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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Red Mesa Unified School District; Cedar Unified School District,

Plaintiffs,

v.

Sara Yellowhair; Helena Hasgood; Harvey Hasgood; Letitia Pete; and, Casey Watchman, Peterson Yazzie, Woody Lee, Jerry Bodie and Evelyn Meadows, Current or Former Members of the Navajo Nation Labor Commission,

Defendants.

NO. CV-09-08071-PCT-PGR

NAVAJO NATION LABOR COMMISSION DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARYJUDGMENT

(ORAL ARGUMENT REQUESTED)

Defendants Watchman, Yazzie, Lee, Bodie, and Meadows, collectively the Navajo Nation Labor Commission Defendants ("Commission") hereby submit their Cross-Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment. The Commission asserts that the Navajo Nation ("Nation") has jurisdiction to regulate employment at Plaintiffs Red Mesa Unified School District

and Cedar Unified School District ("Districts") pursuant to leases the Districts entered into with the Nation for the use of tribal trust lands. It therefore moves the Court to grant it summary judgment, and to deny the Districts' motion.

I. FACTS

The Commission stipulates to the facts and attachments submitted by the Districts, except paragraphs 17 through 19 and paragraph 37 of their Statement of Facts, which concern the alleged misconduct of the employees. *See* Section II, *infra*.[1] The Commission adds the following facts for its motion for summary judgment, which are stated in its separate statement of facts and attachments and incorporated by reference in this motion.

The Navajo Preference in Employment Act (NPEA), despite its name, is a general labor statute defining the responsibilities of employers and employees within the Nation. The NPEA by its clear language applies to all employers. The provision of the NPEA relevant to this case requires employers to provide "just cause" when terminating employees. Under Navajo Nation Supreme Court case law, all employees, whether Navajos, members of other tribes, or non-Indians, are protected

[1] Under LRCiv 56.1(c), the parties may stipulate to facts and agree there is no genuine issue of any material fact. Though anticipated as a separate joint filing, the Commission stipulates to most of the Districts' facts in this pleading. Given the nature of this pleading as both an affirmative motion for summary judgment and a response to the Districts' motion for summary judgment, as directed by the September 21, 2009, Scheduling Order, the Commission believes the stipulation is an appropriate substitute for restating the stipulated facts in its statement of facts and including the same attachments included by the Districts to establish such facts as anticipated by LRCiv 56.1(a).

by the just cause requirement. The NPEA created the Commission, which is an administrative tribunal that hears, among other things, complaints concerning violations of the just cause requirement. Any Commission decision can be appealed to the Navajo Nation Supreme Court.

Yellowhair, the Hasgoods, and Pete were all employed at facilities operated by the Districts on trust land within the Nation. The facility where Yellowhair was employed was originally leased from the Nation to Chinle Unified School District in 1966. The lease was subsequently assigned by Chinle Unified School District to Red Mesa Unified School District in 1984. The lease expired, and Red Mesa currently operates the facility on trust land without an approved lease from the Nation. The facility where the Hasgoods and Pete were employed operates on trust land leased by Cedar Unified School District from the Nation in 1980. As part of their operation of the schools, the Districts explicitly consented to the application of the NPEA in contracts in effect at the time of the Districts' termination of the employees. At the time of the terminations, all the board members of each district, except for one, were Navajos.

After the Navajo Supreme Court ruling that the Commission had jurisdiction to hear the cases, the Districts chose to continue to litigate the cases on the merits before the Commission. In the Hasgood/Pete case, the Commission held an evidentiary hearing on February 17th through the 19th, 2009. Cedar Unified School District fully participated in the hearing. After the hearing Cedar submitted proposed

findings of fact and conclusions of law. In Yellowhair's case, the Commission issued a default judgment against Red Mesa on February 11, 2009. Red Mesa appealed to the Navajo Supreme Court. On June 25, 2009, the Court reversed the default judgment, and remanded for the Commission to hear the case on the merits. The Commission held an evidentiary hearing on the case on February 9th through the 11th and December 14th and 15th, 2009. Red Mesa School District fully participated in the hearing. After the hearing, Red Mesa filed its proposed findings of fact and conclusions of law.

II. THERE IS NO DISPUTE OF MATERIAL FACT

Summary judgment is appropriate if there is no dispute of material fact, and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The Commission agrees with the Districts that there is no dispute of material fact relevant to the jurisdictional issue before the Court. The facts asserted by the Districts and the Commission are material and undisputed, except for several alleged facts the Districts assert concerning the merits of the underlying employment disputes. In their factual recitation the Districts include allegedly undisputed facts that the employees engaged in misconduct. Plaintiffs' Statement of Facts, ¶ 17-19; 37.[2] However, the Districts continue to litigate the disputes before the Commission, and the Commission has not decided whether the employees indeed committed that

[2] The Districts include one alleged fact concerning Hasgood and Pete's misconduct in its motion it did not include in its statement of facts. *See* Plaintiffs' Motion for Summary Judgment at 4 n. 3.

misconduct. As between the Districts, the employees, and the Commission, the facts concerning the actions of the employees are therefore in dispute.

Though currently disputed before the Commission, the merits of the underlying employment disputes are not material to the issue of the Nation's jurisdiction over the school districts. Disputed facts do not defeat summary judgment unless they are material to the substantive claim. *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1039-1040 (9th Cir. 2001). Facts are "material" if they "might affect the outcome of the suit under the governing law." *Id.* Whether or not the employees actually committed misconduct is irrelevant to the jurisdictional issue before this Court, as governing law on tribal jurisdiction over nonmembers places no value on the merits of the underlying dispute. *See* Section II-V, *infra*.

III. THE DISTRICTS MUST ENTER INTO LEASES TO OPERATE SCHOOLS WITHIN THE NATION, AND THEREFORE THE NATION HAS THE RIGHT TO EXCLUDE THE DISTRICTS

The Districts must have the Nation's permission through a lease to operate schools on tribal lands, and the Nation therefore has the right to exclude the Districts.[3] No outside person or entity may use Nation lands held in trust by the United States ("tribal lands") without a lease with the Nation approved by the federal

[3] The Districts suggest the Nation asserts jurisdiction through a right to exclude recognized in the Nation's 1868 treaty with the United States. Plaintiffs' Motion for Summary Judgment at 17. The Nation makes no such argument in this motion, but believes jurisdiction is appropriate under its inherent sovereign authority over lessees on tribal land.

Bureau of Indian Affairs. *See* 25 U.S.C. § 415(a).[4] There is no exception for states or for educational uses. *See* 25 U.S.C. § 415(a) (including "educational purposes" among categories for which Indians can lease trust lands); 25 C.F.R. § 162.104(d) (stating that any "person or legal entity" who is not an Indian landowner, a fractional owner or parent or guardian of a minor child must obtain a lease). Absent a lease, nonmembers, whether subdivisions of a state government or not, are in trespass, and can be ejected. *See* 25 C.F.R. § 162.106. The Nation can preclude state schools from operating on tribal lands within the Nation by withholding approval of a lease. Navajo law recognizes the value state school districts provide to the Nation's children, and therefore leases that are granted charge nothing for the use of tribal lands. 10 N.N.C. § 1202 (2005). However, a lease is still required. *Id.*; 25 U.S.C. § 415. The Nation therefore has the right to deny such lease, and to exclude the Districts.

The obligation of Arizona schools to provide education to Navajo children does not negate the Nation's right to exclude Arizona school districts from tribal lands. The Districts argue that the condition in the Enabling Act, as adopted in the Arizona Constitution, that the State must provide equal public education, prohibits the Nation from excluding them. Plaintiffs' Motion for Summary Judgment at 17-19. However, such obligation is limited or tempered by the need to receive permission to

[4] The Nation may lease trust lands for business purposes without federal approval. *See* 25 U.S.C. § 415(e).

operate on tribal lands. *See Meyers v. Board of Education of the San Juan School District*, 905 F.Supp. 1544, 1558 (D. Utah 1995). That obligation does not negate the Nation's authority to exclude them from tribal lands, but the refusal of the Nation to allow access might be a defense to a claim that the State failed to uphold its obligation. *Cf. Meyers*, 905 F.Supp. at 1558-59, 1578 (recognizing general obligation of state to provide education in case where the Nation was willing to lease land). Indeed, another subsection of the same Enabling Act, equally binding on the State of Arizona, requires that the State disclaim any right or title to tribal lands. Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 569-70. The implication of the Districts' argument is that they may effectively condemn tribal lands anytime they wish to build and operate a school. Such expropriation would patently violate the Enabling Act and the Nation's federally-recognized right to control access to its lands. *See Meyers*, 905 F.Supp. at 1558.

IV. THE DISTRICTS ARE SUBJECT TO THE NATION'S EMPLOYMENT LAWS BASED ON THE LEASES

Because the Districts entered into a lease to use tribal lands, they are subject to tribal regulation of their employment relationships. The Districts are subject to all Navajo laws not explicitly waived in the leases. As there has been no such waiver of employment regulation, the Districts are within the jurisdiction of the Commission.

A. TRIBAL LAWS APPLY TO LESSEES AS A CONDITION OF THEIR ENTRY ONTO TRIBAL LANDS

Tribal governments may regulate lessees in ways they cannot other nonmembers. In *Merrion v. Jicarilla Apache*, the United States Supreme Court recognized that a "nonmember's presence and conduct on Indian lands are conditioned on the limitations the tribe may choose to impose." 455 U.S. 130, 147 (1982). As stated by the Court, the power to exclude nonmembers "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct[.]" *Id.* at 144. By granting a lease, a tribe agrees not to apply its power to exclude "as long as the Non-[member] complies with the initial conditions of entry." *Id.* However, though legally authorized to use tribal lands, a lessee is not immunized from tribal regulation if that regulation is not explicitly stated in the lease, or is only exercised after the lease is approved. *Id.* Nonmembers who use tribal lands "remain[] subject to the risk that the tribe will later exercise its sovereign power." *Id.* A tribe then need not reserve its sovereign right to regulate a lessee by explicitly including such a reservation in a lease, as the tribe has the sovereign authority to impose its law on those who use its land. *Id.* at 146 ("It is one thing to find that the Tribe has agreed to sell the right to use the land . . . it is quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract."). Indeed, explicit consent by the lessee is not required, as "[w]hatever place consent may have in contractual matters and the creation of democratic governments, it has little if any role in measuring the validity

of the exercise of legitimate sovereign authority." *Id.* The Ninth Circuit has followed these principles, distinguishing tribal authority over nonmembers on tribal lands from authority over fee lands. *Compare Big Horn County Elec. Co-op, Inc. v. Adams*, 219 F.3d 944, 952-53 (2000) (distinguishing *Merrion* in context of attempted tribal taxation of equivalent of nonmember-owned fee land) *with Babbitt Ford v. Navajo Indian Tribe*, 710 F.2d 587, 592-96 (1982) (holding based on *Merrion* that Nation could regulate repossessions on tribal lands).

B. *MONTANA* AND *HICKS* DID NOT ALTER THE NATION'S POWER OVER LESSEES RECOGNIZED IN *MERRION*

The *Merrion* rule was not altered by the United States Supreme Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Nevada v. Hicks*, 533 U.S. 353 (2001). The Districts argue that those cases require the Districts to have explicitly consented to the Nation's jurisdiction, and in the absence of such explicit consent, there is no jurisdiction. Plaintiffs' Motion for Summary Judgment at 6. While true in the context of the specific factual scenario in *Hicks*, it is not true for lessees of tribal land. In *Montana*, the Court held that tribes lack civil jurisdiction over nonmembers on *nonmember owned fee land*, unless one of two exceptions was met. 450 U.S. at 565. The exceptions are (1) if the nonmember has a "consensual relationship" with the tribe or a tribal member, and (2) if the conduct of the nonmember "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66. The Court applied this test only to nonmember owned fee land or its functional equivalent until

Hicks, and stated that tribes retained authority over nonmembers on tribal land without the need to fulfill either *Montana* exception. *See Atkinson v. Shirley*, 532 U.S. 645 (2001) (applying *Montana* to fee land within Nation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (same to right-of-way owned by State of North Dakota on Fort Berthold Reservation); *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473, 483 n. 4 (1999) (stating that *Montana* test not necessary because activity occurred on trust land within Nation); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-31 (1983) (same for trust land on Mescalero Apache Reservation).

In *Hicks*, the Court required the Fallon Paiute-Shoshone Tribes to fulfill the *Montana* exceptions, even though the nonmembers' actions occurred on tribal land. 533 U.S. at 359. *Hicks* concerned a tribal court suit against Nevada state law enforcement officers for the allegedly illegal search of a tribal member's home on tribal land for evidence of a crime allegedly committed outside the reservation. *Id.* at 355-57. After applying the two *Montana* exceptions, the Court held the tribe lacked jurisdiction over the law enforcement officers. *Id.* at 359, n.3, 364.

The Court's application of the *Montana* exceptions in *Hicks* does not require application of such exceptions in this case. The Court in *Hicks* explicitly limited its ruling to the facts in the case, and left open the general question whether a tribe has jurisdiction over nonmembers. *Id.* at 358 n.2. The case concerned a one-time, brief incursion onto tribal lands for purposes of investigating an off-reservation crime. *Id.* at 356. It did not involve nonmembers who leased tribal lands for the

construction and operation of a semi-permanent facility on the reservation. Nonmember lessees who remain on the reservation for twenty-five or more years are jurisdictionally distinguishable from the law enforcement officers who briefly and for one time entered tribal lands solely to extract evidence to be used off the reservation.

Further, neither *Montana* nor *Hicks* overruled *Merrion*. Indeed, the Court issued *Merrion* after *Montana*, and by the complete absence of the application of its rule and exceptions clearly believed it inapplicable to lessees of tribal land. The Court cites *Merrion* in *Hicks*, and states nothing that suggests intent to overrule its holding. 533 U.S. at 360. *Merrion* continues to control the question of jurisdiction over nonmember lessees, notwithstanding the invocation of *Montana* in a factually distinct scenario.[5] As recognized by the Supreme Court, "[i]f a precedent [of this] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [a lower federal court] should follow the case which directly controls, leaving to the Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted).

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[5] The Districts concede that under *Merrion*, the Nation generally has the right to exclude and therefore to condition entry of lessees on adherence to tribal laws. *See* Motion for Summary Judgment at 17-18 (quoting *Merrion*, 455 U.S. at 144). They then impliedly concede that *Montana* does not apply if the *Merrion* rule governs this case. The Districts attempt to distinguish this case from the general rule by arguing that as state school districts obliged to provide education to Navajo children they are exempt from the right to exclude. *Id.* However, as discussed in Section III, *supra*, the Nation retains the power to exclude state school districts, and therefore under *Merrion* may regulate school district lessees as any other nonmember utilizing tribal land.

Post-*Hicks* Ninth Circuit opinions also do not require application of *Montana* here. In *Smith v. Salish Kootenai College* the Circuit Court applied *Montana* to a suit by a nonmember Indian against a tribal college for negligent maintenance of a truck and spoliation of evidence that occurred on tribal land. 437 F.3d 1127, 1131, 1135 (2006). The Court cited *Merrion* for the proposition that nonmembers who enter tribal lands are subject to the tribal power to exclude. *Id.* at 1139. It nonetheless required fulfillment of one of the *Montana* exceptions for tribal jurisdiction to apply. *Id.* at 1131, 1135-40. The Circuit Court did not explain why application of *Montana* was necessary despite *Merrion*, but simply applied it, based on its reading of *Hicks*. *Id.* at 1135. Such application contradicts an earlier Ninth Circuit case, *McDonald v. Means*, in which the court explicitly discussed the question whether *Hicks* mandated application of *Montana*, concluding that the stated limitation on the holding by the Supreme Court meant that *Montana* would still not apply generally on tribal lands. 309 F.3d 530, 532-33 (9th Cir. 2002) (amended opinion). Regardless, *Smith* did not involve a lessee of tribal lands, and therefore the application of *Montana* in *Smith* in no way contradicted the lessee rule recognized in *Merrion*.

C. AS THE NATION HAS NOT WAIVED EMPLOYMENT REGULATION IN THE LEASES, ITS EMPLOYMENT LAWS APPLY TO THE DISTRICTS

Under the principle in *Merrion*, as there is no explicit waiver in the lease, the Nation retained and appropriately exercised its jurisdiction to regulate employment at the Districts' facilities on leased tribal land. The Districts point to no

waiver language in the leases. Indeed they cannot because the parties included no such language. As there is no waiver, the Nation has the authority to require the Districts to defend employment decisions before the Commission. The Commission therefore has authority over these disputes.

III. ASSUMING *HICKS* AND *MONTANA* APPLY, THE LEASES ARE CONSENSUAL RELATIONSHIPS

Assuming *Hicks* and *Montana* apply, the leases are "consensual relationships" establishing the Nation's jurisdiction. Even under *Montana* the Nation, through its inherent sovereign authority, can regulate activities of lessees within the exterior boundaries of the Nation. The consensual relationship exception acknowledges the inherent authority of Indian nations to "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." *Montana*, 450 U.S. at 565 (emphasis added). A lease then is explicitly one type of "consensual relationship." Further, the Court recognized in *Hicks* that the location of the nonmember activity on trust land can be dispositive in some cases under *Montana*. 533 U.S. at 360. The voluntary agreement to lease tribal lands is one such case, as absent a waiver, lessees consent through the agreement itself. *See id.* at 360, (citing *Merrion* as holding that "tribe has taxing authority over tribal lands leased by nonmembers" and quoting *Merrion* for proposition that tribe may tax on tribal lands "on which the tribe has . . . authority over a nonmember"

(internal quotation marks omitted)).[6] In this way, *Merrion* is reconcilable with *Montana* because entry onto tribal lands via a lease is a consensual relationship that triggers tribal jurisdiction. *See Atkinson v. Shirley*, 532 U.S. 645, 653 (2001).

Further, under Ninth Circuit precedent, the combination of the leases and other contracts demonstrate consent under the totality of the relationship between the Nation and the Districts. In *FMC v. Shoshone-Bannock Tribes*, the Circuit Court held that tribal civil jurisdiction existed over the employment practices of a nonmember entity operating on fee land within the reservation, based on the totality of the relationship shown by nonmember's mineral leases and other contracts with the tribes. 905 F.2d 1311, 1314 (1990). Similarly here, the Districts have consented to the Nation's jurisdiction not only through the leases, but also through subcontracts with the Nation's Johnson-O'Malley Program (JOM). During the time the Districts terminated Yellowhair, the Hasgoods, and Pete, they accepted funding from the Nation for educational purposes. In the subcontracts, the Districts agreed to comply with the Navajo Preference in Employment Act, and anticipated that at least part of

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[6] The Districts argue that *Hicks* precludes a "consensual relationship" between two governments. Plaintiffs' Motion for Summary Judgment at 10. According to the Districts the Court's holding that a specific agreement between the tribes and Nevada law enforcement is a not a "consensual relationship" under *Montana* means that a state school district, as a political subdivision of a state, can never consent through a lease with a tribe. However, the majority opinion explicitly disclaimed such a broad reading of its holding, stating that it simply meant that the particular agreement was not an "other arrangement" under *Montana* and that "[w]hether contractual relations between [a] State and tribe can expressly or impliedly confer tribal regulatory [and adjudicatory] jurisdiction over nonmembers . . . are questions that may arise in another case, but are not at issue here." *Id.* at 372.

the funding would be used for employment. Defendants' Exhibit 6, ¶ XXX(B); Defendants' Exhibit 7, ¶ XXX(B).[7] The leases, in conjunction with the JOM subcontracts, therefore establish the necessary consent under *Montana*.

Silence as to employment regulation does not defeat the status of the leases as consensual relationships. Tribal jurisdiction is proper in the absence of explicit consent if the attempted regulation has a "nexus" to the consensual relationship. *Atkinson*, 532 at 656. There is a clear nexus in this case, as the leases anticipate the operation and management of schools, which by definition require the Districts' employment of teachers and administrators to fulfill the purpose of the lease. The Nation agreed to allow its lands to be used for the operations of schools; the Nation's regulation of employment at those schools is then clearly tied to the Districts' consensual relationship.

The Districts' characterization of their entry onto tribal lands as involuntary, and therefore not consensual, is incorrect. The Districts suggest the school districts that signed the leases[8] simply had no other option, as they might have faced a suit similar to one filed against a Utah school district years later. *See Meyers*,

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[7] This explicit consent, though not necessary to establish the Nation's jurisdiction, refutes the Districts' claim that they simply can never consent to employment regulation. *See* Plaintiffs' Motion for Summary Judgment at 9. The district officials who approved such agreements clearly believed they had such authority, at least when seeking funding from the Nation for their operations.

[8] Red Mesa Unified School District was not the original lessee, but was assigned the lease by Chinle Unified School District in 1984. Plaintiffs' Statement of Facts, ¶ 4.

905 F.Supp. at 1553. Even if they could have reasonably believed they would be sued for not building the schools, they had several options other than signing the leases in the form they approved. The Districts could have insisted on an explicit waiver of the Nation's authority before signing the lease, as required by Arizona Public Service Company in a lease signed in 1960. *See Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1130 (9th Cir. 1995). They did not. They could have declined to build the schools if the Nation refused to grant a waiver, and defended that choice in any resulting lawsuit by arguing that their obligation to provide education does not require schools to be built subject to tribal laws. They did not. Instead they agreed to build the schools subject to the leases. They did so voluntarily, and therefore have indeed consented to the application of the Nation's employment laws.

IV. ASSUMING *MONTANA* APPLIES, CONTINUED LITIGATION BEFORE THE COMMISSION AFTER THE NAVAJO NATION SUPREME COURT'S JURISDICTIONAL RULING IS CONSENT FOR THE COMMISSION TO HEAR THE DISPUTES

The Districts' continued litigation of the employment claims after the Navajo Supreme Court's jurisdictional decision is consent to the Commission's jurisdiction in these cases. As stated by the Districts, they exhausted their tribal court remedies by challenging the Commission's jurisdiction before the Navajo Supreme Court. Plaintiffs' Motion for Summary Judgment at 6 n. 5. That Court ruled there was jurisdiction. *Cedar Unified School Dist. v. Navajo Nation Labor Comm'n*, No. SC-CV-53-06, slip op. at 13 (Nav. Sup. Ct. November 21, 2007) (Plaintiffs' Exhibit M). At that time, the Districts could have filed the present action, and did not have to

litigate the merits of the claims before the Commission. However, the Districts voluntarily continued the litigation, including an appeal to the Navajo Supreme Court contesting the default judgment issued in the Yellowhair case. They presented evidence and arguments supporting the terminations and submitted proposed findings of fact and conclusions of law, thereby asking the Commission to rule in their favor on the merits of the disputes. By litigating the merits of the terminations before the Commission when they were in no way required to do so, they have invoked the jurisdiction of the Commission, and therefore have a "consensual relationship" to the Nation under *Montana*.

In *Smith*, the Ninth Circuit Court of Appeals recognized that nonmembers may consent to tribal jurisdiction by affirmatively invoking the jurisdiction of a tribal forum to resolve a dispute. *See* 437 F.3d at 1131. In *Smith*, a nonmember Indian filed a cross-claim in tribal court against a tribal college. *Id.* at 1129. By doing so, the Ninth Circuit held that he had a "consensual relationship" under the first exception to *Montana*. *Id.* at 1136, 1140. Though cast in *Smith* in terms of filing a complaint as a plaintiff, the key element of consent recognized in *Smith* is the voluntary invocation of a tribal forum's jurisdiction by a party with full control over its litigation. *See id.* at 1137. The Ninth Circuit has applied this principle of consent in subsequent cases, recognizing that parties may consent through their voluntary participation in tribal litigation. *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 941 (2009) (distinguishing *Smith* because nonmember was involuntary defendant who did

not invoke jurisdiction of tribal court); *Atwood v. Fort Peck Assiniboine*, 513 F.3d 943, 947 (2008) (recognizing jurisdiction by non-Indian father's filing of custody claim in tribal court, and at least "colorable" jurisdiction over father in later proceedings, though not a plaintiff).

The Districts' status as respondents before the Commission does not alter the conclusion that they consented to the Commission's jurisdiction. They invoked the Commission's jurisdiction to decide the merits of these disputes when not required to do so. They were in full control, and could have filed the present action immediately after exhausting their jurisdictional remedies before the Navajo Supreme Court, and could have sought a preliminary injunction to stay proceedings. They did not, instead seeking decisions by the Commission on the merits of the cases. They therefore should be bound by the decisions they affirmatively have sought, as much as a plaintiff was bound in *Smith* by the decision he made to litigate in a tribal forum.

V. THE SOVEREIGN INTERESTS OF THE NATION IN REGULATING LESSEE CONDUCT ON TRIBAL LANDS OUTWEIGH THE STATE INTERESTS IN THIS CASE

The Districts additionally argue that the interests of the State override the Nation's interests in the case, justifying a finding that the Nation lacks jurisdiction.[9]

[9] The Districts make this argument in the context of the second exception to *Montana*. *See* Plaintiffs' Motion for Summary Judgment at 12, 13. The Nation makes no claim that employment regulation fulfills the second *Montana* exception. However, to the extent a balancing of interests analysis is relevant to the general question of jurisdiction, the Commission responds to the Districts' claims.

Plaintiffs' Motion for Summary Judgment at 13-15. The Districts allege several State interests: (1) fulfilling its mandate to education all Arizona children, (2) ensuring school districts as employers are governed by due process procedures mandated by state law, (3) and ensuring employment decisions are effective and not subject to conflicting tribal rulings. *Id.* On the third interest, the Districts further argue that if the Commission orders an employee's reinstatement, they could be subject to potential liability for negligent rehiring. *Id.* at 15. [10]

The authority of the Commission to hear employment claims is not inconsistent with these interests. First, the provision of a tribal forum where employees may contest actions by school districts does nothing to preclude the fulfillment of the State's mandate to educate children. The Districts can operate their schools within the Nation while complying with the laws of the jurisdiction in which they operate. Second, the Commission provides due process to both employers and employees, and the Navajo Supreme Court is available through an appeal or extraordinary writ to remedy any perceived violations. As long as the Commission provides due process, there is no requirement that State laws exclusively provide such due process.

Potential inconsistent decisions can be remedied through arguing that an employee who already went through the state system is precluded from bringing a

[10] The Districts improperly assert that the Commission "[a]ll too often" orders reinstatement of terminated employees. Plaintiffs' Motion for Summary Judgment at 14. There are no facts to support this assertion, and such assertion should be ignored.

second claim. The Navajo Supreme Court has not yet ruled on a claim that an employee who litigated his or her claim of wrongful termination through a state employment system is barred from bringing a claim before the Commission, though the Court has recognized and applied *res judicata* to another outside employment adjudication. *See Peabody Western Coal Co. v. Navajo Nation Labor Comm'n*, 8 Nav. R. 313, 320-21 (Nav. Sup. Ct. 2003) (barring Commission action when employee already arbitrated claim through union collective bargaining agreement). The Districts currently have a potential Navajo remedy to prevent inconsistent rulings that they can assert on appeal, should the Commission rule against them on either employment claim.[11] *See Cedar Unified School Dist.*, No. SC-CV-53-06, slip op. at 7 n.8 (Plaintiffs' Exhibit M) (noting potential *res judicata* argument). Further, adherence to a Commission ruling to reinstate an employee should be a valid defense to a negligent rehiring claim, as the Districts were mandated to do the rehiring by a tribunal with jurisdiction to order the reinstatement.

More importantly, the Nation's interests outweigh such State interests. The Nation has a strong interest in regulating employment relationships within its territory, whether employees are Navajo or not, and the creation of an exception for state school districts undermines the uniform application of Navajo law. Such

[11] The Commission itself declined to dismiss the cases based on res judicata. *See* Plaintiffs' Exhibit Z, at 5. However, such rulings are subject to review by the Navajo Supreme Court after the Commission's final decision on the merits, and therefore the Districts' preclusion claim is not foreclosed.

inconsistency would mean some employees would have the protections of Navajo law, and others would not, simply based on the status of the employer. Further, the Nation has a strong interest in providing a Navajo forum for those who are employed within its territory, with all the protections provided by the Indian Civil Rights Act and the Navajo Bill of Rights. Finally, the Nation has a strong general interest in regulating the conduct of its lessees, and a ruling that the Nation cannot provide an additional forum to that provided by the State for those employed on its lands would greatly undermine that sovereign interest. These interests are particularly strong in this case, all the board members who ultimately terminated the employees were, except for one member, Navajos. In the context of this case, the Nation's interests outweigh those of that State, and jurisdiction is proper.

VI. CONCLUSION

Based on the above, the Commission moves the Court to grant it summary judgment in this matter, and to deny the Districts' motion for summary judgment.

DATED, this 16th day of February, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16th, 2010, the original of this motion was filed electronically, and a true and correct copy of the foregoing was served on the following counsel to this proceeding by U.S. Mail:

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