over the management and operation of the Montezuma Creek Clinic from and after January 1, 2000, when Utah Navajo Health Systems assumed responsibility for that facility under its contract with the Navajo Nation. Further enforcement of that relief—particularly for the benefit of unspecified, unidentified and absent plaintiffs—as against these defendants more than five years after that date would serve no practical purpose.

For essentially the same reason, much of the injunctive relief granted by the Navajo court in favor of plaintiffs Riggs and Dickson on their own pleaded employment-related claims was also rendered moot, and to that extent, the Navajo court's preliminary injunction is no longer capable of specific enforcement in this forum. As to the remainder of the relief granted, *viz.*, expungement of all "charges and writings" referring to the time card issue from plaintiff Riggs' personnel file, this court declines to enforce the preliminary injunctive relief on Riggs' tort law claims as a matter of either full faith and credit or comity because the Navajo court orders—by their express terms—are preliminary and interlocutory orders, not final judgments of that court. *See Restatement (Second) of Conflict of Laws* § 107 (1971).

The interlocutory nature of the three orders at issue also dooms plaintiffs' effort to enforce the other equitable relief granted them by the Navajo court, *viz.*, back pay, back benefits, etc. That relief calls for the payment of money, but in amounts that were not set forth with any particular-

ity in the Navajo court's December 28, 1999, March 1, 2000 and March 6, 2000 Orders. Absent the requisite factual findings by the Navajo court liquidating those sums, the Navajo court orders leave this court with nothing to enforce.

Essentially the same is true as to the Navajo court's preliminary award of "attorney's fees, costs and expenses associated with these proceedings to date" in favor of the plaintiffs, but without specific findings as to amount. Without a definitive answer to the "how much" question, this court remains at a loss as to how to enforce another court's order requiring defendants to pay money to the plaintiffs.

In any event, adjudication of Riggs and Dickson's claims against the Health District was barred by the District's immunity as defined by the Utah Governmental Immunity Act. The State of Utah has not consented to suit against the State or its subdivisions in tribal courts. Its limited statutory waiver of that immunity extends only to the exclusive remedy under the Act in its exclusively designated forum, the Utah state district courts. While that limited waiver encompasses contract claims and claims involving injuries resulting from employee conduct, the Act excepts most intentional tort claims, including defamation, emotional distress, interference with contract, and civil rights violations, from the waiver.

Adjudication in the Navajo Nation District Court of the plaintiffs' claims against defendant Atcitty arising from his conduct as a member of the Health District's governing board is likewise barred by the Utah Governmental Immunity Act, absent a finding that Atcitty acted due to fraud or malice.

This court gives effect to the limited nature of that waiver under the principles of sovereign immunity articulated in *Montana v. Gilham*, 133 F.3d 1133, 1136-1140

(9th Cir.1997), and recognizing that under Navajo case law decided since the orders at issue were entered, the Navajo Supreme Court would likely honor the Health District's immunity under evolving principles of comity and reciprocity. See *Office of Navajo Labor Relations ex rel. Jones v. Central Consolidated School District No. 22*, No. SC-CV-13-98 (Navajo S.Ct. 06/05/2003), at ¶ [25], available at <http://www.tribal-institute.org/opinions/2003.NANN.0000007.htm>.

Only Riggs' defamation claim against defendant Wood was excepted from the effect of the immunity afforded by the Utah Governmental Immunity Act, based upon the Navajo court's preliminary finding that Wood acted through malice in publishing "the phony fraud charge that still maliciously clouds Mr. Riggs' ... name." (December 28, 1999 Order at [15].)

For all of the reasons explained above,

IT IS ORDERED that the Plaintiffs' Motion for Summary Judgment for Enforcement of the Navajo Court Orders under Full Faith and Credit or Comity and Response of the District and County's Briefs and Motions for Summary Judgment [& Memorandum in Support], filed February 28, 2003 (dkt. no. 504), is GRANTED IN PART, but only to the extent that plaintiffs are entitled to entry of judgment declaring that consistent with *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), the Navajo Nation and the Navajo Nation District Court for the District of Shiprock, New Mexico, had civil regulatory authority and adjudicative subject-matter jurisdiction under *Navajo Nation Code*, tit. 7, § 253(B), respectively, over the San Juan Health Services District with respect to its employment relationships with plaintiffs Fred Riggs and Allison Dickson; the Navajo court also had subject-matter jurisdiction of plaintiff Riggs' defamation claim

against defendant Wood, and of plaintiffs Singer, Riggs and Dickson's employment-related claims against defendant Atcitty, under *Navajo Nation Code*, tit. 7, § 253(B), consistent with *Montana v. United States* and *Nelson v. Pfizer, Inc.*, among other authorities; based upon the Navajo court's preliminary finding that Wood acted through malice, the Utah Governmental Immunity Act does not bar Riggs' claim against Wood; the plaintiffs' motion is DENIED as to all claims asserted by plaintiff Donna Singer, with the exception of her claim against defendant Atcitty, a Navajo member, because the Navajo Nation District Court for the District of Shiprock, New Mexico did not have adjudicative subject-matter jurisdiction of her claims against the non-Indian defendants under *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997); the plaintiffs' motion is DENIED as to defendants San Juan County, San Juan County Commissioners Tyron Lewis and Bill Redd, the San Juan County Attorney Craig Halls and County administrator Bailey because the Navajo Nation District Court for the District of Shiprock, New Mexico did not have adjudicative subject-matter jurisdiction under *Navajo Nation Code*, tit. 7, § 253(B) of plaintiffs Riggs and Dickson's claims against these defendants; and the plaintiffs' motion is DENIED in all other respects because, *inter alia*, the Navajo court orders that plaintiffs seek to enforce in this forum are non-final and interlocutory in nature, and in large part have been rendered moot;

IT IS FURTHER ORDERED that San Juan Health District Defendants' Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 496), is GRANTED IN PART, to the extent that the defendants are entitled to entry of a judgment declaring that the

RUTLEDGE v. BARNHART
Cite as 391 F.Supp.2d 1057 (N.D.Ala. 2005)

1057

Navajo Nation District Court for the District of Shiprock, New Mexico did not have adjudicative subject-matter jurisdiction under *Navajo Nation Code*, tit. 7, § 253(B) of the plaintiffs' claims against defendants John Lewis, Karen Adams, Patsy Shumway, and Lauren Schafer; that the Utah Governmental Immunity Act bars adjudication in the Navajo Nation District Court of plaintiffs' claims against Ateitty arising from his conduct as a member of the Health District governing board; the Act also bars adjudication in the Navajo court of Riggs and Dickson's claims against the San Juan Health Services District because its limited waiver of the District's governmental immunity does not extend to adjudication of individual claims against the District in Indian tribal courts; and

IT IS FURTHER ORDERED that "Plaintiffs' Motion for this Court to Address the Defendants' Immunity Issue and Full Faith and Credit Issue in any Order on Jurisdiction," filed September 24, 2004 (dkt. no. 661), is GRANTED IN PART, to extent that those issues have been addressed in this Memorandum Opinion and Order.



Teresa RUTLEDGE, Plaintiff,

v.

**Jo Anne B. BARNHART,
Commissioner of Social
Security, Defendant.**

No. CIV.A. 04-G-0987-J.

United States District Court,
N.D. Alabama,
Jasper Division.

Aug. 22, 2005.

Background: Claimant with fibromyalgia, panic attacks, chronic fatigue syndrome

(CFS), chronic obstructive pulmonary disease (COPD), ruptured discs in her neck, heart murmur, chronic pain and depression brought action seeking judicial review of final adverse decision of Commissioner of the Social Security Administration (SSA) denying her application for disability insurance benefits (DIB).

Holdings: The District Court, Guin, J., held that:

- (1) ALJ erred in discrediting claimant's pain testimony;
- (2) undisputed evidence of claimant's fibromyalgia and its attendant pain alone were substantial evidence of her disability; and
- (3) ALJ erred in his failure to either give substantial or considerable weight to opinion of treating physician or to show good cause for not doing so.

Reversed and remanded.

1. Social Security and Public Welfare
⇨147, 148.15

On judicial review in social security disability case, sole function of district court is to determine whether decision of Commissioner of Social Security Administration (SSA) is supported by substantial evidence and whether proper legal standards were applied; to that end, court must scrutinize record as whole to determine if decision reached is reasonable and supported by "substantial evidence," i.e., such relevant evidence as reasonable person would accept as adequate to support a conclusion. Social Security Act, § 205(g), 42 U.S.C.A. § 405(g).

See publication Words and Phrases for other judicial constructions and definitions.

2. Social Security and Public Welfare
⇨140.21, 140.41, 143.45

Once social security disability claimant has satisfied Steps One and Two of

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

* * * * *

DR. STEVEN MACARTHUR, et al.,)
)
Plaintiffs,)

vs.)

SAN JUAN COUNTY, et al.,)
)
Defendants.)

DONNA SINGER, FRED RIGGS, and)
ALLISON DICKSON,)
)
Plaintiffs,)

vs.)

SAN JUAN COUNTY, SAN JUAN)
HEALTH SERVICES DISTRICT,)
COMMISSIONER TYRON LEWIS,)
COMMISSIONER BILL REDD,)
CRAIG HALLS, RICHARD BAILEY,)
REID WOOD, ROGER ATCITY,)
JOHN LEWIS, KAREN ADAMS,)
PATSY SHUMWAY, and LAUREN)
SCHAFFER,)
)
Defendants.)

Civil No. 2:00-CV-584BSJ

**MEMORANDUM OPINION &
ORDER RE: PLAINTIFFS'
MOTIONS FOR
RECONSIDERATION
(Fed. R. Civ. P. 59(e)/60(b)),
AND OTHER MATTERS**

FILED
CLERK, U.S. DISTRICT COURT
December 15, 2005 (5:01pm)
DISTRICT OF UTAH

* * * * *

This court entered its final Declaratory Judgment (28 U.S.C.A. § 2201(a)) & Judgment & Order of Dismissal in the above-captioned action on October 31, 2005 (dkt. no. 848) ("October 31st Judgment"). On November 7, 2005, plaintiffs Singer, Riggs and Dickson filed a Motion for Clarification, Reconsideration and Amendment of that judgment

(dkt. no. 849), with a supporting memorandum (dkt. no. 850). On November 10, 2005, plaintiff Valdez filed a “Motion to Reconsider and Amend the October 31, 2005 Order and Allow Her to Amend Her Amended Complaint,” (dkt. no. 855), with a supporting memorandum (dkt. no. 856); plaintiffs Lyman and MacArthur also filed a “Motion to Reconsider and Amend the October 31, 2005 Order and Allow Her to Amend Their Amended Complaint,” (dkt. no. 857), with a supporting memorandum (dkt. no. 858).¹

The defendants filed a series of responsive memoranda,² and plaintiffs Singer, Riggs and Dickson filed three reply memoranda.³ The motions were calendared for hearing on November 30, 2005. At the November 30th hearing, Susan Rose, Esq. appeared on behalf of the plaintiffs; Carolyn Cox, Esq. and Robert R. Harrison, Esq. appeared on behalf of the San Juan Health Services District defendants; and Jesse Trentadue, Esq. appeared on behalf of the San Juan County defendants. The court heard the arguments of counsel, and having reviewed

¹Plaintiffs also filed a “Motion to Correct Plaintiffs Motion to Clarify, Reconsider and Amend,” on November 9, 2005 (dkt. no. 853), seeking to remove a redundant page 9 from the Memorandum in Support of Plaintiffs Singer, Riggs, Dickson’s Motion for Clarification, Reconsideration and Amendment, filed November 7, 2005 (dkt. no. 850).

²(See Memorandum in Opposition to Plaintiffs’ Motion for Clarification, Reconsideration and Amendment, filed November 14, 2005 (dkt. no. 859); San Juan County Defendants’ Memorandum in Opposition to Plaintiffs’ Motions to Reconsider, filed November 20, 2005 (dkt. no. 862); Memorandum in Opposition to Plaintiffs’ Motion for Clarification, Reconsideration and Amendment, filed November 21, 2005 (dkt. no. 863); “Memorandum in Opposition to Plaintiffs Lyman’s and MacArthur’s Motion to Reconsider and Amend the October 31, 2005 Order, and to Allow Her [sic] to Amend Her [sic] Amended Complaint,” filed November 21, 2005 (dkt. no. 864); Memorandum in Opposition to Plaintiff Helen Valdez’ Motion to Reconsider and Amend the October 31, 2005 Order, and to Allow Her to Amend Her Amended Complaint,” filed November 21, 2005 (dkt. no. 865).)

³(See “Plaintiff Singer/Riggs/Dickson’s Reply to the Defendants’ Opposition to the Rule 60 Motion to Correct, Ammend [sic] and Reconsider the Court’s October 12, 2005 Order,” filed November 25, 2005 (dkt. no. 866); “Plaintiff Singer/Riggs/Dickson’s Reply to the Defendants COUNTY Opposition on Rule 60 Motion to Correct, Ammend [sic] and Reconsider,” November 29, 2005 (dkt. no. 867); “Plaintiff Singer/Riggs/Dickson’s Reply to the Defendants Second Opposition on Rule 60 Motion to Correct, Ammend, [sic] and Reconsider,” filed November 29, 2005 (dkt. no. 868).)

and considered the memoranda submitted by the parties as well as this court's prior opinions and orders, ruled on the plaintiffs' motions, denying them in each instance. (*See* Minute Entry, dated November 30, 2005 (dkt. no. 871).)

For the sake of clarity of the record in this matter, the court has elected to elaborate upon the reasons for its rulings on the plaintiffs' three Rule 59(e)/Rule 60 motions as well as setting forth in writing the court's rulings on prior motions heard on October 25, 2005.

A. Applicable Standards under Fed. R. Civ. P. 59(e) & 60(b)

According to the court of appeals, "The Federal Rules of Civil Procedure provide that a post-judgment motion may 'aris[e] under either Rule 59(e) (motion to alter or amend the judgment) or Rule 60(b) (relief from judgment for mistake or other reason). The[se] two rules serve different purposes and produce different consequences, both substantive and procedural.' *Sanders v. Clemco Indus.*, 862 F.2d 161, 168 (8th Cir. 1988) (citation and footnote omitted)." *Jennings v. Rivers*, 394 F.3d 850, 854 (10th Cir. 2005).

In this case, plaintiffs' counsel has asserted *both* Rule 59(e) and Rule 60(b) as bases for plaintiffs' three motions for reconsideration, filed within ten days of the entry of the court's October 31st Judgment.⁴ Counsel points to Rule 60(a) as well.

⁴Rule 60(b) reads in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (4) the judgment is void; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed.R.Civ.P. 60(b)(1), (4) & (6).

Generally, Rule 59(e) motions “should be granted only to correct manifest errors of law or to present newly discovered evidence.” *Adams v. Reliance Standard Life Ins. Co.*, 225 F.3d 1179, 1186 n. 5 (10th Cir. 2000); *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir.1997) (same); *see also Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 948 (10th Cir.1995) (noting that the requirements for motions for reconsideration are “an intervening change in the controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice”).

Motions for “reconsideration” will not be granted absent “highly unusual circumstances”—they do not provide litigants with an opportunity for a “second bite at the apple” or allow them, like Emperor Nero, to “fiddle as Rome burns”, or license a litigation “game of hopscotch”, allowing parties to switch from one legal theory to a new one “like a bee in search of honey”. Such motions are not vehicles for relitigating old issues. Courts properly decline to consider new arguments or new evidence on reconsideration where those arguments or evidence were available earlier.

Steven Baicker-McKee, William M. Janssen & John B. Corr, *Federal Civil Rules Handbook* 962 (2006 ed.) (footnotes omitted).

Rule 60(b)(1) provides that

“[o]n motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect....” It “is an extraordinary procedure” which “seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the incessant command of the court’s conscience that justice be done in light of all the facts.” *Cessna Fin. Corp.*, 715 F.2d at 1444 (quoting *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981) (additional internal quotation marks omitted)). The rule “should be liberally construed when substantial justice will thus be served.” *Id.*

“The guidelines governing a district court’s consideration of a Rule 60(b)(1) motion ... are well established.” *Id.* at 1445. Whether the movant has

demonstrated “mistake, inadvertence, surprise, or excusable neglect” is an issue to be “litigated on the merits.” *Id.* “The trial court must determine whether excusable neglect has in fact been established, resolving all doubts in favor of the party seeking relief.” *Id.*

Jennings v. Rivers, 394 F.3d 850, 855-856 (10th Cir. 2005); *see also Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999) (“Rule 60(b)(1) motions premised upon mistake are intended to provide relief to a party in only two instances: (1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order. See *Cashner*, 98 F.3d at 576 (citing 7 James Wm. Moore et. al., *Moore’s Federal Practice* ¶ 60.22[2] (2d ed.1985)).” . . . [T]he kinds of mistakes remediable under a Rule 60(b)(1) motion are litigation mistakes that a party could not have protected against.”); *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996) (“If the mistake alleged is a party’s litigation mistake, we have declined to grant relief under Rule 60(b)(1) when the mistake was the result of a deliberate and counseled decision by the party.”). Relief is available under Rule 60(b)(1) “only for obvious errors of law, apparent on the record. *Alvestad v. Monsanto Co.*, 671 F.2d 908, 912-13 (5th Cir.) (relief under Rule 60(b)(1) limited to ‘perfunctory correction’ of obvious errors of law), *cert. denied*, 459 U.S. 1070, 103 S.Ct. 489, 74 L.Ed.2d 632 (1982); *see also Rocky Mountain Tool & Mach. Co. v. Tecon Corp.*, 371 F.2d 589, 596-97 (10th Cir. 1966) (‘palpably erroneous award’ of interest from date of filing counterclaim rather than from date of entry of judgment correctable under Rule 60(b)(1)).” *Van Skiver v. United States*, 952 F.2d 1241, 1244 (10th Cir. 1991).

Rule 60(b)(4) provides for relief where “the judgment is void”:

A judgment is void for Rule 60(b)(4) purposes if the “rendering court was powerless to enter it.” *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 (10th Cir. 1979). A judgment may in some instances be void for lack of subject matter jurisdiction. E.g. *id.*; *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834, 842 (10th Cir. 1974). “However, this occurs only where there is a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority.” *Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir. 1980) (citations omitted); accord *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir.1986) (observing that collateral attack is permitted under Rule 60(b)(4) where there is “a clear usurpation of power by a district court, and not an error of law in determining whether it has jurisdiction”) (citations omitted).

A court does not usurp its power when it erroneously exercises jurisdiction. *Kansas City Southern*, 624 F.2d at 825. “Since federal courts have ‘jurisdiction to determine jurisdiction,’ that is, ‘power to interpret the language of the jurisdictional instrument and its application to an issue by the court,’ error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction.” *Id.* (quoting *Stoll v. Gottlieb*, 305 U.S. 165, 171, 59 S.Ct. 134, 83 L.Ed. 104 (1938)); see also *Lubben v. Selective Serv. Sys. Local Board No. 27*, 453 F.2d 645, 649 (1st Cir.1972) (“While absence of subject matter jurisdiction may make a judgment void, such total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction.”) (footnote omitted). There must be “no arguable basis on which [the court] could have rested a finding that it had jurisdiction.” *Nemaizer*, 793 F.2d at 65.

Gschwind v. Cessna Aircraft Co., 232 F.3d 1342, 1346 (10th Cir. 2000), *cert. denied*, 533 U.S. 915 (2001); see also Annotation, *Lack of Jurisdiction, or Jurisdictional Error, as Rendering Federal District Court Judgment "Void" for Purposes of Relief under Rule 60(b)(4) of Federal Rules of Civil Procedure*, 59 A.L.R. Fed. 831 (1982 & Supp. 2005).

Rule 60(b)(6) “permits the district court to reverse its order for ‘any other reason justifying relief from the operation of the judgment,’” *Searles v. Dechant*, 393 F.3d 1126, 1131 (10th Cir. 2004), “other than the more specific circumstances set out in Rules

60(b)(1)–(5).” *Gonzalez v. Crosby*, ___ U.S. ___, 125 S.Ct. 2641, 2646 (2005) (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U. S. 847, 863, n. 11 (1988); *Klapprott v. United States*, 335 U. S. 601, 613 (1949) (opinion of Black, J.)).

According to the court of appeals:

We have described Rule 60(b)(6) as a “grand reservoir of equitable power to do justice in a particular case.” *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (en banc) (citation omitted), *cert. denied*, 423 U.S. 1079, 96 S.Ct. 866, 47 L.Ed.2d 89 (1976). In *Pierce*, we were confronted with “[t]he kind of legal error that provides the extraordinary circumstances justifying relief under rule 60(b)(6).” *Van Skiver v. United States*, 952 F.2d 1241, 1244 (10th Cir. 1991), *cert. denied*, 506 U.S. 828, 113 S.Ct. 89, 121 L.Ed.2d 51 (1992). We granted Rule 60(b)(6) relief in *Pierce* based on a post-judgment change in the law “arising out of the same accident as that in which the plaintiffs . . . were injured.” 518 F.2d at 723. Absent a post-judgment change in the law in a factually-related case, however, “we have held that ‘a change in the law or in the judicial view of an established rule of law’ does not justify relief under Rule 60(b)(6).” *Van Skiver*, 952 F.2d at 1245 (quoting *Collins v. City of Wichita*, 254 F.2d 837, 839 (10th Cir. 1958)).

Johnston v. Cigna Corp., 14 F.3d 486, 497 (10th Cir. 1993) (footnote omitted). “Relief under Rule 60(b)(6) is discretionary and is warranted only in exceptional circumstances. . . .” *Id.* (citing *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1147 (10th Cir.1990)). A Rule 60(b)(6) motion “might contend that a subsequent change in substantive law is a ‘reason justifying relief,’ Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim[.] *E.g.*, *Dunlap v. Litscher*, 301 F. 3d 873, 876 (CA7 2002),” *Gonzalez v. Crosby*, 125 S. Ct. at 2647, but even so, the “cases have required a movant seeking relief under Rule 60(b)(6) to show ‘extraordinary circumstances’ justifying the reopening of a final judgment.” *Id.* at 2649.

Moreover, as to relief under Fed. R. Civ. P. 60(a):

Rule 60(a) may be relied on to correct what is erroneous because the thing spoken, written, or recorded is not what the person intended to speak, write, or record. *Allied Materials Corp. v. Superior Prods. Co.*, 620 F.2d 224, 226 (10th Cir. 1980). Rule 60(a) may not be used to change something that was deliberately done, *Security Mut. Casualty Co. v. Century Casualty Co.*, 621 F.2d 1062, 1065 (10th Cir. 1980), even though it was later discovered to be wrong. *Allied Materials*, 620 F.2d at 226. A correction under Rule 60(a) should require no additional proof. See, e.g., *Trujillo v. Longhorn Mfg. Co.*, 694 F.2d 221, 226 (10th Cir. 1982).

McNickle v. Bankers Life and Cas. Co., 888 F.2d 678, 682 (10th Cir. 1989).

And to the extent that plaintiffs MacArthur, Lyman and Valdez again seek leave to amend their complaint, even though Rule 15(a) states that “leave [to amend] shall be freely given when justice so requires,” the court of appeals observes that “‘this presumption is reversed in cases, such as here, where a plaintiff seeks to amend a complaint after judgment has been entered and a case has been dismissed.’ *Bressner v. Ambroziak*, 379 F.3d 478, 484 (7th Cir. 2004); see also *Ahmed*, 297 F.3d at 207-08 (liberality of Rule 15 no longer applicable once judgment has been entered).” *The Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084, 1087-1088 (10th Cir. 2005).

B. Singer, Riggs & Dickson’s Rule 59(e)/60(b) Motion

Plaintiffs Singer, Riggs and Dickson seek relief from this court’s October 31st Judgment under Fed. R. Civ. P. 59(e) and 60(a), (b)(1), (4) & (6), but without detailing the specific relief sought. (See Memorandum in Support of Plaintiffs Singer, Riggs, Dickson’s Motion for Clarification, Reconsideration and Amendment, filed November 7, 2005 (dkt. no. 850) (“Pltfs’ Mem. (850)”), *passim*.) The motion appears to be premised upon five core assertions:

(1) Congress has legislatively overruled *Montana v. United States*, as well as *Strate v. A-1 Contractors*, *Atkinson Trading Co. v. Shirley*, and *Nevada v. Hicks*, reviving inherent tribal civil authority over non-Indians in “Indian country” in all circumstances;

(2) The equal protection clause of the Indian Civil Rights Act, 25 U.S.C.A. § 1302(8) (2001), mandates the exercise of co-extensive tribal civil jurisdiction over tribal members and non-Indians in “Indian country” in all circumstances;

(3) This court lacks authority to review a tribal court order or judgment “for *federal* legal soundness except for Habeas relief[,] 25 USC [§] 1303,” (Pltfs’ Mem. (850), at 7);

(4) The County and the Health District have no governmental immunity because they are not the State or an “arm of the State” (*id.* at 7); and

(5) Under “the Court’s analysis of . . . federal preemption doctrine, all the Navajo law and Orders and Judgments are enforceable at any time, interlocutory or not, without regard to commity [sic] or reciprocity of state and tribal immunity,” (*id.* at 6).

With the exception of plaintiffs’ equal protection theory under 25 U.S.C.A. § 1302(8), each of these propositions was addressed in some detail in this court’s October 12th Memorandum Opinion & Order (dkt. no. 837), *MacArthur v. San Juan County*, 391 F. Supp. 2d 895 (D. Utah 2005), and upon examination, each proposition was shown to lack legal merit.

(1) Plaintiffs have not shown that Congress has legislatively overruled *Montana v. United States*, *Strate v. A-1 Contractors*, *Atkinson Trading Co. v. Shirley*, and *Nevada v. Hicks*, reviving inherent tribal civil authority over non-Indians in “Indian country” in all circumstances

Plaintiffs’ Rule 59(e)/60(b) motion revives their centerpiece legal theory that the analysis of inherent Indian tribal civil authority over non-Indians under *Montana* and its progeny represents an “‘old-law’ analysis” superseded by recent congressional legislation. (Pltfs’ Mem. (850), at 1, 3-6 & nn. 2, 6-7, 10-11; *see also* “Plaintiffs’ Briefing on *Montana*,” filed February 13, 2003 (dkt. no. 492), at 2-10;⁵ “Federalism and Article III Court Limitations in Defining Navajo Tribal Court Jurisdiction” [unsigned original document submitted by plaintiffs’ counsel], filed February 24, 2003 (dkt. no. 502), at 7-15;⁶ Plaintiffs’ Motion for Summary Judgment for Enforcement of the Navajo Court Orders under Full Faith and Credit or Comity and Response of the District and County’s Briefs and Motions for Summary Judgment [& Memorandum in Support], filed February 28, 2003 (dkt. no. 504) (“Pltfs’ Summ. Judg. Mem. (504)”), at 9-14 (“Pro[-]Tribal Presumptions”).) In plaintiffs’ view, “Congress . . . has extinguished the *Montana* analysis altogether.” (“Plaintiff Singer/Riggs/Dickson’s Reply to the Defendants Second Opposition on Rule 60 Motion to Correct, Ammend, [sic] and Reconsider,” filed November 29, 2005 (dkt. no. 868), at 2.)

⁵ As previously noted, plaintiffs “incorporate[d] the briefing done in their Supreme Court petition and Writ of Mandamus petitions into this briefing,” apparently referring to their “Petition for a Writ of Certiorari,” *Riggs v. San Juan County*, No. 02-1253 (U.S.S.Ct., filed February 6, 2003), and “Petition for a Writ of Mandamus and Prohibition,” *In re: Riggs, et al. v. San Juan County, et al.*, Case No. 03-4036 (10th Cir., filed February 13, 2003), copies of which are lodged in this court’s file.

⁶ As previously explained, this submission consisted of exhibits that were supposed to be appended to “Plaintiffs’ Motion to Allow Plaintiffs Corrections of Factual Assertions in the February 24, 2003 Hearing,” (dkt. no. 571), which was served on opposing counsel on or about February 24, 2003, but was not filed with the court until November 18, 2003. *Cf.* Fed. R. Civ. P. 5(d).

Plaintiffs again cite to the Indian Tribal Justice Act of 1993,⁷ the Indian Tribal Justice Technical and Legal Assistance Act of 2000,⁸ the Indian Civil Rights Act of 1968 (“ICRA”),⁹ as amended by Pub. L. No. 101-511,¹⁰ this time adding to that list the Indian Self-Determination and Education Assistance Act of 1975,¹¹ the Indian Self-Determination and Education Assistance Contract Reform Act of 1994,¹² and the Tribal Self-Governance Act of 1994.¹³ (Pltfs’ Mem. (850), at 3-4 & n.7.)

According to plaintiffs’ counsel, the cited statutes “constitute a plan whereby the federal government turned operations of the federal Courts of Indian Offenses over to individual Indian Nations.” (*Id.* at 4.)

The Indian Nations individually volunteered for the program and met federal criteria, by government-to-government contract, on one statutory condition—that under the Indian Civil Rights Act (25 USC 1301 et seq, particularly 1302) and federally approved Indian Nation law, that includes here, the Navajo Nation Bill of Rights, Navajo customs and traditions, and Navajo statutes, and Navajo Rules of Civil Procedure and Rules of Evidence (patterned nearly identical to the federal, similarly to state rules) ‘*any person*’,

⁷Pub. L. No. 103-176, 107 Stat. 200 (1993), *codified at* 25 U.S.C.A. §§ 3601 *et seq.* (2001).

⁸Pub. L. No. 106-559, 114 Stat. 2778 (2000), *codified at* 25 U.S.C.A. §§ 3651 *et seq.* (2001).

⁹Pub. L. No. 90-284, Title II, 82 Stat. 77 (1968), *codified at* 25 U.S.C.A. §§ 1301-1303 (2001).

¹⁰Pub. L. No. 101-511, Title VIII, § 8077(b), (c), 104 Stat. 1892 (1990), *codified at* 25 U.S.C.A. § 1301(2) (2001); *see also* Pub. L. No. 102-137, 105 Stat. 646 (1991).

¹¹Pub. L. No. 93-638, 88 Stat. 2203 (1975), *codified at* 25 U.S.C.A. §§ 450-450n (2001). Plaintiffs’ counsel suggests that this legislation was enacted in 1993 or 1994, (Pltfs’ Mem. (850), at 3 & n.7), but that is simply not true.

¹²Pub. L. 103-413, Title I, 108 Stat. 4250 (1994), *codified at* 25 U.S.C.A. §§ 450 note, 450b, 450c, 450e, 450f, 450j, 450j-1, 450k-450m, 450m-1 (2001).

¹³Pub. L. 103-413, title II, 108 Stat. 4270 (1994) (*codified at* 25 U.S.C.A. §§ 458aa-458hh (2001)). *See also* Tribal Self-Governance Amendments of 2000, Pub. L. 106-260, 114 Stat. 711 (2000) (establishing Tribal Self-Governance Program within the Indian Health Service).

not “any Indian” would be treated equally under ICRA. **25 USC 450f** and notes statutorily memorializes the model agreement and Congressional demands including the application of ICRA to the contract. EXHIBIT 1. This plan for Indian Nation Independence is consistent with history.

(*Id.* at 4-5 (emphasis in original; footnotes omitted).¹⁴)

As recounted in some detail in this court’s October 12th Memorandum Opinion & Order, the Navajo Nation did *not* “volunteer” to take over “operations of the federal Courts of Indian Offenses” under a Pub. L. 93-638 Indian Self-Determination Act contract.

MacArthur, 391 F. Supp. 2d at 966-967. The BIA courts of Indian offenses were entirely displaced by the Navajo Nation Council’s creation of the Navajo courts in 1959, nine years before the enactment of the Indian Civil Rights Act and sixteen years before the enactment of Pub. L. 93-638. *Id.* The Bureau of Indian Affairs has continued to provide partial funding for the Navajo court system since that time, but the operation of the Navajo Nation Judicial Branch continues to embody the exercise of inherent Navajo sovereignty as recognized and enhanced by federal treaty and statutes. Indeed, the Navajo judiciary may well be startled by counsel’s assertion that the Navajo courts are acting as contract administrators of “federal Courts of Indian Offenses” in adjudicating the matters brought before them, applying “federally approved . . . Navajo customs and traditions” and “BIA ratified, trained, funded” Navajo law. (Pltfs’ Mem. (850), at 3, 4.)

¹⁴The referenced “Exhibit 1” is an unauthenticated, undated and incomplete copy of an “Agreement Between the Secretary of the Department of the Interior and the Navajo Nation” purportedly made pursuant to Title I of the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C.A. §§ 450 *et seq.*) concerning the administration of a “Judicial Program.” (Pltfs’ Mem. (850), at Exh. 1.) This document appears to be an excerpt from a compilation of documents received by plaintiffs’ counsel from the Bureau of Indian Affairs in March 2003 pursuant to a Freedom of Information Act request. (*See* Memorandum in Support of Plaintiffs’ Motion to Correct their Submission of the BIA Contract with the Navajo Nation Judicial Program, filed March 28, 2003 (dkt. no. 536), and documents annexed thereto.)

Nothing in Pub. L. 93-638, as amended by the 1994 legislation, or in the contracts made pursuant to its provisions purports to define, limit or expand the substantive extent of Navajo civil or criminal authority or adjudicative jurisdiction, or to limit or supersede the effect of *Montana v. United States*, 450 U.S. 544 (1981), or later cases that follow it. The contract language simply acknowledges the substantive limitations that exist under ICRA and Navajo law.

Plaintiffs insist that the congressional legislation they cite has “lift[ed] the *Montana* presumptions and restrictions” and creates a presumption of tribal civil jurisdiction over tribal members and non-members alike, with no distinction as to land tenure within “Indian country” as defined under 18 U.S.C.A. § 1151 (2000). (*Id.* at 3.)¹⁵ Yet as explained in the October 12th Memorandum Opinion & Order, nothing in the language or legislative history of the 1990, 1993 and 2000 legislation addresses the question of the scope of inherent tribal civil jurisdiction over non-members after *Montana*. See *MacArthur*, 391 F. Supp. 2d at 993-996.

When Congress acts to override the Court’s reading of federal law, it usually makes its purpose explicit. For example, the 1990 and 1991 amendments to 25 U.S.C.A. § 1301 were explicitly intended to overrule *Duro v. Reina*, 495 U.S. 676 (1990), as to the scope of inherent tribal criminal jurisdiction over non-member Indians, as clearly reflected in its

¹⁵ Plaintiffs argue that under the Navajo treaties, the statutes enlarging the Navajo Reservation and “under 18 U.S.C. 1151 defining Indian country, . . . the Navajo have ‘exclusive sovereignty’ over ALL land within the Utah Navajo border,” regardless of *Montana*’s limitation of inherent tribal civil authority over non-Indian conduct on non-Indian lands. (Pltfs’ Mem. (850), at 5.) But cf. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653-654 n.5 (2001) (“Although § 1151 has been relied upon to demarcate state, federal, and tribal jurisdiction over criminal and civil matters, . . . [s]ection 1151 simply does not address an Indian tribe’s inherent or retained sovereignty over nonmembers on non-Indian fee land.”).

legislative history. *See United States v. Lara*, 541 U.S. 193, 199 (2004).

Similarly, the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), legislatively overruled no less than six prior Supreme Court rulings construing federal anti-discrimination statutes, as clearly reflected in its findings and statement of legislative purposes, *id.* at §§ 2, 3, 105 Stat. 1071, and its legislative history. *See, e.g.*, H.R. Rep. No. 102-40(I) (1991); H.R. Rep. No. 102-40(II) (1991); Interp. Mem., 137 Cong. Rec. S 15276 (Oct. 25, 1991); Roger Clegg, *Introduction: a Brief Legislative History of the Civil Rights Act of 1991*, 54 La. L. Rev. 1459 (1994).

No expressions of that kind are to be found with reference to the legislation relied upon by the plaintiffs. To the contrary, the 1993 and 2000 legislation reflects the Senate Indian Affairs Committee's reading of *Montana* as confirming the existence of tribal civil authority over members and non-members. *See MacArthur*, 391 F. Supp. 2d at 995 & n. 144.

Lara establishes that Congress may redefine the scope of tribal authority over non-members by legislative adjustment, as it did in response to *Duro v. Reina* concerning tribal criminal jurisdiction. Congress has not yet done so with reference to *Montana* or its progeny, including *Strate*, *Atkinson*, and the problematic *Nevada v. Hicks*, decided in 2001. So *Montana* continues to govern inherent Indian tribal civil authority over non-Indians conducting activities on non-Indian lands within reservation boundaries. *See MacArthur*, 391 F. Supp. 2d. at 950-955, 968-971, 993-996; *accord, Nelson v. Pfizer, Inc.*, No. SC-CV-01-02 (Navajo S. Ct. November 17, 2003); *Manygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-200 (Navajo S. Ct. August 12, 2003); *Manygoats v. Cameron*

Trading Post, No. SC-CV-50-98 (Navajo S. Ct. January 14, 2000); *cf. Dale Nicholson Trust v. Chavez*, No. SC-CV-69-00 (Navajo S. Ct. January 6, 2004) (jurisdiction over state officers after *Nevada v. Hicks*).

(2) The equal protection clause of the Indian Civil Rights Act, 25 U.S.C.A. § 1302(8) (2001), does not mandate the exercise of co-extensive tribal civil jurisdiction over tribal members and non-Indians in “Indian country” in all circumstances.

Plaintiffs’ counsel insists that the equal protection language of the Indian Civil Rights Act of 1968, 25 U.S.C.A. § 1302(8), mandates the exercise of general Indian tribal civil jurisdiction over tribal members and non-members alike as to any matter arising in “Indian country” as defined by 18 U.S.C.A. § 1151 (2000). If tribal jurisdiction over non-Indian litigants is not co-extensive with jurisdiction over tribal member litigants, plaintiffs insist, tribal courts cannot treat litigants equally or provide equal justice to all persons, as § 1302(8) requires.

Section 1302 reads:

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of *the people* peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of *the people* to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and *the person* or thing to be seized;

(3) subject *any person* for the same offense to be twice put in jeopardy;

(4) compel *any person* in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to *any person* in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [1] a fine of \$5,000, or both;

(8) deny to *any person* within its jurisdiction the equal protection of its laws or deprive *any person* of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to *any person* accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C.A. § 1302 (2001) (emphasis added). Through § 1302, “Congress statutorily imposed on tribal governments a list of specific restraints consisting almost entirely of language copied verbatim from the Constitution, mainly from the Bill of Rights.” Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343, 1345 (1969).

The original draft of the Act would have applied all constitutional guarantees to the tribes with some minor exceptions. Testimony in subcommittee hearings, however, demonstrated that strict application of certain constitutional guarantees would be destructive to Indian culture, and a substitute draft was adopted which enumerated some, but not all constitutional guarantees. The wording of the final version of the bill was taken nearly verbatim from the United States Constitution.

Comment, Martinez v. Santa Clara Pueblo: *The Scope of Indian Equal Protection*, 1976 Utah L. Rev. 547, 548 (1977) (footnotes omitted); *see also United States v. Wheeler*, 435 U.S.

313, 327-328 (1978) (“the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. § 1302, made most of the provisions of the Bill of Rights applicable to the Indian tribes”).

Section 1302(8) forbids any Indian tribe in the exercise of its powers of self-government to “deny to any person within its jurisdiction the equal protection of its laws.” Plaintiffs’ counsel contends that this equal protection guarantee requires that “‘*any person*’, not any Indian’, would be treated equally” by tribal courts and that the Navajo courts apply Navajo law “‘uniformly’ to all persons within the Navajo borders without exception as to the type of land ownership under [18] U.S.C. 1151.” (Pltfs’ Mem. (850), at 4 & n. 9.) The equal and uniform application of Navajo law in turn requires the Navajo courts to exercise co-extensive civil jurisdiction over tribal members and non-members alike; after all, counsel continues, “*Oliphant* and its progeny never discussed the application of ICRA demands on Indian Nation tribunals, nor the constitutionality of the Indian Civil Rights Act, to restrict it.” (*Id.* at 6.)

In fact, *Oliphant* discussed ICRA’s relationship to tribal jurisdiction over non-Indians in a footnote:

Respondents do contend that Congress has “confirmed” the power of Indian tribes to try and to punish non-Indians through the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476, and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302. Neither Act, however, addresses, let alone “confirms,” tribal criminal jurisdiction over non-Indians. The Indian Reorganization Act merely gives each Indian Tribe the right “to organize for its common welfare” and to “adopt an appropriate constitution and bylaws.” With certain specific additions not relevant here, the tribal council is to have such powers as are vested “by existing law.” The Indian Civil Rights Act merely extends to “any person” within the tribe’s jurisdiction certain enumerated guarantees of the Bill of Rights of the Federal Constitution.

As respondents note, an early version of the Indian Civil Rights Act extended its guarantees only to “American Indians,” rather than to “any person.” The purpose of the later modification was to extend the Act’s guarantees to “all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians.” Summary Report on the Constitutional Rights of American Indians, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 10 (1966). But this change was certainly not intended to give Indian tribes criminal jurisdiction over non-Indians. Nor can it be read to “confirm” respondents’ argument that Indian tribes have inherent criminal jurisdiction over non-Indians. Instead, the modification merely demonstrates Congress’ desire to extend the Act’s guarantees to non-Indians if and where they come under a tribe’s criminal or civil jurisdiction by either treaty provision or Act of Congress.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 n.6 (1978).

Looking to the legislative history of § 1302(8), its sponsor, Senator Sam Ervin of North Carolina, had redrafted his Indian civil rights bill in 1967 “according to the recommendations of the Interior Department, but on one critical point he deviated from them[:]”

Interior originally worded its “equal protection” provision in such a way as to limit its application to *members of the tribe* located within its jurisdiction. Sam Ervin’s revision, however, guaranteed equal protection to *any person* within the tribe’s jurisdiction. The significance of the altered wording was that it might be construed to extend equal benefits of tribal affiliation to non-Indians residing, leasing, or owning property on reservations, and subject to regulations established by the tribal councils.

Donald L. Burnett, Jr., *An Historical Analysis of the 1968 ‘Indian Civil Rights’ Act*, 9 Harv. J. Legis. 557, 602 n.239 (1972) (emphasis in original). This view necessarily assumed that Indian tribes had at least *some* authority over non-Indians within reservation boundaries,

evidenced by rulings such as *Williams v. Lee*, 358 U.S. 217 (1959).¹⁶ The legislative history also reflects considerable concern for the protection of tribal civil and criminal jurisdiction over tribal members, but this arose in the context of the unilateral extension of *state* jurisdiction over Indian country without tribal consent under Public Law 83-280, enacted in 1953. *See id.* at 568-569, 596-599. The 1968 Act amended Public Law 83-280 to require tribal consent by referendum to any future extension of state jurisdiction over Indian country and to provide a mechanism for retrocession of state jurisdiction to the tribes and the federal government. Pub. L. No. 90-284, Title IV, 82 Stat. 78-80 (1968), *codified at* 25 U.S.C.A. §§ 1321-1326 (2001). *See also* 1 American Indian Policy Review Comm’n, *Final Report* 151-152 (1977).

Section 1302(8) thus guarantees the equal protection of tribal law to tribal members and non-members alike, *cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63 & n.14 (1978), and was intended to guide and constrain the exercise of tribal authority within the tribes’ existing jurisdiction, but did not undertake to define or enlarge its scope.

Nine years later, the American Indian Policy Review Commission observed that “[t]he question of jurisdiction of tribal governments has grown increasingly complex in recent years,” and that “[t]ribal governments are emerging from an essentially dormant period forcibly imposed upon them by Federal policies directed toward their ultimate destruction.”

1 American Indian Policy Review Comm’n, *Final Report* 153 (1977). Though “[t]here is an

¹⁶While some concern was expressed by ‘white businessmen on the reservations’ in the wake of decisions such as *Williams v. Lee*, 358 U.S. 217 (1959), as to whether they could “expect impartial treatment from a native tribunal” where they were required to litigate in tribal courts, *id.* at 573 n.101, Senator Ervin’s legislative inquiry did not address the precise scope of tribal jurisdiction over non-Indians.

established legal basis for tribes to exercise jurisdiction over non-Indians” as summarized in its *Final Report*, the Commission acknowledged that “the parameters of jurisdiction and authority of tribal governments” remained uncertain and were subject to “case by case determination” based in part on the “multiplicity of circumstances and variance in resources and capabilities of the tribes” at that time. *Id.* at 154.¹⁷

While the enactment of the 1968 Indian Civil Rights Act “demonstrated that: (1) Congress confirmed that Indian tribes exercise jurisdiction over non-Indians when carrying out their powers of self-government, and (2) both Indians and non-Indians now have available ‘sources of protection against arbitrary tribal action. . . .’ *United States v. Mazurie*, 419 U.S. at 558 n.12,” (Brief for Respondents, *Oliphant v. Suquamish Indian Tribe*, No. 76-5729, filed November 4, 1977, 1977 WL 189289, at 61), nothing in the language of § 1302, its legislative history or its subsequent construction has been read to mandate that Indian tribes exercise civil authority over non-Indians coextensive with tribal civil authority over tribal members. *See, e.g., Felix S. Cohen’s Handbook of Federal Indian Law* 255 (Rennard Strickland, et al., eds. 1982) (“The breadth of retained power over non-Indians in civil matters has not been finally resolved.”); *see also* Robert J. McCarthy, *Civil Rights in Tribal Courts: the Indian Bill of Rights at Thirty Years*, 34 Idaho L. Rev. 465, 505-510 (1998).

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The resolution of these issues is complicated by the varying land distribution patterns within the different reservations, the difference in physical, economic and human resources between small tribes and large tribes, differences in the availability and value of natural resources over which the various governments are contending for control, and differences in proximity to large metropolitan areas.

Id. at 153.

(3) Plaintiffs’ assertion that this court lacks authority to review a tribal court order or judgment “for *federal* legal soundness except for Habeas relief[,] 25 USC [§] 1303,” has no substantive merit.

Plaintiffs Singer, Riggs and Dickson brought Navajo tribal court orders into this forum seeking this court’s aid in enforcing those orders against the named defendants. On remand, the court of appeals observed:

We are unwilling to enforce judgments of tribal courts acting beyond their authority, especially where defendants have a federal right “to be protected against an unlawful exercise of Tribal Court judicial power,” *Nat’l Farmers*, 471 U.S. at 851, 105 S.Ct. 2447; *see Wilson*, 127 F.3d at 810 (holding that “federal courts must neither recognize nor enforce tribal judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law”).

MacArthur v. San Juan County, 309 F.3d 1216, 1225 (10th Cir. 2002). As explained in the October 12th Memorandum Opinion & Order, this court must examine the subject-matter jurisdiction of the Navajo court as a predicate for any enforcement of its orders in this court, and that examination raises a federal question. *See MacArthur*, 391 F. Supp. 2d at 985-988. That examination is not a matter of “injecting federal law in place of Navajo customs, traditions and statutory law” without constitutional or statutory authority. (Pltfs’ Mem. (850), at 2; *see id.* at 7 (review “would interject federal law into Navajo law, diminishing their independence”).) It is a matter of determining the legal basis for the exercise of federal judicial power where that power has been invoked by plaintiffs’ pleadings seeking to enforce the Navajo court’s orders in this forum.

(4) Plaintiffs’ assertion that the County and the Health District have no governmental immunity because they are not the State or an “arm of the State” has no substantive merit.

Plaintiffs’ counsel submits that this court’s dismissal of Riggs and Dickson’s claims against the Health District and defendant Atcitty reflected the “application of state sovereign immunity to a political subdivision (for the first time since Lord Coke in England . . .),” (Pltfs’ Mem. (850), at 1 (footnote omitted)),¹⁸ which may overstate things a bit.

The doctrine of sovereign immunity from private suit finds its roots in the English common law. *See, e.g.,* 3 William Blackstone, *Commentaries on the Laws of England* *254-*257 (1768); Guy I. Seidman, *The Origins of Accountability: Everything I Know about the Sovereign’s Immunity, I Learned from King Henry III*, 49 St. Louis U. L.J. 393 (2005).

The doctrine of sovereign immunity comprises two distinct rules, which are not always separately recognized. The one rule holds that the King or the Crown, as the font of law, is not bound by the law’s provisions; the other provides that the King or Crown, as the font of justice, is not subject to suit in its own courts. *See, e.g.,* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 3-4 (1963). The one rule limits the reach of substantive law; the other, the jurisdiction of the courts. We are concerned here only with the latter rule, which took its common-law form in the high middle ages. “At least as early as the thirteenth century, during the reign of Henry III (1216-1272), it was recognized that the king could not be sued in his own courts.” C. Jacobs, *Eleventh Amendment and Sovereign Immunity* 5 (1972). *See also* 3 W. Blackstone, *Commentaries*, *244-*245;

¹⁸Sir Edward Coke (1522-1634) wrote extensively about the English common law, *see, e.g.,* Sir Edward Coke, *Institutes of the Lawes of England* (1608), and wrote an opinion as chief justice of England’s Court of Common Pleas in *Dr. Bonham’s Case* (1610), 8 Co. Rep. 107a, 114a C.P. 1610, available at http://press-pubs.uchicago.edu/founders/documents/amendV_due_process1.html, that is frequently credited as “providing an early foundation for the idea that courts might invalidate legislation that they found inconsistent with a written constitution.” *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 162 (1996) (Souter, J., dissenting). Under Coke’s leadership in 1628, the House of Commons forced Charles I of England to accept Coke’s “Petition of Right” by withholding appropriations of revenues. *See also* Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke* (1957); *The Selected Writings and Speeches of Sir Edward Coke* (Steve Sheppard, ed. 2003) (3 vols.).

Jaffe, *supra*, at 2 (“By the time of Bracton (1268) it was settled doctrine that the King could not be sued *eo nomine* in his own courts”).

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 102-103 (1996) (Souter, Ginsburg & Breyer, JJ., dissenting) (footnote omitted).¹⁹ Sovereign immunity was a privilege understood in the English common law to be reserved solely to the Crown: “the law ascribes to the king the attribute of *sovereignty*, or pre-eminence,” according to Blackstone, 1 William Blackstone, *Commentaries on the Laws of England* *241 (1765); it was the King against whom “no suit or action can be brought . . . even in civil matters, because no court can have jurisdiction over him.” *Id.* at *242.

The common-law doctrine of the immunity of counties and other local governmental units “is generally considered to have originated with the English case *Russell v. The Men of Devon*,” 2 Term Rep. 667, 100 Eng. Rep. 359 (1788).” 1 Shepard’s Editorial Staff, *Civil Actions Against State and Local Government: Its Divisions, Agencies and Officers* § 1.6, at 19 (2d ed. 1992).

Both of the common-law doctrines of sovereign immunity and local governmental

¹⁹ As Justice Souter explains:

The first of these notions rests on the ancient maxim that “the King can do no wrong.” See, e.g., 1 W. Blackstone, *Commentaries* *244. Professor Jaffe has argued this expression “originally meant precisely the contrary to what it later came to mean,” that is, “it meant that the king must not, was not allowed, not entitled, to do wrong.” Jaffe, 77 Harv. L. Rev., at 4 (quoting Ehrlich, *Proceedings Against the Crown* (1216-1377) p. 42, in 6 *Oxford Studies in Social and Legal History* (P. Vinogradoff ed. 1921), at 42); see also 1 Blackstone, *supra*, at *246 (interpreting the maxim to mean that “the prerogative of the crown extends not to do any injury”). In any event, it is clear that the idea of the sovereign, or any part of it, being above the law in this sense has not survived in American law. See, e.g., *Langford v. United States*, 101 U.S. 341, 342-343 (1880); *Nevada v. Hall*, 440 U.S. 410, 415 (1979).

Id. 517 U.S. at 103 n.2.

immunity found their way into American jurisprudence:

These doctrines were recognized by the individual states of the United States from the outset. One court observed that the English common law doctrines of immunity seem to have been windblown across the Atlantic as were the pilgrims on the Mayflower and landed as by chance on Plymouth Rock, for the first American case arose in Massachusetts. The cases . . . set the tumbleweed in motion and nearly every state adopted the doctrine of immunity of the state for the torts of its officers.

Id. § 1.6, at 20 (footnotes omitted) (citing *Mower v. Leicester*, 9 Mass. 247 (1812)). The American “doctrine of sovereign immunity . . . had its origins in the ‘familiar doctrine of the common law,’ *The Siren*, 74 U.S. 152, 153 (1869), ‘derived from the laws and practices of our English ancestors,’ *United States v. Lee*, 106 U.S. 196, 205 (1882).” *Seminole Tribe*, at 130 (Souter, Ginsburg & Breyer, JJ., dissenting) (footnote omitted).

Although statutes came to affect its importance in the succeeding centuries, the doctrine was never reduced to codification, and Americans took their understanding of immunity doctrine from Blackstone, see 3 W. Blackstone, *Commentaries on the Laws of England* ch. 17 (1768). Here, as in the mother country, it remained a common-law rule. See generally, Jaffe, 77 Harv. L. Rev., at 2-19; Borchard, *Governmental Responsibility in Tort*, VI, 36 Yale L. J. 1, 17-41 (1926).

Id. at 131. “Sovereign immunity is a common-law doctrine that long predates our Constitution and the Eleventh Amendment, although it has, of course, been carried forward in our jurisprudence.” *Employees of Dept. of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri*, 411 U.S. 279, 288 (1973) (Marshall, J., concurring in result).

The doctrine of sovereign immunity, strictly defined, is comprised of two separate principles which traditionally have shielded states from litigation in their own courts. The first principle is that a state is immune from suit in its own courts without its consent. . . . The second principle encompassed by

sovereign immunity is that a state is immune from liability for torts committed by its officers agents and employees.

1 Shepard's Editorial Staff, *Civil Actions Against State and Local Government: Its Divisions, Agencies and Officers* § 1.1, at 2 (footnotes omitted). See also 57 Am. Jur. 2d *Municipal, County, School and State Tort Liability* § 10 (2001) ("Sovereign immunity presents a complete bar to suits against the state and it embraces two distinct principles: immunity from liability and immunity from suit.").

It is true that *Alden v. Maine*, 527 U.S. 706 (1999), observed that an "important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." 527 U.S. at 756 (citing *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U. S. 274, 280 (1977); *Lincoln County v. Luning*, 133 U. S. 529 (1890)). But "[i]n many jurisdictions, a distinction is recognized between sovereign immunity, which applies to the state, state agencies, and state officers and employees, and the immunity of political subdivisions of the state such as counties and municipal corporations. The latter type of immunity is commonly referred to as governmental immunity." 1 Shepard's Editorial Staff, *Civil Actions Against State and Local Government: Its Divisions, Agencies and Officers* § 1.1, at 2-3 (footnotes omitted).

As noted above, the doctrine of local governmental immunity finds its own common-law roots. Justice Traynor, writing for the majority in *Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 (1961), reviewed its history:

The rule of county or local district immunity did not originate with the

concept of sovereign immunity. The first case to hold that local government units were not liable for tort was *Russell v. Men of Devon*, 100 Eng.Rep. 359. The case involved an action in tort against an unincorporated county. The action was disallowed on two grounds: since the group was unincorporated there was no fund out of which the judgment could be paid; and “it is better that an individual should sustain an injury than that the public should suffer an inconvenience.” 100 Eng.Rep. 359, 362. The rule of the *Russell* case was first brought into this country by *Mower v. Inhabitants of Leicester*, 9 Mass. 247, 249. There the county was incorporated, could sue and be sued, and there was a corporate fund out of which a judgment could be satisfied. Ignoring these differences, the Massachusetts court adopted the rule of the *Russell* case, which became the general American rule.

359 P.2d at 459.

According to the Utah Supreme Court,

Sovereign immunity was a settled feature of the common law when Utah became a state and adopted its constitution. In *Wilkinson v. State*, 42 Utah 483, 492-93, 134 P. 626, 630 (1913), this court stated:

[I]n the absence of either express constitutional or statutory authority an action against a sovereign state cannot be maintained. The doctrine is elementary and of universal application, and so far as we are aware there is not a single authority to the contrary.

See also *State v. District Court*, 94 Utah 384, 389, 78 P.2d 502, 504 (1937) (“The State cannot be sued unless it has given its consent or has waived its immunity.”); *Campbell Bldg. Co. v. State Road Comm’n*, 95 Utah 242, 249, 70 P.2d 857, 861 (1937) (“[A]ction may not be maintained unless the state has, through legislative or constitutional action, given consent to be sued.”).

Tiede v. State, 915 P.2d 500, 504 (Utah 1996).²⁰ Under Utah common law, “The recognition

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Sovereign immunity--the principle that the state cannot be sued in its own courts without its consent--was a well-settled principle of American common law at the time Utah became a state. *Wilkinson v. State*, 42 Utah 483, 492- 93, 134 P. 626, 630 (1913); *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); *Memphis and Charleston Railroad v. Tennessee*, 101 U.S. 337, 25 L.Ed. 960 (1880). See generally, E.M. Borchard, “Government Liability in Tort,” 34 Yale L.J. 1, 129 (1924), 229 (1925). Article I, § 11 of the Utah Constitution, which prescribes that all courts

(continued...)

of sovereign immunity where properly applicable is hardly open to question in this state,” and “sovereign immunity” was understood by the Utah courts to extend to local government entities without any semantic distinction. *Nestman v. South Davis County Water Improvement Dist.*, 16 Utah 2d 198, 398 P.2d 203 (1965); *see also Lund v. Salt Lake County*, 58 Utah 546, 200 P. 510, 515 (1921) (referring to “the doctrine maintained with practical unanimity in nearly every jurisdiction of the country to the effect that municipal corporations, especially county organizations, are not liable in such cases unless made so by express statute.”)²¹

As recounted in the October 12th Memorandum Opinion & Order, Utah’s common-law sovereign and governmental immunity doctrines were superseded by the enactment in 1965 of the Utah Governmental Immunity Act, “which barred all causes of action against the state and its political subdivisions unless expressly authorized by statute.” *MacArthur*, 391 F. Supp. 2d at 1037 (quoting *Tindley v. Salt Lake City School Dist.*, 2005 UT 30, ¶ 9, 116

²⁰(...continued)

shall be open and persons shall not be barred from using them to redress injuries, was not meant to create a new remedy or a new right of action. *Brown v. Wightman*, 47 Utah 31, 34, 151 P. 366, 366-67 (1915). Consequently, Article I, § 11 worked no change in the principle of sovereign immunity, and sovereign immunity is not unconstitutional under that section. It was so held in *Brown v. Wichita State University*, 219 Kan. 2, 8-12, 547 P.2d 1015, 1022-24 (1976), which involved a similar provision of the Kansas Constitution. We concur in the reasoning and result of that decision.

Madsen v. Borthick, 658 P.2d 627, 629 (Utah 1983).

²¹Utah courts did draw a distinction between “governmental” and “proprietary” functions, the latter being held to be outside the scope of governmental immunity—a distinction that proved troublesome at best. *See Standiford v. Salt Lake City Corp.*, 605 P.2d 1230, 1233-1236 (Utah 1980); *Hansen v. Salt Lake County*, 794 P.2d 838 (Utah 1990). Such a distinction was very common in state common-law doctrines of local government immunity. *See, e.g.*, 1 Shepard’s Editorial Staff, *Civil Actions Against State and Local Government: Its Divisions, Agencies and Officers* § 1.1, at 3.

P.3d 295, 298 (Utah 2005)).²²

In 1978, the Utah Governmental Immunity Act was amended, “cleaning up the prose and broadening the grant of immunity to include claims for ‘any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility.’ 1978 Utah Laws ch. 27, § 2, at 92 (emphasis added).”

Hansen v. Salt Lake County, 794 P.2d at 843.

These health care activities were not defined as governmental functions; rather, immunity was expanded to include them in reaction to one of our cases holding that such activities were not governmental functions. See *Standiford*, 605 P.2d at 1238 (Hall, J., dissenting) (referring to legislature’s reaction to *Greenhalgh*, 530 P.2d 799). This new immunity was clearly subject to the exception language in the beginning of the amended sentence. See Utah Code Ann. § 63-30-3 (Supp. 1979). It also preserved this court’s responsibility to interpret the scope and meaning of “governmental function.”

Id. (footnote omitted). By its 1978 amendment, “the legislature ‘resolved the health care classification question’ by its amendment in 1978 granting immunity for such activities, subject to the Act’s exceptions. . . . The legislature did not define operation of a governmental health care facility as a governmental function; it granted immunity despite our holding in *Greenhalgh* [*v. Payson City*, 530 P.2d 799, 801 (Utah 1975)] that such activities were not governmental functions.” *Id.* The Utah Legislature largely eliminated any

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In 1965, the Utah Legislature passed the Governmental Immunity Act, codifying the sovereign immunity doctrine in Utah. See *DeBry v. Noble*, 889 P.2d 428, 432 (Utah 1995) (citing 1965 Utah Laws 390, ch. 139, § 3). The Act first grants general immunity from suit to governmental entities, then narrows that general grant by waiving immunity for certain claims, and finally broadens immunity again with exceptions to the waivers that result in retaining immunity under certain circumstances. See *Hansen v. Salt Lake County*, 794 P.2d 838, 842 (Utah 1990).

Trujillo v. Utah Dept. of Transp., 1999 UT App 227, ¶ 14, 986 P.2d 752, *757.

governmental-proprietary distinction by amendment in 1987. *See Tindley*, 2005 UT 30, ¶ 21, 116 P.3d at 301; *Carter v. Milford Valley Memorial Hosp.*, 2000 UT App 21, ¶14, 996 P.2d 1076, 1079 (2000).

Thus, at the time that plaintiffs commenced their lawsuit in the Navajo Nation District Court, there appeared to be no question that special districts such as the San Juan Health Services District were “governmental entities” covered by the Utah Governmental Immunity Act, and that the Act governed private civil actions brought against such entities or their officers, directors or employees arising from the operation of a health care facility such as the Montezuma Creek Clinic. *See MacArthur*, 391 F. Supp. 2d at 1037-1040, 1045-1052.

The court resolved the question of declaratory relief as to whether the Navajo Nation District Court may exercise its jurisdiction to grant judicial remedies against the Health District defendants by reference to recent case law from the Navajo Supreme Court indicating that as a matter of comity and reciprocity, the Navajo courts would abide by the governmental immunity of States and their subdivisions where those same States would respect the immunity of Indian tribes and their instrumentalities. *See Office of Navajo Labor Relations ex rel Jones v. Central Consolidated School District No. 22*, No. SC-CV-13-98 (Navajo S. Ct. 06/05/2003), at ¶ [25].²³ *See MacArthur*, 391 F. Supp. 2d at 1042-1045, 1052, 1055-1056. Resort to considerations of comity is commonplace when one sovereign is sued in the courts of another sovereign. *See, e.g., Nevada v. Hall*, 440 U.S. 410 (1979); 1 Shepard’s Editorial Staff, *Civil Actions Against State and Local Government: Its Divisions*,

²³ Available at <http://www.tribal-institute.org/opinions/2003.NANN.0000007.htm>.

Agencies and Officers § 1.4, at 13-15.

Plaintiffs' counsel now argues that the Navajo court orders at issue may be enforced in this court "without regard to comity [sic] or reciprocity of state and tribal immunity," (Pltfs' Mem. (850), at 6), but without making any reference to or analysis of *Jones* or the principles of comity among separate sovereigns upon which *Jones* is footed. Instead plaintiffs' counsel submits that the defendants raised only Eleventh Amendment immunity before the Navajo court; that they waived any immunity by filing a counterclaim on behalf of the Health District against plaintiff Singer and by defending plaintiffs' claims on the merits in that forum; and that "federal preemption doctrine" overcomes state law immunity of a "political subdivision . . . carrying out federal proprietary commercial activities in the Navajo Nation." (*Id.* at 1, 6, 7, 8, 9 & Exh. 3.) "Because these political subdivisions are not the state," counsel insists, "state immunity analysis need not apply." (*Id.* at 7.)

The copy of the defendants' "Findings of Fact Conclusions of Law and Closing Arguments Against Granting of Preliminary Injunctive Relief," filed November 29, 1999, in *Donna Singer, et al. vs. San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation Dist. Ct.), and submitted by plaintiffs' counsel as an exhibit to the present motion, does in fact refer to the Eleventh Amendment immunity of States from suits by Indian tribes as discussed in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991). (*Id.* at 17-18.) It also refers to State sovereign immunity as discussed in *Alden v. Maine*, 527 U.S. 706 (1999), and argues that "a finding of authority in the Plaintiffs to bring the present action in tribal courts would invite claims by persons to do in tribal court against State and local

government officials what the Plaintiffs could not do in federal or state courts against these same Defendants.” (*Id.* at 18-20.) It further argues that “Congress cannot use its plenary power over the Navajo Nation to deprive the state of Utah and its immunized officials of the sovereign right to extend immunity to county and special district officials,” citing to *Alden* and *Seminole Tribe*. (*Id.* at 21-23.) The defendants’ assertion of governmental immunity before the Navajo court obviously was not confined to an assertion of Eleventh Amendment immunity, and indeed, appears to address the “federal preemption doctrine” argument now asserted by plaintiffs in the present motion.

Rather than reflecting the “application of state sovereign immunity to a political subdivision,” as plaintiffs contend, (Pltfs’ Mem. (580), at 1), this court’s analysis addressed the local governmental immunity of the Health District defendants as defined by the Utah Governmental Immunity Act.²⁴ Perhaps it would clarify things simply to say that the Health District defendants are shielded by *governmental immunity* extended under the Act, in contrast to the *sovereign immunity* of States discussed in *Alden v. Maine* as being limited to States and entities that are “arms of the State.”²⁵ *See, e.g., 57 Am. Jur. 2d Municipal, County, School and State Tort Liability* § 10 (“sovereign immunity refers to the immunity of

²⁴Both plaintiffs’ counsel and the Navajo court appear to have become ensnared in the distinction between state “sovereign immunity” discussed in *Alden* and “governmental immunity” afforded to counties and special service districts under the Utah Governmental Immunity Act. (*See* December 28, 1999 Order at [19]-[20].)

²⁵The Utah courts have applied the phrases “sovereign immunity” and “governmental immunity” to both doctrines without apparent distinction, as did the court’s original October 30, 2000 Decision. *See also Brittain v. State*, 882 P.2d 666, 668-69 (Utah Ct. App. 1994) (“The doctrine of sovereign or governmental immunity--requiring the consent of the State in order to subject it to suit in its own courts--is a deeply rooted and well recognized doctrine of American common law.”). Likewise, the Utah Governmental Immunity Act delineated the immunity of the State and its subdivisions from private suit—and the extent of its limited waiver of that immunity—without distinguishing between entities that are “arms of the State” and entities that are not. *See Utah Code Ann. §§ 63-30-1 et seq.* (1997 & Supp. 2003) (repealed 2004).

the state from suit and from liability, while governmental immunity refers to the similar immunities enjoyed by the state's political subdivisions").²⁶ And this court was concerned with the effect of *governmental immunity* under the Utah Governmental Immunity Act as a bar to litigation of plaintiffs' claims against the Health District defendants in tribal court, particularly in light of the Navajo principles of comity and reciprocity articulated in *Jones*. *See also* 57 Am. Jur. 2d *Municipal, County, School and State Tort Liability* § 1 ("governmental or sovereign immunity is best described as a bar to liability").²⁷

This court rejected the Navajo court's legal conclusion that "the defendants" waived their immunity under the Utah Governmental Immunity Act through the Health District's filing of a counterclaim against plaintiff Singer, particularly where that court lacked subject-matter jurisdiction over the dispute between Singer and the Health District. *See MacArthur*, 391 F. Supp. 2d at 1040-1041. Plaintiffs' present motion points to nothing reflecting an

²⁶Such a distinction may have substantive consequences under the Eleventh Amendment as construed in *Seminole Tribe* and *Alden*, but the Eleventh Amendment finds no application in the context of Indian tribal courts.

²⁷Plaintiffs' counsel disputes the authority of a State "to immunize the lowliest worker in the lowliest political subdivisions" from civil liability through legislation such as the Utah Governmental Immunity Act. (Pltfs' Reply Mem. (868), at 5-6.) Yet,

in most jurisdictions, immunity has been limited to varying degrees by the legislature, with or without constitutional sanction. The state legislature generally is considered the appropriate branch of government to control immunity issues. The authority of the legislature to control the entire field of immunity is based on the premise that the legislative branch of government is in a much better position than the judicial branch to restrict the application of immunity. The legislature can supplement restrictions with proper legislation, such as statutory provision for liability insurance. In the absence of a constitutional provision to the contrary, the state legislature ordinarily has the power to control immunity, even after it has been judicially abrogated. The legislature may enact statutes restoring immunity or abolishing or defining the limits of governmental tort immunity. State courts are without power to modify or abrogate constitutional or statutory immunity provisions.

1 Shepard's Editorial Staff, *Civil Actions Against State and Local Government: Its Divisions, Agencies and Officers* § 1.5, at 16-18 (footnotes omitted).

unequivocal intent on the part of the Health District defendants to waive their immunity under the Act—through their defense of plaintiffs’ applications for preliminary injunctive relief, or otherwise.

Nor does the eleventh-hour attempt by plaintiffs’ counsel in the present motion to “federalize” Navajo sovereignty and the operation of the Navajo courts suffice to overcome the Health District defendants’ governmental immunity by virtue of “federal preemption” under the Supremacy Clause, U.S. Const., art. VI, § 2.

(5) Plaintiffs’ assertion that under “the Court’s analysis of . . . federal preemption doctrine, all the Navajo law and Orders and Judgments are enforceable at any time, interlocutory or not, without regard to comity [sic] or reciprocity of state and tribal immunity,” lacks merit.

Counsel makes repeated references to the Navajo Nation’s contract with the Bureau of Indian Affairs for partial funding of its judicial program, to “[f]ederally ratified Navajo customs, traditions, and law,” to “BIA ratified, trained, funded Navajo law,” and “federally approved Indian Nation law,” (Pltfs’ Mem. (850), at 1, 3, 4),²⁸ all in an apparent attempt to invoke “federal preemption” to overcome the defendants’ governmental immunity under Utah law. (See “Plaintiff Singer/Riggs/Dickson’s Reply to the Defendants Second Opposition on Rule 60 Motion to Correct, Ammend, and Reconsider,” filed November 29, 2005 (dkt. no. 868) (“Pltfs’ Reply Mem. (868)”), at 5-6 (“The argument that a state has inherent authority to immunize the lowliest worker in the lowliest political subdivisions for

²⁸(See also “Plaintiff Singer/Riggs/Dickson’s Reply to the Defendants’ Opposition to the Rule 60 Motion to Correct, Ammend [sic] and Reconsider the Court’s October 12, 2005 Order,” filed November 25, 2005 (dkt. no. 866), at 5 (discussing redress for “United States recognized, funded, and quarterly reviewed Navajo Nation law violations” in “a United States recognized, trained, funded U.S. domestic sovereign Treaty protected Navajo Nation Court”).

Treaty violations, the Article VI supreme law of the land, outside the Eleventh Amendment, occurring in or severely effecting [sic] two federally statutory protected Navajo regulated places within the reservation borders” is “legally merit less or frivolous”).)

This court did not suggest that the Utah Governmental Immunity Act shields the State of Utah or its subdivisions from liability under causes of action arising under the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States,” and therefore coming within the scope of the Constitution’s Supremacy Clause, U.S. Const., art. VI, § 2. That question did not arise in this case because plaintiffs insist that they have pursued causes of action arising exclusively under Navajo law in the Navajo court in obtaining the interlocutory orders that they now seek to enforce.

That the subject-matter jurisdiction of the Navajo courts and the scope of Navajo civil authority is delineated by federal law (as well as Navajo law) does not mean that the exercise of Navajo civil authority or the jurisdiction of the Navajo courts represents an extension of federal law. The Navajo courts plainly are not federal instrumentalities—an “arm of the federal government” in the sense of merely being a “contracted out” version of the BIA Courts of Indian Offenses organized under Title 25 of the *Code of Federal Regulations*, as plaintiffs’ counsel now seems to suggest. *Cf. Colliflower v. Garland*, 342 F.2d 369, 378-379 (9th Cir. 1965) (Fort Belknap CFR court of Indian offenses was an “arm of the federal government” holding petitioner in federal custody for purposes of federal habeas corpus

relief).²⁹

The judicial power exercised by the Navajo courts is vested in the Navajo Judicial Branch by the Navajo Nation's own organic laws rooted in its inherent sovereignty. *See, e.g., Bennett v. Navajo Bd. Of Election Supervisors*, No. A-CV-26-90, at ¶¶ [31]-[45] (Navajo S. Ct. 12/12/1990);³⁰ *MacArthur*, 391 F. Supp. 2d at 968-969 & n. 114. Navajo judicial power is not "the judicial Power of the United States" under Article III, or an extension of Congress' legislative authority under Article I or other provisions of the United States Constitution, and it cannot call upon the aid of the Supremacy Clause to overcome a State's legislative authority to define the immunity of its subdivisions and their officers from private suit arising from governmental conduct, or to obtain preemptory enforcement of Navajo court orders in other forums as a matter of "full faith and credit," as plaintiffs' counsel now appears to assert. (*See* Pltfs' Reply Mem. (868), at 5-6.) Counsel's characterization of modern Navajo sovereignty largely as an exercise in "BIA-approved" and supervised contract compliance appears to be directly at odds with the Navajo judiciary's expressed views on the

²⁹ Plaintiffs assert that "the Navajo Nation voluntarily submits itself to review, training, funding and quarterly review of its laws and judicial program to the Bureau of Indian Affairs," and suggests that the jurisdiction of the Navajo courts is determined largely as a matter of federal contract compliance. ("Plaintiff Singer/Riggs/Dickson's Reply to the Defendants' Opposition to the Rule 60 Motion to Correct, Ammend [sic] and Reconsider the Court's October 12, 2005 Order," filed November 25, 2005 (dkt. no. 866), at 5-6.)

³⁰ Available at <http://www.tribal-institute.org/opinions/1990.NANN.0000016.htm>.

subject,³¹ pertinent Supreme Court case law,³² and recent scholarship, *see, e.g.*, Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 Or. L. Rev. 1109 (2004); David E. Wilkins, *The Navajo Political Experience* (rev. ed. 2003).

Given the evolving principles of comity and reciprocity articulated by the Navajo Supreme Court in *Jones*, as well as the interlocutory nature of the tribal court orders at issue, this court need not decide whether a Navajo court may impose civil liability upon a State or its subdivisions absent an unequivocal waiver of governmental immunity under the applicable state statute, or whether such a tribal court judgment would be enforceable in a federal court. *Cf. Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1997) (tribal court may not impose liability on a State absent a waiver of its sovereign immunity).

(6) This court has made no findings of fact in resolving the issues concerning the enforcement of the Navajo court orders at issue.

Plaintiffs assert that this court made its rulings in the October 12th Memorandum Opinion & Order by “finding new facts which were not a part of the Navajo trial record,” and erred “in making new erroneous *Navajo* law fact findings,” and that this court’s October 31st Judgment “lacks a finding of facts required under FRCP at rule 52.” (Pltfs’ Mem. (850), at 2, 8, 9 (emphasis in original).)

³¹ *See, e.g., Deal v. Blatchford*, 3 Navajo Rptr. 159, at ¶ [29] (Navajo Ct. App. 1982); *Arizona Public Service Co. v. Office of Navajo Labor Relations*, No. A-CV-08-87 (Navajo S. Ct. 10/08/1990), available at <http://www.tribal-institute.org/opinions/1990.NANN.0000003.htm> (Navajo Preference in Employment Act an exercise of inherent Navajo sovereignty recognized by 1868 Treaty).

³² *See, e.g., Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985) (“neither Congress nor the Navajos have found it necessary to subject the Tribal Council’s tax laws to review by the Secretary of the Interior”).

Contrary to counsel's assertion, this court made no "new fact findings" concerning pertinent jurisdictional facts. The October 12th Memorandum Opinion & Order reviewed the preliminary findings of fact made by the Navajo court as reflected in that court's written orders, and identified jurisdictional issues as to which the Navajo court made *no* findings of fact. For example, this court did not find that San Juan County and its officials "were not involved with the District," (Pltfs' Mem. (850), at 8); this court simply pointed out that the Navajo court made *no* specific findings that any of the County defendants *were* "involved with the District" concerning the employment actions of which the plaintiffs complained. *MacArthur*, 391 F. Supp. 2d at 1004-1007. This court likewise pointed out that the Navajo court also made *no* findings of fact concerning plaintiffs' exhaustion of their administrative remedies under the Navajo Preference in Employment Act—or any factual basis justifying excuse from that requirement, or facts showing that defendant Laurie Schafer "caused an action to occur within the territorial jurisdiction of the Navajo Nation," Navajo Nation Code, tit. 7, § 253(B) (1995), to the injury of plaintiffs Riggs or Dickson, bringing her within the civil jurisdiction of the Navajo court as a defendant sued in her individual capacity.

Concerning the NPEA exhaustion requirement, plaintiffs' counsel submits three "right to sue" letters received by Singer, Riggs and Dickson from the Office of Navajo Labor Relations, dated August 23, 1999. (Pltfs' Mem. (850), at 8 & Exh. 4.) These letters, captioned "Notice of Right to Proceed," authorized Singer, Riggs and Dickson "to initiate a proceeding *before the Navajo Nation Labor Commission* ('NNLC') regarding allegations that the San Juan Health Services" District had taken adverse employment action against each of

them without cause, or without just cause. (*Id.* at Exh. 4 (emphasis added).) They were issued “pursuant to Section 10.(F.) of the Navajo Preference in Employment Act,” *Navajo Nation Code*, tit. 15, § 610(F) (1995), the Office of Navajo Labor Relations having “determined not to initiate a Commission proceeding on behalf of the individual charging party.” (*Id.* (emphasis in original).)

Not one word of these notices speaks of commencing a civil action in Navajo Nation District Court. They do speak of “the institution of proceedings before the NNLC” and of the plaintiffs’ right to “retain legal representation to assist you with the proceeding before the NNLC.” (*Id.*) Plaintiffs’ lawsuit in the Navajo Nation District had already been filed for more than four months before these notices were issued. These notices neither authorized the commencement of that action nor excused Singer, Riggs and Dickson from proceeding first before the Navajo Nation Labor Commission to obtain their NPEA remedies.

The submission of these notices in this forum at this stage thus cannot mitigate the Navajo court’s failure to make any findings that the NPEA’s exhaustion requirement had either been satisfied or somehow excused at the time that Riggs and Dickson filed their lawsuit in the Navajo court and sought preliminary injunctive relief. This court simply pointed out that the issue was not addressed in written findings, leaving the question of the Navajo court’s jurisdiction over plaintiffs’ NPEA claims unresolved. *See MacArthur*, 391 F. Supp. 2d at 981-982, 1054.

The Navajo court’s orders refer to “[a] letter from Lauren Schafer critical of Ms. Singer” that had been kept in a file in the District CEO’s office, and to Schafer’s testimony

that “after a ‘scrupulous examination’ of Singer’s record for over nine months, Ms. Schafer had not discovered one piece of evidence as to Ms. Singer’s intent to commit fraud,” (December 28, 1999 Order at [10]; *accord* March 1, 2000 Order at 7 (same)), but as this court has already pointed out, “the few facts bearing upon Ms. Schafer’s relationship to *Singer, et al. v. San Juan County, et al.*, that may be gleaned from the orders and plaintiffs’ memoranda had to do with plaintiff *Singer*’s wrongful discharge claims,” and Ms. Singer’s claims against defendant Schafer were not properly before that court under *Montana and Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *MacArthur*, 391 F. Supp. 2d at 1013-1014 (emphasis in original).

This court examined the enforceability of the Navajo court orders at issue in the context of cross-motions for summary judgment filed by plaintiffs Singer, Riggs and Dickson and the Health District defendants under Fed. R. Civ. P. 56 following remand by the court of appeals, reviewing the Navajo court’s legal conclusions *de novo* and its findings of fact under the “clearly erroneous” standard. This court did not engage in a *de novo* review of the evidence in the Navajo court record and made no additional findings of jurisdictional fact beyond those made by the Navajo court in its December 28, 1999 and March 1, 2000 Orders. It may be true, as plaintiffs’ counsel insists, that “the tribal court record shows the county dominated and permeated all the health districts’ acts,” (Pltfs’ Reply Mem. (868), at 5), but the Navajo court made no specific findings to that effect, and this court declines counsel’s invitation to infer such findings from the Navajo court’s conclusory statements concerning “the defendants.”

Absent findings of the requisite jurisdictional facts by the Navajo court, subject-matter jurisdiction over the San Juan County defendants and the individual Health District defendants (except Atcitty and Wood) was not established under the applicable provisions of the *Navajo Nation Code*, let alone *Montana's* “two prime exceptions.” *Strate*, 520 U.S. at 452.

(7) Plaintiffs’ remaining allegations of error fail to meet the applicable standards under Fed. R. Civ. P. 59(e), or Fed. R. Civ. P. 60(a), (b)(1), (4) & (6).

In addition to the five core assertions and the question of “fact findings,” discussed above in some detail, plaintiffs raise a scattering of issues as “other errors.” The defendants correctly respond that plaintiffs Singer, Riggs and Dickson have failed to assert any basis for relief under Rules 59(e), 60(a), or 60(b)(1), (4) or (6) sufficient to meet the applicable standards under those rules—no “manifest errors of law” or “obvious errors of law,” no “newly discovered evidence,” no intervening change in the law, no “plain usurpation of power,” and no “‘extraordinary circumstances’ justifying the reopening of a final judgment.”

As explained in this court’s October 12th Memorandum Opinion and Order, Utah Code Ann. §§ 9-9-201 through 9-9-213 (2003) has no bearing upon the issues in this case. *See MacArthur*, 391 F. Supp. 2d at 1019 n. 178. That chapter does not bar claims in the Utah courts based upon Navajo law;³³ nor does it prohibit violations of Navajo law as a matter of Utah law. (*See* Pltfs’ Mem. (850), at 7; Pltfs’ Reply Mem. (868), at 6.) Utah Code Ann. §§

³³Neither does the second section of Article III of the Utah Constitution, or the corresponding provision of Utah’s Enabling Act, *see* Act of July 16, 1894, ch. 138, § 3 (second), 28 Stat. 107, also cited by plaintiffs. (*See* Pltfs’ Mem. (850), at 7.)

9-9-201 *et seq.* governs the extension of Utah state criminal and civil jurisdiction over Indian reservations with tribal consent under 25 U.S.C.A. §§ 1321-1326—which to date has *not* occurred in Utah. *See State of Utah v. Reber*, 2005 UT App. 485, ¶ 6, ___ P.3d ___, ___, 538 Utah Adv. Rep. 67.

Similarly, *In re Blue Lake Forest Products, Inc.*, 30 F.3d 1138 (9th Cir.), *cert. denied sub nom. Hongkong and Shanghai Banking Corp., Ltd. v. Hoopa Valley Tribe*, 513 U.S. 1059 (1994)—cited by plaintiffs’ counsel as “support[ing] non Indians suing non Indians in Tribal Court for claims arising within reservation borders,” (Pltfs’ Reply Mem. (868), at 4)—involved competing claims to proceeds of the sale of tribal timber that was the subject of a contract between a tribally owned business venture and a non-Indian buyer who defaulted on its payments and filed bankruptcy. The Ninth Circuit held that the tribe was entitled to the proceeds of sale of tribal timber still in the debtor’s possession, with nary a word about the jurisdiction of tribal courts over non-Indians.³⁴

Disputing this court’s conclusion that the Navajo court orders at issue in this case are not enforceable in this forum, plaintiffs concede that the orders “are interlocutory,” but argue that they leave “only damages to be determined, not the merits of these claims,” and that “[t]his Court can order the defendants to carry them out, paying amounts determined by [the] Navajo Court,” (Pltfs’ Reply Mem. (868), at 6), in a trial proceeding yet to be held by that

³⁴Plaintiffs’ supplemental citations to *Shivwits Band of Paiute Indians v. State of Utah*, ___ F.3d ___, (10th Cir. decided November 9, 2005), and *State of Utah v. Reber*, 2005 UT App 485, ___ P.3d ___ (decided November 10, 2005), add nothing pertinent to the analysis of the issues in this case. Both cases involved questions of the exercise of *state* jurisdiction over activities of Indians or their non-Indian lessees within “Indian country,” and there is *no* exercise of state regulatory or adjudicative jurisdiction—civil or criminal—at issue in this case.

court. The argument underscores once more the problematic nature of the enforcement of interlocutory orders of another court and the soundness of the *Restatement* rule requiring finality of foreign judgments. *See MacArthur*, 391 F. Supp. 2d at 1023-1026.

Plaintiffs also assert that this court erred in “not discussing the inherit [sic] contempt and sanction powers of the Navajo Court in regulating conduct committed in its immediate presence,” (Pltfs’ Mem. (850), at 2). The Navajo court’s December 28, 1999 Order discussed “patterns” of “bad faith conduct toward the court” on the part of “the defendants and defendants’ counsel,” conduct that “only magnifies and exemplifies past and continued deprivations of the plaintiffs’ inalienable rights, be they tribal or federal in nature” and “demonstrate[s] the arrogance of the defendants, their cultural insensitivity, and the contempt and disdain in which they hold this Court; the Navajo Nation judicial system; and Native Americans in general.” (“Findings, Opinion and Judgment at Preliminary Injunction,” dated December 28, 1999, in *Donna Singer, et. al. v. San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation District Court, Shiprock District (a copy of which is annexed to the Amended Complaint (dkt. no. 744)), at [16], [18].) Yet the Navajo court’s December 28, 1999 Order imposed no specific sanction upon any defendant or upon the defendants’ counsel in that proceeding based upon the described pattern of “bad faith conduct” that is distinguishable from the preliminary injunctive and other equitable relief that had ostensibly been granted on the merits.

The Navajo court’s “Order Denying Defendants’ Motion to Dissolve or Modify the Preliminary Injunction Order,” dated March 1, 2000, recast that same preliminary relief in

more stringent terms, and referred to Navajo R. Civ. P. 11 and “the Court’s recognized inherent authority to protect its judicial processes” in doing so, but made no specific findings of bad faith conduct on the part of any specific defendant and imposed no sanction distinguishable from the preliminary relief already granted on the merits of plaintiffs’ application.

The “Special Order in Aid to Satisfaction of Preliminary Injunction,” dated March 6, 2000, said nothing about bad faith conduct or sanctions, but the “Order Mandating that All Defendants’ to be Bound by the Preliminary Injunction Order,” signed April 27, 2000, recited that the court had made findings in the December 28, 1999 Order concerning misconduct and that “the new defendants,” *viz.*, defendants’ counsel and their insurer, “did participate in these activities”; it ordered that the new defendants be “bound in privity with the previous defendants” by the terms of the December 28, 1999 Order and “have responsibility for all legal liabilities incurred by the defendants as declared in the December 28, 1999, Preliminary Injunction Order,” apparently as a sanction for litigation misconduct.

These “new defendants,” Dennis Ickes and Truck Insurance, were dismissed from this case for lack of subject-matter jurisdiction on the part of the Navajo court, and the court of appeals affirmed their dismissal. *MacArthur v. San Juan County*, 309 F.3d 1216, 1222-1225 (10th Cir. 2002). So the only named parties against whom a discernable sanction had been imposed by the Navajo court are no longer here. *See MacArthur*, 391 F. Supp. 2d at 920-921 n. 35.) In preparing the October 12th Memorandum Opinion & Order, there appeared to be no point in further belaboring the Navajo court’s power to impose sanctions for litigant or

attorney misconduct, particularly where the Navajo orders still at issue did not explicitly reflect the exercise of that power. *See MacArthur*, 391 F. Supp. 2d at 1029-1030 (Navajo court orders did not explain basis in Navajo law for award of attorney's fees, costs and expenses against all of "the defendants").³⁵

Finally, in asserting that "[t]he idea that all county governments will fail if Indian Nations have authority over their activities within the Indian Nation[']s borders is a legal absurdity," (Pltfs' Reply Mem. (868), at 5), plaintiffs' counsel may well be arguing an extracurricular issue with opposing counsel,³⁶ but this court has made *no such assertion at any point in this proceeding*.

(8) Summary

Plaintiffs dispute the current authority of *Montana v. United States*, 450 U.S. 544 (1981), and the validity of the jurisdictional analysis mandated in this case by the court of appeals. Plaintiffs' counsel has asserted essentially the same position regarding *Montana* since the matter was remanded in October of 2002, and the current Rule 59(e)/Rule 60(b) motion on behalf of Singer, Riggs and Dickson raises nothing new that warrants the abandonment of this court's jurisdictional analysis.

³⁵Under the standards articulated by the Navajo court, the grant of preliminary injunctive and equitable relief was necessarily a *merits-based* determination. (See December 28, 1999 Order at [3] (quoting Navajo R. Civ. P. 65(c); *id.* at [18]-[19] (quoting *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 358 (10th Cir. 1986)).) Findings of a "likelihood of success on the merits" cannot be grounded upon of litigation misconduct. And the imposition of sweeping equitable relief or large monetary penalties upon all of "the defendants" without individualized findings as to culpable conduct would raise serious due process concerns. *See also* Georgene M. Vairo, *Rule 11 Sanctions: Case Law, Perspectives and Preventive Measures* § 7.05 (3d ed. Richard G. Johnson, ed. 2004).

³⁶*See* Pamela Manson, *Tribal courts' power is limited*, S.L. TRIB., Nov. 7, 2005, at B1.

Plaintiffs' reading of the equal protection clause of 25 U.S.C.A. § 1302(8) as mandating a tribal court's exercise of co-extensive subject-matter jurisdiction over non-Indian and tribal member litigants indeed appears to be novel when considered in the larger context of federal Indian law scholarship. But the court is not persuaded that the Supreme Court's construction of § 1302—as extending the Indian Civil Rights Act's guarantees “to non-Indians if and where they come under a tribe's criminal or civil jurisdiction” without defining the extent of tribal jurisdiction—reflects a manifest or obvious error of law warranting relief under Rule 59(e) or Rule 60(b).

Nor have plaintiffs shown manifest or obvious legal error in this court's conclusion that absent an unequivocal waiver, evolving Navajo principles of comity and reciprocity constrain the exercise of Navajo civil jurisdiction over the Health District and defendant Atcitty where the governmental immunity afforded by the Utah Governmental Immunity Act would shield those defendants against litigation and liability outside of the limited waiver, exclusive remedy and exclusive forum provisions of that Act. The Health District's counterclaim against plaintiff Singer did not amount to an unequivocal waiver of the District's governmental immunity, particularly where the Navajo court lacked subject-matter jurisdiction over the dispute between Singer and the District under controlling Supreme Court authority. *See Strate v. A-1 Contractors*, 520 U. S. 438 (1997).

Contrary to plaintiffs' assertion, this court made no new or additional findings of fact in determining the enforceability of the Navajo court orders at issue, and no written findings of fact are required by Fed. R. Civ. P. 52(a). Pointing out, for example, that the Navajo court

made no findings of jurisdictional fact as to the San Juan County defendants does not amount to a finding that such facts did *not* exist; it is simply an observation as to the content of the Navajo court orders at issue in this proceeding. Both plaintiffs and the Health District defendants submitted the issues under Fed. R. Civ. P. 56 on the basis that there was no genuine issue of material fact in this proceeding and that the issues should be decided as a matter of law—as they were in this court’s October 12th Memorandum Opinion & Order and its October 31st Judgment.

A preliminary injunction issued by another court is an interlocutory order, not a final judgment, and need not be enforced either as a matter of full faith and credit or comity. *See MacArthur*, 391 F. Supp. 2d at 1023-1025; *Restatement (Second) of Conflict of Laws* § 107 (1971). Federal recognition of Navajo sovereignty in the 1868 Treaty and subsequent legislation and the current federal policy encouraging tribal self-government and self-determination do not alter that rule as to preliminary judgments issued by tribal courts. Nor does federal recognition, protection and support for tribal sovereignty enable Indian tribes to avail themselves of the benefit of the Supremacy Clause, U.S. Const., art. VI, § 2, in obtaining the peremptory enforcement of tribal court orders.

As explained above, the “other errors” cited by plaintiffs prove to be of no substantive consequence and plainly do not warrant relief from this court’s October 31st Judgment under either Rule 59(e) or Rule 60(b).

Plaintiffs having failed to establish a basis for relief from this court’s October 31st Judgment or for amendment or correction of that judgment pursuant to Fed. R. Civ. P. 59(e),

Fed. R. Civ. P. 60(b)(1), (4) or (6), or Fed. R. Civ. P. 60(a), their Motion for Clarification, Reconsideration and Amendment of that judgment (dkt. no. 849), must be DENIED in all respects.

C. MacArthur, Lyman & Valdez' Rule 59(e)/60(b) Motions

Following the entry of this court's October 31st judgment, plaintiffs MacArthur, Lyman and Valdez filed their *third* set of motions to reconsider this court's dismissal of their claims, this time under both Rules 59(e) and 60(b). (*See* "Plaintiff Valdez's Motion to Reconsider and Amend the October 31, 2005 Order and Allow Her to Amend Her Amended Complaint," filed November 10, 2005 (dkt. no. 855), and supporting memorandum (dkt. no. 856) ("Valdez Mem (856)"); "Plaintiff Lyman and MacArthur's Motion to Reconsider and Amend the October 31, 2005 Order and Allow Her to Amend Their Amended Complaint," (dkt. no. 857), and supporting memorandum (dkt. no. 858) ("Lyman/MacArthur Mem. (858)").) The Health District Defendants filed two responsive memoranda (dkt. nos. 864, 865) and the San Juan County defendants filed one memorandum responding briefly to both motions (dkt. no. 862). Plaintiffs filed no reply memoranda.

(1) Procedural history re: MacArthur, Lyman and Valdez' Motions for Reconsideration.

By a bench ruling made in the context of the Final Pretrial Conference on November 15, 2002, this court dismissed plaintiffs MacArthur, Lyman and Valdez's claims pursuant to Fed. R. Civ. P. 16(c), based upon this court's determination that these plaintiffs' cognizable federal claims were frivolous, that is, that they lacked any arguable basis in law and/or fact, and did not raise any issue warranting a trial on the merits. The court declined to exercise

supplemental jurisdiction over any remaining state law claims that may have raised a triable issue. *See* 28 U.S.C.A. § 1367(c) (1993).

Controversy then ensued concerning the proper form of written order reflecting that ruling, and continued for some time.

Following the reported failure of a judicial settlement conference in September of 2004, plaintiffs MacArthur, Lyman and Valdez filed their first set of motions for reconsideration of the November 15, 2002 bench ruling. (*See* Plaintiff Valdez's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Valdez' Discrimination Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed October 26, 2004 (dkt. no. 664); Plaintiff MacArthur's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed November 23, 2004 (dkt. no. 670); Plaintiff Lyman's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Valdez' [sic] Discrimination Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed December 28, 2004 (dkt. no. 695).) Responsive memoranda were filed by the defendants, followed by the plaintiffs' reply memoranda and several additional motions.³⁷

³⁷(*See* "Plaintiffs' MacArthur, Lyman, Valdez' Motion for Sanctions," filed January 25, 2005 (dkt. no. 703); San Juan County Defendants' Combined (1) Memorandum in Opposition to Plaintiff Valdez' Motion to Reconsider and (2) Motion for an Extension of Time to Respond to Motion for Summary Judgment, filed November 29, 2004 (dkt. no. 673); San Juan County Defendants' Combined (1) Memorandum in Opposition to Plaintiff MacArthur's Motion to Reconsider and (2) Motion for an Extension of Time to Respond to Cross-Motion for Summary Judgment, filed December 13, 2004 (dkt. no. 682); Motion for an Extension of Time to Respond to MacArthur's November 29, 2004 Motion for Summary Judgment (Health District), filed December 14, 2004 (dkt. no. 684); Health District Defendants' Joinder in Motion, filed December 21, 2004 (dkt. no. 690); Motion for an Extension of Time to Respond to Lyman's December 26, 2004 Motion for Summary Judgment (Health District), (continued...)

On June 13, 2005, this court entered its Memorandum Decision & Order (dkt. no. 742), detailing the reasons for the November 15, 2002 pretrial bench ruling and addressing the grounds asserted in MacArthur, Lyman and Valdez' motions for reconsideration, each of which was denied.

Following the issuance of the June 13th Memorandum Decision & Order, plaintiffs MacArthur, Lyman and Valdez filed their second motion for reconsideration, "Plaintiffs Rule 60 Motion to be Relieved of the June 13, 2005 Order of Dismissal, and Stipulated Pre Trial Order," filed July 8, 2005 (dkt. no. 758), with an accompanying memorandum in support (dkt. no. 759) ("Pltfs' Rule 60(b) Mem."). The plaintiffs' memorandum listed nine "categories of problems with the June 13, 2005 Order," including several purported "mistakes" within the meaning of Rule 60(b)(1). (*Id.* at 3-10.)

(2) Plaintiffs' Asserted Rule 60(b) "Mistakes"

Plaintiffs asserted that the Final Pretrial Conference on November 14-15, 2002 was "converted . . . into a dismissal hearing, on motion[s] to dismiss filed on the eve of the pre trial" (Pltfs' Rule 60(b) Mem. at 3.) To the contrary, the November 14-15, 2002 proceeding was a final pretrial conference conducted pursuant to Fed. R. Civ. P. 16(c), as this court has elsewhere explained in some detail. (*See* Mem. Dec. & Order (dkt. no. 742), at 3-7, 168-178.) It was neither calendared nor conducted as a hearing on "motion[s] to dismiss

³⁷(...continued)

filed January 14, 2005 (dkt. no. 699); San Juan County Defendants' Combined (1) Memorandum in Opposition to Plaintiff Lyman's Motion to Reconsider and (2) Motion for an Extension of Time to Respond to Cross-Motion for Summary Judgment, filed January 18, 2005 (dkt. no. 701); Joinder in San Juan County Defendants' Combined (1) Memorandum in Opposition to Plaintiff Lyman's Motion to Reconsider and (2) Motion for an Extension of Time to Respond to Cross-Motion for Summary Judgment, filed February 3, 2005 (dkt. no. 706).)

filed on the eve of the pre trial” by the defendants.³⁸ Nor was it a Rule 56 summary judgment proceeding in which MacArthur, Lyman and Valdez were required to shoulder the burdens imposed by Rule 56(e) to proffer sworn averments raising genuine issues of material fact concerning their claims. The factual allegations supporting Plaintiffs’ claims, as detailed in the Proposed Pretrial Order, were taken as true, together with reasonable inferences drawn therefrom, in evaluating whether those claims were “frivolous” under Fed. R. Civ. P. 16(c)(1). (See Proposed Pretrial Order, received November 12, 2002, Exhibit B to Memorandum in Opposition to Plaintiffs’ Motion to Compel Production of the Stipulated Pre-Trial Order and Motion for an Award of Fees and Costs, filed April 9, 2003 (dkt. no. 547).)

It is certainly true that, as plaintiffs’ counsel suggests, (Pltfs’ Rule 60(b) Mem. at 4), consideration of dismissal pursuant to Rule 12(b)(6) is generally confined to what lies within the four corners of the complaint and that in that context, the court does not make factual findings,³⁹ but the Final Pretrial Conference was not a Rule 12(b)(6) hearing.

Plaintiffs complain that in the court’s June 13th Memorandum Decision & Order “there was an omission of the fact that Mrs. Valdez’s sister in law stated she spoke to Judy K. The SJHSD ER clerk, asking if Helen could be seen here? Then Lori Wallace said ‘Just go to

³⁸The defendants’ Rule 12(b)(6) motions were not calendared until a scheduling conference on January 7, 2003, at which they were set for hearing on February 24, 2003. (See Minute Entry, dated January 7, 2003 (dkt. no. 480).)

³⁹Of course, the court made no factual findings at the Final Pretrial Conference. Cf. Fed. R. Civ. P. 52(a). The court applied Fed. R. Civ. P. 16(c) standards to the factual allegations that counsel used to frame the proposed triable issues set forth in the Proposed Pretrial Order, determining whether those allegations and counsel’s representations as to the facts, taken as true, raised an issue requiring a trial.

the Doctors’. Valdez motion for reconsideration ex. 5. Gonzales deposition at pg. 20, l. 1-5.” (Pltfs’ Rule 60(b) Mem. at 4 n.1.) However, the portion of Charleen Gonzales’ deposition cited by plaintiffs reads as follows:

Q. Did either of you object to being – and by object, I mean, did either of you say to either Judy or Lori Wallace, “We don’t want to go to Dr. Penn’s office. We want to stay here”?

A. Not that I can recall.

(Deposition of Charleen Gonzales, dated January 7, 2002, at 20:1-5.) On that same page, Ms. Gonzales testified that Ms. Wallace did not speak directly to her:

Q. . . . And when you described Ms. Wallace’s comment, you said she came out and she told Judy to tell Helen to go to Dr. Penn’s. Did Lori Wallace ever talk to you directly?

A. No, she didn’t. Helen was in the bathroom and, at the time, the two girls were talking.

Q. So, did you just overhear their conversation?

A. Yeah, uh-huh.

(*Id.* at 20:16-24.) And this testimony remains uncontroverted in this record.

Plaintiffs also asserted that this court erred in recounting that Dr. MacArthur applied for full provisional one-year medical staff privileges on December 9, 1999 “when in fact Dr. MacArthur contests he filed it much earlier,” and that “[t]he Court acknowledges that on about November, 1999 Dr. MacArthur did a caesarian section with Dr. Nelson (Order pg. 8), supporting Dr. MacArthur’s allegation he applied much earlier.” (Pltfs’ Rule 60(b) Mem. at 4 n.1.) Yet the facts recited by the court in the Memorandum Decision & Order simply reiterated the facts as recounted by plaintiffs’ counsel at the Final Pretrial Conference:

MS. ROSE: Okay. Dr. MacArthur went to San Juan County and applied for privileges. He included as he knew he would have to as fundamental his medical license and his DEA license, and he was carrying medical insurance. *This occurred sometime in December* although he did operate or at least watch an operation of Dr. Nelson that was a caesarian in the hospital I believe somewhere around November, although he may not have operated specifically I think he watched Dr. Nelson.

THE COURT: And what year was this?

MS. ROSE: This was in 1999.

(Transcript of Hearing, dated November 14, 2002, at 5:16-6:1 (emphasis added). *See also* Proposed Pretrial Order at 24 ¶¶ 86, 90 (“Dr. MacArthur applied for privileges with the District first in or around October of 1999, then again on or about December 9, 1999,” and “Dr. MacArthur submitted an application and a packet of documents to the District prior to December 9, 1999. This first application can not be found. Dr. MacArthur submitted another application on or about December 9, 1999 with a packet containing minimally his medical license and DEA license.”).)

Plaintiffs further assert that this court “mistakenly found for purposes of RICO and the Sherman Antitrust Act, that hospitals are not involved in interstate commerce, the Court’s order pg. 50.” (Pltfs’ Rule 60(b) Mem. At 5-6.) To the contrary, this court (1) made no *findings* at all; (2) did not decide whether hospitals are involved in interstate commerce; and (3) for purposes of these plaintiffs’ federal antitrust claims, took the plaintiffs’ allegations of an interstate commerce nexus as true. As to plaintiffs’ Hobbs Act allegations as part of their RICO claim, the court observed that “[t]hese *plaintiffs* are not engaged in the interstate transportation *of goods*, or *in the sale of merchandise* flowing through interstate commerce,”

(Mem. Dec. & Order, at 50 (emphasis added)), and *nothing* in the original or amended complaints, the Proposed Pretrial Order or counsel's various assertions, at the Pretrial Conference and elsewhere, suggests that they were.

As to their federal antitrust claims, plaintiffs asserted that this court "immunizes their acts finding them to be 'official' and 'discretionary' without specifying if the actions or the refusal to act was within an intent of the State to eliminate competition or to discriminate. 42 U.S.C 1985. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39 (1985)" (Pltfs' Rule 60(b) Mem. at 7.) But *Town of Hallie* involved the application of the "state action" doctrine, *see Parker v. Brown*, 347 U.S. 341 (1943), and this court did not rely upon the "state action" doctrine in dismissing the plaintiffs' federal antitrust law claims under Fed. R. Civ. P. 16(c)(1). (See Mem. Dec. & Order (dkt. no. 742), at 111-125.)

Apart from specific causes of action, plaintiffs complained that the court relied on an amended complaint "non-existent at the time of the pretrial hearing oral dismissal" and a "pretrial order never part of the Court record made without knowledge of Mary Nielsen's deposition." (Pltfs' Rule 60(b) Mem. at 5.)

The Proposed Pretrial Order was submitted by counsel pursuant to Fed. R. Civ. P. 16(c)(10) and DUCivR 7-1(d), ultimately to be entered in place of prior pleadings in defining the issues for trial. The Proposed Pretrial Order served as the basis for the pretrial colloquy between court and counsel under Rule 16(c). In this case, the Proposed Pretrial Order essentially mirrored the factual allegations of the plaintiffs proposed Amended Complaint, ostensibly submitted a week prior to the pretrial conference as conforming plaintiffs' claims

to the plaintiffs' view of the evidence at that time. (See "Amended Complaint to Conform to the Evidence & the 10th Cir. Court 10-7-02 Opinion," annexed to "Plaintiffs' Rule 15 Motion to Amend and Supplement Complaint to Conform to the Evidence & the 10th Cir. Court 10-7-02 Opinion," and "Memorandum of Fact and Law in Support," filed November 6, 2002 (dkt. no. 438) (hereinafter "Proposed Amended Complaint").)⁴⁰ Both documents—as proposed by counsel—plainly existed at the time of the pretrial conference.

The court's November 15, 2002 bench ruling obviated any need to sign and enter the Proposed Pretrial Order because MacArthur, Lyman and Valdez' claims were not going to proceed to trial. To ensure a complete record of the Final Pretrial Conference in this action, a copy of the Proposed Pretrial Order in .pdf file format was annexed as an Appendix to the June 13, 2005 Memorandum Decision & Order as electronically docketed by the Clerk's Office (dkt. no. 742); the court also granted plaintiffs' motion for leave to file the Proposed Amended Complaint and directed that it be filed *nunc pro tunc* to November 14, 2002. (Mem. Dec. & Order (dkt. no. 742), at 178-181, 187; see Amended Complaint, filed June 14, 2005, *nunc pro tunc* to November 14, 2002 (dkt. no. 744).)

Plaintiffs further objected that the June 13th Memorandum Decision & Order "does not take into consideration the evidence of the ex CFO Mary Nielson's deposition showing a conspiracy to drive out" Dr. Nathaniel Penn, MD. (Pltfs' Rule 60(b) Mem. at 6.) They also assert the lack "of a full and fair opportunity to develop the record based in part upon the

⁴⁰As noted in a November 8, 2002 remark on the docket, the Proposed Amended Complaint was accompanied by a separate addendum of "Pertinent Parts of the Navajo Court Record as Attachment to the Amended Complaint," received by the Clerk of the Court on November 8, 2002 and lodged in the case file.

withheld evidence of Mary Nielson's deposition taken in her own case against SJHSD." (Pltfs' Rule 60(b) Mem. at 7.) The question of the deposition of Mary Nielson had been raised by the plaintiffs in their first round of reconsideration motions and was considered as part of the court's ruling on those motions in the June 13th Memorandum Decision & Order. Ms. Nielson's deposition testimony did not bear directly upon the defendants' alleged conduct toward plaintiffs MacArthur and Lyman, and far from being a "newly discovered" witness, Ms. Nielson was known to plaintiffs' counsel well before pretrial; counsel apparently had deposed Ms. Nielson in connection with the claims of other plaintiffs in this action, indicating a fair opportunity to develop the record based upon Nielson's testimony—had she been asked about Dr. Penn or Dr. Mena.

The plaintiffs' remaining "categories of problems," *e.g.*, a perceived clash between Rule 8's "short and plain statement" requirement and "heightened pleading requirements" purportedly in force at the time the original Complaint was filed, (Pltfs' Rule 60(b) Mem. at 5), reflected no obvious error of law on the part of the court in deciding to dismiss their claims pursuant to Rule 16(b)(1). The plaintiffs assert that "[o]ther numerous errors in law are also in the Order," (Pltfs' Rule 60(b) Mem. at 6.), but counsel apparently did not deem them significant enough either to identify them or support her assertion with citations to pertinent authority.

The plaintiffs' second reconsideration motion was among those considered at the October 25, 2005 hearing on pending motions, and for the reasons outlined above, this court denied the motion. (*See* Minute Entry, dated October 25, 2005 (dkt. no. 847); Transcript of

Hearing, dated October 25, 2005, at 17:4-22:13, 22:23-24:14.)

(3) MacArthur, Lyman & Valdez' Rule 59(e)/Rule 60(b) Motions

Plaintiffs MacArthur, Lyman and Valdez' third set of reconsideration motions, filed after the entry of the October 31st Judgment, raise essentially the same objections to this court's pretrial rulings as the prior motions did.

Plaintiffs' counsel persists in addressing the dismissal of plaintiffs' claims at the Final Pretrial Conference as either a Rule 12(b)(6) or Rule 56 matter—which the June 13, 2005 Memorandum Decision & Order makes clear it was not. MacArthur, Lyman and Valdez' federal claims were dismissed pursuant to Rule 16(c)(1), applying a standard appropriate to the identification of frivolous claims. (*See* Mem. Dec. & Order (dkt. no. 742), at 165-171.) The dismissal was not based on the defendants' Rule 12(b)(6) motions to dismiss, filed on the eve of the pretrial conference (dkt. nos. 443, 445, 447, 450, 452, 454, 456). Nor were the plaintiffs required to shoulder the evidentiary burdens of a party opposing summary judgment under Rule 56. Plaintiffs were called upon to identify triable issues bearing upon non-frivolous federal claims, Fed. R. Civ. P. 16(c)(1), that is, claims arising under federal law and having at least an arguable basis in law and fact.

In the Proposed Pretrial Order, counsel set forth the particulars of the claims of plaintiffs MacArthur, Lyman and Valdez—in terms nearly identical to the allegations of the Proposed Amended Complaint submitted a week earlier—as the plaintiffs' best articulation of those claims as of the time of pretrial. As explained above, the Proposed Pretrial Order served as the basis for an extended colloquy between court and counsel concerning those

factual and legal particulars. (*See* Transcript of Hearing, dated November 14, 2002, *passim*; Transcript of Hearing, dated November 15, 2002, *passim*.) From that colloquy, it became apparent to the court that plaintiffs could not identify any triable issues bearing upon a cognizable federal cause of action, even taking plaintiffs' written factual allegations and counsel's verbal representations as true.

As explained in detail in the court's June 13th Memorandum Decision & Order, plaintiffs could not establish at pretrial an arguable basis in fact and law for their federal antitrust, civil RICO, 42 U.S.C.A. § 1983, EMTALA and other claims against the named defendants. Dismissal of those claims as frivolous under Rule 16(c)(1) left plaintiffs MacArthur and Lyman with a handful of potentially viable state-law causes of action against specific individual defendants, over which this court declined to exercise supplemental jurisdiction. *See* 28 U.S.C.A. § 1367(c) (1993).

Having revisited these questions in some detail once more at the November 30, 2005 hearing on plaintiffs' Rule 59(e)/Rule 60(b) motions, this court remains satisfied that the November 15, 2002 bench ruling was correct, for all of the reasons detailed in the June 13th Memorandum Decision & Order.

In early 2000, as plaintiffs' counsel again acknowledged at the November 30th hearing, both Dr. MacArthur and Ms. Lyman elected not to pursue their requests for practice privileges at San Juan Health Services District facilities, each for his or her own reasons, before any final decision on those requests had been made by the District. In each instance, the request for privileges was under consideration at the time that MacArthur and Lyman

each decided to abandon the effort. And counsel has still not furnished legal authority establishing that MacArthur or Lyman had a legal entitlement to practice privileges at a publicly owned health facility based upon the fact of licensure of each plaintiff as a health care professional by the State of Utah—though counsel persists in making that assertion.

Moreover, as explained above and in the June 13th opinion, according to the uncontroverted deposition testimony in the record in this case, no one ordered plaintiff Helen Valdez to leave the San Juan Hospital emergency room on the morning of April 14, 1999; nor did anyone tell her that if she stayed in the emergency room at that time, she would be refused examination and treatment. Having been told of a conversation between hospital staff overheard by her sister-in-law who had accompanied her to the emergency room, Ms. Valdez left the emergency room of her own accord and returned home.

Even assuming her claim is timely, to sustain her EMTALA claim based upon the events of April 14, 1999, Ms. Valdez must at least allege facts showing that she was actually refused examination and treatment by the hospital in an instance where such examination and treatment was requested. Counsel's conclusory assertion that EMTALA was violated cannot suffice.

Plaintiffs MacArthur, Lyman and Valdez have failed to proffer "newly discovered evidence" or show any manifest or obvious error of law in this court's June 13th Memorandum Decision & Order, or any other extraordinary circumstance justifying relief from this court's October 31st Judgment under either Rule 59(e) or 60(b). These plaintiffs may pursue their viable state tort law claims in an appropriate forum, but they have asserted

no cognizable *federal* claim in this forum having an arguable basis in law or fact, and that survives Rule 16(c)(1) scrutiny in the context of the Final Pretrial Conference. That was true on November 15, 2002, and it remains true today.

D. Rulings on Pending Motions Heard on October 25, 2005

On October 25, 2005, the court heard, considered and ruled upon a series of pending motions. (*See* Minute Entry, dated October 25, 2005 (dkt. no. 847).)

(1) “Plaintiffs Motion for Disqualification,” filed June 17, 2005 (dkt. no. 745).

Plaintiffs’ fifth recusal motion, filed June 17, 2005 (dkt. no. 745), seeks disqualification on the ground that Jesse Trentadue, counsel for the San Juan County defendants, is before this court as the named plaintiff in another civil action, *Trentadue v. Federal Transfer Center*, Civil No. 2:03-CV-946J. Plaintiffs’ counsel cited *no* case law or ethics opinion authority for disqualifying a judge because opposing counsel is before the same judge as a party in another case. Plaintiffs again asked for assignment of “an out of state judge” without “any associations with the State of Utah,” or “with cases involving opposing law firms,” and for this court to order the chief judge of the court of appeals to designate one.

Defendants responded that this motion represents yet another inappropriate attempt by plaintiffs’ counsel to “judge-shop” in light of this court’s June 13, 2005 Memorandum Decision and Order, and is based on nothing more than the court’s adverse rulings against plaintiffs. The Health District Defendants asked for attorney’s fees for responding to the motion.

The court heard and considered argument on this motion on October 25, 2005, and ruled that the motion is DENIED. (*See* Minute Entry, dated October 25, 2005 (dkt. no. 847); Transcript of Hearing, dated October 25, 2005 (“Tr. 10/25/05”), at 2:17-5:12.)

(2) Plaintiffs’ Motion to Lift the Court’s Protective Order for Depositions and other Records in this Case, etc., filed June 30, 2005 (dkt. no. 747).

Plaintiffs moved for “an order lifting the Protective order on depositions and other information that includes patient information, for the limited purpose of submitting the information to government entities for investigation and other law enforcement purposes,” because plaintiffs “wish to submit the information gathered in this case” to federal and state agencies “for investigation of a pattern and practice of actions violating state and federal laws and regulations,” including the Utah Department of Health, the U.S. Department of Justice, the Senate Indian Affairs Committee, U.S. Commission on Civil Rights, the HHS Inspector General’s Office. “Plaintiffs believe there is a public safety problem that requires investigation” of the Health District’s operations. (Plaintiffs’ Motion to Lift the Court’s Protective Order for Depositions and other Records in this Case, etc., filed June 30, 2005 (dkt. no. 747).)

Defendants responded that plaintiffs do not represent the federal and state agencies and have no standing to act on their behalf. The agencies have expressed no interest in participating in the proceeding or obtaining the relief plaintiffs seek, and have their own powers to obtain documents and other information. Plaintiffs replied that their obtaining, compiling and organizing of the information would save time for overburdened investigative agencies.

Noting that state and federal administrative agencies have their own investigative powers, and that the protective order had been stipulated to by the parties in this action, the court ruled that this motion is DENIED. (*See* Minute Entry, dated October 25, 2005 (dkt. no. 847); Tr. 10/25/05, at 8:2-9:24.)

(3) Plaintiffs' Motion to Restrain All Members of the SJHSD Staff from Destroying Any Records at Least Until the Appeal Processes in this Case are Finished, filed June 30, 2005 (dkt. no. 751).

Plaintiffs requested an order prohibiting the destruction of any Health District records “in regards to the issues in this case,” pending completion of the appeal in this case, including “executive session meeting minutes and records, incident reports, records of employee discipline, and patient records going back to 1998,” and if records have already been destroyed, the plaintiffs demand “an immediate accounting of the missing information.” (Memorandum in Support of Plaintiffs' Motion to Restrain All Members of the SJHSD Staff from Destroying Any Records at Least Until the Appeal Processes in this Case are Finished, filed June 30, 2005 (dkt. no. 752), at 1-2.)

Defendants responded that plaintiffs seek preliminary injunctive relief without satisfying the requirements of Fed. R. Civ. P. 65. Plaintiffs replied that they need the records preserved because they did not obtain full access to them through discovery, and claim to invoke the court's inherent powers to govern the conduct of parties before the court rather than injunctive relief under Rule 65.

Having heard and considered the arguments of counsel, the court ruled that this motion is GRANTED IN PART, to the extent that all parties are required to maintain and

preserve all relevant documents and records kept in the ordinary course of business, keeping the same in their possession, custody and control until the completion of all appeals. (*See* Minute Entry, dated October 25, 2005 (dkt. no. 847); Tr. 10/25/05, at 9:25-12:2.)

(4) Plaintiffs' Motion to Clarify the Record and Hold a Full Disclosure Hearing, filed August 2, 2005 (dkt. no. 781).

Plaintiffs seek to have defense counsel "to fully disclose all of their communication with each other, with their respective insurers, and with their clients," and to clarify her allegation that Mr. Harrison possessed certain records sought by plaintiffs in discovery (*e.g.*, the deposition of Health District financial officer Mary Nielson in another case), but never produced. Harrison sent a letter to plaintiffs' counsel demanding that she retract the allegation in her Memorandum supporting her pending Rule 60(b) motion that Harrison had the deposition transcript but did not produce it.

Defendants responded that Harrison's letter does not furnish a basis for an evidentiary hearing or for disclosure of the communications, many of which are privileged.

Having heard and considered the arguments of counsel, the court ruled that this motion is DENIED. (*See* Minute Entry, dated October 25, 2005 (dkt. no. 847); Tr. 10/25/05, at 12:3-15:23.)

(5) Plaintiffs Singer, Riggs and Dickson's Motion to Certify a Question to the Utah Supreme Court, filed August 11, 2005 (dkt. no. 791).

As counsel in a state court case, *Whaley v. Whaley*, No. 20050490SC, plaintiffs' counsel sought to raise Navajo jurisdictional issues before the Utah Supreme Court, and requested that this court certify three related questions to the Utah Supreme Court at the same

time. But in her September 28th reply memorandum, plaintiffs' counsel indicates that the Utah Supreme Court "summarily dismissed the Petition for an Extraordinary Writ in that case that included largely the jurisdictional briefing before this court, without ruling on the questions of jurisdiction before it."

The defendants responded that plaintiffs seek to certify questions to the Utah Supreme Court as a matter of "uncertain" state law that are really federal questions to be determined under federal law, not state law.

The issues before the court in this case concerning the enforcement of the Navajo court's orders turn on questions of federal law and the law of the Navajo Nation. The three questions posed by plaintiffs dealt with treatment of Navajo jurisdiction and the effect of Navajo judgments in the Utah state courts, and are not germane to the issues in this case. In any event, plaintiffs' counsel deemed the request moot and withdrew the motion to certify questions. (*See* Minute Entry, dated October 25, 2005 (dkt. no. 847); Tr. 10/25/05, at 15:23-16:4.)

(6) San Juan County Defendants' Motion for a Finding of Contempt and the Imposition of Sanctions, filed July 7, 2005 (dkt. no. 754).

The San Juan County defendants sought a finding of contempt on the part of plaintiffs' counsel for threatening to proceed further before the Navajo Nation District Court, in violation of this court's January 29, 2004 Order (dkt. no. 603), enjoining the Plaintiffs "from further proceedings in this matter and Navajo Tribal Court until such time when the issue of the Navajo Tribal Court's subject matter jurisdiction has been decided by this Court," if defendants did not meet plaintiffs' \$2,500,000 settlement demand by June 29,

2005.

(7) “Plaintiffs’ Motion to Strike Def’s Motion for Contempt,” filed July 20, 2005 (dkt. no. 786).

Plaintiffs responded by moving to strike the San Juan County defendants’ motion, arguing that plaintiffs are entitled to bring claims directly against the defendants’ insurers as direct or third-party beneficiaries of those policies, and are thus entitled to make settlement demands within policy limits beyond the reach of this court’s January 29, 2004 Order. Defendants replied that their motion is not the proper subject of a motion to strike, and that this court’s January 29, 2004 Order was entered in aid of its own jurisdiction and encompasses counsel’s threats of further litigation made in the context of settlement negotiations.

At the hearing, in light of this court’s October 12, 2005 Memorandum Opinion & Order, counsel for the San Juan County defendants withdrew the motion for a finding of contempt from further consideration, and this court DENIED the plaintiffs’ motion to strike as moot. (*See* Minute Entry, dated October 25, 2005 (dkt. no. 847); Tr. 10/25/05, at 16:5-12.)

(8) Defendants’ Request for Miscellaneous Relief, filed February 17, 2005 (dkt. no. 711).

This request for relief is set forth in the Health District defendants’ “Joinder in San Juan County Defendant Craig Halls’ Memorandum in Opposition to Plaintiffs’ Motion for Sanctions,” filed February 17, 2005 (dkt. no. 711), and asks that this court “exercise its latitude, whether under Rule 11 or in any other way the Court deems appropriate, to intervene in what has become an outrageous departure from standards of civil practice,” (*id.* at 3),

referring to the motion and briefing tactics of plaintiffs' counsel.

Earlier, the Health District defendants had moved for a "protective order" precluding plaintiffs from filing additional motions pending the court's ruling on the issues on remand. (Motion for Protective Order, filed March 20, 2003 (dkt. no. 523).)

The San Juan County defendants filed a similar motion for a filing ban on March 27, 2003 (dkt. no. 534), and joined in the Health District defendants' motion (dkt. no. 538). At the December 19, 2003 hearing on motions, this court granted a preliminary injunction against further proceedings by plaintiffs in Navajo court pending resolution of the issues on remand, but did not otherwise restrain plaintiffs' ability to file motions, and the "protective order/filing ban" motions were terminated.

On August 30, 2005, the Health District Defendants filed a new motion for "protective order" that would bar plaintiffs from filing additional motions without prior court approval, pending the court's decision of the pending issues and motions. They asserted that plaintiffs filed multiple duplicative, repetitive and meritless motions that raise the same issues and repeated the same arguments, many of which have already been rejected. The defendants also asked for attorney's fees. The San Juan County defendants joined this motion on October 6, 2005 (dkt. no. 836). These motions were not calendared for hearing.

On October 12, 2005, this court issued its Memorandum Opinion and Order deciding the jurisdictional issues on remand. By October 25th, this development may have obviated the defendants' requests for interim relief against plaintiffs' filing of additional motions. In any event, the request for miscellaneous relief (dkt. no. 711) was DENIED AS MOOT. (*See*

Minute Entry, dated October 25, 2005 (dkt. no. 847); Tr. 10/25/05, at 16:12-19.)

In addition to the foregoing motions, the court had set the October 25th hearing as a status and scheduling conference concerning additional motions filed by the plaintiffs. (*See* Order re: Pending Motions, filed August 26, 2005 (dkt. no. 811), at 5; Amended Notices of Hearing (dkt. nos. 809, 812, 831).) Those motions included Plaintiffs' Motion to Amend and Supplement the Complaint, filed March 25, 2005 (dkt. no. 716); Plaintiffs' Rule 60 Motion to be Relieved of the June 13, 2005 Order of Dismissal, and Stipulated Pre Trial Order, filed July 8, 2005 (dkt. no. 758), discussed above; "PlaintiffMacArthur [sic], Valdez and Lyman's Motion for the Court to Reconsider June 13, 2005 Order of Dismissal and Motion to Amend/Supplement Their First Amended Complaint," filed August 11, 2005 (dkt. no. 790); "PlaintiffMacArthur [sic], Valdez and Lyman's and Singer, Riggs and Dickson's, Motion for the Court to Appoint a Special Master for the District," filed August 11, 2005 (dkt. no. 793); "Plaintiffs' Application for an immediate Rule 65 Temporary Restraining Order and Preliminary Injunction," filed August 19, 2005 (dkt. no. 798); and Plaintiffs Motion to Use Subpoena Powers, filed September 9, 2005 (dkt. no. 829).

Based upon its examination of the moving papers submitted to the court and further discussion between court and counsel concerning these motions, the court concluded that there was no need for further hearing on these motions and that in each instance, the motions would be DENIED. To the extent that the motions sought to revisit issues already addressed in the court's June 13th and October 12th opinions, they raised no "newly discovered evidence" or contrary legal authority bearing upon those issues. To the extent that the

motions sought to raise matters involving parties and claims not already before the court, (e.g., “PlaintiffMacArthur [sic], Valdez and Lyman’s and Singer, Riggs and Dickson’s, Motion for the Court to Appoint a Special Master for the District,” filed August 11, 2005 (dkt. no. 793); “Plaintiffs’ Application for an immediate Rule 65 Temporary Restraining Order and Preliminary Injunction,” filed August 19, 2005 (dkt. no. 798)), the court concluded that those matters were beyond the scope of this action and were more properly the subject of another lawsuit, should the real parties in interest choose to file one. (*See* Minute Entry, dated October 25, 2005 (dkt. no. 847); Tr. 10/25/05, at 16:20-30:20.)

E. Corrections to the October 12, 2005 Memorandum Opinion & Order and the October 31, 2005 Judgment.

In the course of examining the plaintiffs’ Rule 59(e)/Rule 60(b) motions and reviewing the record in this proceeding, this court noted that the court’s October 31st judgment inadvertently omitted reference to plaintiff Singer’s claim against defendant Atcitty, which was dismissed as barred by the Utah Governmental Immunity Act under Navajo principles of comity and reciprocity articulated in *Jones*. *See MacArthur*, 391 F. Supp. 2d at 1055-1056. That dismissal will be reflected in a separate form of declaratory judgment to be entered forthwith by the Clerk of the Court.

The court has also discovered and corrected several typographical, grammatical and clerical errors in the October 12th Memorandum Opinion & Order. The corrected text of the October 12th Memorandum Opinion & Order has been made available through publication by Thomson West in the permanent bound volume of the *Federal Supplement, Second Series* and on WESTLAW, and is the version cited throughout this memorandum opinion and order.

See MacArthur v. San Juan County, 391 F. Supp. 2d 895, (D. Utah 2005). A copy of the corrected text in .pdf file format is annexed hereto as an Appendix, and shall be entered on the docket as an attachment and made available by the Clerk of the Court.

For the reasons explained above,

IT IS ORDERED that plaintiffs Singer, Riggs and Dickson's Motion for Clarification, Reconsideration and Amendment (dkt. no. 849) is DENIED; plaintiff Valdez' "Motion to Reconsider and Amend the October 31, 2005 Order and Allow Her to Amend Her Amended Complaint," (dkt. no. 855), is DENIED; and plaintiffs Lyman and MacArthur's "Motion to Reconsider and Amend the October 31, 2005 Order and Allow Her to Amend Their Amended Complaint," (dkt. no. 857), is DENIED;

IT IS FURTHER ORDERED that "Plaintiffs Motion for Disqualification," filed June 17, 2005 (dkt. no. 745), is DENIED; Plaintiffs' Motion to Lift the Court's Protective Order for Depositions and other Records in this Case, etc., filed June 30, 2005 (dkt. no. 747), is DENIED; Plaintiffs' Motion to Restrain All Members of the SJHSD Staff from Destroying Any Records at Least Until the Appeal Processes in this Case are Finished, filed June 30, 2005 (dkt. no. 751), is GRANTED IN PART, to the extent that all parties are required to maintain and preserve all relevant documents and records kept in the ordinary course of business, keeping the same in their possession, custody and control until the completion of all appeals; Plaintiffs' Motion to Clarify the Record and Hold a Full Disclosure Hearing, filed August 2, 2005 (dkt. no. 781), is DENIED; Plaintiffs Singer, Riggs and Dickson's Motion to Certify a Question to the Utah Supreme Court, filed August 11, 2005 (dkt. no. 791) is

WITHDRAWN; San Juan County Defendants' Motion for a Finding of Contempt and the Imposition of Sanctions, filed July 7, 2005 (dkt. no. 754), is WITHDRAWN; "Plaintiffs' Motion to Strike Def's Motion for Contempt," filed July 20, 2005 (dkt. no. 786), is DENIED AS MOOT; Defendants' Request for Miscellaneous Relief, filed February 17, 2005 (dkt. no. 711), is DENIED AS MOOT; the Health District Defendants' Motion for a Protective Order, filed August 30, 2005 (dkt. no. 820), joined by the San Juan County defendants on October 6, 2005 (dkt. no. 836), is DENIED AS MOOT; Plaintiffs' Motion to Amend and Supplement the Complaint, filed March 25, 2005 (dkt. no. 716), is DENIED; Plaintiffs' Rule 60 Motion to be Relieved of the June 13, 2005 Order of Dismissal, and Stipulated Pre Trial Order, filed July 8, 2005 (dkt. no. 758), is DENIED; "PlaintiffMacArthur [sic], Valdez and Lyman's Motion for the Court to Reconsider June 13, 2005 Order of Dismissal and Motion to Amend/Supplement Their First Amended Complaint," filed August 11, 2005 (dkt. no. 790), is DENIED; "PlaintiffMacArthur [sic], Valdez and Lyman's and Singer, Riggs and Dickson's, Motion for the Court to Appoint a Special Master for the District," filed August 11, 2005 (dkt. no. 793), is DENIED; "Plaintiffs' Application for an immediate Rule 65 Temporary Restraining Order and Preliminary Injunction," filed August 19, 2005 (dkt. no. 798), is DENIED; and Plaintiffs Motion to Use Subpoena Powers, filed September 9, 2005 (dkt. no. 829), is DENIED;

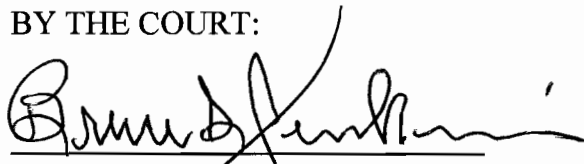
IT IS FURTHER ORDERED that plaintiffs Singer, Riggs and Dickson's "Motion to Correct Plaintiffs Motion to Clarify, Reconsider and Amend," on November 9, 2005 (dkt. no. 853), is GRANTED; and

IT IS FURTHER ORDERED that a copy of the corrected text of this court's

Memorandum Opinion & Order, filed October 12, 2005 (dkt. no. 837), as reported in the permanent bound volume 391 of the *Federal Supplement, Second Series*, beginning at page 895 be and hereby is annexed hereto as an Appendix (in .pdf file format), and shall be entered on the court's docket as an attachment to this Memorandum Opinion & Order and thereby made available by the Clerk of the Court.

DATED this 15 day of December, 2005.

BY THE COURT:



BRUCE S. JENKINS
United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

* * * * *

DR. STEVEN MACARTHUR,
MICHELE LYMAN, P.A., and HELEN
VALDEZ,

Plaintiffs,

vs.

Civil No. 2:00-CV-584BSJ

SAN JUAN COUNTY, SAN JUAN
HEALTH SERVICES DISTRICT,
COMMISSIONER TYRON LEWIS,
COMMISSIONER BILL REDD,
CRAIG HALLS, REID WOOD,
CLEAL BRADFORD, ROGER
ATCITY, JOHN LEWIS, JOHN
HOUSEKEEPER, KAREN ADAMS,
PATSY SHUMWAY, DR. JAMES
REDD, DR. LLOYD VAL JONES, DR.
MANFRED NELSON, RICHARD
BAILEY, MARILEE BAILEY, ORA
LEE BLACK, GARY HOLLADAY,
LORI WALLACE, CARLA
GRIMSHAW, GLORIA YANITO, and
LAURIE SCHAFER,

Defendants;

DONNA SINGER, FRED RIGGS, and
ALLISON DICKSON,

Plaintiffs,

vs.

SAN JUAN COUNTY, SAN JUAN
HEALTH SERVICES DISTRICT,
COMMISSIONER TYRON LEWIS,
COMMISSIONER BILL REDD,
CRAIG HALLS, RICHARD BAILEY,
REID WOOD, ROGER ATCITY,

**DECLARATORY
JUDGMENT**
(28 U.S.C.A. § 2201(a))

FILED
CLERK, U.S. DISTRICT COURT
December 15, 2005 (5:02pm)
DISTRICT OF UTAH

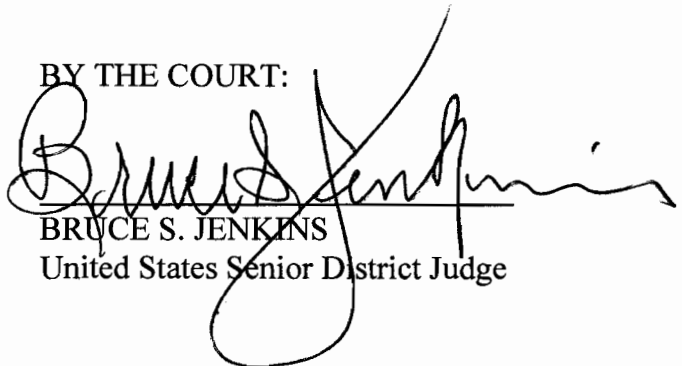
JOHN LEWIS, KAREN ADAMS,)
PATSY SHUMWAY, and LAUREN)
SCHAFFER,)
)
Defendants.)

Based upon the Memorandum Opinion & Order, filed October 12, 2005 (dkt. no. 837), *MacArthur v. San Juan County*, 391 F. Supp. 2d 895 (D. Utah 2005),

IT IS ORDERED, ADJUDGED AND DECREED that adjudication in the Navajo Nation District Court of plaintiff Donna Singer's claims against defendant Roger Atcitty arising from his conduct as a member of the Health District's governing board is barred by the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-1 *et seq.* (1997 & Supp. 2003) (repealed 2004).

DATED this TH15 day of December, 2005.

BY THE COURT:



BRUCE S. JENKINS
United States Senior District Judge

 | [Keyword](#) | [Case](#) | [Docket](#) | Date: [Filed](#) / [Added](#) |  [WP](#) (106367 bytes) |  [RTF](#) (89403 bytes)

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

F I L E D
United States Court of Appeals
Tenth Circuit

July 18, 2007

Elisabeth A. Shumaker
~~Clerk of Court~~

STEVEN MACARTHUR; NATHANIEL PENN;
MICHELLE LYMAN; HELEN VALDEZ;
CANDACE LAWS; LINDA CACAPARDO;
SUE BURTON; AMY TERLAAK; CANDACE
HOLIDAY, NICOLE ROBERTS,

Plaintiffs,

and

ALISON DICKSON; DONNA SINGER; FRED
RIGGS,

Plaintiffs - Appellants/Cross- Appellees,

v.

SAN JUAN COUNTY; SAN JUAN HEALTH
SERVICES DISTRICT; J. TYRON LEWIS,
Commissioner; BILL REDD, Commissioner;
CRAIG HALLS; REID M. WOOD; CLEAL
BRADFORD; ROGER ATCITY; JOHN
LEWIS; JOHN HOUSEKEEPER; KAREN
ADAMS; PATSY SHUMWAY; JAMES D.
REDD; L. VAL JONES; MANFRED R.
NELSON; RICHARD BAILEY; MARILEE
BAILEY; ORA LEE BLACK; GARY
HOLLADAY; LORI WALLACE, also known as
Laurie Walker; ST. PAUL'S INSURANCE;
CARLA GRIMSHAW; GLORIA YANITO;
JULIE BRONSON; R. DENNIS ICKES;
LAURIE SCHAFER; LYN STEVENS, San Juan
County Commissioner; MANUEL MORGAN,
San Juan County Commissioner; NETTIE
PRACK; GLEN IMEL,

Defendants - Appellees/Cross-Appellants.

No. 05-4295, 05-4310

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 2:00-CV-584-BSJ)

Susan Rose, Sandy, Utah, for Plaintiffs - Appellants/Cross-Appellees.

Carolyn Cox (and Blaine J. Benard, with her on the brief), Holme, Roberts & Owen, L.L.P., Salt Lake City, Utah, for Defendants - Appellees/Cross-Appellants San Juan Health Services District, Reid Wood, and Lauren Schafer.

Jesse C. Trentadue, (Michael W. Homer with him on the brief), Suitter Axland, Salt Lake City, Utah, for Defendants - Appellees/Cross-Appellants San Juan County, J. Tyron Lewis, Bill Redd, Craig Halls, and Richard Bailey.

Before **KELLY, EBEL**, and **McCONNELL**, Circuit Judges.

KELLY, Circuit Judge.

Plaintiffs in this case seek enforcement of several preliminary injunction orders issued by a court of the Navajo Nation. Although the decision to enforce a non-final tribal court judgment is a matter of discretion, federal courts will ordinarily err on the side of enforcement of such judgments in the name of comity. We will not enforce a tribal court judgment, however, when the tribal court lacked subject matter jurisdiction. In the realm of tribal court jurisdiction, the regulatory authority of the tribe is often the issue which looms largest, and this case is no exception. Among other things, these appeals require us to examine the regulatory authority of the Navajo Nation over the activities of a nonmember of the tribe when the regulated entity is another independent sovereign acting in its governmental capacity.

Plaintiffs-Appellants Donna Singer, Fred Riggs, and Alison Dickson (collectively "Plaintiffs") appeal the federal district court's refusal to enforce three preliminary injunction orders issued by a Navajo district court against San Juan County, San Juan Health Services District ("SJHSD"), and numerous employees of those entities (collectively "Defendants"). Although the district court's judgment was ultimately in their favor, SJHSD and certain of its employees involved in the litigation also cross-appeal from the district court's judgment that the Navajo Nation possessed civil jurisdiction over several of the claims asserted against SJHSD, Roger Atcity, and Reid Wood. In its opinion below, the district court explained that it would not enforce the preliminary injunction orders because, inter alia, the Navajo Nation lacks regulatory authority over many of the Defendants, the preliminary injunction is interlocutory in nature, much of the preliminary injunction is now moot, and Defendants are nearly all entitled to sovereign immunity. *See MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 1056-57 (D. Utah 2005). Our jurisdiction arises under 28 U.S.C. 1291, and we reverse the district court insofar as it held that the Navajo Nation possessed regulatory and adjudicative authority over Plaintiffs' employment-related claims against SJHSD and Mr. Riggs's defamation claim against Reid Wood. We do, however, ultimately affirm the district court's judgment refusing to enforce the tribal court's preliminary injunction orders.

Background

Because Plaintiffs do not appear to challenge the federal district court's factual recitation, we rely primarily on its version of the facts. Donna Singer, Fred Riggs, and Alison Dickson brought suit against San Juan County, SJHSD, and several employees of those entities in Navajo district court in August 2000. The specific defendants in that case relevant to these appeals were as follows: San Juan County, Utah; SJHSD; San Juan County Commissioners J. Tyron Lewis and Bill Redd, in their individual and official capacities; San Juan County Attorney Craig Halls, in his individual and official capacity; San Juan County Administrator Richard Bailey, in his individual and official capacity; Roger Atcitty, John Lewis, and Karen Adams, members of SJHSD's Board of Trustees, in their individual and official capacities; Patsy Shumway, member of SJHSD's Board of Trustees, in her official capacity only; Reid Wood, SJHSD's Chief Executive Officer, in his individual and official capacity; and Lauren Shafer, SJHSD's Personnel Director of Nursing, in her individual and official capacity.

SJHSD is a special service district organized pursuant to Utah Code 17A-2-1304 (1999), and is tasked with providing health care services to the citizens of San Juan County, Utah. At all relevant times, SJHSD operated the Montezuma Creek Health Clinic ("the Clinic"), which is located in San Juan County and within the exterior boundaries of the Navajo Nation. The record indicates that the land on which the Clinic is located is fee land owned by the State of Utah as part of the Navajo Trust Fund. SJHSD relinquished operation of the Clinic as of January 1, 2000, at which time Utah Navajo Health Systems, an entity affiliated with the Navajo tribe, took over operation.

Ms. Singer is the non-Indian spouse of an enrolled member of the Navajo Nation. She lives outside, but near, the Navajo reservation. Ms. Singer was employed as the manager of the Clinic from 1995 until her termination in December 1998. In the Navajo district court, Ms. Singer alleged that although she was an exempt employee, she was required to keep time cards, allegedly in violation of SJHSD policies. She claimed that on November 13, 1998, a mistake was made on her time card but that she promptly provided a written explanation for the error. Shortly thereafter, she was handed a memorandum by Reid Wood, CEO of SJHSD, referring to allegations of time card fraud and informing her that she was being placed on administrative leave. A second memorandum from Mr. Wood accused her of employment-related misconduct namely that the number of hours worked, as reflected on her time cards, was inflated and notified her of the scheduling of a pre-disciplinary hearing. Following a meeting with Ms. Singer on December 4, 1998, Mr. Wood prepared yet another memorandum to her, dated December 7, explaining that due to the inconsistencies in her time cards, she was being terminated. Ms. Singer later filed a complaint with the Office of Navajo Labor Relations ("ONLR") seeking reinstatement. Eventually, Ms. Singer was rehired at the Clinic after its operation was handed over to Utah Navajo Health Systems.

Mr. Riggs is an enrolled member of the Navajo Nation who resides within the exterior boundaries of the Navajo reservation in New Mexico. SJHSD terminated his employment on November 4, 1998 as part of a reduction in force, but immediately rehired him in a lesser position and at a lesser rate of pay on the condition that he keep time cards. According to Mr. Riggs, he was unaware that on his very first time card he underreported the number of hours of leave taken. As with Ms. Singer, Mr. Wood advised Mr. Riggs in writing that he was accused of time card fraud and placed Mr. Riggs on paid administrative leave. Mr. Riggs likewise had a pre-disciplinary hearing with Mr. Wood on December 4, 1998, but, unlike Ms. Singer, who was terminated, Mr. Wood placed Mr. Riggs on probation for thirty days. Mr. Riggs alleges, however, that he was kept on probation longer than thirty days. On or about December 15, 1998, Mr. Riggs filed a grievance with SJHSD regarding Mr. Wood's disciplinary action, and on February 12, 1999, a grievance hearing was held (the record is unclear as to what the result of this hearing was), but Mr. Riggs avers that the grievance process was tainted by Mr. Wood's influence and lacked impartiality. Mr. Riggs also later filed a grievance with the ONLR. Mr. Riggs remained an employee of the Clinic after Utah Navajo Health Systems assumed operation.

Mr. Dickson, the third plaintiff, is an enrolled member of the Navajo Nation residing within the exterior boundaries of the Navajo Reservation in Utah. Mr. Dickson was initially hired by SJHSD in March 1998 as a full-time, temporary office clerk. He applied for full-time, permanent employment in November or December of 1998 but was refused. Mr. Dickson claims that the refusal to make him a permanent employee violated internal SJHSD policies. He also alleges he was denied a hearing on his grievance. In the Navajo district court, Mr. Dickson also complained about racially insensitive and derogatory remarks allegedly made by Mr. Wood. Like Ms. Singer and Mr. Riggs, Mr. Dickson was permanently employed by Utah Navajo Health Systems at the Clinic after its takeover.

In their complaint filed in the Navajo district court, Plaintiffs asserted numerous claims arising primarily out of their employment at the Clinic. Those claims included the following: violation of the right to free speech as protected by the Navajo Nation, the United Nations, and the United States; violation of the right to freedom of assembly as protected by the Navajo Nation, the United Nations, and the United States; violation of the right to due process as protected by the Navajo Nation, the United Nations, and the United States; wrongful hiring; defamation and tortious interference with future contractual relations; theft; violation of the right to equal protection as protected by the Navajo Nation, the United Nations, and the United States; discrimination as part of an ongoing pattern; intentional and negligent infliction of emotional distress; violation of fiduciary duties; misfeasance; malfeasance in office; obstruction of justice; misuse of judicial process; defamation per se; and the endangerment of Navajo patients.

On December 28, 1999, after holding at least one evidentiary hearing, the Navajo district court found that Plaintiffs' claims had a high likelihood of success on the merits and issued a preliminary injunction ordering Defendants to undertake the following actions: reinstate Ms. Singer and Mr. Riggs to their former positions with full back-pay; offer Mr. Dickson full-time employment with full back-pay and benefits; delete and expunge all disciplinary comments regarding the incidents at issue from Plaintiffs' personnel files; refrain from placing all Physician Assistants on time card requirements; refrain from interfering with clinic operations or moving clinic personnel; pay all attorney's fees, costs, and expenses related to the litigation; and assist, in any manner necessary, diabetic patients' return to the Clinic for treatment. The court also prohibited Defendants from eliminating emergency medical technician services within the Navajo Nation or interfering with laboratory or pharmaceutical services to the Clinic.

Following Defendants' submission of a motion to dissolve/modify the preliminary injunction, the tribal court issued another order on March 1, 2000, which reiterated the conditions of the prior preliminary injunction and also required Defendants to carry out the conditions of the prior injunction by March 3, 2000, to immediately make payment of past due billings of the Clinic, to refrain from interfering with any form of patient care being provided at the Clinic, and to immediately cease billing eligible IHS patients for medical services. In an effort to further enforce its order, the court informed the parties that Defendants would be required to pay \$10,000 per day for every day after March 3, 2000 that Defendants failed to comply with its order, and that the individual defendants and their counsel would be personally liable for \$1,000 of the \$10,000 daily amount.

Shortly thereafter, Plaintiffs filed a motion for a special order, and, in response, the tribal court issued a third order on March 6, 2000. That order required Defendants to take the following additional actions: refrain from alienating any money, property, or assets of any type until the relief granted in the preliminary injunction was satisfied; provide an accounting of all Defendants' assets to Plaintiffs; list Plaintiffs first in order of priority as secured creditors on Defendants' files with the County Recorder of San Juan County; and provide Defendants' 1998 and 1999 tax returns to Plaintiffs. The court further explained that any disobedience of the order would result in the issuance of arrest warrants for Defendants, and it also granted Plaintiffs leave to seek enforcement of the court's orders in Utah or federal court.

Plaintiffs accepted the tribal court's invitation to seek enforcement of the orders and filed suit in federal district court on July 25, 2000. They sought both a declaratory judgment and a preliminary injunction enforcing the tribal court's orders. Less than two months later, Defendants filed a motion to dismiss Plaintiffs' declaratory judgment claims on grounds of sovereign immunity and Plaintiffs filed a cross-claim for summary judgment. The district court granted Defendants' motion to dismiss on October 30, 2000, reasoning that Defendants enjoyed sovereign immunity from suit in tribal court and that their sovereign immunity had not been waived vis--vis the Navajo Nation. For the same reason, the district court also denied Plaintiffs' request for a preliminary injunction and their cross-claim for summary judgment. Plaintiffs appealed from that order.

On appeal, we vacated the district court's order and remanded for further proceedings.⁽¹⁾ See MacArthur v. San Juan County, 309 F.3d 1216, 1228 (10th Cir. 2002) (hereinafter MacArthur I). We held that the district court erred in deciding the sovereign immunity issue before first determining whether the Navajo Nation possessed adjudicative authority over the activities of Defendants, who are nearly all nonmembers of the Navajo Nation. See id. at 1227. We explained that sovereign immunity and tribal regulatory authority are distinct legal doctrines and, pursuant to Nevada v. Hicks, 533 U.S. 353 (2001), the adjudicative authority of tribal courts is a threshold question that must be answered before a court may consider the merits of the underlying action. See id. at 1226-27. We therefore directed the district court, on remand, to conduct an analysis of the Navajo Nation's adjudicative authority over Defendants pursuant to Montana v. United States, 450 U.S. 544 (1981), before reaching the separate issue of sovereign immunity. See id. at 1227.

That is exactly what the district court did. In a published order dated October 12, 2005, the district court rendered judgment in Defendants' favor. In doing so, the district court held that the Navajo Nation possessed civil regulatory and adjudicatory authority over the claims of Mr. Riggs and Mr. Dickson arising out of their consensual employment relationships with SJHSD. See MacArthur v. San Juan County, 391 F. Supp. 2d 895, 1056 (D. Utah 2005) (hereinafter MacArthur II). It also held that the Navajo Nation possessed adjudicatory authority over Mr. Riggs's defamation claim against Mr. Wood and all three Plaintiffs' employment-related claims against Mr. Atcitty, who is an enrolled member of the Navajo Nation. See id. The district court held that the Navajo Nation did not possess regulatory or adjudicatory authority over the activities of the remaining Defendants. See id. Despite the fact that the district court determined that the Navajo Nation possessed subject matter jurisdiction over some of Plaintiffs' claims, it nonetheless refused to issue an injunction or declaratory judgment to enforce the tribal court's orders as to those claims because the orders were non-final and interlocutory in nature, most of the relief granted in the orders has since been rendered moot, Plaintiffs had not properly exhausted their claims, and most of the claims were barred by sovereign immunity. See id. at 1056-57.

Although deciphering Plaintiffs' arguments on appeal is an extremely difficult task,⁽²⁾ they appear to argue that: (1) Defendants may not challenge the propriety of the Navajo district court's orders because they failed to exhaust their remedies in tribal court; (2) the Navajo district court's preliminary injunction is entitled to full faith and credit; (3) federal courts lack the authority to question whether the Navajo district court possessed subject matter jurisdiction and must enforce its preliminary injunction orders without independent review; (4) laws enacted, and policies followed, by Congress and the President subsequent to Montana nullified its framework for defining the inherent sovereignty of Indian tribes; and (5) sovereign immunity does not apply to shield Defendants from liability.

Discussion

1. Standard of Review

We review a district court's grant of summary judgment de novo, applying the same legal standard as below. Jencks v. Modern Woodmen of Am., 479 F.3d 1261, 1264 (10th Cir. 2007). Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

We also review a district court's dismissal for failure to state a claim de novo. Lovell v. State Farm Mut. Auto Ins. Co., 466 F.3d 893, 898 (10th Cir. 2006). We may uphold the grant of a motion to dismiss if, viewing the well-pleaded factual allegations in the complaint as true and in the light most favorable to the non-moving party, the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1968-69, 1974 (2007) (explaining that the pleading standard by which courts look to whether the plaintiff can prove "no set of facts" giving rise to a claim "has earned its retirement"); see also The Ridge at Red Hawk, L.L.C. v. Schneider, F.3d , 2007 WL 1969681, at *3 (2007).

1. Enforcement of the Navajo District Court's Preliminary Injunction Orders

While Plaintiffs have sought both a declaratory judgment and a preliminary injunction, their primary objective in this litigation is to enforce the Navajo district court's preliminary injunction orders granting them broad relief. The primary issue on appeal, therefore, is whether there is anything to prevent us from recognizing and enforcing those orders. But before we address that question head-on, there are a number of threshold issues to be resolved.

To begin, Plaintiffs argue that Defendants may not challenge the enforceability of the tribal court orders because they failed to exhaust available tribal court remedies. "The Supreme Court . . . has required litigants to exhaust their tribal court remedies before a district court may evaluate the existence of a tribal court's jurisdiction." Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006) (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15-16 (1987)). Ordinarily, however, it is federal court plaintiffs, not defendants, who are required to exhaust. Also, Defendants no longer had tribal court remedies available to them once Plaintiffs sought enforcement in federal court. We think that he who defeats another's ability to exhaust cannot then assert failure to exhaust as a defense. Moreover, the remedy for a litigant's failure to exhaust is not enforcement of the tribal court's judgment, as Plaintiffs seek, it is a dismissal or abeyance of the action until exhaustion has occurred, see Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985) neither of which Plaintiffs request. Finally, we possess all the facts necessary to conduct our jurisdictional inquiry and thus exhaustion would serve no purpose other than delay. See Burrell, 456 F.3d at 1168 (listing five exceptions to the exhaustion requirement).

Next, we must determine the proper mechanism by which we might enforce the Navajo district court's orders. Plaintiffs assert that the proper mechanism is the Full Faith and Credit Clause of the Constitution, see U.S. Const. art. IV, 1, and the full faith and credit principles found within 28 U.S.C. 1738. While the Constitution only requires that states grant full faith and credit to the judgments of sister states, 1738 extends that requirement to the courts of the United States and its territories and possessions. See U.S. Const. art. IV, 1; 28 U.S.C. 1738. As we noted in our prior decision in this case, the Supreme Court has broadcast mixed signals as to whether the tribes are to be considered territories or possessions of the United States and thus included within the language of 1738. See MacArthur I, 309 F.3d at 1225. Moreover, "[t]his court has not yet decided whether a tribal court's judgment is entitled to preclusive effect under the Full Faith and Credit Clause or as a matter of comity." Burrell, 456 F.3d at 1176 (McConnell, J., concurring) (internal citations omitted); see also MacArthur I, 309 F.3d at 1225. Regardless, we need not resolve the issue because even if we were required to enforce tribal judgments as a matter of full faith and credit, only final judgments are subject to enforcement pursuant to full faith and credit principles, see Durfee v. Duke, 375 U.S. 106, 111 (1963); Felix S. Cohen, Handbook of

Federal Indian Law 7.07[2][a], at 658 (2005 ed.) (hereinafter Handbook), and the preliminary injunction orders sought to be enforced in this case hardly constitute final judgments, see Sole v. Wyner, 127 S. Ct. 2188, 2195 (2007) ("At the preliminary injunction stage, the court is called upon to assess the probability of the plaintiff's ultimate success on the merits."); Kiernan v. Utah Transit Auth., 339 F.3d 1217, 1220 (10th Cir. 2003) ("A preliminary injunction serves to preserve the status quo pending a final determination of the case on the merits.").⁽³⁾ Therefore, if we are to enforce the preliminary injunction orders, it must be as a matter of comity.

Plaintiffs also argue that we have no power to do anything other than enforce the Navajo district court's orders. In other words, once the tribal court issued its preliminary injunction orders and Plaintiffs arrived at federal court to enforce them, the jurisdiction of the federal courts is limited to enforcement, which is mandatory on our part. This argument misunderstands federal court jurisdiction and the discretion we possess under the doctrine of comity. The question of the regulatory and adjudicatory authority of the tribes is a question bound up in the decision to enforce a tribal court order is a matter of federal law giving rise to subject matter jurisdiction under 28 U.S.C. 1331.⁽⁴⁾ See Nat'l Farmers Union, 471 U.S. at 852; Wilson v. Marchington, 127 F.3d 805, 813 (9th Cir. 1997). Additionally, we proceed cautiously and carefully when called upon to enforce foreign judgments. While there is no doubt that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians," Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 (1978), the decision whether to enforce non-final orders of a tribal court is left primarily to our discretion under the doctrine of comity, see Burrell, 456 F.3d at 1168, 1171; Wilson, 127 F.3d at 810 ("[C]omity . . . affords the best general analytical framework for recognizing tribal judgments.").

The basic dilemma the doctrine of comity is meant to solve is that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority derived." Hilton v. Guyot, 159 U.S. 113, 163 (1895). Thus, comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."⁽⁵⁾ Id. at 164. Comity is not an inexorable command, see id., and a request for recognition of a foreign judgment may be rebuffed on any number of grounds, see Wilson, 127 F.3d at 810; Handbook 7.07[2][a], at 658 ("In contrast to the full faith and credit rule, the comity doctrine allows the receiving court greater discretion to determine whether to enforce the foreign judgment.").

Although recognition and enforcement of tribal court judgments as a matter of comity also lies within our discretion, "[t]he importance of tribal courts and the dignity we accord their decisions will weigh in favor of comity." Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1142 (9th Cir. 2001). Nonetheless, recognition of a tribal court judgment must be refused where one of two circumstances exist. First, comity must not be granted where the tribal court lacked either personal or subject matter jurisdiction. Burrell, 456 F.3d at 1171. Second, a tribal court judgment must not be enforced where the party against whom enforcement was sought was not afforded due process of law. Id. Apart from those two mandatory grounds on which to refuse enforcement, there are several grounds on which a court may exercise its discretion to refuse enforcement of a tribal judgment. See Wilson, 127 F.3d at 810 (listing several possible discretionary reasons for the non-enforcement of tribal judgments).

In this case, we must refrain from enforcing much of the Navajo district court's orders because that court lacked subject matter jurisdiction (i.e. adjudicatory authority) over nearly all of Defendants' activities. Additionally, under the unique circumstances of this case, we will exercise our discretion to similarly refuse to enforce the tribal court judgment even as to those claims over which the tribal court arguably had subject matter jurisdiction (those asserted against Mr. Atcity).

1. Tribal Court Subject Matter Jurisdiction - The Analytical Framework

"Originally the Indian Tribes were separate nations within what is now the United States." Williams v. Lee, 358 U.S. 217, 218 (1959). As separate nations, they enjoyed the same degree of sovereignty as that enjoyed by all other sovereign nations the world over. Through their original incorporation into the United States as well as through specific treaties and statutes, however, they have lost several important aspects of their inherent sovereignty. Id. As to which aspects of inherent sovereignty have been retained and which have been divested, "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." United States v. Wheeler, 435 U.S. 313, 326 (1978). But the Indian tribes' status as dependent nations has not divested them of "the powers of self-government." See id.

Despite the fact that the Navajo Nation retains control over its self-government, "[i]t is true that in the exercise of the powers of self-government, as in all other matters, the Navajo Tribe, like all Indian Tribes, remains subject to ultimate federal control." Id. at 327. This is because "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as 'plenary and exclusive.'" United States v. Lara, 541 U.S. 193, 200 (2004). Congress's "plenary and exclusive" powers in respect to the tribes derive from the Indian Commerce Clause (U.S. Const. art. I, 8, cl. 3), treaties entered into by the Executive Branch, and preconstitutional powers necessarily inherent in any federal government. See id. at 200-01. The upshot of Congress's plenary power over the tribes is that it may "enact legislation that both restricts, and in turn, relaxes . . . restrictions on tribal sovereign authority." Id. at 202.

In the absence of congressional legislation, however, tribal governments retain regulatory authority over all matters falling within their inherent sovereignty. In Montana v. United States, 450 U.S. 544 (1981), the Supreme Court laid down a general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 565. There are, nevertheless, two narrow exceptions to the general rule against tribal authority over nonmembers. First, "[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." Id. Second, "[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566.

Although Montana dealt exclusively with the tribes' regulatory authority over non-Indians, see Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) ("Montana immediately involved regulatory authority . . ."), the Supreme Court has since announced that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," id. It has also since explained that it has left "open the question whether a tribe's adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction." Nevada v. Hicks, 533 U.S. 353, 358 (2001). Thus, our analysis must proceed as follows: initially, we must determine whether each party's status is such that Montana's general rule against regulatory authority over nonmembers is implicated; in other words, we must determine whether the party over whom the tribe is seeking to assert regulatory authority is a nonmember of the Navajo Nation. If the party in question is a nonmember, then we must decide whether either of the two exceptions identified in Montana applies. If one of the two Montana exceptions applies and the tribe therefore possesses regulatory authority over the nonmember, we must determine whether the nonmember's activities also fall within the Tribe's adjudicative authority.

Before conducting this analysis, we must resolve two matters. First, there does not appear to be, and Plaintiffs have not identified any, congressional legislation expressly authorizing the Navajo Nation to exercise regulatory authority over Defendants in this case. Stated slightly differently, Congress has

passed no law which permits the Navajo Nation to exercise regulatory authority over nonmember entities or individuals who employ members of the tribe within the confines of the reservation; nor has it passed a broader statute which arguably encompasses nonmember employers. Consequently, any regulatory authority the Navajo Nation might possess is strictly a byproduct of its retained inherent sovereignty.

Second, Plaintiffs contend that laws and/or policies enacted by Congress and the Executive Branch subsequent to Montana nullified its framework for defining the inherent sovereignty of Indian tribes. This argument is unavailing. Many of the sources on which Plaintiffs rely predate Montana and thus cannot serve as the basis for overturning that decision. We have, nonetheless, reviewed each policy, statute, treaty, and contract relied upon by Plaintiffs and can find no indication whatsoever that Montana has been altered in any way.⁽⁶⁾ Finally, as recently as 2001, the Supreme Court applied the Montana framework in determining whether the Navajo Nation possessed regulatory authority over nonmembers of the tribe, see Hicks, 533 U.S. at 358-65a strong indication that the Montana framework remains alive and well. Consequently, we will proceed to apply the Montana framework.

1. Whether Montana's General Rule Applies

As previously stated, Montana only applies insofar as the tribe in question is seeking to assert regulatory authority over the activities of a nonmember. See 450 U.S. at 565-66. For a long while, however, Montana's applicability seemed to hinge not only on the status of the party over whom authority was exercised but also on the character of the property on which the regulated activities occurred. This stemmed from the fact that "in Montana, as in later cases following Montana's instruction . . . the challenged tribal authority related to nonmember activity on alienated, non-Indian reservation land." Strate, 520 U.S. at 454. Litigants began noticing this common denominator, and in Strate the tribal petitioners argued that Montana was inapplicable because the land on which the regulated activity occurred was not traditional non-Indian fee land due to the fact that, like here, it was held in trust for the tribe and its members. See id. Justice Ginsburg, writing for the Court, acknowledged "that tribes retain considerable control over nonmember conduct on tribal land," but held that the nature of the land in question was more akin to alienated, non-Indian land because the Tribe could not "assert a landowner's right to occupy and exclude." See id. at 454-56. Thus, Montana applied.

The notion that Montana's applicability turns, in part, on whether the regulated activity took place on non-Indian land was finally put to rest in Hicks. In that case, the Navajo Nation attempted to assert regulatory authority over nonmembers' activities unquestionably occurring on Indian land. See Hicks, 533 U.S. at 359. Because the activities occurred on Indian land, Hicks argued that Montana had no relevance. In rejecting that argument, the Court explained that Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) the case upon which Montana primarily relied in defining the scope of the tribes' inherent sovereign powers drew no distinction between Indian and non-Indian land. See Hicks, 533 U.S. at 359. It also noted that language from Montana itself clearly implied that the general rule announced in that case applies to Indian and non-Indian land alike. See id. at 359-60. Thus, while the nature of the property is a factor and possibly a dispositive one to consider in determining whether the regulated activity falls within either of Montana's two exceptions, see id. at 360, the only relevant characteristic for purposes of determining Montana's applicability in the first instance is the membership status of the individual or entity over which the tribe is asserting authority, see id. at 388 (O'Connor, J., concurring in part) ("[T]he majority is quite right that Montana should govern our analysis of a tribe's civil jurisdiction over nonmembers both on and off tribal land.").

Montana's presumption against tribal civil jurisdiction over nonmembers applies nearly across the board in this case because, with the exception of Mr. Atcitty, Defendants are all nonmembers of the Navajo

Nation.⁽⁷⁾ Mr. Atcitty, who was a member of SJHSD's Board of Trustees, is an enrolled member of the Navajo Nation and resides within the borders of the Navajo reservation. As a result, while it is unclear whether the Navajo Nation possessed civil jurisdiction over Mr. Atcitty's activities, given that they were undertaken exclusively in his capacity as a state official, *cf. id.* at 362 ("When . . . state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribe land"), it is clear that he does not fall within the ambit of Montana. We, therefore, proceed to apply Montana to all Defendants except Mr. Atcitty.

1. Application of Montana

The starting point under Montana is, of course, with the general rule "that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. The general rule remains in effect unless a nonmember enters into a consensual relationship with the tribe or its members, or the activities of a nonmember threaten the tribe's right to self-government. *Id.* at 565-66. Because all Defendants, with the lone exception of Mr. Atcitty, are nonmembers, one of these two exceptions must apply in order for the Navajo Nation to assert regulatory authority over their actions.

1. Ms. Singer

Ms. Singer's status as a nonmember of the Navajo Nation renders application of the two Montana exceptions exceedingly straightforward in her case. There is no indication, and Plaintiffs do not contend, that any of the Defendants in this case entered into a consensual relationship with the Navajo Nation itself, and accordingly we are only concerned here with consensual relationships between Defendants and the tribe's members. Because she is a nonmember, however, there is no possibility that Defendants' actions with respect to Ms. Singer could have resulted in a consensual relationship with a member of the Navajo Nation. Moreover, Defendants' employment-related activities in regard to another nonmember on non-Indian land in no way affects the Navajo Nation's right to govern itself. Thus, neither Montana exception applies and the Navajo Nation did not possess regulatory authority over Defendants' activities vis--vis Ms. Singer.

2. Mr. Riggs and Mr. Dickson

The fact that Mr. Riggs and Mr. Dickson are enrolled members of the Navajo Nation renders application of the Montana exceptions more complicated than in Ms. Singer's case.

a. The Consensual Relationship Exception

Our first task is to determine whether any of the Defendants entered into a consensual relationship with Mr. Riggs or Mr. Dickson "through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565. The district court below held that SJHSD had entered into such a relationship with Mr. Riggs and Mr. Dickson via its employment relationship with them. *See MacArthur II*, 391 F. Supp. 2d at 1011-12. Plaintiffs do not appear to argue that a consensual relationship was formed in any other manner.

There is no doubt that an employment relationship between two parties is contractual in nature. *See, e.g., Perry v. Woodward*, 199 F.3d 1126, 1133 (10th Cir. 1999) ("[T]he employment-at-will relationship encompasses sufficient contractual rights to support section 1981 claims for wrongful termination."); *Rackley v. Fairview Care Ctrs., Inc.*, 23 P.3d 1022, 1026 (Utah 2001) ("[A]n employment relationship entered into for an indefinite period of time is presumed to be at-will and gives rise to a contractual arrangement") In fact, the common law tort cause of action for interference with contractual relations encompasses interference with employment, even where the employment is at-will. *See Haddle*

v. Garrison, 525 U.S. 121, 126 (1998) ("The kind of interference with at-will employment relations alleged here is merely a species of the traditional torts of intentional interference with contractual relations and intentional interference with prospective contractual relations."). Consequently, Montana's consensual relationship exception applies to a nonmember who enters into an employment relationship with a member of the tribe.

But not just any consensual employment relationship will do. Rather, Supreme Court precedent clearly limits the regulatory authority of tribes at least that which is derived solely from their inherent sovereignty to the reservation's borders. See Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 (2001) ("An Indian tribe's sovereign power to tax whatever its derivation reaches no further than tribal land."); Strate, 520 U.S. at 446 ("Montana thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions . . .") (emphasis added); Montana, 450 U.S. at 565 ("To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations . . .") (emphasis added). The notion that inherent sovereignty ceases at the reservation's borders is consistent with the Court's statement in Wheeler that "the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." 435 U.S. at 326. It would simply strain credulity to hold that the Navajo Nation may exercise regulatory authority over any employer in the United States so long as the individual or entity employs an enrolled member of the tribe. Therefore, we hold that a tribe only attains regulatory authority based on the existence of a consensual employment relationship when the relationship exists between a member of the tribe and a nonmember individual or entity employing the member within the physical confines of the reservation.

Applying the foregoing principles to this case, the only Defendant arguably falling within the consensual relationship exception is SJHSD itself. SJHSD entered into contractual employment relationships with Mr. Riggs and Mr. Dickson, and they were employed at the Clinic within the exterior boundaries of the Navajo reservation. Mr. Riggs and Mr. Dickson did not enter into a contractual employment relationship with any other Defendant. While some of the Defendants admittedly played a tangential role in SJHSD's employment relationships with the two, none of the Defendants, other than SJHSD, entered into the type of consensual relationship with Mr. Riggs or Mr. Dickson sufficient to fall within the exception. In other words, it is self-evident that none of them entered into "commercial dealing, contracts, [or] leases" with either Mr. Riggs or Mr. Dickson. And being one's coworker or superior standing alone cannot possibly constitute the type of "other arrangements" the Supreme Court had in mind in Montana. If those relationships were sufficient, "the exception would swallow the rule." Atkinson Trading Co., 532 U.S. at 655.

Apart from finding that SJHSD fell within the consensual relationship exception, the district court also held that Reid Wood was subject to the regulatory authority of the Navajo Nation at least insofar as Mr. Riggs's defamation claim was concerned. ⁽⁸⁾ See MacArthur II, 391 F. Supp. 2d at 1014. The district court came to this conclusion because Mr. Wood "was a central character in the events . . . that form the factual basis for plaintiffs['] . . . employment-related claims," and because the Navajo district court did not clearly err in finding that Mr. Wood's characterization of Mr. Riggs's time card errors as fraudulent may make out an actionable defamation claim. See id. The primary fault with the district court's holding lies in the lack of a "central character" exception to the general presumption against the exercise of tribal regulatory authority over nonmembers. Moreover, hanging regulatory authority on the fact that Mr. Wood's statements may constitute actionable defamation places the cart before the horse. That a cause of action may successfully be asserted against Mr. Wood says nothing about the Tribe's ability to regulate Mr. Wood's activities in the first place. Without civil jurisdiction the cause of action is null and void, regardless of whether it might result in a successful judgment if there was jurisdiction. Properly applying Montana, it is clear that Mr. Wood did not enter into the type of consensual relationship

required for the Navajo Nation to obtain regulatory authority over himonly SJHSD, as the employer of Mr. Riggs and Mr. Dickson, arguably did.

Although at first blush it appears that SJHSD's consensual employment relationships with Mr. Riggs and Mr. Dickson fall within Montana's consensual relationship exception, this case is unique in that the consensual relationship at issue involves a political subdivision of the State of Utah, and it was entered into pursuant to an exercise of the police power on non-Indian land. Relying upon Hicks, SJHSD contends its status as a state entity removes it from Montana's first exception. In Hicks, Justice Scalia, writing for the majority, stated in a footnote that, "Read in context, an 'other arrangement' is clearly another private consensual relationship, from which the official actions in this case are far removed." 533 U.S. at 359 n.3. SJHSD seizes upon this statement and argues that an employment relationship between a member of a tribe and a governmental entity on non-Indian land (even within the exterior boundaries of the reservation) cannot meet Montana's first exception, even if a similar private employment relationship would.

SJHSD's argument finds strong support in Hicks. In her concurrence in that case, Justice O'Connor read the majority opinion as disavowing civil jurisdiction based on non-private consensual relationships. She further expressed reservation that the Court's disavowment created a per se rule that consensual relationships entered into between state governments and tribes, "such as contracts for services or shared authority over public resources," could no longer give rise to tribal civil jurisdiction. See id. at 393-94 (O'Connor, J., concurring). Justice Scalia responded in kind with the following:

The [Montana] Court . . . obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into. This is confirmed by the fact that all four of the cases in the immediately following citation involved private commercial actors. See Confederated Tribes, 447 U.S., at 152 (nonmember purchasers of cigarettes from tribal outlet); Williams v. Lee, 358 U.S., at 217 (general store on the Navajo reservation); Morris v. Hitchcock, 194 U.S. 384 (1904) (ranchers grazing livestock and horses on Indian lands "under contracts with individual members of said tribes"); Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905) (challenge to the "permit tax" charged by a tribe to nonmembers for "the privilege . . . of trading within the borders").

Id. at 372.

Justice Scalia is not the only one to have observed that the cases relied upon in support of Montana's consensual relationship exception dealt exclusively with private conduct. Three years prior to Hicks, the Ninth Circuit observed that all of the cases cited to support Montana's first exception "involve either direct regulation by a tribe of non-Indian activity on the reservation or lawsuits between a private party and the tribe or tribal members arising from an on-reservation transaction or agreement." County of Lewis v. Allen, 163 F.3d 509, 515 (9th Cir. 1998) (en banc). As a result of that observation, the en banc court held that an agreement between the State of Idaho and the Nez Perce Tribe did not qualify as a consensual relationship of the type giving rise to tribal regulatory authority. See id.

We too adhere to the distinction between private individuals or entities who voluntarily submit themselves to tribal jurisdiction and "States or state officers acting in their governmental capacity." The power to exercise regulatory authority over another independent sovereign on that sovereign's land, even where a consensual relationship is involved, closely resembles the "freedom independently to determine their external relations," which the tribes necessarily relinquished as a result of their dependent status. See Wheeler, 435 U.S. at 326. Thus, we hold, in the absence of congressional delegation, the tribes may not regulate a State qua State on non-Indian land⁽⁹⁾ (even within the exterior boundaries of the

reservation) based only on a consensual relationship between members of the tribe and the State.⁽¹⁰⁾

In the instant case, the employment relationships at issue involved two members of the Navajo Nation and SJHSD, a political subdivision of the State of Utah. SJHSD is strictly a creature of Utah law, see Utah Code Ann. 17A-2-1304 (1999), and nearly all of its board members were state employees. The employment relationships at issue were entered into exclusively in SJHSD's governmental capacity, and those relationships were part and parcel of SJHSD's duty to provide medical services to residents of San Juan County. See *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 679 F.2d 805, 810 (10th Cir. 1982) ("In its 'governmental capacity' a municipality acts as an arm of the state for the public good on behalf of the state rather than itself."). The provision of medical services is unquestionably an exercise of the police power. See *Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens.") (internal quotations omitted); see also *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 758 (1985) (explaining that a mandated-benefit law was a "valid and unexceptional exercise of the . . . police power" where "[i]t was designed in part to ensure that . . . less wealthy [Massachusetts] residents . . . would be provided adequate mental-health treatment should they require it"). Accordingly, the employment relationships between SJHSD and Mr. Riggs and Mr. Dickson were not "private consensual relationships" in any sense of the term and do not fall within the first Montana exception.

b. The Right to Self-Government Exception

This brings us to Montana's second exception. Again, the exception requires that "the conduct of non-Indians on fee lands within [the] reservation . . . has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana, 450 U.S. at 566. When viewed in isolation, the exception appears broad in scope. The Supreme Court has cautioned, however, that:

Read in isolation, the Montana rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." 450 U.S., at 564. Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them." Williams, 358 U.S., at 220. The Montana rule, therefore, and not its exceptions, applies to this case.

Strate, 520 U.S. at 459 (alterations in original). In framing the second exception, the Court also later added: "Tribal assertion of regulatory authority over nonmembers must be connected to th[e] right of the Indians to make their own laws and be governed by them." Hicks, 533 U.S. at 361.

The proper question in this case, then, is whether regulatory authority over Defendants' activities, with the exception of those of Mr. Atcitty, is needed to preserve the Navajo Nation's right to make their own laws and be governed by them. In regard to the County defendants, the district court accurately noted that the Navajo district court "did not find facts showing conduct on the part of any County defendant that threatened or had some direct effect on the political integrity, the economic security, or the health or welfare of the Navajo Nation." MacArthur II, 391 F. Supp. 2d at 1007. The Navajo district court did not find (and neither do we) that the County defendants including San Juan County, the San Juan County Commissioners, County Attorney Halls, and County Administrator Bailey had any role in the complained of activities, other than that they exercised some control over, and provided advice to, SJHSD. Additionally, Mr. Bailey had some role in Plaintiffs' grievance process she sent grievance decision letters and served as the grievance hearing officer. All of these actions, however, relate

exclusively to the governance of SJHSD; they in no way impact the Navajo Nation's ability to make its own laws and be governed by them.

SJHSD's activities also do not affect the Navajo Nation's right to self-government. Despite Plaintiffs' attempts to make more of it, this case essentially boils down to an employment dispute between SJHSD and three of its former employees, two of whom happen to be enrolled members of the Navajo Nation. While the Navajo Nation undoubtedly has an interest in regulating employment relationships between its members and non-Indian employers on the reservation, that interest is not so substantial in this case as to affect the Nation's right to make its own laws and be governed by them. This is particularly evident here, when only two members of the Nation were involved and the employment relationships at issue were carried out on non-Indian land. The right at issue in this case is the Navajo Nation's claimed right to make its own laws and have others be governed by them, not the right to self-government.

We are therefore left with Ms. Lauren Schafer (SJHSD Personnel Director of Nursing), members of SJHSD's board, and Mr. Wood. Plaintiffs' only complaint about Ms. Schafer is that she failed to do enough to help them in their conflict with SJHSD and Mr. Wood. Moreover, in its orders, the Navajo district court stated only that Ms. Schafer wrote a letter critical of Ms. Singer and that she testified she had discovered only one piece of evidence as to Ms. Singer's intent to commit time card fraud. Failing to help others may violate the "golden rule," but it in no way constitutes an affront to the Navajo Nation's self-governance; and Ms. Schafer's actions vis--vis Ms. Singer are irrelevant due to Ms. Singer's lack of membership in the tribe. Next, because the Navajo district court's orders make no mention of the individual members of SJHSD's board and Plaintiffs make no attempt to explain how their activities pose a threat to the tribe's right to make its own laws, it follows that the individual members of the board fall squarely within Montana's general rule. Finally, as previously detailed, the federal district court held that the Navajo Nation possessed authority over Mr. Wood's alleged defaming of Mr. Riggs. To be sure, that alleged defamation may have had a negative impact on Mr. Riggs individually, but based on the record before us we fail to see how it, or any other of Mr. Wood's actions, negatively affected the tribe as a whole or its ability to self-govern.

In sum, with the arguable exception of Mr. Atcitty, the Navajo Nation did not possess regulatory authority over any of Defendants' activities. Because there exists no adjudicatory authority in the absence of regulatory authority, Strate, 520 U.S. at 453 ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."), the Navajo district court did not possess jurisdiction over Plaintiffs' claims unrelated to the activities of Mr. Atcitty.

D. Discretionary Enforcement With Respect to Mr. Atcitty

Although the Navajo district court arguably possessed regulatory authority over Mr. Atcitty as a member of the Navajo Nation, as previously emphasized, the decision whether to enforce the tribal court orders in regard to Mr. Atcitty lies entirely within our discretion. Under the limited circumstances of this case, we choose not to enforce the tribal court orders in this respect.⁽¹¹⁾ Several considerations guide our decision.

First, as the district court observed, Utah Navajo Health Systems's assumption of control over the operations of the Clinic and Plaintiffs' employment there mooted much, though not all, of the relief afforded in the preliminary injunction orders. Also, while we are not required to refrain from enforcing interlocutory foreign judgments, see Remington Rand Corp. v. Bus. Sys. Inc., 830 F.2d 1260, 1266 (3d Cir. 1987) ("[J]udicial acts need not always be final judgments to be granted comity.") (citing In re Colorado Corp., 531 F.2d 463, 469 (10th Cir. 1976)); Restatement (Second) Conflict of Laws 92 and cmt. c, 98 (1971), the amorphous and incomplete nature of the orders at issue renders them nearly

incapable of enforcement. Much of the relief that is not now moot has not been reduced to a sum certain; consequently, determining what portions of the orders are amenable to enforcement would be impracticable.

Third, despite the fact that Mr. Atcitty's status as an enrolled member of the Navajo Nation arguably imbued the Navajo district court with civil jurisdiction, the activities for which he was sued have little or nothing to do with his status as an enrolled member of the tribe. Normally the lack of a nexus between tribal membership and the claims at issue will not necessarily pose an impediment to enforcement, but here the lawsuit against Mr. Atcitty stems completely from his status as a government employee of the State of Utah. Thus, the same considerations which lead us to conclude that the tribes do not possess jurisdiction over States qua States on state land lead us to conclude that enforcement against Mr. Atcitty should be refused. Finally, it appears that Mr. Atcitty played an extremely minor role in the incidents at issue. His role was confined to membership on SJHSD's board, and he is not even mentioned by name in any of the preliminary injunction orders. Thus, it would be inequitable to enforce the Navajo district court's extremely broad orders against him alone.⁽¹²⁾

In sum, we REVERSE the federal district court insofar as it issued a declaratory judgment that the Navajo Nation possessed civil jurisdiction over the employment-related claims of Mr. Riggs and Mr. Singer against SJHSD. We also REVERSE the district court insofar as it issued a declaratory judgment that the Navajo Nation possessed civil jurisdiction over Mr. Riggs's defamation claim against Reid Wood. We VACATE the district court's issuance of a declaratory judgment that the Navajo Nation possessed civil jurisdiction over Plaintiffs' claims against Roger Atcitty. Finally, we AFFIRM the district court's judgment refusing to enforce the Navajo district court's orders.

FOOTNOTES

Click footnote number to return to corresponding location in the text.

¹ In a separate order, the district court dismissed Plaintiffs' claims against Truck Insurance and R. Dennis Ickes on grounds that the Navajo Nation did not possess regulatory authority over their activities. We affirmed that decision on appeal. See MacArthur I, 309 F.3d at 1222-25. Plaintiffs dedicate significant portions of their brief on appeal arguing why those claims should not have been dismissed. Under the law of the case doctrine, however, we are not free to reconsider the district court's dismissal of those claims or the prior panel's subsequent affirmance of that decision. See Prairie Band Potawatomi Nation v. Wagoner, 476 F.3d 818, 823 (10th Cir. 2007).

² We note that Plaintiffs' briefing in this case has in common many of the problems identified with regard to the briefing in appeal 05-4317. Nonetheless, we reach the merits because we are able to sufficiently decipher Plaintiffs' arguments, and those arguments are non-frivolous enough to warrant full review and response.

³ Although the orders at issue did award attorney's fees, back-pay, and other monetary awards, the amount of those awards was never reduced to a sum certain and thus the orders are not final with respect to those awards. See Harbert v. Healthcare Servs. Group, 391 F.3d 1140, 1145 (10th Cir. 2004) ("[A]n order that determines liability but leaves damages to be calculated is not final.").

⁴ In this case, Plaintiffs argue that federal law has not divested the Navajo Nation of its civil jurisdiction over Defendants' activities. In fact, they allege federal law has granted it such jurisdiction and seek a declaratory judgment saying as much. As a result, we agree with the district court's observation that "the

action . . . is one arising under federal law because it turns on substantial questions of federal law." MacArthur II, 391 F. Supp. 2d at 987-88 (internal quotations and modifications omitted); see also Superior Oil Co. v. United States, 798 F.2d 1324, 1329 (10th Cir. 1986) ("[I]n cases encompassing the federal question whether a tribal court has exceeded its lawful limits of jurisdiction involving an exercise of civil subject-matter jurisdiction . . . the federal district court is empowered to review a tribal court decision under 28 U.S.C. § 1331."); Wilson v. Marchington, 934 F. Supp. 1176, 1178 (D. Mont. 1995), reversed on other grounds at 127 F.3d 805 (9th Cir. 1997). This is especially true considering the prior panel's holding that the Montana analysis is a threshold issue. See MacArthur I, 309 F.3d at 1226-27.

5. Under Utah law, foreign judgments not entitled to full faith and credit may only be enforced under the doctrine of comity. See Mori v. Mori, 931 P.2d 854, 856 (Utah 1997) (citing Hilton).

6. At oral argument, and in a motion for summary disposition filed since, Plaintiffs primarily relied upon a Bureau of Indian Affairs contract with the Navajo Nation in arguing that the jurisdiction of the Navajo courts has been expanded and Montana no longer controls. We have carefully reviewed the copy of that contract provided by Plaintiffs, see Aplt. App. at 178-92, and find no mention of Montana, the inherent sovereignty of the Navajo Nation, or the jurisdiction of its courts, and thus Plaintiffs' reliance on that contract is misguided.

7. Even assuming the rule laid down in Strate were still operable, Montana would nevertheless apply because Plaintiffs have made no showing that the Navajo Nation could "assert a landowner's right to occupy and exclude" others from the trust land on which the Clinic sits. See 520 U.S. at 456.

8. Both SJHSD and Mr. Wood have cross-appealed the district court's judgment holding that the Navajo Nation possessed regulatory authority over each of them.

9. When we use the term "non-Indian land," we use it in the sense that the Supreme Court does: The land involved is non-Indian fee land or akin to non-Indian fee land in that the tribe may not "assert a landowner's right to occupy and exclude" others from the land. See Strate, 520 U.S. at 456.

10. As a result of our limited holding, we need not decide whether Montana's first exception encompasses consensual agreements between tribal members and governmental entities acting in a proprietary, rather than a governmental, capacity. We also express no opinion regarding the ability of the tribes to exercise regulatory authority over States qua States when the regulated activity occurs on Indian land.

11. As a result of our refusal to enforce the Navajo district court's orders on other grounds, the portion of Mr. Atcity's cross-appeal arguing that the Navajo Nation did not possess regulatory authority over him is moot. Nonetheless, we vacate that portion of the federal district court's decision issuing a declaratory judgment that the Navajo district court possessed jurisdiction over Mr. Atcity.

12. Because we decide the case on alternative grounds, we need not address the parties' arguments regarding Defendants' sovereign immunity.

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No. SC-CV-33-07

SUPREME COURT OF THE NAVAJO NATION

Ford Motor Company
Petitioner,

v.

Kayenta District Court,
Respondent,

and concerning,
Joe and Mary Todecheene,
Real Parties in Interest.

**ORDER DENYING MOTION TO AMEND AMICUS BRIEF AND APPENDIX
AND JOIN PARTIES IN SR-CV-162-99**

Before YAZZIE, Chief Justice, and SHIRLEY and YELLOWHAIR, Associate Justices.

Original proceeding concerning Kayenta District Court Cause No. KY-191-2000, the Honorable Leroy Bedonie, presiding.

Richard Derevan, Costa Mesa, California, and Lawrence Ruzow, Window Rock, Navajo Nation, for Petitioner; Richard George, Tuba City, Navajo Nation, and Edward Fitzhugh, Tempe, Arizona, for Real Party in Interest; Louis Denetsosie and Luralene Tapahe, Window Rock, Navajo Nation, for Amicus Navajo Nation; and Susan Rose, pro se, Sandy, Utah, Amicus.

This matter comes before the Court on Amicus Susan Rose's Motion to amend her amicus brief and to join parties from *Singer v. San Juan County*, Shiprock District Court Case No. SR-CV-162-99 in the present writ proceeding. Based on the Court's review of the Motion and responses from Ford Motor Co. and Truck Insurance Co. and San Juan County and Health District, the Court DENIES the motion.

Amicus cites no authority for this Court to join parties in a pending Navajo district court case to a pending Supreme Court writ action through an amicus brief. Indeed there is no such authority. The Court approved the filing of an amicus brief, not

joinder of an entirely different set of parties to this case. Under our law, an amicus is a “friend of the court” that has an interest in a pending case and provides input to assist the Court in resolving that case, *see Johns v. Leupp Schools, Inc.*, 7 Nav. R. 120, 121-22 (Nav. Sup. Ct. 1995); *In re Board of Election Supervisors*, 6 Nav. R. 302, 304 (Nav. Sup. Ct. 1990), not a party that seeks to argue the merits of an entirely different case. There are several ways to properly bring a district court case before the Supreme Court: 1) an appeal, 2) a writ, or 3) a certified questions submitted by the trial court. *See Navajo Rules of Civil Appellate Procedure* 7, 26; *Navajo Nation v. McDonald*, 6 Nav. R. 204, 205 (Nav. Sup. Ct. 1990) (discussing requirements for accepting certified questions from trial courts). If and when the case is properly before the Court under any of these actions, the Court can, in its discretion, consolidate it with another pending case if the legal issues are the same or resolution of one necessarily resolves the other. *See, e.g., Thinn v. Navajo Generating Station*, No. SC-CV-25-06, slip op. at 3 (Nav. Sup. Ct. October 19, 2007) (consolidated appeals); *Cedar Unified School Dist. v. Navajo Nation Labor Comm’n*, No. SC-CV-53-06, slip op. at 1 (Nav. Sup. Ct. November 21, 2007) (consolidated writs). As Amicus has attempted none of these ways to bring the *Singer* case before this Court, this Court cannot join that case to this one. The Court therefore denies the request to join the parties.

As the *Singer* parties will not be joined, the Court also denies the request to amend the amicus brief and appendix. The amendments to the brief argue the merits of the *Singer* case, and amendments to the appendix are relevant to the *Singer* case. There is no purpose to allowing the amendments when the Court has denied the joinder of the *Singer* parties. Therefore, the motion to amend is denied.

Dated this ____2 day of April, 2008.

_____/s/_____Herbert Yazzi_____
Chief Justice

Associate Justice Shirley

_____Telephonically Approved_____
Associate Justice Yellowhair

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

* * * * *

DR. STEVEN MACARTHUR, et al.,	)	Civil No. 2:00-CV-584BSJ
	)	
Plaintiffs,	)	MEMORANDUM OPINION &
	)	ORDER RE: POST-MANDATE
vs.	)	MOTIONS
	)	
SAN JUAN COUNTY, et al.,	)	
	)	
Defendants.	)	
	)	

FILED CLERK, U.S. DISTRICT COURT July 2, 2008 (2:46pm) DISTRICT OF UTAH

* * * * *

On July 18, 2007, the United States Court of Appeals for the Tenth Circuit decided the parties' appeals from this court's October 12, 2005 Memorandum Opinion and Order denying federal court enforcement of certain interlocutory orders entered by the Navajo tribal court in favor of plaintiffs Singer, Riggs and Dickson, as well as this court's December 16, 2005 Memorandum Opinion & Order denying their motion for reconsideration or relief from judgment. The clerk of this court received the court of appeals' mandate on August 27, 2007. On February 19, 2008, the United States Supreme Court denied the petition of Singer, Riggs and Dickson for a writ of certiorari. *See MacArthur v. San Juan County*, 391 F. Supp. 2d 895 (D. Utah), *reconsideration denied*, 405 F. Supp. 2d 1302 (D. Utah 2005), *judgment reversed in part, vacated in part, affirmed in part*, 497 F.3d 1057 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 1229 (2008).

Ordinarily, the denial of certiorari signals the end of the appellate process and often, the end of the litigation itself.

In this case, the San Juan County defendants filed a motion on March 24, 2008 to enjoin further tribal court proceedings and for sanctions (dkt. no. 959), alleging that plaintiffs Singer, Riggs and Dickson were seeking joinder in proceedings before the Navajo Supreme Court in another case, *Ford Motor Company v. Kayenta District Court*, No. SC-CV-33-07, in order to raise the question of tribal court jurisdiction and the enforceability of the interlocutory tribal court orders previously entered in their favor, and urging the Navajo Supreme Court to ignore the rulings of the Tenth Circuit and this court in this case. Other defendants soon joined in that motion (dkt. nos. 965, 971), and plaintiffs Singer, Riggs and Dickson filed a series of motions and memoranda in response (dkt. nos. 962, 963, 967, 968, 969, 970, 977, 978, 979).

In the interim, on April 2, 2008, the Navajo Supreme Court denied the plaintiffs' motion for joinder in the *Ford Motor* proceeding, thus affording the plaintiffs no further opportunity to relitigate their jurisdictional issues in that forum. (*See Order Denying Motion to Amend Amicus Brief and Appendix and Join Parties in SR-CV-1672-99*, dated April 2, 2008, annexed as an exhibit to Truck Insurance's Motion to Join the San Juan County Defendants' Motion to Enjoin Plaintiffs and Their Counsel from Further Proceedings in the Navajo Tribal Court and for Sanctions, filed April 9, 2008 (dkt. no. 971).) The plaintiffs then filed a Rule 60(b) motion for relief from the effect of the Tenth

Circuit's July 18th decision, asking this court "to alter the holding of its 2005 decision, and grant, under the Plaintiffs' proffered analysis, all relief . . . by issuing an order enforcing all the Navajo Court orders, leaving any problems with mootness or other issues for defendants to work out with the Navajo Court." ("Plaintiffs Rule 60 motion Memorandum in support," filed April 21, 2008 (dkt. no. 982), at 4.)

The pending motions were heard on May 12, 2008. Having reviewed the motions, memoranda and exhibits submitted by the parties, and having heard the arguments of counsel, the court ruled that plaintiffs Singer, Riggs and Dickson and their attorneys shall be individually enjoined from proceeding in any other forum to relitigate the questions of jurisdiction, immunity and enforceability of tribal court orders already decided by the court of appeals in its July 18th ruling. (*See* Minute Entry, dated May 12, 2008 (dkt. no. 1005).) The defendants' motion to enjoin further proceedings was thus granted to that extent. The court denied the defendants' request for sanctions. The court also denied the plaintiffs' Rule 60(b) motion. (*Id.*)

Counsel for the San Juan County defendants submitted a proposed form of order reflecting the court's May 12th rulings. Plaintiffs' counsel filed a forty-one page written objection to that proposed order, rearguing in detail the plaintiffs' jurisdictional theories and the grounds for relief from the judgment of the court of appeals already asserted by their Rule 60(b) motion, with additional references intended to place the proposed order "in perspective of this Court and its history." (Plaintiffs' Objection to the Proposed

Order, filed May 29, 2008 (dkt. no. 993) (“Pltfs’ Obj.”), at 1.) Defendants’ counsel filed responses to the plaintiffs’ objection (dkt. nos. 994, 995).

Having reviewed the proposed form of order, plaintiffs’ objections thereto, and the defendant’s responses, the court has chosen to elaborate further upon the specific rulings made at the May 12th hearing and the reasons therefor in this Memorandum Opinion & Order.

Plaintiffs’ Objections to the Proposed Order

Plaintiffs’ counsel acknowledges the substance of the Tenth Circuit’s ruling in this case, namely, that the Navajo tribal court lacked subject matter jurisdiction over the defendants named in the interlocutory tribal court orders that Singer, Riggs and Dickson sought to enforce in this court. Counsel’s objection to the proposed order—and indeed, many of plaintiffs’ recent submissions to this court—raises a more fundamental question: *how is it possible for the federal courts to diminish Navajo tribal court authority over non-Indians, particularly in the context of litigation in which the Navajo Nation is not a party?* Counsel insists that neither this court nor the court of appeals has addressed this question in the opinions already issued in this case, and that the answer to this question casts serious doubt upon the validity and binding effect of the Tenth Circuit’s judgment. (Pltf’s Obj. at 6, 25-27.) If anything, plaintiffs argue, the legal status of the Navajo Nation, the federal government’s fiduciary relationship with the Navajo Nation, and principles of *res judicata* require that the federal courts summarily enforce orders of the

Navajo tribal courts without further examination or inquiry. (*Id.* at 17-35.)

The plaintiffs' view of the governing legal framework was aptly summarized by Felix S. Cohen in the 1942 edition of the *Handbook of Federal Indian Law*:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States, and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

Felix S. Cohen, *Handbook of Federal Indian Law* 123 (1942) (footnotes omitted); *accord Powers of Indian Tribes*, 55 I.D. 14, 22 (1934), 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974* 445, 449.

Plaintiffs' counsel canvasses the treaties and statutes defining the legal relationship between the United States and the Navajo Nation and finds nothing expressly delimiting the jurisdiction of the Navajo tribal courts to adjudicate disputes involving tribal members and non-Indians arising within the boundaries of the Navajo Reservation. General statutes such as the Indian Civil Rights Act speak of the rights of *persons*—not solely tribal members—in dealing with tribal governments, suggesting that the Navajo Nation has authority to act in relation to *all* persons within its territorial jurisdiction in the enforcement of its own laws. More recent legislation, such as the Indian Tribal Justice Act of 1993 and the Indian Tribal Justice Technical and Legal Assistance Act of 2000, was

framed in terms firmly supportive of tribal self-government and effective tribal court systems, and recognizes “tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights,” 25 U.S.C.A. § 3601(6) (2001), making no distinction between tribal and non-Indian litigants.

Yet the answer to the plaintiffs’ more fundamental question lies beyond the “network” of specific Navajo treaties and federal statutes relied upon by plaintiffs’ counsel in support of her argument, or the formulation articulated by Cohen years ago that likewise was rooted in the language of treaties and statutes. As this court previously explained, at least where tribal authority over non-Indians is concerned, the Supreme Court discarded the elegant simplicity of Cohen’s analysis in favor of an amorphous legal standard that finds its source not in treaty or statute, but in abstract notions of intergovernmental dependency and subservience.

The Supreme Court and the Implicit Divestiture of Indian Tribal Authority

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Supreme Court held that all Indian tribes lack inherent jurisdiction to try and punish non-Indians for criminal offenses committed within reservation boundaries because “Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers ‘*inconsistent with their status.*’” *Id.* at 208 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976) (emphasis supplied by the Court)). ““Indian law,”” *Oliphant* explained,

draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text *form the backdrop for the intricate web of judicially made Indian law*, cannot be interpreted in isolation but *must be read in light of the common notions of the day and the assumptions of those who drafted them*. . . .

. . . .
By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a “want of fixed laws [and] of competent tribunals of justice.” H. R. Rep. No. 474, 23d Cong., 1st Sess., 18 (1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

Id. at 210.¹ After *Oliphant*, “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or *by implication as a necessary result of their dependent status*.” *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (emphasis added). This “implicit divestiture” theory bears most heavily upon the scope of Indian tribal authority over non-Indians. Indeed, “The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.” *Id.* at 326.

For the last thirty years, then, the *Oliphant* Court’s “intricate web of judicially made Indian law” has included this implicit divestiture theory, the full scope and extent of

¹*Oliphant* insisted that the implied divestiture of tribal authority over non-Indians comports with “the commonly shared presumption of Congress, the Executive Branch, and lower federal courts,” at least as the Court was able to discern that presumption. 435 U.S. at 206. Cf. Matthew L.N. Fletcher, *The Supreme Court and the Rule of Law: Case Studies in Indian Law*, 55 Fed. Law. 26, 31 (Mar./Apr. 2008) (noting that *Oliphant* “relied on the legislative history of congressional bills that were never enacted and opinions of the Interior Department’s solicitor that had been withdrawn.”)

which the Court itself still struggles to delineate. *See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, ___ U.S. ___, No. 07-411 (decided June 25, 2008). And it is this “intricate web of judicially made Indian law” that holds the answer to the plaintiffs’ fundamental question concerning the federal courts and the Navajo Nation’s authority over non-Indian litigants.

While *Oliphant* held the implicit divestiture of tribal criminal jurisdiction over non-Indians to be complete, the Court has expressly rejected the assertion that Indian tribes had likewise been completely divested of inherent *civil* jurisdiction over non-Indians within reservation boundaries. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 854-55 (1985).

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee*, *supra*, at 223; *Morris v. Hitchcock*, 194 U.S. 384; *Buster v. Wright*, 135 F. 947, 950 (CA8); *see Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 -154. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *See Fisher v. District Court*, 424 U.S. 382, 386 ; *Williams v. Lee*, *supra*, at 220; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128 -129; *Thomas v. Gay*, 169 U.S. 264, 273.

Montana v. United States, 450 U.S. 544, 565-566 (1981) (footnote omitted). “But tribes do not, *as a general matter*, possess authority over non-Indians who come within their

borders: ‘[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.’ *Montana*, at 450 U. S., at 565.” *Plains Commerce Bank*, slip op. at 9 (emphasis added).

As we explained in *Oliphant v. Suquamish Tribe*, 435 U. S. 191 (1978), the tribes have, by virtue of their incorporation into the American republic, lost “the right of governing . . . person[s] within their limits except themselves.” *Id.*, at 209 (emphasis and internal quotation marks omitted).

This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember’s activity occurs on land owned in fee simple by non-Indians—what we have called “non-Indian fee land.” *Strate v. A–1 Contractors*, 520 U. S. 438, 446 (1997) (internal quotation marks omitted).

Id.

At this point, *Oliphant*, *Montana*, and their progeny have drastically limited Indian tribal civil authority over non-Indian activities within reservation boundaries. In this case, the Tenth Circuit read those cases as placing the on-reservation employment activities of the San Juan Health Services District beyond the civil regulatory and adjudicative authority of the Navajo Nation, and it held that the Navajo district court lacked subject-matter jurisdiction over the plaintiffs’ claims against the Health District and its officers, directors and employees as well as various San Juan County officials also named as defendants. *MacArthur*, 497 F.3d at 1072-76. Plaintiffs’ counsel now seeks to undo that ruling by challenging the authority of the federal courts to decide the jurisdictional issue in the first place.

Tribal Jurisdiction Does Not Present a “Political Question”

Plaintiffs’ counsel has repeatedly asserted that the scope of the jurisdiction of the Navajo tribal courts presents a non-justiciable “political question” committed to the Legislative and Executive Branches of the federal government. Yet she points to no pertinent legal authority that lends support to that view. To the contrary, plaintiffs’ counsel has repeatedly cited to *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), which observed that the Supreme Court “has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians.” *Id.* at 851. She has also insisted that the question of Navajo jurisdiction in this case be examined under a “*National Farmers* analysis.” *See id.* at 855-56 (“[T]he existence and extent of a tribal court’s jurisdiction will require a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.”).

Certainly the “network” of specific Navajo treaties and federal statutes relied upon by plaintiffs’ counsel bears upon the question of the scope of Navajo tribal civil authority, as *National Farmers* suggests. But as the Supreme Court recently explained, much of the existing legal authority defining the subject-matter jurisdiction of Indian tribal courts over non-Indian litigants consists of “‘judicially made’ federal Indian law,” that is, federal case law precedent representing a species of “federal common law”—“which ‘common law’ federal courts develop as ‘a “necessary expedient” when Congress has not “spoken to a

particular issue.”” *United States v. Lara*, 541 U.S. 193, 207 (2004) (quoting *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 233-237 (1985) (quoting “*Milwaukee v. Illinois*, 451 U.S. 304, 313-315 (1981)) (emphasis supplied by Court)).²

That plaintiffs’ counsel fundamentally disagrees with the Supreme Court’s reading of the pertinent treaties and statutes does not deprive the Court’s case law of its binding precedential effect upon the lower federal courts, including the Tenth Circuit and this court. Nor may we overrule or simply ignore what the Supreme Court has said.

The Navajo Nation is Not a “Necessary Party” to the Determination of the Jurisdictional Issue

Plaintiffs’ counsel queries how the subject-matter jurisdiction of the Navajo courts may be determined in the context of federal civil litigation to which the Navajo Nation itself is not a party, pointing to the Tenth Circuit’s recent opinion in *Miner Electric Co., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007).

In *Miner Electric*, non-Indian plaintiffs sued the Muscogee (Creek) Nation in federal district court, challenging a civil forfeiture order issued by the tribal court and seeking declaratory and injunctive relief against its enforcement. The tribe moved to

²In essence, plaintiffs’ counsel disputes the *Lara* Court’s premise that Congress has not spoken as to the “particular issue” of Indian tribal authority over non-members, thus leaving room for the development of “federal common law” in *Oliphant*, *Montana*, and later cases. Plaintiffs insist that Congress has already spoken, and that the pertinent federal treaties and statutes affecting the Navajo Nation recognize—and indeed *mandate*—that the Navajo Nation exercise full civil authority “equally over Indian[s] or non-Indians, on all lands within its borders.” (Pltfs’ Obj. at 34.) This is plainly not a frivolous position, but at least since *Oliphant* in 1978, it remains a dissenting view. Cf. *Oliphant*, 435 U.S. at 212 (Marshall, J. & Burger, C.J., dissenting) (“In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation.”)

dismiss, raising the bar of tribal sovereign immunity. The Tenth Circuit agreed with the tribe, holding that “in an action *against an Indian tribe*, we conclude that § 1331 will only confer subject matter jurisdiction where another statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its immunity.” 505 F.3d at 1011 (emphasis added). At the same time, the court noted that tribal sovereign immunity does not extend to bar declaratory or injunctive relief against individual tribal officers, citing *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 575 (10th Cir.1984) (ruling that tribal officer defendants were not protected by the tribe’s immunity and that the suit challenging the validity of certain tribal ordinances could go forward against them).

Tenneco involved two different aspects of an Indian tribe’s “sovereignty”: its immunity from suit and the extent of its power to enact and enforce laws affecting non-Indians. But it does not stand for the proposition, as the Miner parties suggest, that an Indian tribe cannot invoke its sovereign immunity from suit in an action that challenges the limits of the tribe’s authority over non-Indians. On the contrary, we held in *Tenneco* that the tribe was immune from suit. *See id.* at 574. Here, because the Miner parties named only the Nation itself as a defendant, we do not reach the question whether any of the Nation’s officials would be subject to suit in an action raising the same claims.

Miner Electric, 505 F.3d at 1012. Nothing in *Miner Electric* or *Tenneco* suggests that a tribe is a necessary party to any federal court proceeding testing the limits of an Indian tribe’s authority over non-Indians, as plaintiffs’ counsel now contends. (See Pltfs’ Obj. at 20-22 (reading *Miner Electric* to say that “Federal Courts have no subject matter jurisdiction to limit Tribal authority via the federal question statutes, save if the Nation is

a party and waives its sovereignty”).) Nor does it deny due process to decide the jurisdictional issue in the tribe’s absence.³

Seeking Enforcement of Tribal Court Orders Raises the Issue of Tribal Jurisdiction as a “Federal Question”

By bringing a civil action in this court seeking enforcement of the Navajo district court’s interlocutory orders, plaintiffs Singer, Riggs and Dickson invoked the federal question jurisdiction of this court under 28 U.S.C. § 1331, including the authority to examine the subject-matter jurisdiction of the Navajo district court over the named non-Indian defendants. As the court of appeals explains,

Plaintiffs also argue that we have no power to do anything other than enforce the Navajo district court’s orders. In other words, once the tribal court issued its preliminary injunction orders and Plaintiffs arrived at federal court to enforce them, the jurisdiction of the federal courts is limited to enforcement, which is mandatory on our part. This argument misunderstands federal court jurisdiction and the discretion we possess under the doctrine of comity. The question of the regulatory and adjudicatory authority of the tribes—a question bound up in the decision to enforce a tribal court order—is a matter of federal law giving rise to subject matter jurisdiction under 28 U.S.C. § 1331. *See Nat’l Farmers Union*, 471 U.S. at 852, 105 S.Ct. 2447; *Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997).

MacArthur, 497 F.3d at 1066 (footnote omitted); *see also Superior Oil Co. v. United States*, 798 F.2d 1324, 1329 (10th Cir. 1986) (“[I]n cases encompassing the federal

³Most recently, in *Plains Commerce Bank*, the Supreme Court determined the enforceability of a tribal court judgment in the context of a federal declaratory judgment proceeding in which the tribe itself was not joined as a party. The Cheyenne River Sioux Tribe participated as an *amicus curiae* before the court of appeals, but was not called upon to waive its tribal sovereign immunity in order for the issue of tribal subject matter jurisdiction to be decided by the federal courts.

question whether a tribal court has exceeded its lawful limits of jurisdiction involving an exercise of civil subject-matter jurisdiction . . . the federal district court is empowered to review a tribal court decision under 28 U.S.C. § 1331.”); *Plains Commerce Bank*, slip op. at 5 (noting that “whether a tribal court has adjudicative authority over nonmembers is a federal question. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U. S. 9, 15 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U. S. 845, 852–853 (1985). If the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void.”).⁴

Even assuming that the Navajo district court’s orders could be enforced in this proceeding as a matter of comity,

recognition of a tribal court judgment *must* be refused where one of two circumstances exist. First, comity must not be granted where the tribal court lacked either personal or subject matter jurisdiction. . . . Second, a tribal court judgment must not be enforced where the party against whom enforcement was sought was not afforded due process of law. . . .

Id. at 1067 (emphasis in original; citations omitted).⁵ “In this case,” the *MacArthur* panel concluded, “we *must* refrain from enforcing much of the Navajo district court’s orders

⁴Plaintiffs’ counsel queries “the source of Constitutional authority for an Article III Court” to limit the civil authority of an Indian tribe, as in the Tenth Circuit’s ruling in this case. (Pltfs’ Obj. at 16.) Given the fact that “whether a tribal court has adjudicative authority over nonmembers is a federal question,” *Plains Commerce Bank*, slip op. at 5, the source of Constitutional authority to decide that question is to be found in Article III itself: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[.]” U.S. Const., art. III, § 2.

⁵*Cf.* Robert Laurence, *The Role, If Any, for the Federal Courts in the Cross-Boundary Enforcement of Federal, State and Tribal Money Judgments*, 35 Tulsa L.J. 1 (1999).

because that court lacked subject matter jurisdiction (i.e. adjudicatory authority) over nearly all of Defendants' activities." *Id.* (emphasis in original).

Plaintiffs raised a justiciable federal question concerning Navajo civil jurisdiction by seeking to enforce Navajo court orders in a federal district court. That federal question was ultimately decided by the court of appeals.

The Navajo Courts are Not 'Executive Agreement Claims Settlement Courts'

Pointing to the Supreme Court's recent decision in *Medellin v. Texas*, ___ U.S. ___, 128 S. Ct. 1346 (decided March 28, 2008), plaintiffs' counsel asserts that by virtue of the Navajo Nation's contract with the Bureau of Indian Affairs concerning the tribe's judicial program, the Navajo courts enjoy the status of "executive agreement claims settlement courts" whose "acts are entitled to full force and effect" in the courts of the United States. (Pltfs' Obj. at 17-18, 22-24.) Plaintiffs do not identify any other such tribunals, and what the label may signify remains unclear.⁶

The gist of the assertion seems to be this: plaintiffs posit that besides providing financial assistance to the Navajo Nation in aid of its tribal court system, the BIA contract itself mandates that within its reservation boundaries, the Navajo Nation must exercise

⁶*Medellin* does not refer to "executive agreement claims settlement courts." The Court discusses "the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals," but does so in terms of "[t]he Executive's narrow and strictly limited authority" in that regard, without reference to claims settlement courts or other tribunals. 128 S. Ct. at 1371, 1372 (citing *American Ins. Assn. v. Garamendi*, 539 U. S. 396, 415 (2003); *Dames & Moore v. Regan*, 453 U. S. 654, 679-680 (1981); *United States v. Pink*, 315 U. S. 203, 229 (1942); and *United States v. Belmont*, 301 U. S. 324, 330 (1937)). *Medellin* held that a decision of the International Court of Justice was not automatically or directly enforceable as binding federal domestic law in state court proceedings involving criminal defendants who are foreign nationals. How this ruling bears upon the issues now raised by plaintiffs' counsel remains a mystery.

general civil jurisdiction equally over Indians and non-Indians alike —displacing the general rule of *Montana* that, absent a treaty or statute, Indian tribes generally lack authority to regulate the activities of nonmembers within those boundaries. (Pltfs’ Obj. at 34-35.) Indeed, the plaintiffs assert that the BIA contract “is a new relationship between the United States and the Navajo Nation” that “alters Article III authority under Article VI of the Constitution,” presumably referring to the Supremacy Clause, and that “a judicial doctrine . . . must bow to an Article II, sovereign to sovereign, . . . government to government, binding Article VI, ‘executive agreement’ . . .” (*Id.* at 17-18.)

This assertion misses a subtle but critically important distinction: contracts *make law* between the parties in the sense that they create promissory obligations and corresponding rights to performance that are legally enforceable in the courts in the event of a breach. But contracts do not have any *legislative* effect, in the sense of making new legal rules of general application or altering the substantive fabric of the law itself. In this instance, the pertinent legislation is the Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. §§ 450 *et seq.*, which authorizes the making of federal contracts with Indian tribes for a variety of purposes, including the development of more effective tribal court systems. Pursuant to that legislation, the Bureau of Indian Affairs makes contracts with Indian tribes for the funding of social services, such as court services, in fulfillment of the President’s constitutional responsibility to “take Care that the Laws be faithfully executed.” U.S. Const., Art. II, §3.

But as *Medellin* recently pointed out, “This authority allows the President to execute the laws, not make them.” 128 S. Ct. at 1372.

The court has reviewed the copies of the Navajo court program contracts previously submitted by counsel and finds nothing within the four corners of those documents that suggests that the Executive Branch intended to make anything other than a *contract*. The documents give no indication of any administrative rulemaking consistent with the Administrative Procedure Act. Nor have they been ratified by the Senate, as would be required of a federal treaty. They make no mention of any departure from *Montana* or any other judicial precedent dealing with tribal jurisdiction over non-members, or any other change in substantive federal law. Nor do they in any way suggest that by way of the receipt of federal funds pursuant to those contracts, the Navajo tribal courts are somehow “federalized,” rendering their orders and judgments directly enforceable pursuant to the Supremacy Clause of Article VI.

Plaintiffs’ Plea for an Extraordinary Post-Judgment Remedy

Of course, Congress, in the exercise of its “plenary and exclusive” power in Indian affairs remains free to “change ‘judicially made’ federal Indian law through . . . legislation”—including the general rule of *Montana* and its two very narrowly construed exceptions—but unless and until Congress acts, this “intricate web of *judicially made* Indian law” remains among the “laws . . . of the United States” under which a “federal question” may arise within the meaning of 28 U.S.C. § 1331. *Lara*, 541 U.S. at 206

(quoting *Oliphant*, 435 U.S. at 206 (emphasis supplied by Court)); *National Farmers*, 471 U.S. at 857 (“§ 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction”). And it remains an appropriate footing for the court of appeals’ judgment in this case—a judgment that is neither void nor unenforceable.

CONCLUSION

The plaintiffs may well dispute the rule and reasoning of the Supreme Court’s “pathmarking case, *Montana v. United States*, 450 U.S. 544, 564-65 (1981),” and the later cases that follow *Montana*, such as *Nevada v. Hicks*, 533 U.S. 353 (2001), and most recently, *Plains Commerce Bank*.⁷ A number of scholars have penned incisive critiques of the Court’s implied diminishment of tribal civil and criminal jurisdiction over non-Indians.⁸ In this case, plaintiffs’ counsel has made a credible showing that members of

⁷Discord persists on this subject within the Court itself. *See, e.g., Nevada v. Hicks*, 533 U.S. at 387 (O’Connor, Stevens & Breyer, JJ. concurring in judgment) (“Part II of the Court’s decision [in *Hicks*] is unmoored from our precedents”); *Plains Commerce Bank*, slip op. at *1 (Ginsburg, Stevens, Souter & Breyer, JJ., concurring in part and dissenting in part).

⁸*See, e.g.,* Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047 (2005); Philip P. Frickey, *Native American Exceptionalism in Federal Indian Law*, 119 Harv. L. Rev. 431 (2005); Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?*, 5 U. Pa. J. Const. L. 271 (2003); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 Am. U. L. Rev. 1177 (2001); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 Minn. L. Rev. 267 (2001); Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement its Imperfect Notion of Federalism in Indian Country*, 36 Tulsa L.J. 267 (2000); Philip P. Frickey, *A Common Law for Our Age of Colonialism: A Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 Yale L. J. 1 (1999); Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 Minn. L. Rev. 609 (1979); *see also* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573 (1996); Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 Mont. L. Rev. 313 (1997); Int’l Ass’n of Chiefs of Police, *Improving Safety in Indian Country: Recommendations from the IACP 2001 Summit* (2001), at 9, available at <http://www.theiacp.org/research/safetyinindiancountry.pdf> (“If the *Oliphant* decision were

(continued...)

Congress and the Supreme Court may not be on the same page as far as the role and powers of Indian tribal courts are concerned,⁹ and counsel appears entirely correct in asserting that “nothing Congress or the Executive have done [has] limited Navajo Court authority over anyone, Indian or non-Indian, for injurious acts occurring within the Navajo Nation[’s] exterior borders.” (Pltfs’ Obj. at 22.) Nor have the plaintiffs strayed far afield in arguing the importance of giving effect to Navajo tort law as a vital aspect of tribal self-government. *See, e.g., Smith v. Salish Kootenai College*, 434 F.3d 1127, 1140 (9th Cir. 2006) (en banc) (“The Tribes’ system of tort is an important means by which the Tribes regulate the domestic and commercial relations of its members.”). And an argument may well be made that whatever its merits in its own context, *Montana*’s rule and reasoning should find no application at all to the differing historical and legal context of the Navajo Nation and its reservation.¹⁰

Nothing in this court’s May 12th ruling purports to limit the plaintiffs’ or their counsel’s exercise of their First Amendment rights of free expression concerning these

⁸(...continued)

reversed, Indian sovereignty over tribal lands would be affirmed, and tribes’ ability to protect the safety of their citizens, both Indian and non-Indian alike, would greatly improve.”)

⁹*See, e.g.,* Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, § 2(6), 114 Stat. 2778, 2778 (*codified as amended at* 25 U.S.C. § 3651(6) (2000)) (finding that “Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands”).

¹⁰At least one judge of the court of appeals had earlier observed that “general principles of tribal sovereignty applicable to tribal authority over tribal land should not be extrapolated from *Montana*, a narrow, fact-bound case.” *Jicarilla Apache Tribe v. Supron Energy Corp.* 728 F.2d 1555, 1571 n.6 (10th Cir. 1984) (Seymour, J., dissenting in part), *adopted as opinion en banc*, 782 F.2d 855 (10th Cir.), *cert. denied*, 479 U.S. 970 (1986).

questions.

But having made the strategic choice to pursue enforcement of the Navajo court orders in federal court before the tribal court proceedings had been fully concluded, plaintiffs Singer, Riggs and Dickson raised the “federal question” of the extent of tribal jurisdiction over the non-Indian defendants in a federal forum, short-circuiting the usual exhaustion of Navajo tribal remedies, including review by the Navajo Supreme Court.¹¹ Having been raised in this forum, the jurisdictional question was ultimately decided by the court of appeals, with an outcome that was adverse to the plaintiffs.

The plaintiffs asked, and they received an answer, albeit one not to their liking.

Their question having been answered by the court of appeals, this court remains bound by the court of appeals’ mandate, and cannot now set aside or disregard the *MacArthur* panel’s July 18, 2007 ruling. *See, e.g., Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948) (“In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court.”); *Ute Indian Tribe v. State of Utah*, 935 F.Supp. 1473, 1516-18 (D. Utah 1996).¹²

¹¹ As this court has previously observed, the Navajo court orders at issue in this case were not final judgments. Plaintiffs’ Objection now argues that they were, and that principles of *res judicata* should operate to bar re-litigation of the jurisdictional question in the federal courts and render the court of appeals’ judgment void. (Pltfs’ Obj. at 27-30.)

Had the matter first been fully concluded in the tribal courts, including review by the Navajo Supreme Court, the non-Indian defendants could still have sought review by the federal courts of the Navajo courts’ subject-matter jurisdiction, similar to that obtained most recently by the non-Indian defendant in the *Plains Commerce Bank* case. Thus it appears that either way, the tribal jurisdictional issue would ultimately have been resolved by the Tenth Circuit (or the United States Supreme Court), not by the Navajo Supreme Court.

¹² In this Circuit, “The rule is well established that a district court must comply strictly with the mandate (continued...) ”

The parties likewise are bound by the terms of the court of appeals' judgment, and as between these parties, this matter is at an end.

The relief granted by this court at the May 12th hearing bears not upon the Navajo courts—or any other tribunal—but directly upon *these plaintiffs and their counsel*. In aid of the enforcement of the court of appeals' judgment and mandate, this court has ordered *these plaintiffs* not to pursue further judicial enforcement of the Navajo court orders at issue in this proceeding as against the named defendants in any other forum, including the Navajo tribal courts; nor may *these plaintiffs* prosecute claims against the named defendants in the Navajo tribal courts that the court of appeals has already determined to be beyond the tribal courts' jurisdictional reach.

This relief ensures that what the court of appeals has laid to rest remains at rest, at least as among the parties to this proceeding.

At this point, if the rule of *Montana*—as extended by the Tenth Circuit in this case—is to be undone, it will likely be Congress that must undo it. *See, e.g., Nicole E.*

¹²(...continued)

rendered by the reviewing court.” *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 962 F.2d 1528, 1534 (10th Cir.), *cert. denied*, 506 U.S. 956 (1992) (citing *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 584-85 (D.C. Cir. 1980) (stating that district court has ‘no power to reconsider issues laid to rest’ on prior appeal).” The principle is one of long standing:

Whatever was before the [superior] Court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermeddle with it, further than to settle so much as has been remanded.

Sibbald v. United States, 37 U.S. (12 Pet.) 488, 492 (1838).

Ducheneaux, Note, *Smith v. Salish Kootenai College: Self-Determination as Governing Principle or Afterthought in Tribal Civil Jurisdiction Jurisprudence?* 68 Mont. L. Rev. 211 (2007). In any event, the court of appeals' judgment and mandate remain the law of this case as to these plaintiffs and the named defendants.

Therefore,

IT IS ORDERED that the defendants' motion to enjoin further tribal court proceedings and for sanctions (dkt. no. 959), is GRANTED IN PART, and only to this extent: plaintiffs Singer, Riggs and Dickson, individually and through their counsel of record, are hereby permanently enjoined from seeking to enforce certain orders entered in *Donna Singer, et. al. v. San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation District Court, Shiprock District), namely (1) the "Findings, Opinion and Judgment at Preliminary Injunction," dated December 28, 1999, (2) the "Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order," entered March 1, 2000, and (3) the "Special Order in Aid to Satisfaction of Preliminary Injunction," signed March 6, 2000, in any judicial proceeding before any other court as against the defendants named in this action; and they are permanently enjoined from prosecuting any claim for damages or other relief against these named defendants in the Navajo tribal courts as to which the court of appeals has determined that the tribal courts lack subject-matter jurisdiction in *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007); in all other respects, the defendants' motion is DENIED;

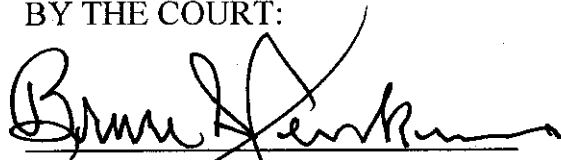
IT IS FURTHER ORDERED that plaintiffs' motion for a more definite statement (dkt. no. 962), "Plaintiffs' motion to dismiss the Defendants' motion for an Order to Show Cause and strike For Mootness" (dkt. no. 967), and Plaintiffs' Rule 60 Motion (dkt. no. 981), are hereby DENIED;

IT IS FURTHER ORDERED that plaintiffs' motions for an extension of time (dkt. nos. 969, 998), are hereby DENIED AS MOOT; and

IT IS FURTHER ORDERED that plaintiffs' Motion for Further Briefing in Light of *Prairie Commerce Bank v. Long Family Land & Cattle Co.* (dkt. no. 1002), and "Plaintiffs' Motion to Strike Mrs. Cox's (994) and Mr. Harrison's (995) Responses to Plaintiffs' Objection to the Proposed Order to Enjoin and for Sanctions" (dkt. no. 1007), are DENIED.

DATED this 1st day of July, 2008.

BY THE COURT:


BRUCE S. JENKINS
United States Senior District Judge

No. SC-CV-33-07

SUPREME COURT OF THE NAVAJO NATION

Ford Motor Company,
Petitioner,

v.

Kayenta District Court,
Respondent,

and concerning,
Joe and Mary Todecheene,
Real Parties in Interest.

OPINION

Before YAZZIE, Chief Justice, and GRANT and SHIRLEY, Associate Justices.

Original proceeding concerning Kayenta District Court Cause No. KY-191-2000, the Honorable Leroy Bedonie, presiding.

Richard Derevan, Costa Mesa, California, and Lawrence Ruzow, Window Rock, Navajo Nation, for Petitioner; Richard George, Tuba City, Navajo Nation, and Edward Fitzhugh, Tempe, Arizona, for Real Parties in Interest; Louis Denetsosie and Luralene Tapahe, Window Rock, Navajo Nation, for Amicus Navajo Nation; and Susan Rose, pro se, Sandy, Utah, Amicus.

This case concerns a jurisdictional challenge by Ford Motor Company. The Court holds that the Navajo Nation courts have authority to hear a claim against a motor vehicle manufacturer alleging that a vehicle defect resulted in the death of a Navajo police officer on a road located on the trust land within the Navajo Reservation.

I

The relevant facts are as follows. A Navajo Nation police officer, Esther Todecheene, died from injuries when she was ejected as her police vehicle overturned on a dirt road located on trust land within the Utah portion of the Navajo Reservation. The vehicle was manufactured by Petitioner Ford Motor Company (Ford), and was purchased

by the Navajo Nation through Gurley Motor Company of Gallup, New Mexico, a Ford dealer located off the Reservation. The Nation purchased the vehicle as part of a larger purchase of about 360 vehicles from Gurley. The fleet purchase via a secured transaction was financed by Ford Motor Credit Company, a subsidiary of Ford. Ford Motor Credit financed the purchase as a tax-exempt transaction with a sovereign Indian nation under the Indian Tribal Government Tax Status Act of 1986. *See* 26 U.S.C. § 7701. An amendment to the purchase agreement states that the Nation certified that the vehicles would be used “only in the exercise of essential government functions by the Nation: as defined by the Act. Agreement, Amendment Section 7, Exhibit D to Affidavit of Francesca Walter, Operations Services Coordinator, Ford Motor Credit, Exhibit 3 in support of Petition for Writ of Prohibition.

The case has taken a long, tortuous path to this Court. Real Parties in Interest Joe and Mary Todecheene, parents of Esther Todecheene, filed a wrongful death claim in the Tuba City District Court in April, 2000. In the complaint they alleged that a defective seat belt caused their daughter’s death, and sought damages from Ford as the manufacturer of the vehicle. The case was transferred to Kayenta District Court (District Court). Ford moved to dismiss the case from the District Court, arguing that the suit was not within the court’s jurisdiction under United States Supreme Court precedent defining the scope of tribal jurisdiction over non-Indians under federal Indian law. The District Court ruled it had jurisdiction. Instead of seeking review by this Court, Ford filed an action in the federal district court of Arizona to enjoin the Navajo Nation courts from hearing the case. The federal district court ruled there was no jurisdiction. Applying the test in the United States Supreme Court’s opinion in *Montana v. United States*, 450 U.S. 544 (1981), the Arizona federal district court held that pursuant to *Montana*, Indian

nations lack civil jurisdiction over non-Indians unless one of two exceptions is met. The court concluded that neither of the *Montana* exceptions were met. On appeal, the Ninth Circuit initially affirmed the federal district court decision. However, the Ninth Circuit later vacated that ruling upon a petition for rehearing filed by the Real Parties in Interest and Navajo Nation, and required Ford to seek review by the Navajo Supreme Court on one issue: whether the Navajo Nation could assert jurisdiction under the second *Montana* exception, which recognizes Indian nation jurisdiction if the conduct of the non-Indian “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 566.

Consistent with the Ninth Circuit’s instructions, Ford filed this petition for a writ of prohibition with this Court. Following the filing of the writ, this Court posed an additional question to the parties in keeping with its own precedents. Namely, whether the Treaty of 1868 (Treaty between the Navajo Tribe of Indians and the United States of America, 15 Stat. 667) provides an independent ground for the Nation’s courts to hear the case under the right of inherent sovereignty. The Navajo Nation Department of Justice and Susan Rose, a private attorney, filed amicus briefs on these issues.

While Ford’s Petition was pending here, the United States Supreme Court heard another case on the civil jurisdiction of Indian nation courts over non-Indians, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 28 Su. Ct. 2709 (2008) (*Plains Commerce*). With the concurrence of all the parties, this Court stayed consideration of the Petition until the United States Supreme Court issued its opinion in *Plains Commerce*.

Once the opinion in *Plains Commerce* was issued, this Court invited supplemental briefs on the effect, if any, of the *Plains Commerce* opinion. Ford and Amicus Susan Rose filed briefs on the effect of *Plains Commerce*. The Court held oral argument at the Sandra Day O'Connor School of Law at Arizona State University on September 18, 2008.

II

The issues in this case are (1) whether pursuant to Article II of the Treaty of 1868 (Treaty), Navajo courts have subject matter jurisdiction over a liability claim filed by a tribal member against the nonmember manufacturer of an allegedly defective vehicle that caused the death of a Navajo Nation police officer on a dirt road on trust land within the Nation, where said vehicle was financed for sale to the Navajo Nation by a subsidiary of the manufacturer specifically for use by Navajo police officers to patrol all roads within the Navajo Nation; and (2) whether *Montana v. United States* applies and authorizes such jurisdiction under the same factual circumstances.

III

The Navajo Nation retains civil jurisdiction over claims arising within the Nation by inherent sovereignty under Article II of the Treaty. To the Navajo, the Treaty is the organic law. It is the old law made at Fort Sumner by our ancestors following years of captivity to secure the Nation's prosperity. *Hwéeldidi Beehaz'ánii Sáni Nihizázini' nee'niji' bee hoot'ih dooleel yiniyé nihá áyiilaagii*. This is why the Treaty is considered a sacred document. This Court cannot ignore this law which embodies *Naayéé' yee ak'ehdeesdlii'go Hózhóójii yee ak'idiyaa silii'* (they overcome adversity through Protective Way to restore peace and harmony) between our ancestors and the United States. This Court's precedents have emphasized the Treaty as the primary source of the nation's authority over non-Indians within the Nation. *See Cedar Unified School Dist.*

v. Navajo Nation Labor Comm’n, No. SC-CV-53-06, slip op. at 5-7 (Nav. Sup. Ct. November 21, 2007) (employment regulation of state-organized school districts); *Thinn v. Navajo Generating Station* No. SC-CV-25-06, slip op. at 4 (Nav. Sup. Ct. October 19, 2007) (employment regulation of non-Indian operated power plant); *In the Matter of A.P.*, 8 Nav. R. 671 (Nav. Sup. Ct. 2005) (juvenile delinquency jurisdiction over non-Indian minor); *Dale Nicholson Trust v. Chavez*, 8 Nav. R. 417 (Nav. Sup. Ct. 2004) (regulation of state tax officials’ seizure of non-Indian property). Although the Ninth Circuit did not address the Treaty in considering the jurisdictional question before it, this Court of obliged to do so.

Ford makes several arguments against the applicability of the Treaty in this case. Ford first argues the Treaty issue is not properly before this Court because no one asserted the Treaty as a source of jurisdiction before the District Court, the federal district court or the Ninth Circuit. Further, the Ninth Circuit instructed Ford to assert only the second exception to *Montana* before this Court, and not the Treaty. Ford also argues that the Treaty power only applies to the area of the Navajo Reservation as defined within Article II of the Treaty, and not to any later additions to the Nation’s territory, such as the area in Utah where the accident occurred. Finally, Ford argues that United States Supreme Court case law, including the recent opinion in *Plains Commerce Bank*, denies jurisdiction under the Treaty in these factual circumstances and this Court should overrule its precedents that state otherwise.¹

This Court rejects Ford’s arguments. While it is true that the parties did not raise

¹ In response to a direct question from the Court at oral arguments, Ford’s counsel informed the Court that Ford wasn’t asking the Court to overrule *Nelson v. Pfizer*, 8 Nav. 369 (Nav. Sup. Ct. 2003) because in *Pfizer* the drug company was clearly “present” in the Navajo Nation, whereas in this case, Ford is not present because it sold the Expedition to the dealer.

the Treaty before other courts in this case, this Court is not bound by that lack of discussion. Subject matter jurisdiction may be raised at any time, and the Court itself may present the issue. *See Budget and Finance Committee v. Navajo Nation Office of Hearings and Appeals*, No. SC-CV-63-05, slip op. at 4 (Nav. Sup. Ct. January 4, 2006); *In the Matter of A.P.*, *supra* at 78; *Dale Nicholson Trust*, *supra* at 424. This includes the authority to raise jurisdictional arguments not presented by the parties. *See id.*² This County follows Navajo law, and its recent precedents emphasize the Treaty as a source of law to define the Navajo courts' authority. The Court cannot ignore those precedents in considering the scope of jurisdiction in this case.

As we stated in *Dale Nicholson Trust*, Article II specifically recognizes the Navajo Nation's authority to regulate all nonmembers other than certain federal employees on its lands. *Dale Nicholson Trust*, *supra* at 428. When the President of the United States through executive order, or Congress through statute, expanded the Navajo Reservation, our leaders understood at the time and understand today that their Treaty-recognized authority extends to that land. As with other extensions, the Reservation was extended through Executive Order of May 17, 1884 into the portion of Utah on which this claim arose by the federal government with neither conditions nor limitations on the Nation's authority over that extension. The Nation's Article II authority is no different whether on the original Reservation or later extensions.³

Finally, United States Supreme Court case law by no means denies jurisdiction

² The Court notes that the United States Supreme Court raised and analyzed *Montana's* second exception in *Plains Commerce*, though no federal court below considered it. *See, e.g., City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 n. 8 (2005) (raising equitable defenses not argues in parties' briefs, stating that such defenses were "fairly concluded" within questions presented to the Court).

³ The other party to this Treaty has also opined and treated executive order reservations the same as the land reserved by treaty. *See* 34 Op. A.G. 181, 186-189 (1924) and *see also* Cohen's Handbook of Federal Indian Law § 15.04[3][c][4] (Nell Jessup ed., 2005 ed.).

under the Treaty in these factual circumstances. *Montana* and its progeny address private nonmember actors and matters that neither implicate the public welfare of the Nation nor involve constant movement by a public tribal official between trust and non-trust lands in performance of public safety duties. This case concerns the death of a Navajo Nation police officer during the performance of patrol duties caused by an allegedly defective official vehicle driven by the officer on roads traversing both trust and non-trust lands within the Nation. The claim has been brought by the family of the deceased officer against a nonmember manufacturer who also financed the sale of this and 360 like vehicles to the Navajo government through its subsidiary. No case law in the United States Supreme Court has previously addressed jurisdiction in such factual circumstances. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) called for the application of *Montana* where a claim involving nonmembers occurred on a public road within the reservation boundaries over which a tribe had neither exclusive nor concurrent control over maintenance or operation of vehicles on that road by authorizing treaty or statute. *Strate* at 445-459. In this case, the public road was a dirt road patrolled and controlled by Navajo Nation police pursuant to Navajo Nation treaty powers. *Montana itself* involved the sources and scope of the power of an Indian tribe to regulate hunting and fishing on by nonmembers of the tribe on non-Indian property within reservation boundaries, and is not on point. *Plains Commerce* addresses the sale of non-tribal land between non-members and is distinguished from this case.

The Treaty basis for tribal court jurisdiction has been upheld by the United States Supreme Court in *Montana* which held that the Crow Tribe had jurisdiction to regulate non-Indians on tribal trust land because of a similar treaty with the United States. See

Montana v. United States, 450 U.S. 544, 558 (1981); *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 (2001) (reiterating *Montana*'s recognition of Treaty regulatory authority); *South Dakota v. Bourland*, 508 U.S. 679, 687-88 (recognizing same authority under 1868 Treaty of Fort Laramie for Sioux Nation). No subsequent opinion has changed that, as neither *Hicks* nor *Plains Commerce* considered whether a treaty provision separately justified authority over non-Indians. The Court will not overrule its precedents on the Treaty.

The Navajo courts have subject matter jurisdiction over this action under Article II of the Treaty. The only issue in this case is whether Ford can be said to be "present" within the Nation to invoke the Nation's Treaty authority. Under the circumstances, an applicable test for Ford's presence is the "minimum contacts" requirements of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The minimum contacts test was used by the 9th Circuit in *Hinshaw v. Mahler*, 41 F.3d 1178 (1994) in finding tribal court jurisdiction in a suit brought by a member against a nonmember for a claim arising on a reservation public road. While *Strate* overruled other portions of *Hinshaw* and narrowed tribal jurisdiction on public roads to only those roads which a tribe maintains or controls operation of vehicles pursuant to treaty or statute, the public road in question in this matter is a dirt road patrolled by the Nation's police. *Hinshaw* continues to be good law in the 9th Circuit concerning public roads such as in this case. The *International Shoe* opinion has been used for the past 50 years to help establish the circumstances under which a person or corporation comes under the jurisdiction of forum that is not of primary residence. This Court may choose to apply a variation of the minimum contacts test of *International Shoe*.

To the extent that a corporation enjoys the privilege of conducting business with a tribe, it should also expect to be brought before a tribal court for claims arising from that business activity. Here, Ford's presence is not based on a lease with the Nation, and no representatives of Ford are or have been physically within the Reservation. Instead, Ford's products have entered the Nation through financing by a Ford subsidiary and purchase from a Ford Dealership.

Under the circumstances, the Court holds that Ford is present through its vehicles that entered the Nation's territory. Ford actively participated in the sale and financing of the vehicles to the Navajo Nation government through a Ford dealer and Ford financing subsidiary. Ford had full knowledge that the vehicles were intended for the specific use of tribal officials performing official tribal activities. This Court has previously recognized inherent jurisdiction over a products liability claim when a diabetes drug entered the Nation through prescription, provision and/or ingestion within Nation. *Cf. Nelson v. Pfizer*, 8 Nav. R. 369, 373 (Nav. Sup. Ct. 2003). That one of those police vehicles crashed while performing official duties on a dirt road on trust land⁴ within the Nation is enough to invoke the Nation's absolute civil jurisdiction under the Treaty. It is for these types of cases that the Navajo Nation Council enacted the Navajo Long-Arm Civil Jurisdiction and Service of Process Act, 7 N.N.C. § 253a.⁵

⁴ It is noteworthy that the particular dirt road where the accident and death occurred is a reservation road that is not identified as a federal or state right-of-way and the parties, as the federal district court noted, do not contest the characterization of the reservation road. This *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (Tribes lacked jurisdiction where an accident occurred on a public highway maintained by the State pursuant to a federally granted right-of-way over Indian reservation land), would not apply in this case.

⁵ The Court notes the federal district court, in its vacated decision, disregarded the Navajo Long-Arm Civil Jurisdiction Act, 7 N.N.C. 253(a)(c)(4), noting that it was enacted after the commencement of this case and the retroactive application was not discussed by the parties. This Court affirms the Navajo District Court's application of this statute. The Court takes judicial notice that the Long-Arm Civil Jurisdiction and Service of Process Act enacted in 2001 does not establish Navajo civil jurisdiction over nonmembers. The Act

It is noted that state official activity on tribal land was given special treatment by the United States Supreme Court in *Nevada v. Hicks*, where the Court applied *Montana* in spite of the claim arising on tribal land. The Court limited its holding “to the question of tribal court jurisdiction over state officials enforcing state law. *Hicks*, 533 U.S. 353, 358 n. 2 (2001). Here, we have a manufacturer-financer of an allegedly defective product sold and financed to tribal officials with a fatal consequence that could well have occurred on or off trust land during patrol duties. The protection of the lives of tribal officials performing tribal duties in tribal vehicles deserves no less special treatment by Navajo courts.

IV

The Court finds that *Montana* does not apply in this case. However, even under *Montana* and its exceptions, the Nation has jurisdiction over this case.

This Court believes that both *Montana* exceptions are met.

A.

The Court finds that the first *Montana* exception is met. Ford, through its finance subsidiary Ford Motor Credit, established a “consensual relationship” with the Navajo Nation upon sale and financing of over 300 vehicles to the Navajo Nation government for official use. This was a significant transaction with a sovereign Indian nation. Ford benefited both from the purchase and financing. In addition, Ford Motor Credit structured the transaction as a tax-exempt purchase by an Indian nation and required the Nation to certify that the vehicles would only be used for “essential governmental

codified the inherent authority of the Navajo Nation as affirmed in Article II of the Treaty of 1868. As such, the Act clarified the modern application of this authority.

functions,” as defined by the Indian Tribal Government Tax Status Act (Act). The Act authorizes Indian nations to be treated as state governments for purposes of federal tax exemptions if the nation engages in an “essential governmental function.” See 26 U.S.C. § 7871. We have her not merely a product entering the stream of commerce and incidentally being present within the Nation. The product was sold directly to the Nation and was foreseen to be put to government use primarily on reservation roads.

In addition,, Section 24 of the amended financing agreement states that the transaction “will be governed by Navajo substantive and procedural law.... All actions which arise out of this Lease or out of the transaction it represents shall be brought in the courts of the Navajo Nation.” The Court holds that this explicit language further establishes a consensual relationship under *Montana* between Ford Motor Company and the Navajo Nation, through its finance subsidiary, Ford Motor Credit.

B

The second *Montana* exception is met where the conduct of the non-Indian “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana*, 450 U.S. at 566. Since *Montana* the U.S. Supreme Court has narrowed the exception, stating that the assertion of Indian nation jurisdiction must be “necessary to protect tribal self-government and control internal relations.” *Atkinson Trading Post*, *supra* at 658. In *Plains Commerce*, the Indian Nation must now show some “catastrophic” effect on its existence to justify its civil authority over a nonmember. 128 S. Ct. at 7276-27. The U.S. Supreme Court did not explain “catastrophic effect.”

Navajo Nation police officers depend on their official vehicles to perform patrol

and police duties across 26,110 square miles of the Nation. Our officers are severely understaffed and underpaid. Serving a reservation population of 165,614, our police officer to population ratio is 0.8:1,000, compared with the recommended United States average ratio of 2.5:1,000. The patrol work in the largely rural high desert is lonely, difficult and thankless. It is extremely difficult to attract and maintain police officers under these circumstances. It will be impossible to recruit and keep police officers if the Navajo Nation government is powerless to prevent defective vehicles from being purchased for their use, and powerless to process claims through our courts for police fatalities caused by defective vehicles. The effect on public safety and government morale would be "catastrophic" were jurisdiction over such claims to be denied the Navajo courts.

Evidently, the death of a police officer in the isolated remoteness of the reservation that is caused by a defective official vehicle threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe in numerous ways. It threatens the functioning of Navajo Public Safety; public confidence in our police officers and Navajo Nation government; the public welfare of the Navajo people who rely on the isolated patrols of Navajo police; the recruitment and retention of Navajo police officers; the ability of Navajo Nation government to provide protection to its law enforcement officials in the field and to the public; and so on.

Navajos live daily with the tension between Navajo law and the laws of the United States government. Over the past twenty years, the United States Supreme Court has handed a series of decisions that erode tribal sovereignty as traditional principles of judicial interpretation of treaty rights are continually revised. The evolving judicial

standard results in an unwarranted abrogation of settled treaty rights, especially treaty rights to regulate.

More, not less, rights to regulate are needed, particularly with respect to tribal law enforcement. Congress itself has taken notice that crime levels on Indian reservations have reached epidemic proportions. Studies predict that more than one in three Native American women will be raped in their lifetimes, and two in five will be victims of physical abuse. Drug traffickers are targeting Indian Reservations as safe havens because of the lack of police presence and the disjointed system of justice that is in place.⁶ The case at hand involves the tribal sovereign right to protect Navajo law enforcement in the performance of their duties, which by necessity covers highways and notoriously dangerous dirt roads on and off trust lands to reach remote populations quickly and efficiently in dependable vehicles. The right to provide an avenue for accountability and redress in our tribal courts when equipment supplied to our government for tribal law enforcement use is defective goes to the very heart of our Nation's self-governance.

This Court finds that the second *Montana* exception is met.

V

Based on the above, the Court DENIES the request for a writ of prohibition.

Dated this _13____ day of December, 2008.

Herbert Yazzie / _____
Chief Justice

Associate Justice Grant

Associate Justice Shirley

⁶ June 23, 2008 Press Release on the proposed Tribal Law and Order bill, Congressional Committee on Indian Affairs.

TREATY WITH THE NAVAHO, 1849.

(Kappler's Indian Affairs)

**Sept. 9, 1849. | 9 Stat., 974. | Ratified Sept. 9, 1850. | Proclaimed
Sept. 24, 1850.**

Page Images: [583](#) | [584](#) | [585](#)

THE following acknowledgements, declarations, and stipulations have been duly considered, and are now solemnly adopted and proclaimed by the undersigned; that is to say, John M. Washington, governor of New Mexico, and lieutenant-colonel commanding the troops of the United States in New Mexico, and James S. Calhoun, Indian agent, residing at Santa Fé, in New Mexico, representing the United States of America, and Mariano Martinez, head chief, and Chapitone, second chief, on the part of the Navajo tribe of Indians:

ARTICLE 1.

The said Indians do hereby acknowledge that, by virtue of a treaty entered into by the United States of America and the United Mexican States, signed on the second day of February, in the year of our Lord eighteen hundred and forty-eight, at the city of **Guadalupe Hidalgo**, by N. P. Trist, of the first part, and Luis G. Cuevas, Bernardo Couto, and Mgl Atristain, of the second part, the said tribe was lawfully placed under the **exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection.**

ARTICLE 2.

That from and after the signing of this treaty, hostilities between the contracting parties shall cease, and perpetual peace and friendship shall exist; the said tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may be at any time at enmity with the people of the said United States; that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States, or by other persons or powers in amity with the said States, shall be referred to the Government of said States for adjustment and settlement.

ARTICLE 3.

The Government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajoes, it is agreed that the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid Government, shall have the same force and efficiency, and shall be as binding and as obligatory upon the said Navajoes, and executed in the same manner, as if said laws had been passed for their sole benefit and protection; and to this end, and for all other useful purposes, the government of New Mexico, as now organized, or as it may be by the Government of the United States, or by the legally constituted authorities of the people of New Mexico, is recognized and acknowledged by the said Navajoes; and for the due enforcement of the aforesaid laws, until the Government of the United States shall otherwise order, the territory of the Navajoes is hereby annexed to New Mexico.

ARTICLE 4.

The Navajo Indians hereby bind themselves to deliver to the Military authority of the United States in New Mexico, at Sante Fé, New Mexico, as soon as he or they can be apprehended, the murderer or murderers of Micente Garcia, that said fugitive or fugitives from justice may be dealt with as justice may decree.

ARTICLE 5.

All American and Mexican captives, and all stolen property taken from Americans or Mexicans, or other persons or powers in amity with the United States, shall be delivered by the Navajo Indians to the aforesaid military authority at Jemez, New Mexico, in or before the 9th day of October next ensuing, that justice may be meted out to all whom it may concern; and also all Indian captives and stolen property of such tribe or tribes of Indians as shall enter into a similar reciprocal treaty, shall, in like manner, and for the same purposes, be turned over to an authorized officer or agent of the said States by the aforesaid Navajoes.

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ARTICLE 6.

Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Navajo Indian or Indians, he or they shall be arrested and tried, and, upon conviction, shall be subjected to all the penalties provided by law for the protection of the persons and property of the people of the said States.

ARTICLE 7.

The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

ARTICLE 8.

In order to preserve tranquility, and to afford protection to all the people and interests of the contracting parties, the Government of the United States of America will establish such military posts and agencies, and authorize such trading-houses, at such time and in such places as the said Government may designate.

ARTICLE 9.

Relying confidently upon the justice and the liberality of the aforesaid Government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Navajoes that the Government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

ARTICLE 10.

For and in consideration of the faithful performance of all the stipulations herein contained by the said Navajo Indians, the Government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures, as said Government may deem meet and proper.

ARTICLE 11.

This treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the Government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Navajo Indians shall not be held responsible for the conduct of others, and that the Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

In faith whereof, we, the undersigned, have signed this treaty, and affixed thereunto our seals, in the valley of Cheille, this the ninth day of September, in the year of our Lord one thousand eight hundred and forty-nine.

J. M. Washington, [L.S.] Brevet Lieutenant-Colonel Commanding.

James S. Calhoun, [L.S.] Indian Agent, residing at Santa Fe.

Mariano Martinez, Head Chief, his X mark, [L.S.]

Chapitone, Second Chief, his X mark, [L.S.]

J. L. Collins.

James Conklin.

Lorenze Force.

Antonio Sandoval, his X mark,

Francisco Josto, Governor of Jemez, his X mark.

Witnesses—

H. L. Kendrick, Brevet Major U. S. Army.

J. N. Word, Brevet First Lieutenant Third Infantry.

John Peck, Brevet Major U. S. Army.

J. F. Hammond, Assistant Surgeon U. S. Army.

H. L. Dodge, Captain commanding Eut. Regulars.

Richard H. Kern.

J. H. Nones, Second Lieutenant Second Artillery.

Cyrus Choice.

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John H. Dickerson, Second Lieutenant First Artillery.

W. E. Love.

John G. Jones.

J. H. Simpson, First Lieutenant Corps Topographic Engineers.

TREATY WITH THE NAVAHO, 1868.

(Kappler's Indian Affairs)

**June 1, 1868. | 15 Stats., p. 667. | Ratified July 25, 1868. |
Proclaimed Aug. 12, 1868.**

Page Images: [1015](#) | [1016](#) | [1017](#) | [1018](#) | [1019](#) | [1020](#)

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Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo Nation or tribe of Indians, represented by their chiefs and head-men, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and head-men being hereto subscribed,) of the other part, witness:

ARTICLE 1.

From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

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If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained. If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of

Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE 2.

The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Cañon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30' west of Greenwich, provided it embraces the outlet of the Cañon-de-Chilly, which cañon is to be all included in this reservation, shall be, and the same is hereby, **set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.**

ARTICLE 3.

The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter-shop and blacksmith-shop, not to cost exceeding one thousand dollars each; and a schoolhouse and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE 4.

The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

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ARTICLE 5.

If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land-book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo land-book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE 6.

In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE 7.

When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a

period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE 8.

In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency-house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit: Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian—each Indian being encouraged to manufacture their own clothing, blankets, &c. to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein

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named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE 9.

In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2d. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3d. That they will not attack any persons at home or travelling, nor molest or disturb any wagon-trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the Government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head-men of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE 10.

No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article [5] of this treaty.

ARTICLE 11.

The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their

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removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE 12.

It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any condition provided in the law, to wit:

- 1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.
- 2d. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.
- 3d. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.
- 4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.
- 5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE 13.

The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. Sherman,
Lieutenant-General, Indian Peace Commissioner.
S. F. Tappan,
Indian Peace Commissioner.

Barboncito, chief, his x mark.

Armijo, his x mark.

Delgado.

Manuelito, his x mark.

Largo, his x mark.

Herrero, his x mark.

Chiqueto, his x mark.

Muerto de Hombre, his x mark.

Hombro, his x mark.

Narbono, his x mark.

Narbono Segundo, his x mark.

Gañado Mucho, his x mark.

Council:

Riquo, his x mark.

Juan Martin, his x mark.

Serginto, his x mark.

Grande, his x mark.

Inoetenito, his x mark.

Muchachos Mucho, his x mark.

Chiqueto Segundo, his x mark.

Cabello Amarillo, his x mark.

Francisco, his x mark.

Torivio, his x mark.

Desdendado, his x mark.

Juan, his x mark.

Guero, his x mark.

Gugadore, his x mark.

Cabason, his x mark.

Barbon Segundo, his x mark.

Cabares Colorados, his x mark.

[Page 1020](#)

Attest:

Geo. W. G. Getty, colonel Thirty-seventh Infantry, brevet major-general U. S. Army.

B. S. Roberts, brevet brigadier-general U. S. Army, lieutenant-colonel Third Cavalry.

J. Cooper McKee, brevet lieutenant-colonel, surgeon U. S. Army.

Theo. H. Dodd, United States Indian agent for Navajos.

Chas. McClure, brevet major and commissary of subsistence, U. S. Army.

James F. Weeds, brevet major and assistant surgeon, U. S. Army.

J. C. Sutherland, interpreter.

William Vaux, chaplain U. S. Army.

BIA-INDIAN SELF DETERMINATION ACT
CONTRACT, EXECUTIVE AGREEMENT, AND FUNDING AGREEMENT
FOR
THE NAVAJO NATION COURTS TO PROVIDE
JUDICIAL PROGRAM SERVICES
UNDER THE INDIAN CIVIL RIGHTS ACT



United States Department of Interior
BUREAU OF INDIAN AFFAIRS
Navajo Regional Office
P.O. Box 1060
Gallup, New Mexico 87305

IN REPLY REFER TO:
270 - FOIA

MAR 13 2003

CERTIFIED MAIL - RECEIPT REQUESTED

Ms. Susan Rose
9553 South 1335 East
Sandy, Utah 84092

Dear Ms. Rose:

This is a further response to your letter dated, January 27, 2003, to the Navajo Regional Director in which you requested copies of a contracts No. CTN00T78047 for the 1998 calendar year, CTN00T78079 for the calendar year 1999, and the most recent copy(ies) of the same.

The Navajo Regional Office is responding to your correspondence as a Freedom of Information Act (FOIA) request for a search for the documents. In our search for responsive documents we have enclosed copies, as provided by the Navajo Regional Office's Branch of Self-Determination, of the contracts No. CTN00T78047 for the 1998 calendar year, CTN00T78079 for the calendar year 1999, and the calendar year 2003 modifications for both contracts.

In your referenced letter you have indicated a willingness to pay a reasonable cost for the search, reproduction, and processing of the documents. The fees to process your request in accordance with 43 CFR 2.20, Appendix A, is calculated as follows:

<u>Search and Review</u>	
Professional Staff @ \$18.60 hr. X 5 hours	= \$ 93.00
<u>Photocopying</u>	
12: pages @ .13 cents per page	= \$ 15.99
Total:	\$108.99

The amount includes the time for searching, collecting, reviewing, assembling, duplicating, and mailing of the documents. Further, the time involved for the key staff to process your request is included in the calculation. There is no provision in the Code of Federal Regulations or the Department of Interior policy for facsimiled response to FOIA requests.

Please submit a check or money order payable to the Bureau of Indian Affairs and mail to: Navajo Regional Office, ATTN: FOIA, P. O. Box 1060, Gallup, New Mexico 87305-1060.

For any questions regarding this matter, you may contact Mr. Grant Vaughn, Esq., at 505/248-5600, or Tim Clani, FOIA Coordinator, at 505/863-8320.

Sincerely,

Navajo Regional Director

Enclosures

AWARD/CONTRACT		1. CERTIFIED FOR NATIONAL DEFENSE UNDER BDSA REG 2 AND OF DAYS REG	
2. CONTRACT (Proc. Inst. Ident.) NO. CTN00T78047		3. EFFECTIVE DATE January 1, 1997	
5. ISSUED BY U.S. Department of the Interior BIA-Navajo Area Office P.O. Box 1060 Gallup, New Mexico 87305		4. REGISTRATION/PURCHASING EL	
6. ADMINISTERED BY (If other than Item 5) BIA/Navajo Area Office Branch of Contracts & Property Mgmt. P.O. Box 1060 Gallup, New Mexico 87305		CODE	
7. NAME AND ADDRESS OF CONTRACTOR (No., street, city, county, State and ZIP Code) THE NAVAJO NATION Office of Contracts and Grants P.O. Box 9000 Window Rock, Arizona 86515-9000 "JUDICIAL BRANCH"		8. DELIVERY MAY 01 1997 FOB ORIGIN OTHER (see below) BARBARA PINE-SMITH Not Applicable	
11. SHIP TO/MARK FOR N/A		12. PAYMENT WILL BE MADE BY BIA/NAO/Branch of Finance P.O. Box 1060 Gallup, New Mexico 87305-1060	
13. THIS ACQUISITION WAS: (Check appl. box(es)) A. ADVERTISED B. NEGOTIATED PURSUANT TO: X P.L. 93-638, as amended		14. ACCOUNTING AND APPROPRIATION DATA N00310 97 39410 255Z	
15A. ITEM NO.	15B. SUPPLIES/SERVICES	15C. QUANTITY	15D. UNIT
	The Contractor shall provide Judicial and related services on the Navajo Reservation.		
		15E. UNIT PRICE	15F. AMOUNT
15G. TOTAL AMOUNT OF CONTRACT ▶ \$ 700,800.00			
16. TABLE OF CONTENTS			
W/ SEC.	DESCRIPTION	PAGE(S)	W/ SEC.
PART I - THE SCHEDULE			PART II - CONTRACT CLAUSES
A	SOLICITATION/CONTRACT FORM		I
B	SUPPLIES OR SERVICES AND PRICES/COSTS		J
C	DESCRIPTION/SPECS./WORK STATEMENT		K
D	PACKAGING AND MARKING		L
E	INSPECTION AND ACCEPTANCE		M
F	DELIVERIES OR PERFORMANCE		
G	CONTRACT ADMINISTRATION DATA		
H	SPECIAL CONTRACT REQUIREMENTS		
CONTRACTING OFFICER WILL COMPLETE ITEM 17 OR 18 AS APPLICABLE			
17. ☒ CONTRACTOR'S NEGOTIATED AGREEMENT (Contractor is required to sign this document and return all copies to issuing office.) Contractor agrees to furnish and deliver all items or perform all the services set forth or otherwise identified above and on any continuation sheets for the consideration stated herein. The rights and obligations of the parties to this contract shall be subject to and governed by the following documents: (a) this award/contract, (b) the solicitation, if any, and (c) such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein. (Attachments are listed herein.)		18. ☐ AWARD (Contractor is not required to sign this document.) You offer on Solicitation Number including the additions or changes made by you which additions or change are set forth in full above, is hereby accepted as to the items listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary.	
19A. NAME AND TITLE OF SIGNER (Type or print) Albert A. Hale, President Navajo Nation President		20A. NAME OF CONTRACTING OFFICER James S. Harjo, 1420-4162-0298	
19B. NAME OF CONTRACTOR BY <i>[Signature]</i> (Signature of person authorized to sign)		20B. UNITED STATES OF AMERICA BY <i>[Signature]</i> (Signature of Contracting Officer)	
19C. DATE SIGNED DEC 26 1996		20C. DATE SIGNED 12-27-96	

NSN 7540-01-152-8069
PREVIOUS EDITION UNUSABLE

26-106

STANDARD FORM 26 (REV. 10-81)
Prescribed by GSA

AMENDMENT OF SOLICITATION/ MODIFICATION OF CONTRACT		1. CONTRACT ID CODE C N00778047	
2. AMENDMENT/MODIFICATION Modification No. One (1)	3. EFFECTIVE DATE 01/17/97	4. REQUISITION FOR USE REQ NO.	5. PROJECT NO. (If applicable)
6. ISSUED BY U.S. Department of the Interior Bureau of Indian Affairs Navajo Area Office Gallup, New Mexico 87305	7. ADMINISTERED BY (If other than Item 6) BIA-Navajo Area Office Branch of Contracts and Property Management P.O. Box 1060 Gallup, New Mexico 87305-1060 BARBARA PINE-SMITH	8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code) The Navajo Nation Office of Contracts and Grants P. O. Box 9000 Window Rock, Arizona 86515 "JUDICIAL BRANCH"	
9A. AMENDMENT OF SOLICITATION NO.		9B. DATED (SEE ITEM 11)	
10A. MODIFICATION OF CONTRACT/ORDER NO.		10B. DATED (SEE ITEM 13)	
X		X	
CTN00778047		December 31, 1996	
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS			
☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.			
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.			
12. ACCOUNTING AND APPROPRIATION DATA (If required) See Attachment.			
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.			
☒ A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.			
☐ B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying off appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).			
☐ C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:			
☒ D. OTHER (Specify type of modification and authority) Mutual Agreement by Both Parties.			
E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return All copies to the issuing office.			
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.) Contract No. CTN00778047 is modified as follows:			
1. INCLUDE: Fiscal Year 1997, Contract Support funds of \$84,000.00, revised Accounting Data is enclosed and made a part of this contract. The Budget shall be revised accordingly. The total contract amount of \$700,800.00, is hereby increased by \$84,000.00, reflecting a new contract total balance of \$784,800.00. *All other terms and conditions remain in full force and effect.*			
Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.			
15A. NAME AND TITLE OF SIGNER (Type or print) The Honorable Robert Yazzie, Chief Justice Judicial Branch of the Navajo Nation		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or Print) EDITH LESLIE, 1420-2209-0499	
15B. CONTRACTOR/OFFEROR (Signature of person authorized to sign)		15C. DATE SIGNED 02/19/97	
15D. UNITED STATES OF AMERICA (Signature of Contracting Officer)		15E. DATE SIGNED FEB 20 1997	
NSN 7450-01-152-8070 PREVIOUS EDITION UNUSABLE		STANDARD FORM 30 (REV. 10-83) Prescribed by GSA FAR (48 CFR) 53.243	

ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NUMBER: CTN00T78047
 CONTRACTOR: THE NAVAJO NATION – JUDICIAL BRANCH
 MODIFICATION NO.: ONE (1)

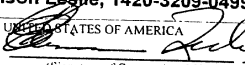
APPROPRIATION DATA	CONTRACT BALANCE	INC./DEC.	NEW TOTAL
N00310 97 39410 255Z	\$ 700,800.00	0.00	\$ 700,800.00
N00310 97 39270 255Z	\$ 0.00	84,000.00	\$ 84,000.00
TOTAL CONTRACT AMOUNT:	\$ 700,800.00	84,000.00	\$ 784,800.00

SUMMARY: TOTAL CY-1997 \$784,800.00

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT		1. CONTRACT CODE	PAGE OF PAGES
2. AMENDMENT/MODIFICATION Modification No. Six (6)		CTN00T78047	1
3. EFFECTIVE DATE May 22, 1998		4. REQUISITION/PURCHASE REQ NO.	
5. PROJECT NO. (If applicable)			
6. ISSUED BY CODE		7. ADMINISTERED BY (If other than Item 6) CODE	
US DEPARTMENT OF INTERIOR Bureau of Indian Affairs Navajo Area Office		BIA-Navajo Area Office Branch of Contracts & Property Mgmt. PO BOX 1060 Gallup, New Mexico 87305-1060	
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)		9A. AMENDMENT OF SOLICITATION NO.	
The Navajo Nation Office of Contracts and Grants P.O. Box 9000 Window Rock, Arizona 86515-9000 "Judicial Branch"		9B. DATED (SEE ITEM 11)	
		10A. MODIFICATION OF CONTRACT/ORDER NO.	
CODE		10B. DATED (SEE ITEM 13)	
FACILITY CODE		CTN00T78047	
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS		December 31, 1996	
☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.			
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods. (a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.			
12. ACCOUNTING AND APPROPRIATION DATA (If required)			
See Attachment			
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.			
(a) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.			
B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).			
C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:			
D. OTHER (Specify type of modification and authority)			
☒ Mutual Agreement by Both Parties			
E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return All copies to the issuing office.			
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)			
Contract No. CTN00T78047 is modified as follows:			
INCLUDE: Fiscal Year 1993, Contract Support funds of \$133,269.00. Revised Accounting Data is enclosed and made a part of this contract. Budget shall be revised accordingly.			
The total contract amount of \$1,816,352.04 is increased by \$133,269.00 reflecting a new contract balance of \$1,949,621.04.			
"All other terms and conditions remain in full force and effect"			
Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.			
15A. NAME AND TITLE OR SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or Print)	
Robert Yazzie, Chief Justice		Edison Leslie, 1420-3209-0499	
15B. CONTRACTING OFFICER		16B. UNITED STATES OF AMERICA	
BY <i>Robert Yazzie</i>		BY <i>Edison Leslie</i>	
(Signature of person authorized to sign)		(Signature of Contracting Officer)	
15C. DATE SIGNED 7/13/98		16C. DATE SIGNED JUL 15 1998	
NSN 7450-01-152-8070 PREVIOUS EDITION UNUSABLE		STANDARD FORM 30 Prescribed by GSA FAR (48 CFR) 53.243	

ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NO.: CTN00T78047
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: Six (6)

ACCOUNTING AND APPROPRIATION	ORIGINAL AMOUNT	INCREASE/ DECREASE	NEW TOTAL
N00310 97 39410 255Z	\$700,800.00		
N00310 97 39270 255Z	\$100,301.00	\$0.00	\$700,800.00
N00310 96 39410 255Z(CO)	\$3,631.02	\$0.00	\$100,301.00
N00310 96 39270 255Z (CO)	\$51,124.02	\$0.00	\$3,631.02
Calendar Year 1997 Total	\$855,856.04	\$0.00	\$51,124.02
N00310 98/99 39410 255Z	\$960,496.00	\$0.00	\$855,856.04
N00310 98/99 39270 255Z	\$0.00 +	\$133,269.00	\$960,496.00
CURRENT YEAR 1998	\$960,496.00 +	\$133,269.00	\$133,269.00
			\$1,093,765.00
SUMMARY			
CALENDAR YEAR 1997 TOTAL:	\$855,856.04		
CURRENT YEAR 1998 TOTAL:	\$1,093,765.00		
GRAND TOTAL:	\$1,949,621.04		

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT		1. CONTRACT ID CODE CTN 78047		PAGE OF PAGES 1	
2. AMENDMENT/MODIFICATION Modification No. EIGHT (8)		3. EFFECTIVE DATE September 23, 1998		4. REQUISITION/PURCHASE REQ NO.	
6. ISSUED BY US DEPARTMENT OF INTERIOR Bureau of Indian Affairs Navajo Area Office		7. ADMINISTERED BY BIA-Navajo Area Office Branch of Contracts & Property Mgmt. PO BOX 1060 Gallup, New Mexico 87305-1060		5. PROJECT NO. (if applicable)	
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)					
The Navajo Nation Office of Contracts and Grants P.O. Box 9000 Window Rock, Arizona 86515-9000 "Judicial Branch"					
9A. AMENDMENT OF SOLICITATION NO.					
9B. DATED (SEE ITEM 11)					
10A. MODIFICATION OF CONTRACT/ORDER NO.					
10B. DATED (SEE ITEM 13) December 31, 1996					
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS					
☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.					
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter make reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.					
12. ACCOUNTING AND APPROPRIATION DATA (If required) See Attachment					
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.					
(a) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A. B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b). C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF: D. OTHER (Specify type of modification and authority)					
E. IMPORTANT: Contractor ☒ is not, ☐ is required to sign this document and return _____ copies to the issuing office.					
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.) Contract No. CTN00T78047 is modified as follows:					
INCLUDE: Fiscal Year 1998, Contract Support funds of \$9,489.00. Revised Accounting Data is enclosed and made a part of this contract. Budget shall be revised accordingly. The total contract amount of \$1,949,621.04 is increased by \$9,489.00 reflecting a new contract balance of \$1,959,110.04. All other terms and conditions are to remain the same.					
Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.					
15A. NAME AND TITLE OR SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or Print)			
		Edison Leslie, 1420-3209-0499			
15B. CONTRACTOR / OFFEROR		15C. DATE SIGNED		16B. UNITED STATES OF AMERICA	
(Signature of person authorized to sign)				BY 	
				16C. DATE SIGNED SEP 24 1998	
NSN 7450-01-152-8070 PREVIOUS EDITION UNUSABLE		STANDARD FORM 30 Prescribed by GSA FAR (48 CFR) 53.243 (REV. 10-83)			

ACCOUNTING AND APPROPRIATION L F A
 CONTRACT NO.: CTN00T78047
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: EIGHT (8)

ACCOUNTING AND APPROPRIATION	ORIGINAL AMOUNT	INCREASE/DECREASE	NEW TOTAL
N00310 97 39410 255Z	\$627,959.55	\$0.00	\$627,959.55
N00310 97 39270 255Z	\$100,301.00	\$0.00	\$100,301.00
N00310 96 39410 255Z (CO)	\$3,631.02	\$0.00	\$3,631.02
N00310 96 39270 255Z (CO)	\$51,124.02	\$0.00	\$51,124.02
CALENDAR YEAR 1997 TOTAL	\$783,015.59	\$0.00	\$783,015.59
N00310 98/99 39410 255Z	\$960,496.00	\$0.00	\$960,496.00
N00310 98/99 39270 255Z	\$133,269.00 +	\$9,489.00	\$142,758.00
N00310 97 39410 255Z (CO)	\$72,840.45	\$0.00	\$72,840.45
CURRENT YEAR 1998	\$1,166,605.45 +	\$9,489.00	\$1,176,094.45
SUMMARY			
CALENDAR YEAR 1997 TOTAL:	\$783,015.59		
CURRENT YEAR 1998 TOTAL:	\$1,176,094.45		
GRAND TOTAL:	\$1,959,110.04		

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT		CONTRACT NO. CTN00T78047		PAGE OF PAGE 1
2. AMENDMENT/MODIFICATION	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ NO.	5. PROJECT NO. (If applicable)	
Modification No. Nine(9)	Dec. 29, 1998			
6. ISSUED BY	7. ADMINISTERED BY (If other than Item 6)	CODE		
US DEPARTMENT OF INTERIOR Bureau of Indian Affairs Navajo Area Office	BIA-Navajo Area Office Branch of Contracts & Property Mgmt. PO BOX 1060 Gallup, New Mexico 87305-1060			
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)		(X) 9A. AMENDMENT OF SOLICITATION NO.		
The Navajo Nation Office of Contracts and Grants P.O. Box 9000 Window Rock, Arizona 86515-9000 "Judicial Branch"		9B. DATED (SEE ITEM 11)		
CODE		10A. MODIFICATION OF CONTRACT/ORDER NO.		
FACILITY CODE		10B. DATED (SEE ITEM 13)		
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS		December 31, 1996		
☐ The above numbered solicitation is a needed as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.				
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods. (a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter make reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.				
12. ACCOUNTING AND APPROPRIATION DATA (If required)				
See Attachment				
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.				
(a) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONT.				
B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).				
C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:				
D. OTHER (Specify type of modification and authority)				
X Mutual Agreement by Both Parties				
E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return ALL copies to the issuing office.				
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)				
Contract No. CTN00T78047 is modified as follows:				
INCLUDE: Fiscal Year 1999, program funds of \$966,726.00. Revised Accounting Data and Budget are enclosed and made part of this contract.				
The total contract amount of \$1,959,110.04 is increased by \$966,726.00 reflecting a new contract balance of \$2,925,836.04.				
All other terms and conditions are to remain the same.				
Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.				
15A. NAME AND TITLE OR SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or Print)		
Honorable Robert Yazzie, Chief Justice		James S. Harjo 1420-4162-0300		
15B. CONTRACTOR/OFFEROR		15C. DATE SIGNED		16C. DATE SIGNED
12/30/98		BY		1-6-99
(Signature of person authorized to sign)		(Signature of Contracting Officer)		
NSN 7450-01-152-8070 PREVIOUS EDITION UNUSABLE		STANDARD FORM 30 Prescribed by GSA (REV. 10-83)		

ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NO.: CTN00T78047
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: NINE (9)

ACCOUNTING AND APPROPRIATION	ORIGINAL AMOUNT	INCREASE/ DECREASE	NEW TOTAL
N00310 97 39410 255Z	\$627,959.55		\$627,959.55
N00310 97 39270 255Z	\$100,301.00	\$0.00	\$100,301.00
N00310 96 39410 255Z (CO)	\$3,631.02	\$0.00	\$3,631.02
N00310 96 39270 255Z (CO)	\$51,124.02	\$0.00	\$51,124.02
CALENDAR YEAR 1997 TOTAL	\$783,015.59	\$0.00	\$783,015.59
N00310 98/99 39410 252Z	\$960,496.00	\$0.00	\$960,496.00
N00310 98/99 39270 252Z	\$142,758.00	\$0.00	\$142,758.00
N00310 97 39410 255Z (CO)	\$72,840.45	\$0.00	\$72,840.45
CALENDAR YEAR 1998	\$1,176,094.45	\$0.00	\$1,176,094.45
N00780 99/00 39280 2521	\$0.00	+	\$966,726.00
CURRENT YEAR 1999	\$0.00	+	\$966,726.00
SUMMARY			
CALENDAR YEAR 1997 TOTAL:	\$783,015.59		
CALENDAR YEAR 1998 TOTAL:	\$1,176,094.45		
CURRENT YEAR 1999 TOTAL:	\$966,726.00		
GRAND TOTAL:	\$2,925,836.04		

AMENDMENT OF SOLICITATION/ MODIFICATION OF CONTRACT		TRACT ID CODE	PAGE OF PAGE
2. AMENDMENT/MODIFICATION NO. Mod. No. Ten (10)	3. EFFECTIVE DATE 08/12/99 EL	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (if applicable)
6. ISSUED BY U.S. Department of the Interior Bureau of Indian Affairs Navajo Area Office Gallup, New Mexico 37305-1060	7. ADMINISTERED BY BIA- Navajo Area Office Branch of Self-Determination P.O. Box 1060 Gallup, New Mexico 87305-1060	CODE	
8. NAME AND ADDRESS OF CONTRACTOR: (No., street, county, State and ZIP Code) The Navajo Nation Office of Contracts and Grants P. O. Box 9000 Window Rock, Arizona 86515-9000		(x) 9A. AMENDMENT OF SOLICITATION NO.	
Judicial Branch"		9B. DATED (SEE ITEM 11)	
CODE		10A. MODIFICATION OF CONTRACT/ORDER NO. X CTN00T78047	
FACILITY CODE		10B. DATED (SEE ITEM 13) X December 31, 1996	
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS			
☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods.			
☐ is extended, ☐ is not extended.			
(a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.			
12. ACCOUNTING AND APPROPRIATION DATA (If required) See Attachment			
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.			
(A) THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.			
B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).			
C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:			
D. OTHER (Specify type of modification and authority) Mutual Agreement by Both Parties			
E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return copies to the issuing office.			
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)			
Contract Number CTN00T78047 is modified as follows:			
1. Identify savings of \$225,825.68 for the same program is being moved from Calendar Year 1998 into Calendar Year 1999. Revised Accounting Data is enclosed and made a part of this contract. Budget shall be revised accordingly.			
2. There is no change in the Total Contract Amount.			
All other terms and conditions remain in full force and effect.			
Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.			
15A. NAME AND TITLE OF SIGNER (Type or print) The Honorable Robert Yazzie, Chief Justice Judicial Branch of the Navajo Nation		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or Print) Edison Leslie, Awarding Official	
15B. CONTRACTOR OFFEROR <i>Robert Yazzie</i> (Signature of person authorized to sign)		16B. UNITED STATES OF AMERICA BY <i>Edison Leslie</i> (Signature of Contracting Officer)	
15C. DATE SIGNED 9/3/99		16C. DATE SIGNED SEP 13 1999	

ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NUMBER: CTN00T78047
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: TEN (10)

ACCOUNTING AND APPROPRIATION	ORIGINAL AMOUNT	INCREASE/ DECREASE	NEW TOTAL
N00310 97 39410 255Z	\$ 627,959.55	\$ 0.00	\$ 627,959.55
N00310 97 39270 255Z	\$ 100,301.00	\$ 0.00	\$ 100,301.00
N00310 96 39410 255Z(CO)	\$ 3,631.02	\$ 0.00	\$ 3,631.02
N00310 96 39270 255Z(CO)	\$ 51,124.02	\$ 0.00	\$ 51,124.02
CALENDAR YEAR 1997 TOTAL	\$ 783,015.59	\$ 0.00	\$ 783,015.59
N00310 98/99 39410 252Z	\$ 960,496.00	\$ - 204,430.41	\$ 756,065.59
N00310 98/99 39270 252Z	\$ 142,758.00	\$ - 21,395.27	\$ 121,362.73
N00310 97 39410 (CO)	\$ 72,840.45	\$ 0.00	\$ 72,840.45
CALENDAR YEAR 1998 TOTAL	\$ 1,176,094.45	\$ - 225,825.68	\$ 950,268.77
N00780 99/00 39280 2521	\$ 966,726.00	\$ 0.00	\$ 966,726.00
N00310 98/99 39410 252Z (CO)	\$ 0.00	\$ + 204,430.41	\$ 204,430.41
N00310 98/99 39270 252Z (CO)	\$ 0.00	\$ + 21,395.27	\$ 21,395.27
CALENDAR YEAR 1999 TOTAL	\$ 966,726.00	\$ + 225,825.68	\$ 1,192,551.68

SUMMARY

CALENDAR YEAR 1997 TOTAL: \$ 783,015.59
 CALENDAR YEAR 1998 TOTAL: \$ 950,268.77
 CALENDAR YEAR 1999 TOTAL: \$ 1,192,551.68
 GRAND TOTAL: \$ 2,925,836.04

AMENDMENT OF SOLICITATION		MODIFICATION OF CONTRACT		CONTRACT ID CODE		PAGE OF PAGE	
2. AMENDMENT/MODIFICATION NO. Mod. No. Eleven (11)		3. EFFECTIVE DATE December 20, 1999		4. REQUISITION/PURCHASE REQ. NO.		5. PROJECT NO. (If applicable)	
6. ISSUED BY U.S. Department of the Interior Bureau of Indian Affairs Navajo Regional Office Gallup, New Mexico 87305-1060		7. ADMINISTERED BY BIA-Navajo Regional Office Branch of Self-Determination P.O. Box 1060 Gallup, New Mexico 87305-1060		CODE		CODE	
8. NAME AND ADDRESS OF CONTRACTOR The Navajo Nation Office of Contracts and Grants P. O. Box 9000 Window Rock, Arizona 86515-9000				(No., street, county, State and ZIP Code)			
9A. AMENDMENT OF SOLICITATION NO.				(X)			
9B. DATED (SEE ITEM 11)							
10A. MODIFICATION OF CONTRACT/ORDER NO.				X CTN00T78047			
10B. DATED (SEE ITEM 13)				X December 31, 1996			
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS							
☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers tendered. ☐ is extended. ☐ is not extended.							
(a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.							
12. ACCOUNTING AND APPROPRIATION DATA (If required) See Attachment							
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.							
(X) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.							
B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).							
C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:							
D. OTHER (Specify type of modification and authority) Mutual Agreement by Both Parties							
E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return copies to the issuing office.							
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)							
Contract Number CTN00T78047 is modified as follows: Extend the contract terms for the Annual Funding Agreement (AFA) from December 31, 1999 to January 31, 2000 with no change in the contract amount. The program shall continue to operate until a new Model and Annual Funding Agreement is in place by January 31, 2000. Budget shall be revised accordingly. There is no change in the total contract amount All other terms, conditions and provisions are to remain in full force and effect.							
Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.							
15A. NAME AND TITLE OR SIGNER (Type or print)				16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or Print)			
15B. CONTRACTOR / OFFEROR				16B. UNITED STATES OF AMERICA			
15C. DATE SIGNED				16C. DATE SIGNED			
(Signature of person authorized to sign)				(Signature of Contracting Officer)			
NSN 7450-01-152-8070 PREVIOUS EDITION UNAVAILABLE				STANDARD FORM 30 Prescribed by GSA FAR (48 CFR) 53.243			

ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NUMBER: CTN00T78047
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: ELEVEN (11)

ACCOUNTING AND APPROPRIATION	ORIGINAL AMOUNT	INCREASE/ DECREASE	NEW TOTAL
N00310 97 39410 255Z	\$ 627,959.55	\$ 0.00	\$ 627,959.55
N00310 97 39270 255Z	\$ 100,301.00	\$ 0.00	\$ 100,301.00
N00310 96 39410 255Z(CO)	\$ 3,631.02	\$ 0.00	\$ 3,631.02
N00310 96 39270 255Z(CO)	\$ 51,124.02	\$ 0.00	\$ 51,124.02
CALENDAR YEAR 1997 TOTAL	\$ 783,015.59	\$ 0.00	\$ 783,015.59
N00310 98/99 39410 252Z	\$ 756,065.59	\$ 0.00	\$ 756,065.59
N00310 98/99 39270 252Z	\$ 121,362.73	\$ 0.00	\$ 121,362.73
N00310 97 39410 (CO)	\$ 72,840.45	\$ 0.00	\$ 72,840.45
CALENDAR YEAR 1998 TOTAL	\$ 950,268.77	\$ 0.00	\$ 950,268.77
N00780 99/00 39280 2521	\$ 966,726.00	\$ 0.00	\$ 966,726.00
N00310 98/99 39410 252Z (CO)	\$ 204,430.41	\$ 0.00	\$ 204,430.41
N00310 98/99 39270 252Z (CO)	\$ 21,395.20	\$ 0.00	\$ 21,395.27
CALENDAR YEAR 1999 TOTAL	\$ 1,192,551.68	\$ 0.00	\$ 1,192,551.68

SUMMARY

CALENDAR YEAR 1997 TOTAL: \$ 783,015.59
 CALENDAR YEAR 1998 TOTAL: \$ 950,268.77
 CALENDAR YEAR 1999 TOTAL: \$ 1,192,551.68
 GRAND TOTAL: \$ 2,925,836.04

AWARD/CONTRACT		1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 350)		RATING	PAGE OF PAGE	
2. CONTRACT (Proc. Inst. Ident.) NO. CTN00T78079		3. EFFECTIVE DATE February 1, 2000		4. REQUISITION/PURCHASE REQUEST/PROJECT NO. EL		
5. ISSUED BY U.S. Department of the Interior BIA-Navajo Regional Office P.O. Box 1060 Gallup, New Mexico 87305		6. ADMINISTERED BY (If other than Item 5) Navajo Regional Office Branch of Self-Determination P.O. Box 1060 Gallup, New Mexico 87305				
7. NAME AND ADDRESS OF CONTRACTOR (No., street, city, county, State and ZIP Code) The Navajo Nation Office of Contracts and Grants P.O. Box 9000 Window Rock, Arizona 86515-9000		8. DELIVERY ☐ FOB ORIGIN ☐ OTHER (See below)		9. DISCOUNT FOR PROMPT PAYMENT		
10. SUBMIT INVOICES (4 copies unless otherwise specified) TO THE ADDRESS SHOWN IN		11. SHIP TO/MARK FOR		12. PAYMENT WILL BE MADE BY BIA/NRO/Branch of Finance P.O. Box 1060 Gallup, New Mexico 87305-1060		
13. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION: ☐ 10 U.S.C. 2304(c) ☒ P.L. 93-638, as amended ☐ 41 U.S.C. 253(c)		14. ACCOUNTING AND APPROPRIATION DATA N00780 2000/2001 39280		15. TOTAL AMOUNT OF CONTRACT \$ 991,240.00		
15A. ITEM NO.	15B. SUPPLIES/SERVICES	15C. QUANTITY	15D. UNIT	15E. UNIT PRICE	15F. AMOUNT	
	THE CONTRACTOR SHALL PROVIDE JUDICIAL SERVICES IN ACCORDANCE WITH THE MODEL AGREEMENT, ANNUAL FUNDING AGREEMENT SCOPE OF WORK, BUDGET, AND OTHER TERMS AND CONDITIONS.					
16. TABLE OF CONTENTS						
U)	SEC.	DESCRIPTION	PAGE(S)	U)	SEC.	
PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES		
A		SOLICITATION/CONTRACT FORM		I		CONTRACT CLAUSES
B		SUPPLIES OR SERVICES AND PRICES/COSTS		PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.		
C		DESCRIPTION/SPECS./WORK STATEMENT		J		LIST OF ATTACHMENTS
D		PACKAGING AND MARKING		PART IV - REPRESENTATIONS AND INSTRUCTIONS		
E		INSPECTION AND ACCEPTANCE		K		REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS
F		DELIVERIES OR PERFORMANCE		L		INSTRS., CONDS., AND NOTICES TO OFFERORS
G		CONTRACT ADMINISTRATION DATA		M		EVALUATION FACTORS FOR AWARD
H		SPECIAL CONTRACT REQUIREMENTS				
CONTRACTING OFFICER WILL COMPLETE ITEM 17 OR 18 AS APPLICABLE						
17. ☐ CONTRACTOR'S NEGOTIATED AGREEMENT (Contractor is required to sign this document and return _____ copies to issuing office.) Contractor agrees to furnish and deliver all items or perform all the services set forth or otherwise identified above and on any continuation sheets for the consideration stated herein. The rights and obligations of the parties to this contract shall be subject to and governed by the following documents: (a) this award/contract, (b) the solicitation, if any, and (c) such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein. (Attachments are listed herein.)			18. ☐ AWARD (Contractor is not required to sign this document.) Your offer on Solicitation Number _____ including the additions or changes made by you which additions or changes are set forth in full above, is hereby accepted as to the items listed above and as to the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary.			
19A. NAME AND TITLE OF SIGNER (Type or print) Robert Yazzie, Chief Justice of the Judicial Branch - THE NAVAJO NATION			20A. NAME OF CONTRACTING OFFICER Dolores F. Torrez, Awarding Official			
19B. NAME OF CONTRACTOR BY <i>Robert Yazzie</i>			20B. UNITED STATES OF AMERICA BY <i>Dolores F. Torrez</i>			
19C. DATE SIGNED 02/02/2000			20C. DATE SIGNED FEB 23 200			

NSN 7540-01-152-8069

PREVIOUS EDITION UNUSABLE

26-107

STANDARD FORM 26 (REV. 4-85)

AMENDMENT OF SOLICITATION/ MODIFICATION OF CONTRACT		1. CONTRACT ID CODE	PAGE OF PAGE
2. AMENDMENT/MODIFICATION NO. Mod. No. Twelve (12)	3. EFFECTIVE DATE December 13, 2000	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
6. ISSUED BY U.S. Department of the Interior Bureau of Indian Affairs Navajo Regional Office	7. ADMINISTERED BY (If other than Item 6) BIA-Navajo Regional Office Branch of Self-Determination P.O. Box 1060 Gallup, New Mexico 87305-1060	CODE	
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code) The Navajo Nation Office of Contracts and Grants P. O. Box 9000 Window Rock, Arizona 86515-9000 Judicial Branch"		9A. AMENDMENT OF SOLICITATION NO. 9B. DATED (SEE ITEM 11) 10A. MODIFICATION OF CONTRACT/ORDER NO. X CTN00T78047 10B. DATED (SEE ITEM 13) X December 31, 1996	
CODE		FACILITY CODE	
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS			
☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers is extended. ☐ is not extended.			
(a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.			
12. ACCOUNTING AND APPROPRIATION DATA (If required) See Attachment			
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, II MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.			
(a) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A. B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b). C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF: D. OTHER (Specify type of modification and authority) Mutual Agreement by Both Parties			
E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return copies to the issuing office.			
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject, matter where feasible.) Contract Number CTN00T78047 is modified as follows: Identification of funds carryover to each Calendar Year. These funds are moved into the next Calendar Year and authorized for use. See attached Accounting and Appropriation Data. Budget shall be revised accordingly. There is no change in the Grand Total amount of \$ 2,925,836.04. All other terms, conditions and provisions are to remain in full force and effect.			
15A. NAME AND TITLE OR SIGNER (Type or print) Robert Yazzie, Chief Justice of the Judicial Branch - THE NAVAJO NATION		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or Print) Edison Leslie, Awarding Official	
15B. CONTRACTOR OFFICIAL (Signature of person authorized to sign)		16B. UNITED STATES OF AMERICA (Signature of Contracting Officer)	
15C. DATE SIGNED 12/24/01		16C. DATE SIGNED JAN 02 21	
NSN 7450-01-152-8070 PREVIOUS EDITION UNUSABLE		STANDARD FORM 30 Prescribed by GSA FAR (48 CFR) 53.243	

ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NUMBER: CTN00T78047
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: TWELVE (12)

ACCOUNTING AND APPROPRIATION	ORIGINAL AMOUNT	INCREASE/ DECREASE	NEW TOTAL
N00310 97 39410 255Z	\$ 627,959.55	\$ 0.00	\$ 627,959.55
N00310 97 39270 255Z	\$ 100,301.00	\$ - 50,496.85	\$ 49,804.15
N00310 96 39410 255Z(CO)	\$ 3,631.02	\$ 0.00	\$ 3,631.02
N00310 96 39270 255Z(CO)	\$ 51,124.02	\$ 0.00	\$ 51,124.02
CALENDAR YEAR 1997 TOTAL	\$ 783,015.59	\$ - 50,496.85	\$ 732,518.74
N00310 98/99 39410 252Z	\$ 756,065.59	\$ 0.00	\$ 756,065.59
N00310 98/99 39270 252Z	\$ 121,362.73	\$ - 50,496.85	\$ 70,865.88
N00310 97 39410 (CO)	\$ 72,840.45	\$ 0.00	\$ 72,840.45
N00310 97 39270 255Z (CO)	\$ 0.00	\$ +50,496.85	\$ 50,496.85
CALENDAR YEAR 1998 TOTAL	\$ 950,268.77	\$ 0.00	\$ 950,268.77
N00780 99/00 39280 2521	\$ 966,726.00	\$ 0.00	\$ 966,726.00
N00310 98/99 39410 252Z (CO)	\$ 204,430.41	\$ 0.00	\$ 204,430.41
N00310 98/99 39270 252Z (CO)	\$ 21,395.27	\$ +50,496.85	\$ 71,892.12
CALENDAR YEAR 1999 TOTAL	\$ 1,192,551.68	\$ +50,496.85	\$ 1,243,048.53

SUMMARY

CALENDAR YEAR 1997 TOTAL: \$ 732,518.74
 CALENDAR YEAR 1998 TOTAL: \$ 950,268.77
 CALENDAR YEAR 1999 TOTAL: \$ 1,192,551.68
 GRAND TOTAL: \$ 2,925,836.04

AMENDMENT OF SOLICITATION MODIFICATION OF CONTRACT		1. CONTRACT ID CODE		PAGE OF PAGE							
2. AMENDMENT/MODIFICATION NO. Mod. No. Thirteen (13)		3. EFFECTIVE DATE March 22, 2001		4. REQUISITION/PURCHASE REQ. NO.							
6. ISSUED BY U.S. Department of the Interior Bureau of Indian Affairs Navajo Regional Office		7. ADMINISTERED BY BIA-Navajo Regional Office Regional Branch of Self Determination P.O. Box 1060 Gallup, New Mexico 87305-1060		5. PROJECT NO. (If applicable)							
8. NAME AND ADDRESS OF CONTRACTOR The Navajo Nation Office of Contracts and Grants P. O. Box 9000 Window Rock, Arizona 86515-9000 Judicial Branch"		(x) 9A. AMENDMENT OF SOLICITATION NO.		9B. DATED (SEE ITEM 11)							
CODE		FACILITY CODE		10A. MODIFICATION OF CONTRACT/ORDER NO. X CTN00T78047							
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS		10B. DATED (SEE ITEM 13) X December 31, 1996									
☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified. 12. ACCOUNTING AND APPROPRIATION DATA (If required) See Attachment 13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14. (x) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A. B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b). C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF: D. OTHER (Specify type of modification and authority) Mutual Agreement by Both Parties E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return copies to the issuing office. 14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.) Contract Number CTN00T78047 is modified as follows: Identify savings of \$251,236.55 for the same program is being moved from Contract No. CTN00T78047 into Contract No. CTN00T78079. Revised Accounting Data is enclosed and made a part of this contract. The contract amount of \$ 2,925,836.04 is decreased by \$ 251,236.55 reflecting a new contract total amount of \$ 2,674,599.49. All other terms, conditions and provisions are to remain in full force and effect. Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect. <table border="1"> <tr> <td>15A. NAME AND TITLE OR SIGNER Robert Yazzie, Chief Justice of the Judicial Branch, THE NAVAJO NATION</td> <td>16A. NAME AND TITLE OF CONTRACTING OFFICER Dolores F. Torrez, Awarding Official</td> </tr> <tr> <td>15B. CONTRACTOR/OFFEROR <i>(Signature)</i> <i>Robert Yazzie</i></td> <td>16B. UNITED STATES OF AMERICA <i>(Signature of Contracting Officer)</i> <i>Dolores F. Torrez</i></td> </tr> <tr> <td>15C. DATE SIGNED 4/10/01</td> <td>16C. DATE SIGNED APR 5 2001</td> </tr> </table> NSN 7450-01-152-8070 PREVIOUS EDITION UNUSABLE STANDARD FORM 30 Prescribed by GSA FAR (48 CFR) 53.243 (REV. 10-83)						15A. NAME AND TITLE OR SIGNER Robert Yazzie, Chief Justice of the Judicial Branch, THE NAVAJO NATION	16A. NAME AND TITLE OF CONTRACTING OFFICER Dolores F. Torrez, Awarding Official	15B. CONTRACTOR/OFFEROR <i>(Signature)</i> <i>Robert Yazzie</i>	16B. UNITED STATES OF AMERICA <i>(Signature of Contracting Officer)</i> <i>Dolores F. Torrez</i>	15C. DATE SIGNED 4/10/01	16C. DATE SIGNED APR 5 2001
15A. NAME AND TITLE OR SIGNER Robert Yazzie, Chief Justice of the Judicial Branch, THE NAVAJO NATION	16A. NAME AND TITLE OF CONTRACTING OFFICER Dolores F. Torrez, Awarding Official										
15B. CONTRACTOR/OFFEROR <i>(Signature)</i> <i>Robert Yazzie</i>	16B. UNITED STATES OF AMERICA <i>(Signature of Contracting Officer)</i> <i>Dolores F. Torrez</i>										
15C. DATE SIGNED 4/10/01	16C. DATE SIGNED APR 5 2001										

ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NUMBER: CTN00T78047
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: THIRTEEN (13)

ACCOUNTING AND APPROPRIATION	ORIGINAL AMOUNT	INCREASE/ DECREASE	NEW TOTAL
N00310 97 39410 255Z	\$ 627,959.55	\$ 0.00	\$ 627,959.55
N00310 97 39270 255Z	\$ 49,804.15	\$ 0.00	\$ 49,804.15
N00310 96 39410 255Z(CO)	\$ 3,631.02	\$ 0.00	\$ 3,631.02
N00310 96 39270 255Z(CO)	\$ 51,124.02	\$ 0.00	\$ 51,124.02
CALENDAR YEAR 1997 TOTAL	\$ 732,518.74	\$ 0.00	\$ 732,518.74
N00310 98/99 39410 252Z	\$ 756,065.59	\$ 0.00	\$ 756,065.59
N00310 98/99 39270 252Z	\$ 70,865.88	\$ 0.00	\$ 70,865.88
N00310 97 39410 (CO)	\$ 72,840.45	\$ 0.00	\$ 72,840.45
N00310 97 39270 255Z (CO)	\$ 50,496.85	\$ 0.00	\$ 50,496.85
CALENDAR YEAR 1998 TOTAL	\$ 950,268.77	\$ 0.00	\$ 950,268.77
N00780 99/00 39230 2521	\$ 966,726.00	\$ - 200,739.70	\$ 765,986.30
N00310 98/99 39410 252Z (CO)	\$ 204,430.41	\$ 0.00	\$ 204,430.41
N00310 98/99 39270 252Z (CO)	\$ 71,892.12	\$ - 50,496.85	\$ 21,395.27
CALENDAR YEAR 1999 TOTAL	\$ 1,243,048.53	\$ - 251,236.55	\$ 991,811.98

SUMMARY

CALENDAR YEAR 1997 TOTAL: \$ 732,518.74
 CALENDAR YEAR 1998 TOTAL: \$ 950,268.77
 CALENDAR YEAR 1999 TOTAL: \$ 991,811.98
 GRAND TOTAL: \$ 2,674,599.49

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT		CONTRACT CODE	PAGE OF PAGE
2. AMENDMENT/MODIFICATION Mod. No. One (1)	3. EFFECTIVE DATE January 11, 2001	4. REQUISITION/PURCHASE REQ NO.	1
6. ISSUED BY CODE	7. ADMINISTERED BY (If other than Item 6) CODE	5. PROJECT NO. (If applicable)	
US DEPARTMENT OF INTERIOR Bureau of Indian Affairs Navajo Regional Office		BIA-Navajo Regional Office Regional Branch of Self-Determination PO BOX 1060 Gallup, New Mexico 87305-1060	
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)		(X) 9A. AMENDMENT OF SOLICITATION NO.	
The Navajo Nation Office of Contracts and Grants P. O. Box 9000 Window Rock, Arizona 86515-9000 Judicial Branch"		9B. DATED (SEE ITEM 11)	
CODE		10A. MODIFICATION OF CONTRACT/ORDER NO.	
FACILITY CODE		X CTN00T78079	
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS		X 10B. DATED (SEE ITEM 13) February 23, 2000	
☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers is extended, ☐ is not extended.			
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.			
12. ACCOUNTING AND APPROPRIATION DATA (If required)			
See Attachment.			
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.			
(X) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 14A.			
B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(D).			
C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:			
D. OTHER (Specify type of modification and authority)			
X Mutual Agreement by Both Parties.			
E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return all copies to the issuing office.			
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)			
Contract Number CTN00T78079 is modified as follows:			
1. INCLUDE: Fiscal Year 2001, direct program funds of \$ 911,465.00. Revised Accounting Data, Annual Funding Agreement, Scope of Work are enclosed and made a part of this contract. Budget shall be revised accordingly.			
2. The contract amount of \$ 991,240.00 is increased by \$ 911,465.00 reflecting a new contract total amount of \$ 1,902,705.00			
ALL OTHER TERMS, CONDITIONS AND PROVISIONS ARE TO REMAIN IN FULL FORCE AND EFFECT.			
Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.			
15A. NAME AND TITLE OR SIGNER (Type or Print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or Print)	
The Honorable Robert Yazzie, Chief Justice Judicial Branch of the Navajo Nation		Dolores F. Torrez, Awarding Official	
15B. CONTRACTOR'S OFFEROR (Signature of person authorized to sign)		16B. UNITED STATES OF AMERICA BY (Signature of Contracting Officer)	
15C. DATE SIGNED 01/23/01		16C. DATE SIGNED JAN 24 2001	
NSN 7450-01-152-8070 PREVIOUS EDITION UNAVAILABLE			
STANDARD FORM 30 Prescribed by GSA FAR (48 CFR) 53.243 (REV. 10-83)			

ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NUMBER: CTN00T78079
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: ONE (1)

Accounting Data	Original Amount	Increase/Decrease	New Total
N00780 2000/2001 39280	\$ 991,240.00	\$ 0.00	\$ 991,240.00
Fiscal Year 2000 Total:	\$ 991,240.00	\$ 0.00	\$ 991,240.00
N00780 2001/2002 39280	\$ 0.00	\$+ 911,465.00	\$ 911,465.00
Fiscal Year 2001 Total:	\$ 0.00	\$+ 911,465.00	\$ 911,465.00

SUMMARY

Fiscal Year 2000 Total: \$ 991,240.00
 Fiscal Year 2001 Total: \$ 911,465.00

GRAND TOTAL: \$ 1,902,705.00

AMENDMENT OF SOLICITATION, MODIFICATION OF CONTRACT		1. CONTRACT ID CODE	PAGE OF PAGE
2. AMENDMENT/MODIFICATION NO. Mod. No. Four (4)	3. EFFECTIVE DATE March 29, 2001	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
6. ISSUED BY U.S. Department of the Interior Bureau of Indian Affairs Navajo Regional Office	7. ADMINISTERED BY BIA-Navajo Regional Office Regional Branch of Self Determination P.O. Box 1060 Gallup, New Mexico 87305-1060	CODE	
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code) The Navajo Nation Office of Contracts and Grants P. O. Box 9000 Window Rock, Arizona 86515-9000 Judicial Branch"		(k) 9A. AMENDMENT OF SOLICITATION NO.	
CODE		9B. DATED (SEE ITEM 11)	
FACILITY CODE		10A. MODIFICATION OF CONTRACT/ORDER NO. X CTN00T78079	
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS		10B. DATED (SEE ITEM 13) X February 23, 2000	
☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers tendered. ☐ is extended, ☐ is not extended. Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. It by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.			
12. ACCOUNTING AND APPROPRIATION DATA (If required) See Attachment			
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.			
(a) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.			
B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).			
C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:			
D. OTHER (Specify type of modification and authority) Mutual Agreement by Both Parties			
E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return copies to the issuing office.			
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.) Contract Number CTN00T78079 is modified as follows: Identify savings of \$ 116,814.08 for the same program is being moved from Calendar 2000 into Calendar Year 2001. Revised Accounting Data is enclosed and made a part of this contract. Budget shall be revised accordingly. There is no change in the total contract amount. All other terms, conditions and provisions are to remain in full force and effect.			
Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.			
15A. NAME AND TITLE OR SIGNER (Type or print) Hon. Robert Yazzie, Chief Justice		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or Print) Edison Laslie, Awarding Official	
15B. CONTRACTOR'S OFFEROR (Signature of person authorized to sign)		16B. UNITED STATES OF AMERICA BY Dolores Torres (Signature of Contracting Officer)	
15C. DATE SIGNED 6/05/01		16C. DATE SIGNED JUN 2	
NSN 7450-01-52-8070 PREVIOUS EDITION UNAVAILABLE		STANDARD FORM 30 Prescribed by GSA FAR (48 CFR) 53.243	

ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NUMBER: CTN00T78079
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: FOUR (4)

Accounting Data	Original Amount	Increase/Decrease	New Total
N00780 2000/2001 39280	\$ 991,240.00	\$ - 116,814.08	\$ 874,425.92
N00780 99/00 39280 252I (CO)	\$ 200,739.70	\$ 0.00	\$ 200,739.70
N00310 98/99 39270 252Z(CO)	\$ 50,496.85	\$ 0.00	\$ 50,496.85
Fiscal Year 2000 Total:	\$ 1,242,476.55	\$ - 116,814.08	\$ 1,125,662.47
N00780 2001/2002 39280	\$ 1,010,511.00	\$ 0.00	\$ 1,010,511.00
N00780 2000/2001 39280(CO)	\$ 0.00	\$ + 116,814.08	\$ 116,814.08
Fiscal Year 2001 Total:	\$ 1,010,511.00	\$ + 116,814.08	\$ 1,127,325.08

SUMMARY

Fiscal Year 2000 Total: \$ 1,125,662.47
 Fiscal Year 2001 Total: \$ 1,127,325.08

GRAND TOTAL: \$ 2,252,987.55

AMENDMENT OF SOLICITATION. MODIFICATION OF CONTRACT		1. CONTRACT ID CODE	PAGE OF PAGE 1
2. AMENDMENT/MODIFICATION NO. Mod. No. Three (3)	3. EFFECTIVE DATE March 22, 2001	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
6. ISSUED BY U.S. Department of the Interior Bureau of Indian Affairs Navajo Regional Office	7. ADMINISTERED BY (If other than Item 6) BIA-Navajo Regional Office Regional Branch of Self Determination P.O. Box 1060 Gallup, New Mexico 87305-1060	CODE	
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code) The Navajo Nation Office of Contracts and Grants P. O. Box 9000 Window Rock, Arizona 86515-9000 Judicial Branch"		(X) 9A. AMENDMENT OF SOLICITATION NO. 9B. DATED (SEE ITEM 11) 10A. MODIFICATION OF CONTRACT/ORDER NO. X CTN00T78079 10B. DATED (SEE ITEM 13) X February 23, 2000	
CODE	FACILITY CODE		
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS			
☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.			
12. ACCOUNTING AND APPROPRIATION DATA (If required) See Attachment			
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.			
(X) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.			
B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).			
C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:			
D. OTHER (Specify type of modification and authority) Mutual Agreement by Both Parties			
E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return copies to the issuing office.			
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.) Contract Number CTN00T78079 is modified as follows: Identify savings of \$251,236.55 for the same program is being moved from Contract No. CTN00T78047 into Contract No. CTN00T78079. Revised Accounting Data is enclosed and made a part of this contract. Budget shall be revised accordingly. The contract amount of \$2,001,751.00 is increased by 251,236.55 reflecting a new contract total amount of \$2,252,987.55 All other terms, conditions and provisions are to remain in full force and effect.			
Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.			
15A. NAME AND TITLE OF SIGNER (Type or Print) Robert Yazzie, Chief Justice of the Judicial Branch, THE NAVAJO NATION		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or Print) Dolores F. Torrez, Awarding Official	
15B. CONTRACTOR OFFICER <i>(Signature of person authorized to sign)</i>		16B. UNITED STATES OF AMERICA BY <i>(Signature of Contracting Officer)</i>	
15C. DATE SIGNED 4/10/01		16C. DATE SIGNED APR 5 2001	
NSN 7450-01-152-8070 PREVIOUS EDITION UNAVAILABLE		STANDARD FORM 30 Prescribed by GSA FAR (48 CFR) 53.243	

ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NUMBER: CTN00T78079
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: THREE (3)

Accounting Data	Original Amount	Increase/Decrease	New Total
N00780 2000/2001 39280	\$ 991,240.00	\$ 0.00	\$ 991,240.00
N00780 99/00 39230 252I (CO)	\$ 0.00	\$ + 200,739.70	\$ 200,739.70
N00310 98/99 39270 252Z(CO)	\$ 0.00	\$ + 50,496.85	\$ 50,496.85
Fiscal Year 2000 Total:	\$ 991,240.00	\$ + 251,236.55	\$ 1,242,476.55
N00780 2001/2002 39280	\$ 1,010,511.00	\$ 0.00	\$ 1,010,511.00
Fiscal Year 2001 Total:	\$ 1,010,511.00	\$ 0.00	\$ 1,010,511.00

SUMMARY

Fiscal Year 2000 Total: \$ 1,242,476.55
 Fiscal Year 2001 Total: \$ 1,010,511.00

GRAND TOTAL: \$ 2,252,987.55

AMENDMENT OF SOLICITATION MODIFICATION OF CONTRACT		1. CONTRACT ID CODE		PAGE OF PAGE 1	
2. AMENDMENT/MODIFICATION NO. Mod. No. Two (2)		3. EFFECTIVE DATE February 13, 2001		4. REQUISITION/PURCHASE REQ. NO.	
6. ISSUED BY U.S. Department of the Interior Bureau of Indian Affairs Navajo Regional Office		7. ADMINISTERED BY BIA-Navajo Regional Office Regional Branch of Self Determination P.O. Box 1060 Gallup, New Mexico 87305-1060		5. PROJECT NO. (If applicable)	
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code) The Navajo Nation Office of Contracts and Grants P. O. Box 9000 Window Rock, Arizona 86515-9000 Judicial Branch		(x) 9A. AMENDMENT OF SOLICITATION NO.		9B. DATED (SEE ITEM 11)	
CODE		FACILITY CODE		10A. MODIFICATION OF CONTRACT/ORDER NO. X CTN00T78079	
				10B. DATED (SEE ITEM 11) X February 23, 2000	
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS					
☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers is extended. ☐ is not extended.					
(a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.					
12. ACCOUNTING AND APPROPRIATION DATA (If required) See Attachment					
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.					
(x) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.					
B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14., PURSUANT TO THE AUTHORITY OF FAR 43.103(b).					
C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:					
D. OTHER (Specify type of modification and authority) Mutual Agreement by Both Parties					
E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return copies to the issuing office.					
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.) Contract Number CTN00T78079 is modified as follows: INCLUDE: Additional Fiscal Year 2001, direct program funds of \$99,046.00. Revised Accounting Data is enclosed and made a part of this contract. Budget shall be revised accordingly. The contract amount of \$1,902,705.00 is increased by \$99,046.00 reflecting a new contract total amount of \$ 2,001,751.00. All other terms, conditions and provisions are to remain in full force and effect.					
Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.					
15A. NAME AND TITLE OR SIGNER (Type or print) Robert Yazzie, Chief Justice of the Judicial Branch, The Navajo Nation		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or Print) Edison Leslie, Awarding Official			
15B. CONTRACTOR'S OFFEROR <i>(Signature of person authorized to sign)</i>		15C. DATE SIGNED 3/10/01		16B. UNITED STATES OF AMERICA <i>(Signature of Contracting Officer)</i>	
				16C. DATE SIGNED MAY 16 20	

NSN 7450-01-152-8070
PREVIOUS EDITION UNAVAILABLE

STANDARD FORM 30 (REV. 10-83)
Prescribed by GSA
FAR (48 CFR) 53.243

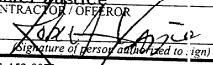
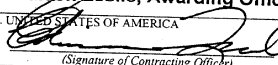
ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NUMBER: CTN00T78079
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: TWO (2)

Accounting Data	Original Amount	Increase/Decrease	New Total
N00780 2000/2001 39280	\$ 991,240.00	\$ 0.00	\$ 991,240.00
Fiscal Year 2000 Total:	\$ 991,240.00	\$ 0.00	\$ 991,240.00
N00780 2001/2002 39280	\$ 911,465.00	\$+ 99,046.00	\$ 1,010,511.00
Fiscal Year 2001 Total:	\$ 911,465.00	\$+ 99,046.00	\$ 1,010,511.00

SUMMARY

Fiscal Year 2000 Total: \$ 991,240.00
 Fiscal Year 2001 Total: \$ 1,010,511.00

 GRAND TOTAL: \$ 2,001,751.00

AMENDMENT OF SOLICITATION / MODIFICATION OF CONTRACT		1. CONTRACT ID CODE	PAGE OF PA
2. AMENDMENT/MODIFICATION NO. Mod. No. Five (5)	3. EFFECTIVE DATE January 11, 2002	4. REQUISITION/PURCHASE R.Q. NO.	5. PROJECT NO. (If applicable)
6. ISSUED BY U.S. Department of the Interior Bureau of Indian Affairs Navajo Regional Office	7. ADMINISTERED BY (If other than Item 6) BIA-Navajo Regional Office Regional Branch of Self Determination P.O. Box 1060 Gallup, New Mexico 87305-1060	CODE	
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code) The Navajo Nation Office of Contracts and Grants P. O. Box 9000 Window Rock, Arizona 86515-9000 Judicial Branch"		(X) 9A. AMENDMENT OF SOLICITATION NO. 9B. DATED (SEE ITEM 11) 10A. MODIFICATION OF CONTRACT ORDER NO. X CTN00T78079 10B. DATED (SEE ITEM 13) X February 23, 2000	
CODE		FACILITY CODE	
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS ☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers tendered. ☐ is extended, ☐ is not extended. (a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.			
12. ACCOUNTING AND APPROPRIATION DATA (If required) See Attachment			
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.			
(A) THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.			
B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).			
C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:			
D. OTHER (Specify type of modification and authority) Mutual Agreement by Both Parties			
E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return copies to the issuing office.			
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.) Contract Number CTN00T78079 is modified as follows: Include: Fiscal Year 2002 direct program funds of \$ 1,032,546.00. Revised Accounting Data, Annual Funding Agreement, Scope of Work and Budget are enclosed and made a part of this contract. The contract amount of \$ 2,252,987.55 is increased by \$ 1,032,546.00 reflecting a new contract total amount of \$ 3,285,533.55. All other terms, conditions and provisions are to remain in full force and effect.			
Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.			
15A. NAME AND TITLE OR SIGNER (Type or print) Honorable Robert Yazzie Chief Justice		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or Print) Edison Leslie, Awarding Official	
15B. CONTRACTOR'S OFFEROR  (Signature of person authorized to sign)		16B. UNITED STATES OF AMERICA BY  (Signature of Contracting Officer)	
15C. DATE SIGNED 1/16/02		16C. DATE SIGNED JAN 17 2002	
NSN 7450-01-152-8078 PREVIOUS EDITION UNAVAILABLE		BIA-2001-L1-000002 STANDARD FORM 30 Prescribed by GSA (REV. 10-83) FAR (48 CFR) 53.243	

ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NUMBER: CTN00T78079
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: FIVE (5)

Accounting Data	Original Amount	Increase/Decrease	New Total
N00780 2000/2001 39280	\$ 874,425.92	\$ 0.00	\$ 874,425.92
N00780 99/00 39280 252I (CO)	\$ 200,739.70	\$ 0.00	\$ 200,739.70
N00310 98/99 39270 252Z(CO)	\$ 50,496.85	\$ 0.00	\$ 50,496.85
Fiscal Year 2000 Total:	\$ 1,125,662.47	\$ 0.00	\$ 1,125,662.47
N00780 2001/2002 39280	\$ 1,010,511.00	\$ 0.00	\$ 1,010,511.00
N00780 2000/2001 39280(CO)	\$ 116,814.08	\$ 0.00	\$ 116,814.08
Fiscal Year 2001 Total:	\$ 1,127,325.08	\$ 0.00	\$ 1,127,325.08
N00780 2002/2003 39280	\$ 0.00	\$ +1,032,546.00	\$ 1,032,546.00
Fiscal Year 2002 Total:	\$ 0.00	\$ +1,032,546.00	\$ 1,032,546.00

SUMMARY

Fiscal Year 2000 Total: \$ 1,125,662.47
 Fiscal Year 2001 Total: \$ 1,127,325.08
 Fiscal Year 2002 Total: \$ 1,032,546.00
 GRAND TOTAL: \$ 3,285,533.55

AMENDMENT OF SOLICITATION/ MODIFICATION OF CONTRACT		1. CONTRACT ID CODE
2. AMENDMENT/MODIFICATION NO. Mod. No. Six (6)	3. EFFECTIVE DATE May 23, 2002	4. REQUISITION/PURCHASE REQ. NO.
6. ISSUED BY U.S. Department of the Interior Bureau of Indian Affairs Navajo Regional Office	7. ADMINISTERED BY BIA-Navajo Regional Office Regional Branch of Self Determination P.O. Box 1060 Gallup, New Mexico 87305-1060	
8. NAME AND ADDRESS OF CONTRACTOR The Navajo Nation Office of Contracts and Grants P. O. Box 9000 Window Rock, Arizona 86515-9000 Judicial Branch"		(No., street, county, State and ZIP Code)
9A. AMENDMENT OF SOLICITATION NO.	9B. DATED (SEE ITEM 11)	10A. MODIFICATION OF CONTRACT/ORDER NO.
		X CTN00T78079
		X February 23, 2000
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS		
The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers is extended, is not extended.		
(a) By completing Items 8 and 15, and returning copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.		
12. ACCOUNTING AND APPROPRIATION DATA (If required)		
See Attachment		
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.		
(A) THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.		
(B) THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).		
(C) THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:		
(D) OTHER (Specify type of modification and authority)		
Mutual Agreement by Both Parties		
E. IMPORTANT: Contractor is not, X is required to sign this document and return copies to the issuing office.		
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)		

Contract Number CTN00T78079 is modified as follows:

Identify savings of \$ 187,471.80 for the same program is being moved from Fiscal Year 2001 into Fiscal Year 2002. Revised Accounting Data is enclosed and made a part of this contract. Budget shall be revised accordingly.

There is no change in the total contract amount.

All other terms, conditions and provisions are to remain in full force and effect.

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OR SIGNER Robert Yozzie, Chief Justice	15B. CONTRACTOR / OFFEROR <i>Robert Yozzie</i>	15C. DATE SIGNED 9/19/02	16A. NAME AND TITLE OF CONTRACTING OFFICER Edison Leslie, Awarding Official	16B. UNITED STATES OF AMERICA <i>Edison Leslie</i>	16C. DATE SIGNED SEP 30 2002
NSN 7459-01-152-8070 PREVIOUS EDITION UNAVAILABLE			BIA-2001-L1-000002 STANDARD FORM 30 Prescribed by GSA FAR (48 CFR) 53.243		

ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NUMBER: CTN00T78079
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: SIX (6)

Accounting Data	Original Amount	Increase/Decrease	New Total
N00780 2000/2001 39280	\$ 874,425.92	\$ 0.00	\$ 874,425.92
N00780 99/00 39280 252I (CO)	\$ 200,739.70	\$ 0.00	\$ 200,739.70
N00310 98/99 39270 252Z(CO)	\$ 50,496.85	\$ 0.00	\$ 50,496.85
Fiscal Year 2000 Total:	\$ 1,125,662.47	\$ 0.00	\$ 1,125,662.47
N00780 2001/2002 39280	\$ 1,010,511.00	\$ - 187,471.80	\$ 823,039.20
N00780 2000/2001 39280(CO)	\$ 116,814.08	\$ 0.00	\$ 116,814.08
Fiscal Year 2001 Total:	\$ 1,127,325.08	\$ - 187,471.80	\$ 939,853.28
N00780 2002/2003 39280	\$ 1,032,546.00	\$ 0.00	\$ 1,032,546.00
N00780 2001/2002 39280(CO)	\$ 0.00	\$ + 187,471.80	\$ 187,471.80
Fiscal Year 2002 Total:	\$ 1,032,546.00	\$ + 187,471.80	\$ 1,220,017.80

SUMMARY

Fiscal Year 2000 Total: \$ 1,125,662.47
 Fiscal Year 2001 Total: \$ 939,853.28
 Fiscal Year 2002 Total: \$ 1,220,017.80
 GRAND TOTAL: \$ 3,285,533.55

AMENDMENT OF SOLICITATION/NO. 2		MODIFICATION OF CONTRACT		1. CONTRACT ID CODE	
Mod. No. Seven (7)		3. EFFECTIVE DATE December 20, 2002		4. REQUISITION/PURCHASE REQ. NO.	
6. ISSUED BY U.S. Department of the Interior Bureau of Indian Affairs Navajo Regional Office		7. ADMINISTERED BY BIA-Navajo Regional Office Regional Branch of Self Determination P.O. Box 1060 Gallup, New Mexico 87305-1060		5. PROJECT NO. (if applicable)	
8. NAME AND ADDRESS OF CONTRACTOR The Navajo Nation Office of Contracts and Grants P. O. Box 9000 Window Rock, Arizona 86515-9000		9A. AMENDMENT OF SOLICITATION NO.		9B. DATED (SEE ITEM 11)	
10A. MODIFICATION OF CONTRACT/ORDER NO.		10B. DATED (SEE ITEM 13)		10C. DATED (SEE ITEM 13)	
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS		11A. AMENDMENT OF SOLICITATION NO.		11B. DATED (SEE ITEM 13)	
12. ACCOUNTING AND APPROPRIATION DATA See Attachment		13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.		14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)	
15A. NAME AND TITLE OF SIGNER (Type or Print) Honorable Robert Yazzie Chief Justice of the Navajo Nation		15B. DATE SIGNED 01/08/03		15C. UNITED STATES OF AMERICA BY (Signature of Contracting Officer)	
16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or Print) Edison Leslie - Awarding Official		16B. DATE SIGNED JAN 14 2003		16C. DATE SIGNED	
NSN 7450-01-152-8070 PREVIOUS EDITION UNAVAILABLE		BIA-2001-L-1-000002		STANDARD FORM 30 Prescribed by GSA FAR (48 CFR) 53.243	

Contract Number CTN00T78079 is modified as follows:

Include: Partial Fiscal Year 2003 program funds in the total amount of \$291,190.00. Extend the contract terms for the Annual Funding Agreement (AFA) from December 31, 2002 to March 31, 2003. The program shall continue to operate until a new Annual Funding Agreement is in place by March 31, 2003. Revised Accounting Data is enclosed and made a part of this contract. Budget shall be revised accordingly.

The contract amount of \$ 3,285,533.55 is increased by \$ 291,190.00 reflecting a new contract total amount of \$ 3,576,723.55.

All other terms, conditions and provisions are to remain in full force and effect.

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

ACCOUNTING AND APPROPRIATION DATA
 CONTRACT NUMBER: CTN00T78079
 CONTRACTOR: THE NAVAJO NATION - JUDICIAL BRANCH
 MODIFICATION NUMBER: SEVEN (7)

Accounting Data	Original Amount	Increase/Decrease	New Total
N00780 2000/2001 39280	\$ 874,425.92	\$ 0.00	\$ 874,425.92
N00780 99/00 39280 252I (CO)	\$ 200,739.70	\$ 0.00	\$ 200,739.70
N00310 98/99 39270 252Z(CO)	\$ 50,496.85	\$ 0.00	\$ 50,496.85
Fiscal Year 2000 Total:	\$ 1,125,662.47	\$ 0.00	\$ 1,125,662.47
N00780 2001/2002 39280	\$ 823,039.20	\$ 0.00	\$ 823,039.20
N00780 2000/2001 39280(CO)	\$ 116,814.08	\$ 0.00	\$ 116,814.08
Fiscal Year 2001 Total:	\$ 939,853.28	\$ 0.00	\$ 939,853.28
N00780 2002/2003 39280	\$ 1,032,546.00	\$ 0.00	\$ 1,032,546.00
N00780 2001/2002 39280(CO)	\$ 187,471.80	\$ 0.00	\$ 187,471.80
Fiscal Year 2002 Total:	\$ 1,220,017.80	\$ 0.00	\$ 1,220,017.80
N00780 2003/2004 39280	\$ 0.00	\$ + 291,190.00	\$ 291,190.00
Fiscal Year 2003 Total:	\$ 0.00	\$ + 291,190.00	\$ 291,190.00

SUMMARY

Fiscal Year 2000 Total: \$ 1,125,662.47
 Fiscal Year 2001 Total: \$ 939,853.28
 Fiscal Year 2002 Total: \$ 1,220,017.80
 Fiscal Year 2003 Total: \$ 291,190.00

GRAND TOTAL: \$ 3,576,723.55

AGREEMENT BETWEEN THE SECRETARY
OF THE DEPARTMENT OF THE INTERIOR
AND THE NAVAJO NATION

A. Authority and Purpose

1. Authority

This agreement, denoted a Self-Determination Contract (referred to in this agreement as the "Contract"), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the "Secretary"), for and on behalf of the United States pursuant to Title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.) and by the authority of the Navajo Nation (referred to in this agreement as the "Contractor"). The provisions of Title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.) are incorporated in this agreement.

2. Purpose

Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities and programs (or portions thereof), that are otherwise contractible under Section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: Judicial Program. In accordance with Section 100, Scope of Work, and other attachments.

B. Terms, Provisions and Conditions

1. Term

Pursuant to Section 105(c)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c)(1)),

the term of this contract shall be six (6) years. Pursuant to Section 105(d) (1) of such Act (25 U.S.C. 450j(d)), upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (F) (2).

2. Effective Date

This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

3. Program Standards

The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (A) (2) of the Contract in conformity with the following standards: in accordance with Navajo Nation Law and the Indian Civil Rights Act.

4. Funding Amount

Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (F) (2). Such amount shall not be less than the applicable amount determined pursuant to Section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

5. Limitation of Costs

The Contractor shall not be obligated to continue

performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

6. Payment

A. In general - Payments to the Contractor under this Contract shall:

- (i) be made as expeditiously as practicable; and
- (ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

B. Quarterly, semi-annual, lump-sum, and other methods of payment:

- (i) In general - Pursuant to Section 108(b) of the Indian Self-Determination and Education Assistance Act, and notwithstanding any other provision of law, for each fiscal year covered by this Contract, the Secretary shall make

available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection (F) (2) by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement; and

- (ii) Method of quarterly payment - If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection (F) (2), each quarterly payment made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the Contract year coincides with the Federal fiscal year, payment for the first quarter shall be made not later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions and activities subject to this Contract; and

- (iii) Applicability - Chapter 39 of Title 31, United States Code, shall apply to the payment of funds due under this Contract and the annual funding agreement referred to in clause (i).

7. Records and Monitoring

A. In general - Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the recordkeeping system of the Department of the Interior or the Department of Health and Human Services (or both), records of the Contractor shall not be considered Federal records for purposes of Chapter 5 of Title 5, United States Code.

B. Recordkeeping System - The Contractor shall maintain a recordkeeping system and, upon reasonable advance request, provide reasonable access to such records to the Secretary.

C. Responsibilities of Contractor - The Contractor shall be responsible for managing the day-to-day operations conducted under this Contract and for monitoring activities conducted under this Contract to ensure compliance with the contract and applicable Federal requirements. With respect to the monitoring activities of the Secretary, the routine monitoring visits shall be limited to not more than one performance monitoring visit for this Contract by the head of each operating division, departmental bureau, or departmental agency, or duly authorized representative of such head unless:

- (i) the Contractor agrees to one or more additional visits; or

(ii) the appropriate official determines that there is reasonable cause to believe that grounds for reassumption of the Contract, suspension of Contract payments, or other serious Contract performance deficiency may exist.

No additional visit referred to in clause (ii) shall be made until such time as reasonable advance notice that includes a description of the nature of the problem that requires the additional visit has been given to the Contractor.

8. Property

A. In general - As provided in Section 105(f) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(f)), at the request of the Contractor, the Secretary may make available, or transfer to the Contractor, all reasonably divisible real property, facilities, equipment, and personal property that the Secretary has used to provide or administer the programs, services, functions, and activities covered by this Contract. A mutually agreed upon list specifying the property, facilities, and equipment so furnished shall also be prepared by the Secretary, with the concurrence of the Contractor, and periodically revised by the Secretary, with the concurrence of the Contractor.

B. Records - The Contractor shall maintain a record of all property referred to in subparagraph (A) or other property acquired by the Contractor under Section 105(f)(2)(A) of such Act for purposes of replacement.

C. Joint Use Agreements - Upon the request of the Contractor, the Secretary and the Contractor shall enter into a separate joint use agreement to address the shared use by the parties of real or personal property that is not reasonably divisible.

D. Acquisition of Property - The Contractor is granted the authority to acquire such excess property as the Contractor may determine to be appropriate in the judgment of the Contractor to support the programs, services, functions, and activities operated pursuant to this Contract.

E. Confiscated or Excess Property - The Secretary shall assist the Contractor in obtaining such confiscated or excess property as may become available to tribes, tribal organizations, or local governments.

F. Screener Identification Card - A screener identification card (General Services Administration form numbered 2946) shall be issued to the Contractor not later than the effective date of this Contract. The designated official shall, upon request, assist the Contractor in securing the use of the card.

G. Capital Equipment - The Contractor shall determine the capital equipment, leases, rentals, property, or services the Contractor requires to perform the obligations of the Contractor under this subsection, and shall acquire and maintain records of such capital equipment, property rentals, leases, property, or services through applicable procurement procedures of the Contractor.

9. Availability of Funds

Notwithstanding any other provision of law, any funds provided under this contract.

A. shall remain available until expended; and

B. with respect to such funds, no further:

(i) approval by the Secretary, or

(ii) justifying documentation from the Contractor, shall be required prior to the expenditure of such funds.

10. Transportation

Beginning on the effective date of this Contract, the Secretary shall authorize the Contractor to obtain interagency motor pool vehicles and related services for performance of any activities carried out under this Contract.

11. Federal program guidelines, manuals, or policy directives

Except as specifically provided in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.) the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

12. Disputes

A. Third-Party Mediation Defined - For the purposes of this Contract, the term "third-party mediation" means a form of mediation whereby the Secretary and the Contractor nominate a third party who is not employed by or significantly involved with the Secretary of the Interior, the Secretary of Health and Human

Services, or the Contractor, to serve as third-party mediator to mediate disputes under this Contract.

B. Alternative Procedures - In addition to, or as an alternative to, remedies and procedures prescribed by Section 110 of the Indian-Self-Determination and Education Assistance Act (25 U.S.C. 450m-1), the parties to this Contract may jointly:

- (i) submit disputes under this Contract to third-party mediation; and
- (ii) submit the dispute to the adjudicatory body of the Contractor, including the tribal court of the Contractor; and
- (iii) submit the dispute to mediation processes provided for under the laws, policies, or procedures of the Contractor; or
- (iv) use the administrative dispute resolution process authorized in subchapter IV of Chapter 5, Title 5, United States Code.

C. Effect of Decisions - The Secretary shall be bound by decisions made pursuant to the procedures set forth in subparagraph (B), except that the Secretary shall not be bound by any decision that significantly conflicts with the interests of Indians or the United States.

13. Administrative Procedures of Contractor

Pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. 1301, et seq.), the laws policies, and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to programs,

services, functions, and activities that are provided by the Contractor pursuant to this Contract.

14. Successor Annual Funding Agreement

A. In general - Negotiations for a successor annual funding agreement, provided for in subsection (F)(2), shall begin not later than 120 days prior to the conclusion of the preceding annual funding agreement. Except as provided in Section 105(c)(2) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450(c)(j)(2)), the funding for each successor annual funding agreement shall only be reduced pursuant to Section 106(b) of such Act (25 U.S.C. 450j-1(b)).

E. Information - The Secretary shall prepare and supply relevant information, and promptly comply with any request by the Contractor for information that the Contractor reasonably needs to determine the amount of funds that may be available for a successor annual funding agreement, as provided for in subsection (F)(2) of this Contract.

15. Contract Requirements, Approval by Secretary

A. In general - Except as provided in subparagraph (B), for the term of the contract Section 2103 of the Revised Statutes (25 U.S.C. 81) and Section 16 of the Act of June 18, 1934 (48 Stat. 987, Chapter 576; 25 U.S.C. 476) shall not apply to any contract entered into in connection with this Contract.

B. Requirements - Each Contract entered into by the Contractor with a third party in connection with performing the obligations of the Contractor under this Contract shall

(i) be in writing;

- (ii) identify the interested parties, the authorities of such parties, and purpose of the Contract;
- (iii) state the work to be performed under the Contract; and
- (iv) state the process for making any claim, the payments to be made, and the terms of the Contract, which shall be fixed.

C. Obligation of the Contractor

1. Contract Performance

Except as provided in subsection (D) (2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (F) (2) of this Contract.

2. Amount of Funds

The total amount of funds to be paid under this Contract pursuant to Section 106(a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

3. Contracted Programs

Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this Contract and funded through the annual funding agreements under subsection (F) (2).

4. Trust Services for Individual Indians

A. In general - To the extent that the annual funding agreement provides funding for the delivery of trust services to

individual Indians that have been provided by the Secretary, the Contractor shall maintain at least the same level of service as the Secretary provided for such individual Indians, subject to the availability of appropriated funds for such services.

B. Trust Services to Individual Indians - For the purposes of this paragraph only, the term "trust services for individual Indians" means only those services that pertain to land or financial management connected to individually held allotments.

5. Fair and Uniform Services

The Contractor shall provide services under this Contract in a fair and uniform manner and shall provide access to an administrative or judicial body empowered to adjudicate or otherwise resolve complaints, claims, and grievances brought by program beneficiaries against the Contractor arising out of the performance of the Contract.

D. Obligation of the United States

1. Trust Responsibility

A. In general - The United States reaffirms the trust responsibility of the United States to the Navajo Nation to protect and conserve the trust resources of the Navajo Nation and the trust resources of individual Indians.

B. Construction of Contract - Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility.

2. Good Faith

To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. 1601, et seq.).

3. Programs Retained

As specified in the annual funding agreement, the United States hereby retains the programs, services, functions, and activities with respect to the tribe(s) that are not specifically assumed by the Contractor in the annual funding agreement under subsection (F) (2).

E. Other Provisions

1. Designated Officials

Not later than the effective date of this Contract, the United States shall provide to the Contractor, and the Contractor shall provide to the United States, a written designation of a senior official to serve as a representative for notices, proposed amendments to the Contract, and other purposes for this Contract.

2. Contract Modifications or Amendment

A. In general - Except as provided in subparagraph (B), no modification to this Contract shall take effect unless such modification is made in the form of a written amendment to the Contract, and the Contractor and the Secretary provide written consent for the modification.

B. Exception - The addition of supplemental funds for programs, functions, and activities (or portions thereof) already

included in the annual funding agreement under subsection (F) (2), and the reduction of funds pursuant to Section 106(b) (2), shall not be subject to subparagraph (A).

3. Officials Not to Benefit

No Member of Congress, or resident commissioner, shall be admitted to any share or part of any contract executed pursuant to this Contract, or to any benefit that may arise from such contract. This paragraph may not be construed to apply to any contract with a third party entered into under this Contract if such contract is made with a corporation for the general benefit of the corporation.

4. Covenant Against Contingent Fees

The parties warrant that no person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

F. Attachments

1. Approval of Contract

Unless previously furnished to the Secretary, the resolution of the Intergovernmental Relations Committee of the Navajo Nation Council authorizing the contracting of the programs, services, functions, and activities identified in this Contract is attached to this Contract as attachment 1.

2. Annual Funding Agreement

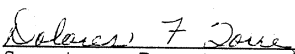
A. In general - The annual funding agreement under this

Contract shall only contain:

- (i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and
- (ii) such other provision, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agreed.

B. Incorporation by Reference - The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2.


Robert Yazzie, Chief Justice
of the Judicial Branch
THE NAVAJO NATION


Robert G. Salazar, Secretary, Department of the
Interior, or designee
UNITED STATES OF AMERICA

ANNUAL FUNDING AGREEMENT
BETWEEN
THE NAVAJO NATION
AND
THE UNITED STATES OF AMERICA
SECRETARY OF
THE DEPARTMENT OF THE INTERIOR

This Annual Funding Agreement ("AFA") is entered into between the Navajo Nation and the United States Department of the Interior ("DOI"), pursuant to the agreement between the Navajo Nation and DOI for Judicial Branch, pursuant to Title I of the Indian Self-Determination and Education Assistance Act, as amended, (hereinafter referred to as the "Contract").

1. The Navajo Nation shall administer the programs identified in the Scope of Work, attached hereto and incorporated by reference herein as Attachment A, during the term of this AFA in accordance with the provisions of the Contract and this AFA and any attachments hereto.

2. Subject to the availability of funding, DOI shall provide the direct program funding amount of \$966,726.00, for the term of this AFA, exclusive of any Central Office or Area shares, direct contract support, startup costs and indirect costs, in one lump sum payment to the Navajo Nation in accordance with Article B, Section 6 of the Contract. Full payment shall be made by wire transfer within 10 days of execution of this AFA. Accounting and budget data are attached hereto and incorporated by reference herein as Attachment B.

3. In addition to the amount referred to in Paragraph 2 of this AFA, DOI shall pay a sum to be negotiated representing

Central Office and Area shares associated with this AFA. It does not reflect Central Office or Area shares which the Navajo Nation has requested or included in other 1999 P.L. 93-638 contracts.

A. In addition to the amount in Paragraph 2 the Navajo Nation has identified additional contract support needs to be negotiated. This amount and any other additional contract support amount needed are subject to negotiation between the Navajo Nation and DOI. The Navajo Nation shall be entitled to contract support cost funds to the full extent specified in Section 106(a)(2) of P.L. 93-638, as amended, and related provisions. The Navajo Nation's request for contract support costs for new and expanded programs is subject to the availability of appropriations for that purpose.

B. It is understood by the parties that additional contract support funds may not be initially available to the Navajo Nation. However, upon becoming available by Congressional appropriation for this purpose or through the identification of appropriate budget savings from Contract Support Cost line items, the Navajo Nation shall participate in the distribution of those shortfall funds. If, during the term of this AFA, it is not possible to pay all contract support amounts, DOI shall make a good faith effort, subject to applicable law, to identify funds or to obtain an appropriation to address this shortfall. In any event, if there is a contract support shortfall, DOI will report all shortfalls to Congress, and simultaneously provide the Navajo Nation with such report.

4. In addition to the amount identified in Paragraph 2 of this AFA, the Navajo Nation shall receive indirect costs appli-

cable to the period covered by this AFA as determined pursuant to the applicable Indirect Cost Agreement, negotiated between the Navajo Nation and its cognizant agent. In the event that sufficient funds are unavailable to fully pay indirect costs associated with this AFA, DOI will pay any shortfall in indirect costs when, and to the extent that, such contract support costs shortfall funds are appropriated by Congress. In no event does the Navajo Nation waive its right to recover 100% of the indirect costs associated with this AFA.

5. In the event that funding of this AFA is reduced because of Congressional action, the Navajo Nation retains the option to renegotiate the Scope of Work with DOI contained in Attachment A of this AFA, consistent with Section 106 of P.L. 93-638, as amended.

*To be Nec.
Gama S. Hango
12.23.98*

~~6. A. The title to all property acquired or used under predecessor P.L. 93-638 contracts or grants presently used in connection with the programs covered by this AFA shall be transferred to the Navajo Nation. A list of such property shall be prepared by DOI and shall be reconciled by the parties within 60 days after execution of this AFA.~~

~~B. Employees of the programs (including those providing substantial support to the contracted program) covered by this AFA shall be eligible for housing from DOI on the same basis as DOI employees for vacant housing.~~

C. The Navajo Nation has identified a need for office space. Whenever feasible, DOI shall make such office space available to the Navajo Nation, together with such services as may be necessary for that office space. When not available and tribal

buildings are used, DOI will enter into a lease pursuant to Section 105(f)(1) of the Act and Subpart H of the Regulations.

7. The Navajo Nation shall maintain a fiscal accounting system which will provide accurate, current and complete information with respect to this AFA, consistent with federal statutory and regulatory requirements.

8. Unless otherwise stated elsewhere in this AFA or through an approved and executed Intergovernmental Personnel Agreement, all personnel employed by the Nation to carry out the Contract, AFA, Scope of Work and any other attachments hereto shall meet the qualifications set forth by the Navajo Nation Department of Personnel Management. Further, all personnel employed by the Navajo Nation under this AFA will adhere to applicable Navajo Nation personnel policies and procedures, including sick leave, holidays, pay schedules and pay tables.

9. Pre-award costs with respect to the performance of the Contract and this AFA may be paid with funding under this AFA to the extent (a) that such costs are otherwise reasonable, allowable and allocable to performance of the attached Scope of Work, and (b) that the Nation informed DOI of costs consistent with Section 106(a)(6) P.L. 93-638, if this AFA covers the initial year of a contract.

10. Consistent with Section 7(c) of P.L. 93-638, as amended, the Navajo Business Preference Law (5 N.N.C. Section 201, et seq.) and the Navajo Preference in Employment Act (15 N.N.C. Section 601, et seq.) shall apply to the administration of the Contract and this AFA.

11. The following individuals are designated by the respective parties to receive notices and other information with respect to this AFA:

A. For the Navajo Nation:

Contracting Officer
Navajo Nation Office of Contracts and Grants
P.O. Box 646
Window Rock, Arizona, 86515

B. For the Department of the Interior:

James Harjo, Contracting Officer
BIA-Navajo Area Office
P.O. Box 1060
Gallup, New Mexico 87305

12. In the performance of the Contract and this AFA, the Navajo Nation agrees to comply with all applicable federal and Navajo Nation regulations and executive orders. The parties shall renegotiate and modify the language of this AFA to conform with any applicable federal and Navajo Nation laws which are passed after the effective date of this agreement. It is the responsibility of DOI to inform the Navajo Nation of all federal laws, regulations and executive orders it believes apply to this AFA within 30 days of execution.

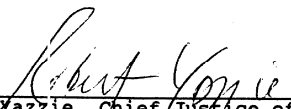
13. During the course of this AFA, the Navajo Nation shall submit semi-annual program reports and an annual financial report within 120 days of the close of this AFA.

14. The provisions of this AFA are severable. If any provision of this AFA is determined to be invalid or unenforceable by a court of competent jurisdiction, such invalidity shall not affect the remainder of the AFA.

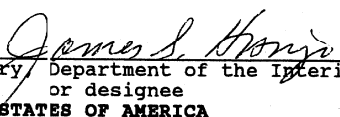
15. Nothing in this AFA shall be construed as waiving the sovereign immunity of the Navajo Nation. The parties agree

that nothing in this AFA shall waive any rights of the parties under applicable federal law.

16. This AFA shall be effective as of January 1, 1999, and remain in effect through December 31, 1999, or until a successor AFA is negotiated and becomes effective.



Robert Yazzie, Chief Justice of
the Judicial Branch
NAVAJO NATION
12/21/98
Date

for 

Secretary, Department of the Interior,
or designee
UNITED STATES OF AMERICA
1-6-99
Date

Section 100 - Scope of Work

101. Purpose

The Judicial Branch contract is to provide judicial and related services which, prior to 1958, were provided by the Courts of Indian Offenses. The Navajo Nation Council created the Navajo tribal courts in 1959 to replace the Courts of Indian Offenses. The Bureau of Indian Affairs continues to provide partial funds for judicial operation of the Navajo Nation courts.

102. Operation Guidelines

- Laws enacted by the Navajo Nation Council.
- Procedures, guidelines, and policies adopted for the courts to hear cases and render decisions in the supreme court and district/family courts and process peacemaking cases.
- Applicable Navajo Nation and federal administrative rules and regulations.
- Judicial Branch goals which are: (1) to hear and decide cases justly, promptly, and economically; and (2) to maintain Navajo courts as an independent and respected branch of the government.
- Applicable federal laws and regulations.

103. Operation Methods and Procedures

The Chief Justice administers the Judicial Branch and supervises the work of all justices and judges of the Navajo Nation pursuant to 7 N.N.C. §371.

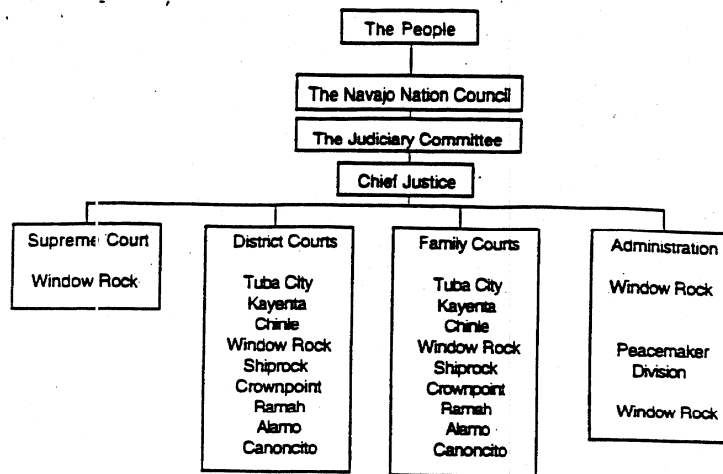
The Judicial Branch of the Navajo Nation is comprised of the Administrative Office of the Courts, Navajo Nation Supreme Court, Peacemaker Division, and the district and family courts.

The Judicial Branch provides a fair, impartial forum for interpretation of the Navajo Nation Codes, the 1968 Indian Civil Rights Act, and applicable federal laws and regulations.

The Navajo Nation Bar Association ensures that the standards of the courts are upheld by attorneys and lay advocates for the benefit of the general public.

The Judiciary Committee of the Navajo Nation Council provides legislative oversight for the Judicial Branch pursuant to 2 N.N.C. §191 and 2 N.N.C. §571-575.

The Chief Justice, President of the Navajo Nation, and the Speaker of the Navajo Nation Council meet on a regular basis to address the needs of the people.



104. Measurement for Progress and Accomplishments

Quarterly and annual reports provide details on the accomplishments of the goals and objectives of the Judicial Branch. Performance measures have been adopted to gauge accomplishments.

105. Personnel System and Position Descriptions

The Judicial Branch, pursuant to Navajo Law at 7 N.N.C. §404, has Personnel Rules and position descriptions for all non-judicial court personnel.

106. Plan of Operation

Title 7, N.N.C. §101-404, Court and Procedures, serves as the approved plan of operation for the Judicial Branch of the Navajo Nation.

ANNUAL FUNDING AGREEMENT
BETWEEN
THE NAVAJO NATION
AND
THE UNITED STATES OF AMERICA
SECRETARY OF
THE DEPARTMENT OF THE INTERIOR

This Annual Funding Agreement ("AFA") is entered into between the Navajo Nation and the United States Department of the Interior ("DOI"), pursuant to the agreement between the Navajo Nation and DOI for Judicial Program, pursuant to Title I of the Indian Self-Determination and Education Assistance Act, as amended, (hereinafter referred to as the "Contract").

1. The Navajo Nation shall administer the programs identified in the Scope of Work, attached hereto and incorporated by reference herein as Attachment A, during the term of this AFA in accordance with the provisions of the Contract and this AFA and any attachments hereto.

2. Subject to the availability of funding, DOI shall provide the direct program funding amount of \$991,240, for the term of this AFA, exclusive of any Central Office or Area shares, direct contract support, startup costs and indirect costs, in one lump sum payment to the Navajo Nation in accordance with Article B, Section 6 of the Contract. Full payment shall be made by wire transfer within 10 days of execution of this AFA. Accounting and budget data are attached hereto and incorporated by reference herein as Attachment B. This amount is to provide for program operations

consistent with the scope of work for the period January 1, 2000 through December 31, 2000.

3. In addition to the amount referred to in Paragraph 2 of this AFA, DOI shall pay a sum to be negotiated representing Central Office and Area shares associated with this AFA. It does not reflect Central Office or Area shares which the Navajo Nation has requested or included in other CY 2000 P.L. 93-638 contracts.

A. In addition to the amount in Paragraph 2 the Navajo Nation has identified additional contract support needs to be negotiated. This amount and any other additional contract support amount needed are subject to negotiation between the Navajo Nation and DOI. The Navajo Nation shall be entitled to contract support cost funds to the full extent specified in Section 106(a)(2) of P.L. 93-638, as amended, and related provisions. The Navajo Nation's request for contract support costs for new and expanded programs is subject to the availability of appropriations for that purpose.

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4. In addition to the amount identified in Paragraph 2 of this AFA, the Navajo Nation shall receive indirect costs applicable to the period covered by this AFA as determined pursuant to the applicable Indirect Cost Agreement, negotiated between the Navajo Nation and its cognizant agent. In the event that sufficient funds are unavailable to fully pay indirect costs associated with this AFA, DOI will pay any shortfall in indirect costs when, and to the extent that, such contract support costs shortfall funds are appropriated by Congress. In no event does the Navajo Nation waive its right to recover 100% of the indirect costs associated with this AFA.

5. In the event that funding of this AFA is reduced because of Congressional action, the Navajo Nation retains the option to renegotiate the Scope of Work with DOI contained in Attachment A of this AFA, consistent with Section 106 of P.L. 93-638, as amended.

6. The Navajo Nation has identified a need for office space. Whenever feasible, DOI shall make such office space available to the Navajo Nation, together with such services as may be necessary for that office space. When not available and tribal buildings are used, DOI will enter into a lease pursuant to Section 105(f)(1) of the Act and Subpart H of the Regulations.

7. The Navajo Nation shall maintain a fiscal accounting system which will provide accurate, current and complete information with respect to this AFA, consistent with federal statutory and regulatory requirements.

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9. Pre-award costs with respect to the performance of the Contract and this AFA may be paid with funding under this AFA to the extent (a) that such costs are otherwise reasonable, allowable and allocable to performance of the attached Scope of Work, and (b) that the Nation informed DOI of costs consistent with Section 106(a)(6) P.L. 93-638, if this AFA covers the initial year of a contract.

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B. For DOI:

Awarding Official
BIA-Navajo Regional Office
P.O. Box 1060
Gallup, New Mexico 87305

12. In the performance of the Contract and this AFA, the Navajo Nation agrees to comply with all applicable federal and Navajo Nation regulations and executive orders. The parties shall renegotiate and modify the language of this AFA to conform with any applicable federal and Navajo Nation laws which are passed after the effective date of this agreement. It is the responsibility of DOI to inform the Navajo Nation of all federal laws, regulations and executive orders it believes apply to this AFA within 30 days of execution.

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under applicable federal law.

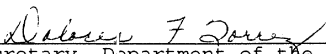
16. This AFA shall be effective as of February 1, 2000, and remain in effect through December 31, 2000, or until a successor AFA is negotiated and becomes effective.



Robert Yazzie, Chief Justice of
the Judicial Branch
THE NAVAJO NATION

10/11/99

Date



Secretary, Department of the Interior,
or designee
UNITED STATES OF AMERICA

FEB 23 2000

Date

Section 100 - Scope of Work

101. Purpose

The Judicial Branch contract is to provide judicial and related services which, prior to 1958, were provided by the Courts of Indian Offenses. The Navajo Nation Council created the Navajo tribal courts in 1959 to replace the Courts of Indian Offenses. The Bureau of Indian Affairs continues to provide partial funds for judicial operation of the Navajo Nation courts.

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- Laws enacted by the Navajo Nation Council.
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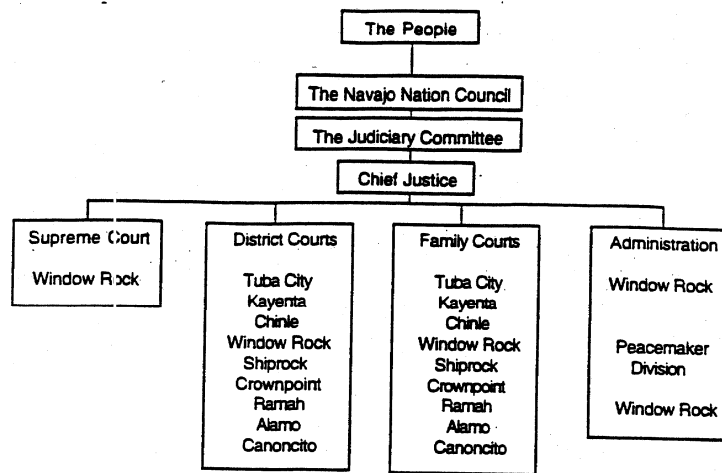
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The Chief Justice, President of the Navajo Nation, and the Speaker of the Navajo Nation Council meet on a regular basis to address the needs of the people.



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Quarterly and annual reports provide details on the accomplishments of the goals and objectives of the Judicial Branch. Performance measures have been adopted to gauge accomplishments.

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The Judicial Branch, pursuant to Navajo Law at 7 N.N.C. §404, has Personnel Rules and position descriptions for all non-judicial court personnel.

106. Plan of Operation

Title 7, N.N.C. §101-404, Court and Procedures, serves as the approved plan of operation for the Judicial Branch of the Navajo Nation.

■ Case No. 13,799, 2 Curt. 454^{[FN1](#)}

^{[FN1](#)} Reported by Hon. B. R.
Curtis, Circuit Justice.

Circuit Court, D. **Massachusetts**.
TAYLOR et al.

v.

MORTON.

Oct. Term, 1855.^{[FN2](#)}

^{[FN2](#)} Affirmed in [2 Black \(67 U. S.\) 481](#).

This action of assumpsit [by Charles G. Taylor and others], for money had and received, was against [Marcus Morton] the collector of customs of the port of Boston and Charlestown, and came on to be tried before the district judge, at a former term. The parties put in their evidence, and then agreed that the case should be taken from the jury, and submitted to the court, with authority to draw all such inferences of fact as a jury would be authorized to draw from the evidence; and that a verdict should be entered as the court might think proper upon the law and the evidence.

West Headnotes

Customs Duties 114 ⚔️11

[114](#) Customs Duties

[114I](#) Validity, Construction, and Operation of Customs Laws in General

[114k10](#) Treaty Provisions

[114k11](#) k. Reciprocity.

[Most Cited Cases](#)

A promise in a treaty for nondiscriminating import duties comes within the political, and not the judicial, department of the government, and the courts cannot try the question of its observance; and the question whether certain articles upon which a specific duty is imposed by name are, like certain other articles, within a treaty stipulation for nondiscriminating duties, is exclusively for congress.

Treason 384 ⚔️6

[384](#) Treason

[384k6](#) k. Adhering or Giving Aid and Comfort to Enemies. [Most Cited Cases](#)

Although a treaty is the law of the land under the constitution of the United States, congress may abrogate it, as far as it is municipal law, provided its subject-matter is within the legislative power of congress.

***784** Choate & Bell, for plaintiffs.
Hallett, Dist. Atty., and C. J. Loring,
contra.

CURTIS, Circuit Justice.

This is an action of assumpsit for money had and received, brought against the defendant as collector of the customs of the port of Boston, to recover back moneys alleged to have been illegally exacted by him in payment of duties, upon a quantity of hemp imported by the plaintiff from Russia, while the tariff act of 1842 (5 Stat. 548) was in operation. The duties charged were at the rate of forty dollars per ton. The plaintiffs allege that twenty-five dollars per ton was the true rate. The commercial treaty between the United States and Russia of the 18th December, 1832, stipulated, in substance, that no higher rates of duty should be imposed on the products of Russia imported from that country into the United States, than on the like articles imported from other countries. The tariff act of 1842 imposed a duty of forty dollars per ton on all hemp excepting Manilla, Suera, and other hems of India, on ***785** which a duty of twenty-five dollars only was to be levied.

The plaintiff's counsel insists, that the import now in question is, within the meaning of the treaty, an article 'like' Bombay hemp; that congress has

levied upon Bombay hemp a duty of twenty-five dollars per ton; that as soon as this lower duty had been levied on an article like Russian hemp, the stipulation in the treaty at once took effect, as part of our municipal law, and reduced the duty leviable on Russian hemp to twenty-five dollars per ton; and so, that under the laws of the United States, the amount beyond twenty-five dollars per ton, was illegally exacted, and can be recovered back in this action.

Several question, involved in this position, require examination. **One of them,** when stated abstractly, is this,- if an act of congress should levy a duty upon imports, which an existing commercial treaty declares shall not be levied, **so that the treaty is in conflict with the act,** does the former or the latter give the rule of decision in a judicial tribunal of the United States, in a case to which one rule or the other must be applied? The second section of the fourth article of the constitution is: **'This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land.'** There is nothing in the language of this clause which enables us to say, that in the case supposed, the treaty, and not the act of

congress, is to afford the rule. Ordinarily, treaties are not rules prescribed by sovereigns for the conduct of their subjects, but contracts, by which they agree to regulate their own conduct. This provision of our constitution has made treaties part of our municipal law. But it has not assigned to them any particular degree of suthority in our municipal law, nor declared whether laws so enacted shall or shall not be paramount to laws otherwise enacted. No such declaration is made, even in respect to the constitution itself. It is named in conjunction with treaties and acts of congress, as one of the supreme laws, but no supremacy, is in terms assigned to one over the other. And when it became necessary to determine whether an act of congress repugnant to the constitution could be deemed by the judicial power an operative law, the solution of the question was found, by considering the nature and objects of each species of law, the authority from which each emanated, and the consequences of allowing or denying the paramount effect of the constitution. It is only by a similar course of inquiry that we can determine the question now under consideration.

In commencing this inquiry I think it material to observe, that it is solely a question of municipal, as

distinguished from public law. The foreign sovereign between whom and the United States a treaty has been made, has a right to expect and require its stipulations to be kept with scrupulous good faith; but through what internal arrangements this shall be done, is, exclusively, for the consideration of the United States. Whether the treaty shall itself be the rule of action of the people as well as the government, whether the power to enforce and apply it shall reside in one department, or another, neither the treaty itself, nor any implication drawn from it, gives him any right to inquire. If the people of the United States were to repeal so much of their constitution as makes treaties part of their municipal law, no foreign sovereign with whom a treaty exists could justly complain, for it is not a matter with which he has any concern. We may approach this question therefore free from any of that anxiety respecting the preservation of our national faith, which can scarcely be too easily awakened, or too sensibly felt. For this question, in that aspect of it, is not, whether the act of congress is consistent with the treaty, but whether that is a judicial question to be here tried. If the act of congress, because it is the later law, must prescribe the rule by which this case is to be determined, we do not inquire whether it proceeds upon a just

interpretation of the treaty, or an accurate knowledge of the facts of likeness or unlikeness of the articles, or whether it was an accidental or purposed departure from the treaty; and if the latter, whether the reasons for that departure are such as commend themselves to the just judgment of mankind. It is sufficient that the law is so written, and, if I mistake not, we shall find by further examination, great reasons for not entering into these inquiries. By the eighth section of the first article of the constitution, **power is conferred on congress to regulate commerce with foreign nations, and to lay duties, and to make all laws necessary and proper for carrying those powers into execution.** That the act now in question is within the legislative power of congress, unless that power is controlled by the treaty, is not doubted. It must be admitted, also, that in general, power to legislate on a particular subject, includes power to modify and repeal existing laws on that subject, and either substitute new laws in their place, or leave the subject without regulation, in those particulars to which the repealed laws applied. There is therefore nothing in the mere fact that a treaty is a law, which would prevent congress from repealing it. Unless it is for some reason distinguishable from other laws, the rule which it gives may be

displaced by the legislative power, at its pleasure.

The first and most obvious distinction between a treaty and an act of congress is, that the former is made by the president and ratified by two thirds of the senators present; the latter by majorities of both houses of congress and the president, or by the houses only, by constitutional majorities, if the president refuses his assent. Ordinarily, it is certainly *786 true, that the powers of enacting and repealing laws reside in the same persons. But there is no reason, in the nature of things, why it may not be otherwise. In the country from which we have derived many political principles, the king, by force of his prerogative makes laws for the colonies, which parliament repeals or modifies at its discretion. *Campbell v. Hall*, Cowp. 204. I think it is impossible to maintain that, under our constitution, the president and senate exclusively, possess the power to modify or repeal a law found in a treaty. If this were so, inasmuch as they can change or abrogate one treaty, only by making another inconsistent with the first, the government of the United States could not act at all, to that effect, without the consent of some foreign government; for no new treaty, affecting, in any manner, one already

in existence, can be made without the concurrence of two parties, one of whom must be a foreign sovereign. That the constitution was designed to place our country in this helpless condition, is a supposition wholly inadmissible. It is not only inconsistent with the necessities of a nation, but negative by the express words of the constitution. That gives to congress, in so many words, power to declare war, an act which, ipso jure, repeals all provisions of all existing treaties with the hostile nation, inconsistent with a state of war. It is true this particular power to repeal laws found in treaties, is expressly given, and is applicable only to a case of war; but, in the first place, it is sufficient to prove the position stated above, that there is nothing, in the nature of things, which requires that the same persons who make the law by a treaty, should alone have power to repeal it. In the next place, it is also true, that the powers to regulate commerce and to levy duties are as expressly given, as the power to declare war; and the former are as absolute and unrestrained as the latter.

It may be said that a declaration of war, being necessarily inconsistent with existing treaties with the hostile nation, the power to declare it is necessarily a power to repeal such treaties; but that power to regulate

commerce and impose duties might be and was expected to be exercised in conformity with existing treaties. To a certain extent this may be admitted. But it cannot be admitted that these powers can be, or were expected to be exerted, under all circumstances, which might possibly occur in the life of a nation, in subordination to an existing treaty; nor that the only modes of escape from the effect of an existing treaty, were the consent of the other party to it, or a declaration of war. To refuse to execute a treaty, for reasons which approve themselves to the conscientious judgment of the nation, is a matter of the utmost gravity and delicacy; but the power to do so, is prerogative, of which no nation can be deprived, without deeply affecting its independence. That the people of the United States have deprived their government of this power in any case, I do not believe. That it must reside somewhere, and be applicable to all cases, I am convinced. I feel no doubt that it belongs to congress. That, inasmuch as treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the president, while they continue unrepealed, and inasmuch as the power of repealing these municipal laws must reside somewhere, and no body other than congress possesses it,

then legislative power is applicable to such laws whenever they relate to subjects, which the constitution has placed under that legislative power. In conformity with these views was the action of congress, in passing the act of July 7, 1798 (1 Stat. 578), declaring the treaties with France no longer obligatory on the United States.

It is pertinent, to advert briefly to some of the consequences of holding an opposite doctrine, which are directly presented by the case at bar. If the treaty were held to be paramount to the act of congress on this trial, it would be necessary to determine, first, what is the true interpretation of the words, 'like article'; and this would be a question of law to be decided by the court; and a rule having been thus obtained, the question whether Russian hemp is like Bombay or Manilla hemp, would be a matter of fact to be submitted to the jury. The just interpretation of the treaty, by which a practical rule may be arrived at, applicable to this particular case, and capable of guiding a jury in its decision, is attended with no small difficulty. The respective counsel for the parties have widely different views concerning it. The one contends that 'like' denotes substantial identity; or, at least, sameness in all respects. That the

origin, the mode of production and preparation, the uses to which each is adapted and applied, and the pecuniary value of each in the market, are all to be considered; and that an article made from a different plant, by different methods of manufacture, having substantially different qualities, not capable of being usefully employed for the same purposes, and bearing a much lower price in the market, is not 'like,' within the meaning of the treaty. The other maintains that these diversities are unimportant. Undoubtedly it is the duty of the court to encounter these difficulties, and ascertain the true rule, and it is the duty of the jury to apply this rule, and find their verdict accordingly, if this be a judicial inquiry. But it is quite plain, it cannot be competent for the court to go any further than a determination that the case is within the treaty. If congress legislates in subordination to the treaty, viewed as municipal law, it is not material what its reasons were for legislating in contravention of the treaty. If the other party to it, had by similar legislation, in admitted or plain disregard of the treaty, afforded the amplest reasons for counter legislation, how could *787 this court take notice of or weigh those reasons?

Is it a judicial question, whether a treaty with a foreign sovereign has

been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws. And it necessarily follows, that if they are denied to congress and the executive, in the exercise of their legislative power, they can be found nowhere, in our system of government. On the other hand, if it be admitted that congress has these powers, it is wholly immaterial to inquire whether they have, by the act in question, departed from the treaty or not; or if they have, whether such departure were accidental or designed, and if the latter, whether the reasons therefor were good or bad. If by the act in question they have not departed from

the treaty, the plaintiff has no case. If they have, their act is the municipal law of the country, and any complaint, either by the citizen, or the foreigner, must be made to those, who alone are empowered by the constitution, to judge of its grounds, and act as may be suitable and just.

There is another view of this case, which has been presented by the plaintiff's counsel, and requires examination. It is urged that, as Russian hemp is not specifically named, the court may conclude, it was not the intention of congress to include it under the words 'all unmanufactured hemp'; that though these words are board enough to include it, the obligation, arising from the treaty, not to include it, is such as to raise an exception of this article; and that the true construction of the act is, 'upon all unmanufactured hemp, not hereinafter excepted, either expressly, or by force of the treaty with Russia, the duty is to be \$40 a ton, and upon those so excepted \$25 a ton.' To this construction of the act, I think there are insuperable objections. It must be admitted at the outset, that it would do violence to the language of the act, and would force into it an exception which it does not contain. Why should this be done? It is said because it is offered to be proved to the satisfaction of a jury, by the

evidence in this case, that Russian hemp is like Bombay hemp, and so there should be no discriminating duty levied. But, in the first place, this argument makes the jury the judges whether the case is, in point of fact, within the treaty, and then makes the court declare that, if within the treaty, there should be no discriminating duty. As already stated, I do not consider these to be judicial questions. It must be observed also, that there are two ways of avoiding discrimination. One is to reduce the duty on the article which is provided for in the treaty; the other, to increase the duty on the 'like' article. The treaty is as well satisfied by one mode as by the other. If I were to assume that this case is within the treaty, and that it was the intention of congress not to depart from it, how shall I say that they intended to have the duty on Russian hemp \$25 a ton, rather than the duty on Bombay hemp \$40 a ton? One is as consistent with their language as the other; or rather neither can be reconciled with what they have said.

The truth is, that this clause in the treaty is **merely a contract**, addressing itself to the legislative power. The distinction between such treaties, and those which operate as laws in courts of justice, is settled in our jurisprudence. It was clearly

pointed out in [Foster v. Neilson, 2 Pet. \[27 U. S.\] 314](#). By the treaty between the United States and Spain, of the 22d of February, 1819 (8 Stat. 252), it was stipulated by the former, 'that all grants of land made, &c., by his Catholic majesty, &c., shall be ratified and confirmed to the persons in possession of the lands, &c.' The question arose, whether this clause operated on the titles to the lands. Mr. Chief Justice Marshall, delivering the opinion of the court said: 'Our constitution declares a treaty to be a law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political not to the judicial department, and the legislature must execute the contract before it can become a rule for the court.' After commenting on the language of the article, he proceeds. 'This seems to be the language of contracts; and if it is, the ratification and confirmation which are promised, must be the act of the legislature. Until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject.' This is the established doctrine under this treaty, as well as

under that by which Louisiana was acquired. 8 Stat. 200. See [Garcia v. Lee, 12 Pet. \[37 U. S.\] 519](#). Its applicability to a stipulation, like that now in question, is clear. The contract is to legislate in conformity with a rule therein given. This necessarily addresses itself, exclusively, to the legislative power. It is a rule of their action, and not of the action of courts of justice. They alone must determine which construction *788 it shall receive, and what cases are or are not within it, in point of fact, unless by law they refer these matters to the judicial department of the government. To some extent, congress has done so, both under the Florida and Louisiana treaties. But they have not done so under this treaty with Russia. And, in the language already quoted, 'until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject.'

For these reasons, I am of opinion that, inasmuch as the duty paid in this case was duly assessed and levied pursuant to the act of congress, there is no further or other question to be tried, and the plaintiffs cannot recover. I desire to add, what perhaps is not necessary, that the various suppositions of violation or departure from treaties by foreign sovereigns, or by our country, which are put by way

of argument in the course of this opinion, have no reference whatever to the treaty now in question, or to any actual case; that I have not formed, or intended to intimate, any opinion, upon the question whether the duty levied upon hemp, the product of Russia, is, or is not higher, than a just interpretation and application of the treaty with the sovereign of that country would allow; as, in my judgment, it belongs to the political department of the government of the United States to determine this question.

On error, the above judgment was affirmed by the supreme court. [2 Black \(67 U. S.\) 481](#).

C.C.Mass. 1855.

Taylor v. Morton

2 Curt.C.C. 454, 23 F.Cas. 784, No. 13,799

END OF DOCUMENT

The Declaration of Independence: A Transcription

IN CONGRESS, July 4, 1776.

“The unanimous Declaration of the thirteen united States of America,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”

TEXT OF THE NORTHWEST ORDINANCE

“Be it ordained by the United States in Congress assembled,
That the said territory, for the purposes of temporary
government, be one district, subject, however, to be divided
into two districts, as future circumstances may, in the opinion
of Congress, make it expedient.

.....It is hereby ordained and declared by the authority
aforesaid, That the following articles shall be considered as
articles of compact between the original States and the people
and States in the said territory and forever remain unalterable,
unless by common consent, to wit:

Art. 1. No person, demeaning himself in a peaceable and
orderly manner, shall ever be molested on account of his mode
of worship or religious sentiments, in the said territory.

Art. 2. The inhabitants of the said territory shall always be
entitled to the benefits of the writ of habeas corpus, and of the
trial by jury; of a proportionate representation of the people in
the legislature; and of judicial proceedings according to the
course of the common law. All persons shall be bailable,
unless for capital offenses, where the proof shall be evident or
the presumption great. All fines shall be moderate; and no

cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed.

Art. 3. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.

.... Be it ordained by the authority aforesaid, That the resolutions of the 23rd of April, 1784, relative to the subject of this ordinance, be, and the same are hereby repealed and declared null and void. “

U.S. CONSTITUTION ARTICLE III SECTION 1.

“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. “

U.S. CONSTITUTION ARTICLE. VI. - DEBTS, SUPREMACY, OATHS

“.....This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

UTAH ENABLING ACT

[Protecting Navajo from State power consistent with Treaty of
Guadalupe Hidalgo and two Navajo Treaties]

**“AN ACT to enable the People of Utah to form a
Constitution and State Government, and to be admitted
into the Union on an equal footing with the original
States.**

*Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled:*

SEC. 1. That the inhabitants of all that part of the area of the
United States now constituting the Territory of Utah, as at
present described, may become the State of Utah, as
hereinafter provided.

SEC. 3. That the delegates to the Convention thus elected
shall meet at the seat of government of said Territory on the
first Monday in March, eighteen hundred and ninety-five, and,
after organization, shall declare on behalf of the people of said
proposed State that they adopt the Constitution of the United
States, whereupon the said Convention shall be, and is
hereby, authorized to form a Constitution and State
government for said proposed State. The Constitution shall be
republican in form, and make no distinction in civil or political
rights on account of race or color, **except as to Indians not
taxed, and not to be repugnant to the Constitution of the
United States and the principles of the Declaration of
Independence.** And said Convention shall provide, by
ordinance irrevocable without the consent of the United States
and the people of said State

First. That perfect toleration of religious sentiment shall be
secured, and that no inhabitant of said State shall ever be
molested in person or property on account of his or her mode
of religious worship: Provided, That polygamous or plural
marriages are forever prohibited.

Second. That the people inhabiting said proposed State do
agree and declare that they **forever disclaim all right and title
to the unappropriated public lands lying within the
boundaries thereof; and to all lands lying within said limits
owned or held by any Indian or Indian tribes; and that until
the title thereto shall have been extinguished by the United**

States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations and has obtained {5} from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as such act of Congress may prescribe.”

ANETH EXTENSION ACT

(KAPPLER'S INDIAN AFFAIRS VOL V)

“Chapter 160

March 1, 1933. | [H.R. 11735.] 47 Stat., 1418.

***An Act To permanently set aside certain
lands in Utah as an addition to the
Navajo Indian Reservation, and for other
purposes¹
Section 2***

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all vacant, unreserved, and undisposed of public lands within the areas in the southern part of the State of Utah, bounded as follows: Beginning at a point where the San Juan River intersects the one hundred and tenth degree of west latitude; thence down said river to its confluence with the Colorado River; thence down the Colorado River to a point where said river crosses the boundary line between Utah and Arizona; thence east along said boundary line to the one hundred and tenth degree of west longitude; thence north to the place of beginning; also beginning at a point where the west rim of Montezuma Creek or wash intersects the north boundary line of the Navajo Indian Reservation in Utah; thence northerly along the western rim of said creek or wash to a point where it intersects the section line running east and west between sections 23 and 26, township 39 south, range 24 east, Salt Lake base and meridian in Utah; thence eastward along said section line to the northeast section corner of section 26, township 39 south, range 25 east; thence south one mile along the section line between sections 25 and 26 to the southeast section corner of section 26, township 39 south, range 25 east; thence eastward along the section line between sections 25 and 36, township 39 south, range 25 east, extending through township 39 south, range 26 east, to its intersection with the boundary line between Utah and Colorado; thence south along said boundary line to its intersection with the north boundary

line of the Navajo Indian Reservation; thence in a westerly direction along the north boundary line of said reservation to the point of beginning be, and the same are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon: *Provided*, That no further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said county under the Act of July 4, 1884 (23 Stat. 96; U.S.C., title 43, sec. 190). Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37 1/2 per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: *Provided*, That said 37 1/2 per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.

SEC. 2.

That the State of Utah may relinquish such tracts of school land within the areas added to the Navajo Reservation by section 1 of this Act as it may see fit in favor of the said Indians, and shall have the right to select other unreserved and nonmineral public lands contiguously or noncontiguously located within the State of Utah, equal in area and approximately of the same value to that relinquished, said lieu selections to be made in the same manner as is provided for in the Enabling Act of July 16, 1894 (28 Stat. L. 107), except as to the payment of fees or commissions which are hereby waived.

Approved, March 1, 1933.”

**NAVAJO NATION PURCHASED FROM UTAH ALL LANDS,
AND SURFACE RIGHTS TO SCHOOL TRUST LANDS
WHEREIN UTAH MANAGED THE SUBSURFACE MINERAL
RIGHTS**

“Chapter 570

August 9, 1937. | [H. R. 6958.] 50 Stat., 564.

***An Act Making appropriations for the
Department of the Interior for the fiscal
year ending June 30, 1938, and for other
purposes***
Section 2

Purchase of land for Navajo Indians, Utah (tribal funds): For the purchase of lands and improvements thereon, and of improvements on former public-domain lands, within additions made to the Navajo Reservation, Utah, by Executive order of May 15, 1905, and the Act of March 1, 1933 (47 Stat., p., 1418), \$20,000, payable from funds deposited to the credit of the Navajo Tribe. “

**1968 ANETH EXTENSION AMENDMENT TO THE ANETH
EXTENSION**

(KAPPLER’S VOL. VI)

“Public Law 90-306

May 17, 1968 | [S. 391] 82 Stat. 121

AN ACT

***To amend the Act of March 1, 1933 (47
Stat. 1418), entitled "An Act to
permanently set aside certain lands in
Utah as an addition to the Navajo Indian
Reservation, and for other purposes".***

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Act of March 1, 1933 (47 Stat. 1418), is amended by deleting all of that part of the last proviso of said section 1 after the word "Utah" and inserting in lieu thereof: "for the health, education, and general welfare of the Navajo Indians residing in San Juan County. Planning for such expenditures shall be done in cooperation with the appropriate departments, bureaus, commissions, divisions, and agencies of the United States, the State of Utah, the county of San Juan in Utah, and the Navajo Tribe, insofar as it is reasonably practicable, to accomplish the objects and purposes of this Act. Contribution may be made to projects and facilities within said area that are not exclusively for the benefits of the beneficiaries hereunder in proportion to the benefits to be received therefrom by said beneficiaries, as may be determined by the State of Utah through its duly authorized officers, commissions, or agencies. An annual report of its accounts, operations, and recommendations concerning the funds received hereunder shall be made by the State of Utah, through its duly authorized officers, commissions, or agencies, to the Secretary of the Interior and to the Area Director of the Bureau of Indian Affairs for the information of said beneficiaries."

Approved, May 17, 1968. "

CHARTER OF THE UNITED NATIONS

The U.S. Senate, by a vote of 89 to 2, gave its consent to the ratification of the UN Charter on July 28, 1945.

“Chapter XI

Declaration regarding non-self-governing territories

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
- c. to further international peace and security;
- d. to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapter XII and XIII apply.

Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters. “



**THE UNITED NATIONS
INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS**

created in 1966 and entered into force on 23 March 1976
The U. S. ratified the document with reservations in 1992

“PREAMBLE

The States Parties to the present Covenant,
Considering that, in accordance with the principles proclaimed
in the Charter of the United Nations, recognition of the
inherent dignity and of the equal and inalienable rights of all
members of the human family is the foundation of freedom,
justice and peace in the world,

Recognizing that these rights derive from the inherent dignity
of the human person,

Recognizing that, in accordance with the Universal Declaration
of Human Rights, the ideal of free human beings enjoying civil
and political freedom and freedom from fear and want can only
be achieved if conditions are created whereby everyone may
enjoy his civil and political rights, as well as his economic,
social and cultural rights,

Considering the obligation of States under the Charter of the
United Nations to promote universal respect for, and
observance of, human rights and freedoms,

Realizing that the individual, having duties to other
individuals and to the community to which he belongs, is
under a responsibility to strive for the promotion and
observance of the rights recognized in the present Covenant,
Agree upon the following articles:

PART 1

Article 1

1. All peoples have the right of self-determination. By virtue
of that right they freely determine their political status
and freely pursue their economic, social and cultural
development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 1. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative

- authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
2. To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the

destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3.
 1. No one shall be required to perform forced or compulsory labour;
 2. Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
 3. For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
 1. Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
 2. Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
 3. Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

4. Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2.
 1. Accused persons shall, save in exceptional circumstances, be segregated from convicted

- persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
2. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or

a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 1. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 2. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 3. To be tried without undue delay;
 4. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal

- assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
5. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 6. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 7. Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at

- the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

3. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
4. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
5. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by

law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

6. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

7. Everyone shall have the right to hold opinions without interference.
8. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
9. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 1. For respect of the rights or reputations of others;
 2. For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

10. Any propaganda for war shall be prohibited by law.
11. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized.

No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

12. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
13. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
14. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

15. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
16. The right of men and women of marriageable age to marry and to found a family shall be recognized.
17. No marriage shall be entered into without the free and full consent of the intending spouses.
18. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

19. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
20. Every child shall be registered immediately after birth and shall have a name.
21. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

22. To take part in the conduct of public affairs, directly or through freely chosen representatives;

23. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
24. To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

U.S. REPORT UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS JULY 1994

“Article 1 - Self-Determination

Generally. The basic principle of self-determination is at the core of American political life, as the nation was born in a struggle against the colonial regime of the British during the eighteenth century. The right to self-determination, set forth in Article 1 of the Covenant, is reflected in Article IV, Section 4 of the U.S. Constitution, which obliges the federal government to guarantee to every state a "Republican Form of Government." Implicitly, this article ensures that every state will be governed by popularly elected officials. Similarly, Articles I and II of the Constitution, as amended by the Twelfth, Seventeenth, Twentieth, Twenty-second, and Twenty-third Amendments to the Constitution, and the second clause of the Fourteenth Amendment, describe in detail the manner by which the national government is to be elected. The right to vote in federal, state, and local elections is also implicit, for it is the "essence of a democratic society." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The states are permitted to set the qualifications for voting, but the states are limited by the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments from restricting the franchise on the basis of race, color, previous condition of servitude, sex, failure to pay a poll tax, or for being under any age except 18 years. Hence, the people of the United States are free in law and in practice to determine their "political status" within the structure of the Constitution, and to change the Constitution itself through amendment. There have been 27 such amendments since the founding of the Republic, beginning with the Bill of Rights (Amendments I-X) in 1791.

The right to pursue economic and cultural development is not mentioned, in such terms, in the U.S. Constitution, yet it is among the most

fundamental principles that define American society. The essential civil and political rights guaranteed by the Constitution and the Covenant, and a free market economy, provide the basis for free and liberal pursuit of economic or cultural development, with virtually no restraint save for those necessary to protect public safety and welfare.

Property rights are specifically protected by the Fifth and Fourteenth Amendments, which guarantee that neither the states nor the federal government may deprive one of property without due process or take property for public use without fair compensation. The Constitution does not, however, protect persons or corporations from reasonable economic regulation by both the states and the federal government. Cultural life, on the other hand, is generally protected by the First Amendment guarantees of freedom of speech and association which are very broadly construed, as discussed below in connection with Articles 18, 19, 21 and 22.

II. Native Americans

Introduction. The United States is home to a wide variety of indigenous people or groups who, despite their ethnic, cultural and linguistic diversity, are generally referred to as Native Americans. Many are organized as tribes, some of which have obtained official recognition by the federal government while others have not. For purposes of this report, the term also includes special status groups such as Alaska Natives and native Hawaiians. The term "Alaska Natives" includes Inuits (sometimes referred to as Eskimos), Indians, and Aleuts. Native Hawaiians are not a federally recognized Indian tribe or group. The lifestyles of Native Americans vary widely, from those in which traditional culture

is still largely practiced (over 100,000 Native Americans still speak their native languages) to those who have been largely or completely assimilated into urban modernity.

In the 1990 census, 1.9 million individuals, or less than one percent of the population, identified themselves as Native Americans. The largest tribes or ethnic groups among these self-identified Native Americans were the Cherokee, Navajo, native Hawaiians, Chippewa and Sioux. The states with the largest Native American populations include Oklahoma, California, Arizona, Hawaii and New Mexico. The highest proportion of Native Americans to the rest of the population occurs in Alaska (15.6 percent). Approximately half of the total Native American population lives on or near a reservation. The largest land-holding tribes are the Navajo (whose land is located in Arizona, New Mexico and Utah and covers an area larger than nine of the 50 states), Tohono O'odham, Pine Ridge, Cheyenne River, and San Carlos. In total, Native American tribes and individuals own between 50 and 60 million acres of land. In addition, Alaskan natives own another 44 million acres of land as a result of the Alaska Native Claims Settlement Act.

Of all Native American tribes, 542 are federally recognized, including 223 Alaska villages and regional tribes. The term "tribe" here refers to the political and institutional mechanisms of tribal authorities which exercise jurisdiction over reservation or other tribal lands. The members of a tribe, as individuals, are U.S. citizens with the same rights as other U.S. citizens and may live where they choose. Within the area of tribal jurisdiction, however, the tribe itself generally is the governing authority and not a state or other local government. Tribes enjoy considerable

autonomy even with respect to the federal government. Federally recognized tribes are eligible to participate in specified programs funded and administered by the Bureau of Indian Affairs (BIA) in the Department of the Interior. Since 1978, 150 groups have notified the BIA of the intention to seek federal recognition. As of mid-1994, 73 groups had submitted letters of intent to petition; 26 petitions were incomplete; 9 petitions were under active consideration; 5 were ready for active consideration; 7 required legislation; and 30 had been resolved (9 acknowledged as tribes; 13 denied; 5 legislatively determined; and 3 otherwise addressed).

The Alaska Native Claims Settlement Act identified 44 million Alaskan acres as Native controlled and owned, and extinguished Natives' claims to most of the rest of Alaska. Native Hawaiians have sought ownership and control over land and acknowledgement of Native American status for some time but without success.

Under U.S. law, Native American tribes are distinct, **independent** political communities, which retain all aspects of their sovereignty not withdrawn by treaty or statute or by implication as a result of their status. See *United States v. Wheeler*, 435 U.S. 313 (1978); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Perhaps the most fundamental principle of the law governing the relationship between the United States and Native American tribes is the principle that the powers vested in Native American tribes **are inherent powers of a limited sovereignty which has never been extinguished.** They are not, in general, delegated powers granted by acts of Congress.

Although Native American tribes are currently

accorded a substantial measure of autonomy and self-governance, there are still many areas of difficulty and controversy in their relationships with federal and state governments. Despite some improvements, Native Americans are far more likely to live in poverty and suffer high rates of disease, suicide and homicide than the majority of U.S. citizens.

According to the 1990 census, 31 percent of Native Americans lived below the poverty level. In 1991 the unemployment rate for Native Americans was 45 percent. Native Americans experience disproportionately high rates of mortality from tuberculosis, alcoholism, accidents, diabetes, homicide, suicide, pneumonia and influenza.

Historical Background. Some scholars have estimated the Native American population of the United States to have been as high as 10 million persons at the time of initial European contact. The basis of indigenous social and political organization was tribal. Tribes ranged from small semi-nomadic bands to large, highly organized, and sophisticated communities. Tribes were self-governing entities with clearly understood socio-political rankings or hierarchies. They had systems of social and political control to perform or regulate subsistence and economic activity (including trading with other tribes), distribute wealth, recognize land boundaries, conduct war and regulate domestic and other aspects of intragroup relations.

The organizers of government of the United States recognized the self-governance of Indian groups. The Constitution vests in the federal government the exclusive authority to regulate commerce with Native American tribes. Art. 1, § 8, cl. 3. The First Congress acted promptly to exercise this authority, enacting the Indian Trade and Intercourse Act of 1790, 1 Stat. 137. Further, President Washington

and the First Congress reached agreement that the treaty-making power of the federal government extended to treaties with Native American tribes, establishing the precedent that Native American treaties -- like those with foreign nations -- needed Senate approval before they could take effect.

As the largely European immigrant population of the United States increased and moved westward, there was increasing tension and violence between settlers and Native Americans. Opting to resolve the situation by accommodating the settlers, the federal government between 1815 and 1845 sought to remove eastern tribes from their tribal homelands. However, with the continued westward push of immigrant settlement, further removal became impossible. In the 1850 s, the federal government adopted a new policy of assignment of tribes to permanent reservations. Reservations were intended to be for the exclusive use of Native Americans, providing a fixed and permanent home under the superintendence of a tribal agent. Comm r of Indian Affairs Annual Rept., S. Exec. Doc. No. 1, 33d Cong., 2d Sess. 225 (1854). Confinement to reservations was often strenuously opposed by tribes, leading to a series of military conflicts that extended through the 1870 s.

By 1880, there were serious doubts about the reservation policy. Economically and socially, most reservations were not successful. There was widespread destitution in tribal country and significant corruption in the administration of the federal Native American service. Political reformers came to favor allotment of land to individual Indians as a response to these problems and as the vehicle to assimilate Indians into mainstream society. Economic interests in the

western states supported allotment because it promised to open additional land to settlement.

In 1887, the General Allotment Act authorized the Secretary of the Interior to allot tracts of reservation land to individual Native Americans -- 80 acres (approximately 32.3 hectares) to an individual and 160 acres (64.7 hectares) to a family. The allotted land was to be held in trust by the United States for a period of 25 years; thereafter a fee patent was to be issued. Consistent with the philosophy underlying the allotment policy, legislative and administrative policies accompanying allotment strongly discouraged tribal self-government and traditional cultural and religious practices.

The General Allotment Act and subsequent allotment legislation resulted in a significant diminution of Native American land holdings. Of 40 million acres allotted to individuals, some 27 million acres were lost by sale or foreclosure between 1887 and 1934. An additional 60 million acres were sold to non-Native American homesteaders or corporations as "surplus" or were ceded outright. In total, Native American land holdings declined from 138 million acres in 1887 to 48 million acres in 1934.

In 1934, the policies of assimilation and allotment were rejected with the enactment by Congress of the Indian Reorganization Act (IRA). See 25 U.S.C. 461-479. The overriding purpose of the Act was to establish "machinery whereby Indian tribes would be able to assume greater self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). The IRA took a community-based approach to preservation of a tribal land base and reorganization of tribal governments. The Act stopped allotment and contained provisions to

stabilize tribal land holdings and for the acquisition in trust of additional trust lands for Native American reservations. It provided that tribes could organize for their common welfare, adopt constitutions and bylaws, and form tribal corporations, with the power to own, hold, manage, and operate property and businesses.

However, in the late 1940 s, federal policy shifted again, with congressional and executive reports proposing renewed policies of assimilation. In 1953, House Concurrent Resolution 108 declared as congressional policy the termination of federal control and supervision over Native American tribes and the freeing of tribes and their members "from all disabilities and limitations specially applicable to Indians." The Indian Reorganization Act was not repealed, but individual acts were passed to implement the new policy for individual tribes or groups of tribes. Specific arrangements varied from tribe to tribe, but these acts typically required tribal approval before the sale or encumbrance of tribal land. For most purposes, the federal trust relationship was ended for terminated tribes, and tribes and their individual members were made subject to state jurisdiction. Eligibility for special federal services for tribes and tribal members was ended.

The impact of termination on these tribes was devastating. Tribes often went from prosperity to poverty. Many terminated tribes saw their land sold. The termination act stripped tribes of their exemption from taxation, and tribal leaders were forced to begin to sell ancestral tribal land to pay the taxes. By the 1960 s, many tribes faced the loss of their land, tribal identity, and culture.

By 1970, however, national policy had shifted once

again, **this time toward a goal of tribal self-determination.** The new policy was first articulated in a 1970 message to Congress by President Nixon. The message called for rejection of the extremes of both termination and excessive tribal dependence on the federal government. The message said that the time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions and proposed a new policy of self-determination **"to strengthen the Indian s sense of autonomy without threatening his sense of community."** H.Doc. 91-363, 91st Cong., 2d Sess. 1-3 (1970). This new policy found expression in the Indian Self-Determination Act, discussed below.

Current Policy. Current policy continues and builds upon this policy of tribal "self-determination" as expressed by President Clinton on April 29, 1994, in a meeting with tribal leaders. The President signed two memoranda: one instructing all government agencies to cooperate wherever possible in meeting the need for eagle feathers in the traditional practices of Native Americans, and the other directing federal agencies to ensure that they interact with tribes on a government-to-government basis.

In terms of legal status, Native American tribes are recognized as "unique aggregations possessing attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1974). "The sovereignty that Indian tribes retain is of a unique and limited character. . . . In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status (i.e., by virtue of their being within and part of the United States)."

United States v. Wheeler, 435 U.S. 313, 323 (1977).

In recent decisions, the U.S. Supreme Court has recognized the inherent right of tribes to tax non-Native Americans doing business within their territories, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and the immunity of Native Americans and their property from state taxation, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), and *Bryan v. Itasca County*, 426 U.S. 373 (1976). The Supreme Court has also upheld the right of tribal courts to make the initial determinations as to the scope of their own jurisdiction. *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

The Supreme Court has recognized that, as a general rule, **states lack authority to exercise their civil, regulatory laws on Native American territory. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).** A tribe's authority to regulate land use within the boundaries of its territories has been found to vary depending on the character of the territory. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, 113 S.Ct. 2309 (1993). As a guiding principle for these decisions, the Supreme Court has stated that 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." *Montana v. United States*, 450 U.S. 544, 564 (1981).

The Supreme Court has held that tribal courts are the proper forum for the adjudication of civil disputes involving Native Americans and non-Native Americans arising on a reservation. *Fisher v.*

District Court, 424 U.S. 382 (1976). "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty, and, as a result, "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts, unless affirmatively limited by a specific treaty provision or federal statute." Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

In the area of criminal jurisdiction, Congress during the 1950's gave several of the states authority to exercise concurrent jurisdiction on Indian reservations. 18 U.S.C. 1162; 28 U.S.C. 1360. In 1968 Congress limited the tribal exercise of criminal jurisdiction to misdemeanors. 25 U.S.C.

1302(7). The Supreme Court subsequently concluded that tribes do not have criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). It also concluded that tribes do not have criminal jurisdiction over nonmember Indians. *Duro v. Reina*, 495 U.S. 676 (1990). In 1990, however, Congress effectively reversed the *Duro* decision, recognizing the unique nature of the Indian communities. See Act of November 5, 1990, 104 Stat. 1893; Act of October 9, 1991, 105 Stat. 616; Act of October 28, 1991, 105 Stat. 646.

Indian Self-Determination Act. In the 1970 message on Indian policy mentioned above, then-President Nixon called for legislation to allow tribes to take over control and operation of federally-funded and -administered Indian programs from the Department of the Interior and what is now the Department of Health and Human Services. In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEA), 25 U.S.C. 450, et seq. The Act declares it to be the policy of the United States to assure maximum Indian participation in

the direction of educational as well as other federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities." 25 U.S.C. 450a(a).

The ISDA directs the Secretaries of the Interior and Health and Human Services to enter into contracts or grants with Indian tribes and organizations to plan, conduct, or administer programs that the Secretaries are authorized to administer for the benefit of Indians. Contracts designated as mature contracts may be for an indefinite term, and reporting requirements are minimal. **The Act specifically provides that it neither affects the sovereign immunity of Indian tribes nor requires the termination of any existing trust responsibility of the United States with respect to Indian people.**

In 1991, the Bureau of Indian Affairs within the Department of the Interior (BIA) distributed \$481,228,608 to 414 Indian tribal contractors under the provisions of the ISDA.

Self-Governance Demonstration Project. **In 1988 amendments to the ISDA, Congress established a Self-Governance Research and Demonstration Project involving 20 Indian tribes. Title III, Pub. L. No. 100-472, 102 Stat. 2296 (1988).** The purpose of the Self-Governance Project is to allow tribes greater flexibility in administering their own programs and services with minimal federal governmental involvement. The participant tribes sign a self-governance compact with the government and are allowed to redesign BIA programs and redistribute funding according to tribal priorities. The tribes in the demonstration program operate BIA programs with only limited requirements to adhere to federal regulations and record-keeping requirements. **In December 1991, Congress increased to 30 the number**

of tribes eligible to participate in the Self-Governance Project and extended the demonstration period from 1993 to 1996. Pub. L. No. 102-184, 105 Stat. 1278 (1991). Congress is currently considering legislation to make the project permanent.

Recognition of Tribes. After the abandonment of the termination policy in the 1960's and 1970's, the federal relationship with many of the "terminated" tribes was restored, beginning with the Menominee Tribe in 1973. Menominee Restoration Act, 25 U.S.C.

903-903f. During the same period, there was a growing awareness of, and interest among, other groups of Indian descendants not formally recognized as tribes by the federal government in asserting their tribal status, tribal treaty rights, or tribal land claims. Many groups of these Indian descendants sought recognition from the federal government.

In 1978, the Department of the Interior established a program within the Bureau of Indian Affairs to standardize the recognition process and provide substantive criteria for determining whether a group of Indian descendants existed as an Indian tribe. Previously, such determinations had been made on an ad hoc basis. The program included an effort to identify all groups interested in petitioning to establish their tribal status. The effort ultimately identified 150 groups of Indian descendants with an interest in establishing tribal status.

The acknowledgement process requires documentation of specific criteria including that the group has been viewed as Indian since historical times, lives in community, and exercises political authority over its members. Thus far, the status of 30 groups has

been resolved either by the Department of the Interior or through special legislation.

Indian Natural Resources. Indian tribes retain considerable control over natural resources and wealth, with some added protection by the federal government through the establishment of a trust. The federal trust responsibility to the Indian tribes has its roots in the assertion by the federal government that it has the power to control the sale of Indian land to non-Indians. The policy was first asserted by Great Britain in the Royal Proclamation of 1763, which stated that only the Crown could take lands from the Indians. The policy continued after independence in the Indian Trade and Intercourse Act, passed by the first Congress in 1790 and is now codified in 25 U.S.C. 177. The courts have held that along with the power to control the disposition of the land comes the responsibility to manage the land for the benefit of the Indian owners and with the same care and skill that a person of ordinary prudence would exercise in dealing with his or her own property. *United States v. Mason*, 412 U.S. 391, 398 (1973).

The United States also has a more general trust relationship with the Indian people, *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (Mitchell II), and that relationship creates an overriding duty to deal fairly with all Indians. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). The trust obligation is a **strict fiduciary standard** that applies to all departments of the government that deal with Indians, not just the departments specifically charged with responsibility for Indian affairs. If Indians believe the government is not acting in accordance with its trust responsibilities, they may seek injunctive relief from the courts to compel the government to perform its duties or, if damage has

already occurred, they may obtain damages through a breach of trust action. *Mitchell II*, 463 U.S. at 226-28.

Land. According to a 1990 Bureau of Indian Affairs report, tribes and individual Native Americans own between 50 and 60 million acres of trust or restricted land. This represents 2.34 percent of the total land base in the United States. Federal law specifically prohibits the alienation of tribal trust lands absent the consent of the federal government. 25 U.S.C. 177. It is the intent of the statutory restraint on alienation of Native American lands to insulate such lands from the full impact of market forces, preserving the land base for the furtherance of Native American values. Inherent in this federal policy is the view that preservation of a substantial land base is essential to the existence of tribal society and culture.

Prior to the 1930's, federal policies had the effect of diminishing the Native American land base. As indicated above, between 1887 and 1934 Native American land holdings declined from 138 million acres to 48 million acres. However, the 1934 Indian Reorganization Act contained provisions to stabilize the Indian land base. More recently, the Congress enacted the Indian Land Consolidation Act of 1983 to assist tribes in addressing the allotment policy. 25 U.S.C. 2201-11. The Act authorizes tribes to establish land consolidation areas where tribes are assisted in acquiring and exchanging land in order to consolidate their holdings. The Act also provided that especially small fractionated interests in allotted land owned by individuals do not pass to the owners' heirs, but return to the tribe upon the death of those individuals. This latter provision of the Act was found to violate the constitutional rights of Native American landowners

in *Hodel v. Irving*, 481 U.S. 704 (1987). The Act has been amended to address this decision, but constitutional challenges to the amended Act are currently pending in the courts.

Enforcement of Land Rights Against Third Parties. Federal law has attempted to protect tribal possessory rights against intrusion by third parties by restraining and punishing various types of trespass. Ordinary trespass remedies are available to Native American tribes to prevent trespasses upon their land and to recover damages for injuries arising out of such trespasses. Accordingly, actions may be maintained for ejectment, for injunctions against intrusions and to recover damages for trespass on, or injury to, tribal lands. See *Oneida County v. Oneida Indian Nation*, 470 U.S. 226 (1985).

Possessory suits or damage actions involving tribal possessory rights may be commenced either by the tribe itself or by the federal government acting on behalf of the tribe. Basically these claims allege that (i) the affected tribe has a superior property interest in the subject land (i.e., aboriginal or recognized title), (ii) the Nonintercourse Act provides that no transfer of tribal lands is valid unless approved by the federal government, (iii) subsequent to the Act certain tribal lands were conveyed to third parties without specific governmental approval, (iv) these conveyances are in violation of the Act and thus, invalid, and (v) the affected tribe is now entitled, despite the passage of time, to return of the land and/or to damages for trespasses committed by those who wrongfully occupied the land. *Oneida County*, *supra*.

In instances where the federal government has been requested but has been unwilling to take action on

behalf of the tribe, the courts have been willing to order the commencement of a possessory action on the theory that the federal trusteeship over Native American lands created by the statutory restraints on alienation imposes an affirmative obligation to protect Indian possessory rights. In tribal possessory actions commenced directly by the tribe, the tribe may assert any and all positions, claims, and defenses that would have been available had the suit been commenced by the federal government. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

Indian Land Rights Against the United States. The great bulk of aboriginal Native American land in what is now the United States passed out of indigenous ownership before 1890 by cession pursuant to treaty or taking by the federal government. The right of Native Americans to obtain compensation for or recovery of this land differs from their rights against third parties.

Aboriginal Indian interest in land derives from the fact that the various tribes occupied and exercised sovereignty over lands at the time of occupation by white people. This interest does not depend upon formal recognition of the aboriginal title, and gives the tribes the right to occupy and possess the land. Aboriginal title gives a tribe the right to possess land as against third parties until and unless Congress specifically extinguishes the right.

Congress may recognize or extinguish aboriginal rights. **Once aboriginal rights are recognized by Congress, then the tribe has title that cannot be extinguished without a clear and specific action by Congress in a treaty, statute or executive order, and compensation for the extinguishment of the right. *Oneida Indian Nation v. County of Oneida*,**

414 U.S. 661 (1974); United States ex rel. Hualapai Indians v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941). However, by law, Congress is not obligated to pay compensation to the tribes when it extinguishes aboriginal Indian rights that have not been recognized by Congress. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

Despite this legal doctrine, compensation has in fact been paid by the United States for many Indian land cessions at the time they were made, although the compensation often has been less than adequate. In this century, additional provision has been made for cases in which no or inadequate compensation was paid. In the first half of the 20th Century, special jurisdictional statutes gave some tribes the right to sue in the Court of Claims for compensation for land taking. In 1946, Congress adopted the Indian Claims Commission Act, 25 U.S.C. 70, et seq., which provided for a quasi-judicial body, the Indian Claims Commission (ICC), to open up unresolved Indian claims against the United States, a large portion of which involved claims for taken lands. The Act authorized claims arising from the taking by the United States, whether as a result of a Treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant, as well as claims not recognized by any existing rule of law or equity based on general principles of fair and honorable dealings. 25 U.S.C. 70a.

The ICC provided a forum for suits against the United States Government that would otherwise have been barred by time and sovereign immunity, and in some respects provided Indians with special benefits that would not ordinarily have been available under regular court rules and procedures. Recovery of

compensation did not depend on proof of recognized title; compensation was available even if a tribe's property interest was aboriginal only. Further, compensation was available if a tribe's interest in land was found to have been taken for less than adequate compensation. However, the wording of the Act and its legislative history made clear that only financial compensation was contemplated by Congress; the ICC had no authority to restore land rights that had been extinguished. *Osage Nation v. United States*, 1 Indian Claims Commission 54 (1948), reversed on other grounds, 119 Ct.Cl. 592, cert. denied, 342 U.S. 896 (1951).

Water. Generally, Indian water rights are based on the federal or Indian reserved rights legal doctrine first enunciated by the U.S. Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908). *Winters* held that the establishment of an Indian reservation includes an implicit reservation of water necessary to provide a permanent home for Indians. The holding followed the recognized rule that treaties are not grants of rights to Indians, but grants of rights from them and a reservation of those rights not granted. *United States v. Winans*, 198 U.S. 371, 381 (1905). In *Winters*, the Supreme Court recognized that in establishing reservations, not only did the United States reserve water for Indians, but the Indians themselves also reserved their aboriginal right to "command of the lands and water." 207 U.S. at 576. Indian reserved water rights differ from water rights held by non-Indians under state law in a number of key respects. For example, Indian water rights are not based on the amount of water a tribe has historically put to use or "appropriated." Rather, the quantity of water that a tribe is entitled to is an amount sufficient to carry out the purpose of making the reservation a permanent home base for Indian people.

Included within this measure is water for domestic, commercial, industrial, recreational, hunting and fishing, and agricultural purposes. The water right is broad enough "to satisfy the future as well as the present needs of the Indian[s]." *Arizona v. California*, 373 U.S. 546, 600 (1963). Another unique aspect of an Indian reserved water right is that it is not forfeited through nonuse, so that a tribe's water rights are protected from usurpation by its non-Indian neighbors during those periods of time when the tribe is unable, because of economic or other constraints, to use its water.

Hunting and Fishing Rights. Through international treaties and domestic legislation, Congress and the executive branch have sought to ensure conservation of wildlife yet recognize the essential rights of Indians to hunt and fish to maintain their culture. In the contiguous 48 states where Indian tribes had reserved hunting and fishing rights in treaties, litigation in federal court provided the primary means of protecting Indian hunting and fishing rights. In the early 1970's, the United States initiated litigation against the states of Washington, Oregon, and Michigan to define and protect from state regulation the treaty fishing rights of many tribes. The cases have recognized legitimate conservation needs but, at the same time, by protecting the tribes' right to regulate the fishery free of state controls, the litigation has done a great deal to preserve and enhance fundamental tribal rights.

In addition to U.S. Government participation in hunting and fishing rights litigation on behalf of the tribes, the BIA has provided tribes with funding to support the tribes' own litigation and funding to develop their own fish and game management capabilities and resources. Congress has enacted

legislation to make the income derived from treaty fishing tax exempt thereby providing some measure of economic protection to preserve the cultural activity of treaty fishing.

In Alaska, although aboriginal hunting and fishing rights were extinguished, certain statutory provisions exempt Alaska Natives from many wildlife management statutes and mandate a subsistence priority for rural Alaskans.

Minerals. Decisions of the U.S. Supreme Court in the 1930's established that the minerals in, on, or under Indian-owned land were constituent elements of the land and thus owned by the Indians who own the land. *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *British-American Oil Prod. Co. v. Board of Equalization*, 299 U.S. 159, 164-65 (1936). Minerals currently being produced are primarily oil, gas, and coal. Other minerals known to exist on Indian lands include shale, gilsonite, uranium, gypsum, helium, copper, iron, zinc, lead, phosphate, asbestos, and bentonite. Mineral resources in, on, or under lands owned by any individual Indian or Alaska Native or any Indian tribe, the title to which is held in trust by the United States or subject to a restraint on alienation imposed by the United States, are subject to development and disposition under statutes and regulations of the United States. These statutes and regulations provide that while the individual Indian or Indian tribe is the lessor, the Secretary of the Interior must approve the lease or other minerals agreement before it is effective. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372 (1968); *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1459 (9th Cir. 1986). The regulations are detailed and cover items such as durational requirements, rental and royalty rates, acreage restrictions, environmental requirements,

and operating requirements. See 25 C.F.R. Part 211 (Leasing of Tribal Lands for Mining); 25 C.F.R. Part 212 (Leasing of Allotted Lands for Mining). Under this comprehensive system of statutes and regulations applicable to Indian mineral resources, the United States has a fiduciary obligation toward Indians with respect to management of Indian mineral resources. *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1987); *Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F.2d 782, 794 (9th Cir. 1986).

Indian mineral resources can be developed under two different statutory schemes. The first is a leasing system where the individual Indian or Indian tribe may lease its mineral resource to a developer. 25 U.S.C. 396-396g. The second statutory scheme was established in 1982 with the enactment of the Indian Mineral Development Act, codified at 25 U.S.C. 2101-08. The purpose of that Act was to allow Indian tribes to enter into various kinds of agreements for the development of their mineral resources. Tribes wishing to have greater responsibility, oversight, and flexibility in the control and development of their own mineral resources can negotiate innovative, flexible business arrangements under the Act. The tribes are not limited to the leases and the restrictions on leasing that are present under the 1938 leasing statute.

Under either statutory scheme, Indian lands are not treated as federal public lands for purposes of mineral regulation. The principal goal of the Department of the Interior in Indian mineral resource management is not to further federal energy policies, but rather to assist Indian landowners in deriving maximum economic benefit from their resources consistent with sound conservation,

environmental, and cultural practices.

Timber. Indian tribes have full equitable ownership in timber located on tribal reservation lands.

United States v. Algoma Lumber Co., 305 U.S. 415, 420 (1939). The question of tribal ownership of timber resources was unresolved until the 1938 decision of the United States Supreme Court in *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938), which held that timber was a constituent element of the land and owned by the tribe unless the treaty with the tribe specified otherwise.

Individual Indians and Indian tribes generally may not sell the timber on their land without the approval of the Secretary of the Interior. The U.S. Congress authorized the sale of standing timber in 1910. 25 U.S.C. 406, 407. Under these statutes, timber may be sold in accordance with regulations promulgated by the Secretary of the Interior found at 25 C.F.R. Part 163. The regulations state that the objectives with respect to management of Indian forest lands are to preserve commercial forest lands in a perpetually productive state, develop a sales program supported by written tribal objectives and a long-range multiple use plan, develop resources for jobs and income, regulate water runoff and soil erosion, and preserve wildlife, recreational, cultural, aesthetic, and traditional values. 25 C.F.R. 163.3. In *Mitchell v. United States*, 463 U.S. 206 (1983), these statutes and regulations were held to create a fiduciary relationship between the government and Indian timber owners.

In 1990, the U.S. Congress declared that the United States has a trust responsibility toward Indian forest lands when it passed the National Indian Forest Resources Management Act. 25 U.S.C. 3101-20. The act reaffirmed the existing Native American

forest land management objectives and established some new program directions. The purposes of the Act are to allow both the Department of the Interior and the Native Americans to participate in the management of Indian forest lands in a manner consistent with the Secretary's trust responsibility and with the objectives of the Indian owners; to provide educational and training opportunities to increase the number of Indians working in forestry programs on Indian lands; and to authorize the necessary appropriations to carry out the protection, conservation, utilization, management, and enhancement of Indian forest lands objectives of the act."

**Updated Core Document Forming Part of the Reports of
the United States of America regarding the U.N.
COVENANT ON CIVIL AND POLITICAL RIGHTS**

Released by the Bureau of Democracy, Human Rights and
Labor

October 21, 2005 <http://www.state.gov/g/drl/rls/55516.htm>

III. GENERAL FRAMEWORK FOR THE PROTECTION OF
HUMAN RIGHTS

A. Legal framework

118. The essential guarantees of human rights and fundamental freedoms within the United States are set forth in the Constitution and statutes of the United States, as well as the constitutions and statutes of the several states and other constituent units. In practice, the enforcement of these guarantees ultimately depends on the existence of an independent judiciary with the power to invalidate acts by the other branches of government which conflict with those guarantees. Maintenance of a republican form of government with vigorous democratic traditions, popularly elected executives and legislatures, and the deep-rooted legal protection of freedoms of opinion, expression and the press, all contribute to the protection of fundamental rights against governmental limitation and encroachment.

D. Human rights instruments

Multilateral treaties

149. The United States is at present Party to the following multilateral human rights instruments:

- Slavery Convention and its amending Protocol;

Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to

- Slavery;
- Protocol Relating to the Status of Refugees;
- Inter-American Convention on the Granting of Political Rights to Women;
- Convention on the Political Rights of Women;
- Convention on the Prevention and Punishment of the Crime of Genocide;
- ILO Convention No. 105 concerning the Abolition of Forced Labor;
- International Covenant on Civil and Political Rights;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- International Convention on the Elimination of All Forms of Racial Discrimination;
- ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor;
- The Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict;
- The Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution, and Child Pornography.

150. Moreover, the United States has signed but not yet ratified the following multilateral human rights treaties:

- International Covenant on Economic, Social and Cultural Rights;
- American Convention on Human Rights;
- Convention on the Elimination of All Forms of Discrimination against Women.

151. In addition, the United States has entered into many bilateral treaties (including consular treaties and treaties of friendship, commerce and navigation) which contain provisions guaranteeing various rights and protections to

cases, these may be invoked directly in United States courts for that purpose.

Treaties as law

152. Duly ratified treaties are binding on the United States as a matter of international law. Whether a given treaty has the force of domestic law, and if so, to what extent, will depend on the specific provisions of the treaty, including any reservations, understandings, or declarations made by the United States. For example, not all treaty provisions create judicially enforceable individual rights in the courts of the United States. In some cases where a treaty provision does not by its own force grant a judicially enforceable individual right, the federal government may enact implementing legislation that grants such a right as a means of implementing the treaty provision.

153. Historically, the prospect that the constitutional treaty power could be used to override or invalidate state and local law generated considerable domestic political controversy. Although it has been recognized that the treaty power is not limited by the scope of congressional authority over domestic matters (See Missouri v. Holland, 252 U.S. 416 (1920)), reliance upon that power to preempt State and local law has been considered by some to be an interference with the rights of the constituent States reserved to them under the Constitution. Consequently, the expectation has been that any changes to United States law required by treaty ratification will be accomplished in the ordinary legislative process.

154. Also, treaties as well as statutes must conform to the requirements of the Constitution. Reid v. Covert, 354 U.S. 1 (1957). Thus, the United States is unable to accept a treaty obligation which limits constitutionally protected rights, as in the case of Article 20 of the International Covenant on Civil and Political Rights, which infringes upon freedom of speech and association guaranteed under the First Amendment to the Constitution.

155. Consequently, in giving advice and consent to ratification of a treaty concerning the rights of individuals, Congress must give careful consideration to the specific provisions of the treaty and to the question of consistency with existing state and federal law, both constitutional and statutory. **When elements or clauses of a treaty conflict with the Constitution, it is necessary for the United States to take reservations to those elements or clauses, simply because neither the President nor Congress has the power to override the Constitution.** In some cases, it has been considered necessary for the United States to state its understanding of a particular provision or undertaking in a treaty, or to make a declaration of how it intends to apply that provision or undertaking.

Implementation

156. When necessary to carry out its treaty obligations, the United States generally enacts implementing legislation rather than relying on a treaty to be "self-executing". Thus, for example, to implement the Genocide Convention, the United States Congress adopted the Genocide Convention Implementation Act of 1987, codified at 18 U.S.C. § 1091-93. When such legislation is required, the United States' practice with respect to certain treaties has been to enact the necessary legislation before depositing its instrument of ratification. It is for this reason, for example, that the United States did not deposit its instrument of ratification for the Convention Against Torture until 1994, even though the Senate gave its advice and consent to ratification of that treaty in 1990, as Congress did not approve the necessary implementing legislation until May 1994.

157. However, the United States does not believe it necessary to adopt implementing legislation when domestic law already makes adequate provision for the requirements of the treaty.

Again, the Convention Against Torture provides a case in point. While final ratification awaited enactment of legislation

giving United States courts criminal jurisdiction over extraterritorial acts amounting to torture which had not previously been covered by United States law, no new implementing legislation was proposed with respect to torture within the United States because United States law at all levels already prohibited acts of torture within the meaning of the Convention. **Similarly, because the basic rights and fundamental freedoms guaranteed by the International Covenant on Civil and Political Rights (other than those to which the United States took a reservation) have long been protected as a matter of federal constitutional and statutory law, it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law.** That important human rights treaty was accordingly ratified in 1992 shortly after the Senate gave its advice and consent. “

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EXECUTIVE ORDERS AS FOUND IN ‘NOTES’ OF 25 U.S.C. 450 INDIAN SELF DETERMINATION ACT

Ex. Ord. No. 13175. Consultation and Coordination With Indian Tribal Governments

Ex. Ord. No. 13175, Nov. 6, 2000, [65](#) F.R. [67249](#), provided:
By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States **government-to-government relationships** with Indian

tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) “Policies that have tribal implications” refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) “Indian tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, [25 U.S.C. 479a](#).

(c) “Agency” means any authority of the United States that is an “agency” under [44 U.S.C. 3502 \(1\)](#), other than those considered to be independent regulatory agencies, as defined in [44 U.S.C. 3502 \(5\)](#).

(d) “Tribal officials” means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and

territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals.

Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that

have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's

prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993 [[5](#) U.S.C. [601 note](#)], each agency shall include a certification from the official designated to ensure

compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review) [[5 U.S.C. 601 note](#)], Executive Order 12988 (Civil Justice Reform) [[28 U.S.C. 519 note](#)], OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments [set out below].

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism) [[5 U.S.C. 601 note](#)].

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person. William J. Clinton.

Government-to-Government Relations With Native American Tribal Governments

Memorandum of President of the United States, Apr. 29, 1994, [59 F.R. 22951](#), provided:

Memorandum for the Heads of Executive Departments and Agencies

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Today, as part of an historic meeting, I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments.

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

(a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a **government-to-government relationship** with federally recognized tribal governments.

(b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

(c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal

government rights and concerns are considered during the development of such plans, projects, programs, and activities.

(d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.

(e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.

(f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 (“Enhancing the Intergovernmental Partnership”) [former [5 U.S.C. 601 note](#)] and 12866 (“Regulatory Planning and Review”) [[5 U.S.C. 601 note](#)] to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

The head of each executive department and agency shall ensure that the department or agency’s bureaus and components are fully aware of this memorandum, through publication or other means, and that they are in compliance with its requirements.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

William J. Clinton.

STATUTES

25 USC § 71. Future treaties with Indian tribes

“No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. Such treaties, and any Executive orders and Acts of Congress under which the rights of any Indian tribe to fish are secured, shall be construed to prohibit (in addition to any other prohibition) the imposition under any law of a State or political subdivision thereof of any tax on any income derived from the exercise of rights to fish secured by such treaty, Executive order, or Act of Congress if section 7873 of title 26 does not permit a like Federal tax to be imposed on such income. “

Indian Self-Determination and Education Assistance Act

4 January 1975

25 U.S.C. § 450. Congressional statement of findings

“ (a) Findings respecting historical and special legal relationship, and resultant responsibilities

The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) Further findings

The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people. “

25 U.S.C. § 450a. Congressional declaration of policy

“(a) Recognition of obligation of United States

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) Declaration of commitment

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(c) Declaration of national goal

The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being. “

§ 450l. Contract or grant specifications (Congress spells out provisions of ISDA contract by statute pursuant to Treaty)

“ (a) Terms

Each self-determination contract entered into under this subchapter shall—

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section (with modifications where indicated and the blanks appropriately filled in), and

(2) contain such other provisions as are agreed to by the parties.

(b) Payments; Federal records

Notwithstanding any other provision of law, the Secretary may make payments pursuant to section 1(b)(6) of such model agreement. As provided in section 1(b)(7) of the model agreement, the records of the tribal government or tribal organization specified in such section shall not be considered Federal records for purposes of chapter 5 of title 5.

(c) Model agreement

The model agreement referred to in subsection (a)(1) of this section reads as follows:

“SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE XXXXXX TRIBAL GOVERNMENT.

“(a) Authority and Purpose.—

“(1) Authority.—This agreement, denoted a Self-Determination Contract (referred to in this agreement as the ‘Contract’), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the ‘Secretary’), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and by the authority of the XXXXXX tribal government or tribal organization (referred to in this agreement as the ‘Contractor’). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated in this agreement.

“(2) Purpose.—Each provision of the Indian Self-Determination and Education Assistance Act ([25 U.S.C. 450](#) et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

“(b) Terms, Provisions, and Conditions.—

“(1) Term.—Pursuant to section 105(c)(1) of the Indian Self-Determination and Education Assistance Act ([25 U.S.C. 450j\(c\)\(1\)](#)), the term of this contract shall be XX years. Pursuant to section 105(d)(1) of such Act ([25 U.S.C. 450j\(d\)](#)), upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (f)(2).

“(2) Effective date.—This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

“(3) Program standard.—The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Contract in conformity with the following standards: (list standards).

“(4) Funding amount.—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act ([25 U.S.C. 450j-1](#)).

“(5) Limitation of costs.—The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract.

If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

“(6) Payment.—

“(A) In general.—Payments to the Contractor under this Contract shall—

“(i) be made as expeditiously as practicable; and “(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

“(B) Quarterly, semiannual, lump-sum, and other methods of payment.—

“(i) In general.—Pursuant to section 108(b) of the Indian Self-Determination and Education Assistance Act, and notwithstanding any other provision of law, for each fiscal year covered by this Contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement. “(ii) Method of quarterly payment.—If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection (f)(2), each quarterly payment made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the Contract year coincides with the Federal fiscal year, payment for the first

quarter shall be made not later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions, and activities subject to this Contract. “(iii) Applicability.—Chapter 39 of title 31, United States Code, shall apply to the payment of funds due under this Contract and the annual funding agreement referred to in clause (i).

“(7) Records and monitoring.—

“(A) In general.—Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the recordkeeping system of the Department of the Interior or the Department of Health and Human Services (or both), records of the Contractor shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code.

“(B) Recordkeeping system.—The Contractor shall maintain a recordkeeping system and, upon reasonable advance request, provide reasonable access to such records to the Secretary.

“(C) Responsibilities of contractor.—The Contractor shall be responsible for managing the day-to-day operations conducted under this Contract and for monitoring activities conducted under this Contract to ensure compliance with the Contract and applicable Federal requirements. With respect to the monitoring activities of the Secretary, the routine monitoring visits shall be limited to not more than one performance monitoring visit for this Contract by the head of each operating division, departmental bureau, or departmental agency, or duly authorized representative of such head unless—

“(i) the Contractor agrees to one or more additional visits; or

“(ii) the appropriate official determines that there is reasonable cause to believe that grounds for reassumption of the Contract, suspension of Contract payments, or other serious Contract performance deficiency may exist.

No additional visit referred to in clause (ii) shall be made until such time as reasonable advance notice that includes a description of the nature of the problem that requires the additional visit has been given to the Contractor.

“(8) Property.—

“(A) In general.—As provided in section 105(f) of the Indian Self-Determination and Education Assistance Act ([25 U.S.C. 450j \(f\)](#)), at the request of the Contractor, the Secretary may make available, or transfer to the Contractor, all reasonably divisible real property, facilities, equipment, and personal property that the Secretary has used to provide or administer the programs, services, functions, and activities covered by this Contract. A mutually agreed upon list specifying the property, facilities, and equipment so furnished shall also be prepared by the Secretary, with the concurrence of the Contractor, and periodically revised by the Secretary, with the concurrence of the Contractor.

“(B) Records.—The Contractor shall maintain a record of all property referred to in subparagraph (A) or other property acquired by the Contractor under section 105(f)(2)(A) of such Act for purposes of replacement.

“(C) Joint use agreements.—Upon the request of the Contractor, the Secretary and the Contractor shall enter into a separate joint use agreement to address the shared use by the parties of real or personal property that is not reasonably divisible.

“(D) Acquisition of property.—The Contractor is granted the authority to acquire such excess property as the Contractor may determine to be appropriate in the judgment of the Contractor to support the programs, services, functions, and activities operated pursuant to this Contract.

“(E) Confiscated or excess property.—The Secretary shall assist the Contractor in obtaining such confiscated or excess property as may become available to tribes, tribal organizations, or local governments.

“(F) Screener identification card.—A screener identification card (General Services Administration form numbered 2946) shall be issued to the Contractor not later than the effective date of this Contract. The designated official shall, upon request, assist the Contractor in securing the use of the card.

“(G) Capital equipment.—The Contractor shall determine the capital equipment, leases, rentals, property, or services the Contractor requires to perform the obligations of the

Contractor under this subsection, and shall acquire and maintain records of such capital equipment, property rentals, leases, property, or services through applicable procurement procedures of the Contractor.

“(9) Availability of funds.—Notwithstanding any other provision of law, any funds provided under this Contract—

“(A) shall remain available until expended; and

“(B) with respect to such funds, no further—

“(i) approval by the Secretary, or “(ii) justifying documentation from the Contractor,

shall be required prior to the expenditure of such funds.

“(10) Transportation.—Beginning on the effective date of this Contract, the Secretary shall authorize the Contractor to obtain interagency motor pool vehicles and related services for performance of any activities carried out under this Contract.

“(11) Federal program guidelines, manuals, or policy directives.—Except as specifically provided in the Indian Self-Determination and Education Assistance Act ([25 U.S.C. 450](#) et seq.) the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

“(12) Disputes.—

“(A) Third-party mediation defined.—For the purposes of this Contract, the term ‘third-party mediation’ means a form of mediation whereby the Secretary and the Contractor nominate a third party who is not employed by or significantly involved with the Secretary of the Interior, the Secretary of Health and Human Services, or the Contractor, to serve as a third-party mediator to mediate disputes under this Contract.

“(B) Alternative procedures.—In addition to, or as an alternative to, remedies and procedures prescribed by section 110 of the Indian Self-Determination and Education Assistance Act ([25 U.S.C. 450m-1](#)), the parties to this Contract may jointly—

“(i) submit disputes under this Contract to third-party mediation; “(ii) submit the dispute to the adjudicatory body of the Contractor, including the tribal court of the Contractor;

“(iii) submit the dispute to mediation processes provided for

under the laws, policies, or procedures of the Contractor; or
“(iv) use the administrative dispute resolution processes authorized in subchapter IV of chapter 5 of title 5, United States Code.

“(C) Effect of decisions.—The Secretary shall be bound by decisions made pursuant to the processes set forth in subparagraph (B), except that the Secretary shall not be bound by any decision that significantly conflicts with the interests of Indians or the United States.

“(13) Administrative procedures of contractor.—Pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.), the laws, policies, and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to programs, services, functions, and activities that are provided by the Contractor pursuant to this Contract.

“(14) Successor annual funding agreement.—

“(A) In general.—Negotiations for a successor annual funding agreement, provided for in subsection (f)(2), shall begin not later than 120 days prior to the conclusion of the preceding annual funding agreement. Except as provided in section 105(c)(2) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j (c)(2)) the funding for each such successor annual funding agreement shall only be reduced pursuant to section 106(b) of such Act (25 U.S.C. 450j-1 (b)).

“(B) Information.—The Secretary shall prepare and supply relevant information, and promptly comply with any request by the Contractor for information that the Contractor reasonably needs to determine the amount of funds that may be available for a successor annual funding agreement, as provided for in subsection (f)(2) of this Contract.

“(15) Contract requirements; approval by secretary.—

“(A) In general.—Except as provided in subparagraph (B), for the term of the Contract, section 2103 of the Revised Statutes (25 U.S.C. 81), section 16 of the Act of June 18, 1934 (48 Stat. 987, chapter 576; 25 U.S.C. 476), and the Act of July 3, 1952 (25 U.S.C. 82a), shall not apply to any contract entered into in connection with this Contract.

“(B) Requirements.—Each Contract entered into by the Contractor with a third party in connection with performing the obligations of the Contractor under this Contract shall—
“(i) be in writing; “(ii) identify the interested parties, the authorities of such parties, and purposes of the Contract; “(iii) state the work to be performed under the Contract; and “(iv) state the process for making any claim, the payments to be made, and the terms of the Contract, which shall be fixed.

“(c) Obligation of the Contractor.—

“(1) Contract performance.—Except as provided in subsection (d)(2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (f)(2) of this Contract.

“(2) Amount of funds.—The total amount of funds to be paid under this Contract pursuant to section 106 (a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

“(3) Contracted programs.—Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this Contract and funded through the annual funding agreement under subsection (f)(2).

“(4) Trust services for individual indians.—

“(A) In general.—To the extent that the annual funding agreement provides funding for the delivery of trust services to individual Indians that have been provided by the Secretary, the Contractor shall maintain at least the same level of service as the Secretary provided for such individual Indians, subject to the availability of appropriated funds for such services.

“(B) Trust services to individual indians.—For the purposes of this paragraph only, the term ‘trust services for individual Indians’ means only those services that pertain to land or financial management connected to individually held allotments.

“(5) Fair and uniform services.—The Contractor shall provide services under this Contract in a fair and uniform manner and shall provide access to an administrative or judicial body empowered to adjudicate or otherwise resolve complaints,

claims, and grievances brought by program beneficiaries against the Contractor arising out of the performance of the Contract.

“(d) Obligation of the United States.—

“(1) Trust responsibility.—

“(A) In general.—The United States reaffirms the trust responsibility of the United States to the XXXXXX Indian tribe(s) to protect and conserve the trust resources of the Indian tribe(s) and the trust resources of individual Indians.

“(B) Construction of contract.—Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility.

“(2) Good faith.—To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.).

“(3) Programs retained.—As specified in the annual funding agreement, the United States hereby retains the programs, services, functions, and activities with respect to the tribe(s) that are not specifically assumed by the Contractor in the annual funding agreement under subsection (f)(2).

“(e) Other Provisions.—

“(1) Designated officials.—Not later than the effective date of this Contract, the United States shall provide to the Contractor, and the Contractor shall provide to the United States, a written designation of a senior official to serve as a representative for notices, proposed amendments to the Contract, and other purposes for this Contract.

“(2) Contract modifications or amendment.—

“(A) In general.—Except as provided in subparagraph (B), no modification to this Contract shall take effect unless such modification is made in the form of a written amendment to the Contract, and the Contractor and the Secretary provide written consent for the modification.

“(B) Exception.—The addition of supplemental funds for programs, functions, and activities (or portions thereof)

already included in the annual funding agreement under subsection (f)(2), and the reduction of funds pursuant to section 106 (b)(2), shall not be subject to subparagraph (A).

“(3) Officials not to benefit.—No Member of Congress, or resident commissioner, shall be admitted to any share or part of any contract executed pursuant to this Contract, or to any benefit that may arise from such contract. This paragraph may not be construed to apply to any contract with a third party entered into under this Contract if such contract is made with a corporation for the general benefit of the corporation.

“(4) Covenant against contingent fees.—The parties warrant that no person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

“(f) Attachments.—

“(1) Approval of contract.—Unless previously furnished to the Secretary, the resolution of the XXXXXX Indian tribe(s) authorizing the contracting of the programs, services, functions, and activities identified in this Contract is attached to this Contract as attachment 1.

“(2) Annual funding agreement.—

“(A) In general.—The annual funding agreement under this Contract shall only contain—

“(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and “(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

“(B) Incorporation by reference.—The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2.”

§ 450n. Sovereign immunity and trusteeship rights unaffected

“Nothing in this subchapter shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people. “

**ALLOTMENT ACTS UPON WHICH *MONTANA* RELIES IS
REPEALED**

“25 U.S.C. 331-333

Repealed. Pub. L. 106–462, title I, § 106(a)(1), Nov. 7, 2000, 114 Stat.
2007”

25 U.S.C. § 1301. Definitions

“For purposes of this subchapter, the term—

(1) “Indian tribe” means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) “powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) “Indian court” means any Indian tribal court or court of Indian offense; and

(4) “Indian” means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.”

25 U.S.C. §1302

“No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and 11 a fine of \$5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons. “

25 U.S.C § 1303. Habeas corpus

“The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe. “

25 U.S.C § 1322. Assumption by State of civil jurisdiction

“(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Force and effect of tribal ordinances or customs

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with

any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section. “

25 U.S.C § 1323. Retrocession of jurisdiction by State

“ (a) Acceptance by United States

The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of title [18](#), section 1360 of title 28, or section 7 of the Act of August 15, 1953 ([67 Stat. 588](#)), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Repeal of statutory provisions

Section 7 of the Act of August 15, 1953 ([67 Stat. 588](#)), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.
“

25 U.S.C § 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

“Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be. “

25 U.S.C § 1326. Special election

“State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of

the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults. “

25 USC § 3601. Findings

“The Congress finds and declares that—

- (1) there is a government-to-government relationship between the United States and each Indian tribe;
- (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;
- (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;
- (4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;
- (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;
- (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights;
- (7) traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this chapter;
- (8) tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation; and
- (9) tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this chapter. “

25 U.S.C § 3602. Definitions

“For purposes of this chapter:

(1) The term “Bureau” means the Bureau of Indian Affairs of the Department of the Interior.

(2) The term “Courts of Indian Offenses” means the courts established pursuant to part 11 of title 25, Code of Federal Regulations.

(3) The term “Indian tribe” means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native entity, which administers justice under its inherent authority or the authority of the United States and which is recognized as eligible for the special programs and services provided by the United States to Indian tribes because of their status as Indians.

(4) The term “judicial personnel” means any judge, magistrate, court counselor, court clerk, court administrator, bailiff, probation officer, officer of the court, dispute resolution facilitator, or other official, employee, or volunteer within the tribal justice system.

(5) The term “Office” means the Office of Tribal Justice Support within the Bureau of Indian Affairs.

(6) The term “Secretary” means the Secretary of the Interior.

(7) The term “tribal organization” means any organization defined in section 450b (1) of this title.

(8) The term “tribal justice system” means the entire judicial branch, and employees thereof, of an Indian tribe, including (but not limited to) traditional methods and forums for dispute resolution, lower courts, appellate courts (including intertribal appellate courts), alternative dispute resolution systems, and circuit rider systems, established by inherent tribal authority whether or not they constitute a court of record.”

25 U.S.C § 3631. Tribal authority

“Nothing in this chapter shall be construed to—

(1) encroach upon or diminish in any way the inherent sovereign authority of each tribal government to determine the role of the tribal justice system within the tribal government or to enact and enforce tribal laws;

(2) diminish in any way the authority of tribal governments to appoint personnel;

(3) impair the rights of each tribal government to determine the nature of its own legal system or the appointment of authority within the tribal government;

(4) alter in any way any tribal traditional dispute resolution forum;

(5) imply that any tribal justice system is an instrumentality of the United States; or

(6) diminish the trust responsibility of the United States to Indian tribal governments and tribal justice systems of such governments.”

CHAPTER 38A—INDIAN TRIBAL JUSTICE TECHNICAL AND LEGAL ASSISTANCE

25 USC § 3651. Findings

“The Congress finds and declares that—

(1) there is a government-to-government relationship between the United States and Indian tribes;

(2) Indian tribes are sovereign entities and are responsible for exercising governmental authority over Indian lands;

(3) the rate of violent crime committed in Indian country is approximately twice the rate of violent crime committed in the United States as a whole;

(4) in any community, a high rate of violent crime is a major obstacle to investment, job creation and economic growth;

(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments; [Police powers]

(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands;

(7) enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency;

(8) there is both inadequate funding and an inadequate coordinating mechanism to meet the technical and legal assistance needs of tribal justice systems and this lack of adequate technical and legal assistance funding impairs their operation;

(9) tribal court membership organizations have served a critical role in providing training and technical assistance for development and enhancement of tribal justice systems;

(10) Indian legal services programs, as funded partially through the Legal Services Corporation, have an established record of providing cost effective legal assistance to Indian people in tribal court forums, and also contribute significantly

to the development of tribal courts and tribal jurisprudence;
and

(11) the provision of adequate technical assistance to tribal courts and legal assistance to both individuals and tribal courts is an essential element in the development of strong tribal court systems.”

25 USC § 3652. Purposes

“The purposes of this chapter are as follows:

(1) to carry out the responsibility of the United States to Indian tribes and members of Indian tribes by ensuring access to quality technical and legal assistance.

(2) To strengthen and improve the capacity of tribal court systems that address civil and criminal causes of action under the jurisdiction of Indian tribes.

(3) To strengthen tribal governments and the economies of Indian tribes through the enhancement and, where appropriate, development of tribal court systems for the administration of justice in Indian country by providing technical and legal assistance services.

(4) To encourage collaborative efforts between national or regional membership organizations and associations whose membership consists of judicial system personnel within tribal justice systems; non-profit entities which provide legal assistance services for Indian tribes, members of Indian tribes, and/or tribal justice systems.

(5) To assist in the development of tribal judicial systems by supplementing prior congressional efforts such as the Indian Tribal Justice Act [25 U.S.C. 3601 et seq.] (Public Law 103–176). “