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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, Anslem Bitsoi, Casey Watchman, Peterson Yazzie, Woody Lee, Jerry Bodie, Victoria A. Dixon, Leffew R. Denny, and Evelyn Meadows, Current or Former Members of the Navajo Nation Labor Commission, Defendants.	NO. CV-09-08071-PCT-PGR **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56, Fed.R.Civ.P., Plaintiffs Red Mesa Unified School District and Cedar Unified School District move for summary judgment on their complaint. The facts are not disputed. The individual Defendants Yellowhair, Hasgood, Hasgood and Pete were employees of the Plaintiff School Districts. The individuals signed employment contracts with the Plaintiff Districts agreeing to abide by Arizona law and District policy in the matter of their employments. In 2004 and 2002, respectively, the Districts terminated the individuals' employments for good cause, after affording each of them all the process they were due under Arizona law and District policy. But rather than utilizing their exclusive appeal remedies under Arizona law (which would have been to file a complaint – appeal or special action as the case may be – in the Navajo County

Superior Court), the individual Defendants filed claims with the Navajo Nation Labor Commission ("NNLC"), arguing that their terminations violated Navajo law – namely, the Navajo Preference in Employment Act ("NPEA"). The NPEA requires employers to give preference in employment to Navajos and dictates that employers may not fire employees without "just cause." The NNLC has held hearings on these claims, although as of this date it has not yet rendered decisions in either case.

In educating children on the reservations, the Districts are state political subdivisions fulfilling the state's constitutional mandate to provide a general and uniform public education for all Arizona children. *See* Ariz. Const. Art. 11, §1. As a matter of law, the tribe does not have jurisdiction over the School Districts' personnel policies and decisions, nor should they be able to, in essence, re-hear and re-determine those decisions. Plaintiffs therefore seek summary judgment on their complaint for declaratory and injunctive relief. This motion is supported by the accompanying Statement of Facts and its attachments, incorporated herein by reference.

I. FACTS

The Arizona Constitution, Art. 11, §1, mandates that the legislature shall provide for the establishment and maintenance of a general and uniform public school system. Pursuant to that constitutional mandate, Plaintiffs Red Mesa Unified School District and Cedar Unified School District are Arizona school districts operating within the geographical boundaries of the Navajo and Hopi reservations on land leased from the Navajos. [Red Mesa is on the Navajo reservation; Cedar Unified covers both reservations.] The Districts are political subdivisions of the State of Arizona, organized under and governed by Arizona laws for the purpose of the administration, support and maintenance of public schools. A.R.S. § 15-101(21). In short, the Plaintiff School Districts are operating on tribal lands leased from the Tribes pursuant to a constitutional mandate to provide a general and uniform public school system for all children in

Arizona.[1]

Sara Yellowhair, both Hasgoods, and Letitia Pete are all members of the Navajo tribe. Yellowhair was employed by Red Mesa, and Hasgood, Hasgood and Pete were employed by Cedar Unified.[2] They each signed employment contracts with their respective employer Districts. In her contract, Yellowhair specifically agreed that (1) "the Governing Board may terminate this Contract at any time for unprofessional conduct or other breach of this Contract pursuant to the laws of the State of Arizona and the rules and policies of this District," and (2) "This agreement is governed by the laws of the State of Arizona and exclusively in its Courts." The Hasgoods and Pete agreed in their contracts to "fulfill the requirements of the position as defined by the job description, policy and procedures of the BOARD and other applicable state and federal laws," and to "be subject to all applicable conditions, obligations, responsibilities, rights and privileges as defined by Federal and State law." None of the contracts indicated any consent by either of the parties to be governed by Navajo law.

In August 2004, Red Mesa Superintendent Slowman-Chee discovered that Yellowhair had engaged in a pattern of financial mismanagement of District funds, including a pattern of not seeking Governing Board approval for numerous change orders and purchase orders; failing to comply with state rules and regulations regarding the disposition of District property; and failing to comply with state rules and regulations regarding procurement procedures. All in all, Yellowhair spent in excess of $2 million without prior Governing Board approval and authorization. As a result, the District overspent its capital budget by more than $2 million. In 2002, it was discovered that the

[1] The State of Arizona has at least eight public school districts located within the boundaries of tribal reservations, including Cedar Unified, Red Mesa Unified, Ganado Unified, Kayenta Unified, Pinon Unified, Tuba City Unified, Window Rock Unified, and Chinle Unified.

[2] As is relevant here, the Hasgoods and Pete signed employment contracts with the District for the 2002-03 school year. Yellowhair had a contract with Red Mesa for the 2003-2004 year.

Hasgoods and Pete had accessed pornographic websites on a District computer,[3] which was deemed to be a misuse of District property and unprofessional conduct. In both the Yellowhair and Hasgood/Pete cases, the Districts conducted full investigations, and held hearings before hearing officers. The hearing officers recommended the individuals' terminations, which recommendations were accepted by the respective Governing Boards. All the individuals were thus terminated.

Under A.R.S. § 15-543(A), Yellowhair's statutorily-mandated and exclusive remedy for appealing the Board's determination was to file an appeal in Arizona state court. Similarly, the Hasgoods' and Pete's state law remedy was to file a special action appeal in state court. *Woerth v. City of Flagstaff*, 167 Ariz. 412, 417, 808 P.2d 297, 302 (App. 1990). But neither Yellowhair nor the Hasgoods/Pete pursued their state law appeal remedies. Instead, they filed individual charges with the Office of Navajo Labor Relations (ONLR).[4] Because the ONLR was unable to complete probable cause determinations within the requisite 180 days as to whether Red Mesa/Cedar Unified violated the NPEA, it issued the individuals Right to Sue letters. On March 29, 2005, Yellowhair filed a complaint with the NNLC against Red Mesa; and on May 13, 2005, the Hasgoods and Pete filed their complaint with the NNLC against Cedar Unified.[5]

The School Districts moved to dismiss the NNLC complaints for lack of jurisdiction. But in each case, the NNLC denied the motions to dismiss and set the matters for hearing. Both Red Mesa and Cedar Unified filed Writs of Prohibition with the

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[3] including sexswap.com, sextracker.com, girlsturnedon.com, sexcamcity.net, and myfavounteamateurs.com

[4] The responsibilities of the ONLR include "to monitor and enforce the NPEA," to "implement the employment and labor laws, policies, and regulations of the Navajo Nation," and "to act as an administrative agency for matters relating to the enforcement of employment preference in hiring, recruitment, promotion, layoff, termination, transfer and other areas of employment." *See* 15 N.N.C. § 202.

[5] The NNLC is a fact-finding body and presides over trials. 15 N.N.C. § 304. Appeals are taken to the Navajo Supreme Court. *See* 15 N.N.C. § 613; Rule 17, NNLC Rules of Procedure ("The Decision of the Commission shall be final with a right of appeal only on questions of law to the Navajo Nation Supreme Court.")

Navajo Supreme Court asking the Court to prevent the NNLC from hearing the matters, which were governed by Arizona law and had already been decided via the due process termination hearing procedures mandated by Arizona law. The Districts argued that the NNLC actions would exceed tribal authority, ignore the extensive due process already provided the individuals, and would potentially result in nullifying the previous decisions.

The Navajo Supreme Court consolidated the two matters for purposes of its decision, and held that the NNLC had jurisdiction to hear the individuals' complaints alleging wrongful discharge in violation of the NPEA. *See Cedar Unified School Dist. v. Navajo Nation Labor Commission*, No. SC-CV-53-06 (Nav. Sup. Ct. Nov. 21, 2007).[6] The matters were returned to the NNLC for hearings on liability.

The NNLC held a hearing on liability in February, 2009 in the Hasgoods/Pete matter, but it has not yet issued a decision. In the Yellowhair matter, the NNLC also held a hearing in February 2009. At the beginning of the hearing, the NNLC ordered a default against Red Mesa because a snowstorm had prevented Red Mesa's representative from arriving at the hearing on time. Red Mesa had to appeal the default to the Navajo Supreme Court, which vacated the default and remanded the matter back to the Commission for a resumption of the hearing. That hearing resumed on December 14 and 15, 2009. At the conclusion of the hearing, the NNLC ordered the parties to submit Findings of Fact and Conclusions of Law by January 15, 2010, after which the Commission will take the matter under advisement and issue a written decision.

II. THE NAVAJO TRIBE LACKS REGULATORY AND ADJUDICATORY AUTHORITY OVER PERSONNEL DECISIONS MADE BY ARIZONA PUBLIC SCHOOL DISTRICTS ON RESERVATION LAND

A federal court may determine whether a tribal court has exceeded the lawful limits of its jurisdiction. *National Farmers Union Ins. Companies v. Crow Tribe of*

[6] Plaintiffs thus exhausted their tribal remedies by having obtained a ruling on jurisdiction from the Navajo Supreme Court. *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985) (the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians should be conducted in the first instance in the Tribal Court itself).

Indians, 471 U.S. 845, 853 (1985). The Ninth Circuit recently explained the "ground rules governing tribal adjudicatory jurisdiction over nonmembers":

> As a general rule, tribes do not have jurisdiction, either legislative or adjudicative, over non-members, and tribal courts are not courts of general jurisdiction. Nevertheless, stemming from their inherent sovereignty, tribes do have legislative jurisdiction within the two Montana exceptions. The Montana framework is applicable to tribal adjudicative jurisdiction, which extends no further than the Montana exceptions. Beyond the jurisdiction they enjoy from their inherent sovereignty, tribes may also be granted jurisdiction via treaty or congressional statute.

Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc., 569 F.3d 932, 940 (9th Cir. 2009).

A. The Montana test applies.

As is noted above, Indian tribes possess attributes of sovereignty over both their members and their territories, but they do not, as a general rule, possess inherent sovereign powers over the activities of nonmembers like Plaintiffs here, because those powers have been implicitly divested. *Montana v. United States*, 450 U.S. 544, 563-65 (1981). But for two exceptions that have come to be known as the "Montana test" (discussed below), *Montana* dictates that a tribe lacks inherent jurisdiction to regulate nonmember activities. *Id*. at 564-67. *Nevada v. Hicks*, 533 U.S. 353, 359-60, 374 (2001) (Montana test applied in suit by tribal member against state game wardens who searched member's home; tribal court lacked jurisdiction to adjudicate member's civil claims against wardens).[7]

[7] *Montana* initially limited its "no tribal jurisdiction over nonmembers" holding to the nonmembers' activities on fee land owned by the nonmember within the reservation. *See Montana*, 450 U.S. at 556-558. But that initial restriction to nonmember-owned property has since virtually evaporated. *See Nevada v. Hicks*, supra (applying Montana test though game wardens' search took place on land that plaintiff tribe member did not own in fee). The *Hicks* Court rejected the circuit court's holding that tribal jurisdiction existed simply from the fact that the tribal member's home was located on tribe-owned land within the reservation. *Id*. at 357, 121. Instead, the ownership status of the land is only one factor to consider in determining whether tribal regulation of nonmember activities is "'necessary to protect tribal self-government or to control internal relations.'" *Id*. at 359-60 (quoting *Montana*, 450 U.S. at 564). Indeed, it cautioned that "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." *Id.* In *Hicks*, the Court held that tribal ownership of the land in question

The Montana test applies here. Like the state game wardens in *Hicks*, the School Districts in the NNLC cases are nonmember defendants who entered the reservation to provide constitutionally-mandated educational services to the tribe. The state interest of fulfilling the constitutional mandate to educate all of Arizona's children – including those on tribal lands – is at least as substantial as the state interest identified in *Hicks* – that of pursuing off-reservation violations of state law. Indeed, the School Districts' presence on tribal land is even less voluntary than the game wardens' presence in *Hicks*, considering that the Navajos have previously sued the State of Utah for not providing a school in the proximity of the reservation residences of certain Navajo children. *See Meyers v. Board of Education of the San Juan School District*, 905 F. Supp. 1544, 1551-56 (D. Utah 1995). The Montana test applies to determine whether there is tribal court jurisdiction over the School Districts' personnel policies and decisions.

B. The Montana test dictates that tribal jurisdiction does not exist over the School Districts' employment decisions

Again, as a general rule, Indian tribes do not possess inherent sovereign powers over the activities of nonmembers. The two exceptions to the general rule are as follows: First, a tribe may regulate "the activities of *nonmembers who enter consensual relationships with the tribe or its members*, through commercial dealing, contracts, leases,

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was not dispositive of tribal jurisdiction over the game wardens "when weighed against the State's interest in pursuing off-reservation violations of its laws." *Id.* at 370. *See also Hicks* at 381 (Souter, J., concurring): "After *Strate*, it is undeniable that a tribe's remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted."

Further, while *Hicks* itself limited its precise holding to "the question of tribal-court jurisdiction over state officers enforcing state law," and left open "the question of tribal court jurisdiction over non-member defendants in general," *id* at 358 n.2, the Ninth Circuit has subsequently held that the Montana test applies in all cases in which tribal jurisdiction is an issue. *See, e.g., Smith v. Salilih Kootenai College*, 434 F.3d 1127, 1135 (9th Cir. 2006) (Montana test applied to nonmember plaintiff's assertion that the tribal court lacked jurisdiction over his claims; court found tribal jurisdiction because plaintiff's claims against defendant tribal entity arose out of tribe's activities on tribal land); *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932 (9th Cir. 2009) (applying Montana test to suit by nonmember against member without discussing land ownership). Indeed, as the Supreme Court noted, it has never held a tribal court has jurisdiction over a nonmember defendant. *Hicks, supra* at 358 n.2.

or other arrangements." *Montana*, 450 U.S. at 564 (emphasis added). Second, a tribe may 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. Other than these two exceptions, the tribes' inherent sovereignty does not give it jurisdiction to regulate the activities of nonmembers. *See Plains Commerce Bank v. Long Family Land and Cattle Company, Inc*., __ U.S. __, 128 S.Ct. 2709, 2720 (2008) ("efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.' (Citation omitted.) The burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land.").

The School Districts maintain that neither of the Montana exceptions applies to allow the tribal jurisdiction here. Importantly, it is Defendants who bear the burden of showing otherwise. *Id*.

1. <u>The first Montana exception does not apply</u>.

a. The leases do not create the requisite consensual relationship.

The Montana "consensual relationship" exception does not apply here. Defendants might argue that by entering into leases with the tribe, the Districts entered into a consensual relationship with the tribe and therefore consented to the tribe's exercise of regulatory or adjudicatory jurisdiction over their personnel policies and decisions. The argument would be incorrect. First, there is no provision in any of the leases whereby the School Districts consented to such jurisdiction. In the leases, the School Districts agreed only to lease the school premises from the tribe, to comply with tribal law *concerning the leased physical premises*, and to prevent others from engaging in illegal conduct on the leased premises or from using the leased premises in an illegal manner. The leases say nothing about the Districts agreeing to the tribe's general exercise of regulatory and

adjudicative jurisdiction over the Districts' employment decisions.[8]

Nor do the Districts even have the authority to contractually submit their employment decisions to tribal authority. Arizona public school districts are political subdivisions, A.R.S. § 15-101(20), and have only the authority that the Arizona Legislature has statutorily granted them. The power to contractually agree to submit to tribal court jurisdiction is not one of those powers. *See, e.g., Tucson Unified School District No. 1 v. Tucson Education Association*, 155 Ariz. 441, 442-43,747 P.2d 602,603-04 (App. 1987) ("A.R.S. § 15-341 sets forth the powers and duties of a school board. They are numerous and varied. Nowhere do they expressly empower the school board to enter into an arbitration agreement which would allow a third-party arbitrator to bind the school board in a decision involving a labor grievance school districts").[9]

Second, the School Districts simply cannot be said to be in a "consensual relationship" with the tribe. As is set forth above, the School Districts entered the reservation to fulfill a constitutional mandate to educate all of Arizona's children – including those on tribal lands – via a general and uniform public school system. The Districts constitutionally must provide services on the reservation, or else be subject to a lawsuit like *Meyers v. Bd. of Education, supra*, for failing to locate a school district in

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[8] In any event, even had there been such an agreement in the leases (which there is not), Red Mesa's 1966 lease (assigned from Chinle) expired in 1991, and to Plaintiffs' knowledge there is no valid replacement lease.

[9] Furthermore, with respect to Red Mesa's lease, the lease was drafted and signed by the Chinle School District in 1966, nearly 20 years **before** the 1985 enactment of the NPEA. Chinle then assigned the lease to Red Mesa in 1984, still a year before the NPEA's enactment. Similarly, Cedar entered into its lease with the Nation on September 18, 1980, five years before the enactment of the NPEA. Therefore, at the time relevant here, none of the Districts had any notice that they would be required to abide by the NPEA in their employment decisions. And while the NPEA provides that its provisions are incorporated into any lease or other transaction document as a matter of law and constitute "affirmative contractua1 obligations of the contracting parties," 15 N.N.C. § 609(A), more than a general agreement to comply with future law should be required before a political subdivision of a state can be held to have waived the right to have its personnel decisions governed by state law in state courts (that is, even assuming for the sake of argument the lease provisions could be interpreted to include a general agreement to comply with future as well as existing Navajo law, and the School Districts had the authority to enter into such an agreement).

proximity to the tribe's children. This is not the kind of "consensual relationship" the *Montana* Court had in mind. Rather, consensual relationships are those existing between the tribe and businesses entering the reservation for profit. *See Hicks*, 533 U.S. at 359 n.3 (rejecting argument that the tribe could regulate the game wardens in the case before it because in obtaining search warrants from the tribal court they had entered into the type of consensual relationship *Montana* had described; stating, "[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."). As *Hicks* explained, 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." *Id*. at 372.

Third, even if entering into leases with the tribe could be considered a "consensual relationship" with the Districts (which it is not), for the consensual relationship exception to apply, the regulation the tribe is attempting to impose must have a nexus to the consensual relationship itself. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) (owner of hotel complex on non-tribal fee land within the reservation did not consent to Navajo hotel occupancy tax based on having obtained an Indian trader license, which authorized the owner to transact business with the Navajo Nation). A nonmember's consensual relationship in one area does not trigger civil authority in another. *Id*. at 656. In other words, under this exception, a tribal court has jurisdiction over a nonmember only where the claim brought in tribal court has a nexus to the consensual relationship between the nonmember and the tribe. *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 942 (9th Cir. 2009). Leasing land on the reservation for the purpose of fulfilling a constitutional mandate to maintain a general and uniform public school system simply does not have the requisite nexus to the tribe's attempt to exercise jurisdiction over the Districts' employment decisions.

The Supreme Court recently pointed out the critical importance of a

nonmember's actual consent to be bound by tribal authority:

> Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution." The Bill of Rights does not apply to Indian tribes. Indian courts "differ from traditional American courts in a number of significant respects." And nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.

Plains Commerce Bank, supra, 128 S.Ct. at 2724. That consent does not exist here.

b. The employment contracts do not create the requisite consensual relationship.

The School Districts' employment contracts with the individuals did not expressly or impliedly confer tribal regulatory or adjudicatory jurisdiction over the School Districts' personnel policies or decisions either. To the contrary, the contracts explicitly provided that the employees would abide by applicable Arizona law and District policy. Yellowhair's contract specified that any action regarding her discipline or termination would be conducted in accordance with state law and exclusively in state courts. Thus, the School District did not cede any regulatory or adjudicatory jurisdiction over its personnel matters to the tribe in the employment contracts. Moreover, because the individuals' employment contracts were entered into as part and parcel of the state's constitutional mandate to educate Arizona children, they do not constitute consensual relationships in any event. *See MacArthur v. San Juan County*, 497 F.3d 1057, 1074 (10th Cir. 2007) (employment relationship between tribal members and the San Juan Health Services District, a political subdivision of the State of Utah, were not "consensual relationships" because employment contracts were entered into exclusively in District's governmental capacity; relationships were part and parcel of District's duty to provide medical services to residents of San Juan County).

2. The second Montana exception does not apply.

a. The exception applies only where tribal power is necessary to avert catastrophic consequences.

Montana's second exception can be misperceived. The exception is only triggered by nonmember conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered necessary to self-government. *See Atkinson*, 532 U.S. at 657 n. 12. The second exception envisions situations where the conduct of the nonmember poses a direct threat to tribal sovereignty. *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc*., 569 F.3d 932, 943 (9th Cir. 2009) (finding no tribal jurisdiction). Indeed, to fall under this exception, **"tribal power must be necessary to avert catastrophic consequences."** *Plains Commerce Bank, supra*, 128 S. Ct. at 2726.

In *Strate v. A-I Contractors*, 520 U.S. 438, 459 (1997), the Court explained that the second *Montana* exception must be read in conjunction with the preface to the section in *Montana* in which it was discussed: "'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.'" *These* are the types of exercises of tribal power that are "necessary to protect tribal self-government or to control internal relations." *Hicks*, 513 U.S. at 360-61.

The tribe will not face "catastrophic consequences" if it lacks jurisdiction over an "NPEA violation" suit against an Arizona political subdivision (which is operating on the reservation pursuant to a constitutional mandate to provide services), that is filed by former District employees whom the political subdivisions terminated for cause after following due process procedures under state law. *MacArthur v. San Juan County*, 497 F.3d 1057, 1074-75 (10th Cir. 2007) (overruling district court's holding, in case by tribal members against state political subdivision, that tribal jurisdiction exists due to

strong Navajo interest in regulating the terms and conditions of Navajo employment and protection of the employment security of tribal members "[i]n a tribal community that depends so heavily on the wage economy"). The *MacArthur* court stated:

> 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.

Id. (emphasis in original). This case also involves "the Navajo Nation's claimed right to make its own laws and have *others* be governed by them, not the right to self-government."

b. Tribal jurisdiction would impinge on important state interests both on and off the reservations

When "state interests outside the reservation are implicated, States may regulate the activities even of tribal members on tribal land." *Hicks, supra*, at 362. The precept applies with force here. The state certainly has a substantial interest in fulfilling its constitutional mandate to educate all Arizona children.[10] It also has a substantial interest in ensuring that its political subdivision School Districts, as employers – and their employees – are protected and governed by the due process procedures that state law and District policy mandate. *See* A.R.S. §§ 15-341(A)(24), 15-539 to -543. Those procedures provide a constitutional and ordered method of ensuring the validity of the Districts' employment decisions.[11]

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[10] The "[e]ducation of its citizenry" is one of the State's most important functions. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351, 35 P3d 105, 112 (App. 2001)

[11] The Legislature has statutorily established local school district governing boards whose responsibilities include to "prescribe and enforce policies and procedures for the

Equally important is the state interest in ensuring that the Districts' employment decisions made and reviewed under Arizona law remain effective, binding, and not subject to potentially conflicting tribal court rulings. All too often, the NNLC orders Districts on the reservations to re-hire employees previously terminated in accordance with Arizona law, because the NNLC disagrees with the just cause determination or because the NPEA requires employers to give employment preference to Navajos. Not only does this create disorder in the process, but it unfairly subjects the Districts to potential liability if, after being re-hired, the employee again engages in negligent or more culpable conduct in the course and scope of his employment. District liability in such cases can be vicarious,[12] or direct based on a claim that the District negligently hired, re-hired, and/or retained the employee, knowing of the employee's propensity to act improperly. A.R.S. § 12-820.05(B).[13] The District would be responsible for defending such claim and paying any judgment awarded to a claimant even though it was not the School District's choice to re-hire the employee.

Clearly, the Districts' School Boards need to be free to avoid potential

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governance of the schools, not inconsistent with law or rules prescribed by the state board of education." A.R.S. § 15-341(A)(1). Statutory procedures ensure that a certificated teacher or administrator subject to dismissal receives sufficient notice and an opportunity to be heard to satisfy due process.

[12] The Arizona Reports are replete with cases in which Arizona public school districts have been sued as a result of a district employee's allegedly negligent, grossly negligent, or intentional conduct. *See, e.g.*, *Doe v. Gilbert Unified School Dist*., 200 Ariz. 174, 24 P.3d 1269 (2001) (parents sued District and State for alleged molestation of son by teacher); *Nolde v. Frankie*, 192 Ariz. 276, 279, ¶8, 964 P.2d 477 (1998) (former students sued school district for alleged molestation by coach); *LaFrentz v. Gallagher*, 105 Ariz. 255, 462 P.2d 804 (1970) (student sued school district for alleged assault and battery by teacher); *Morris v. Ortiz*, 103 Ariz. 119, 437 P.2d 652 (1968) (parents sued school district for injuries sustained by student in auto mechanics class); *Board of Trustees Eloy Elementary School Dist. v. McEwen*, 6 Ariz. App. 148, 430 P.2d 727 (App. 1967) (plaintiff sued school district for negligently allowing defendants-teachers to assault plaintiff).

[13] "A public entity is not liable for losses that arise out of and are directly attributable to an act or omission determined by a court to be a criminal felony by a public employee **unless the public entity knew of the public employee's propensity for that action**. This subsection does not apply to acts or omissions arising out of the operation or use of a motor vehicle" (emphasis added).

liability by disciplining/terminating employees in accordance with Arizona law and not have that decision "undone" by tribal court adjudicatory jurisdiction. Furthermore, supplanting the state's due process system with a process that permits an employee to bypass his administrative remedies and avoid the state-imposed burden of proof[14] – would seriously infringe upon the state's interest in fulfilling its constitutional mandate to educate all of the Arizona's children in the manner that the Legislature has determined will best achieve that goal.

c. A finding of no tribal jurisdiction will not seriously imperil the tribe's ability to protect its self-government or to control its internal relations

While the Navajos certainly have an interest in regulating the employment practices of all employers on the reservation and in adjudicating employment-related disputes under the NPEA, a finding that the tribe lacks jurisdiction over the School Districts' employment decisions will not seriously imperil its ability to protect its self-government or to control its internal relations. *See State of Montana Department of Transportation v. King*, 191 F.3d 1108, 1111 (9th Cir. 1999). In *King*, the tribe agreed to transfer property to the state so the state could construct and maintain a highway at its own expense on tribal land. The tribe thereafter attempted to impose on state highway maintenance crews a tribal employment ordinance that regulated employment practices for the crews, including requiring tribal member preferences, hiring quotas and special seniority rules. The Ninth Circuit held there was no tribal jurisdiction under the second Montana exception, even though "poverty stalks the reservation," seventy percent of the tribe's members were unemployed, and the high levels of unemployment on the reservation harmed the tribe. *Id.* at 1111, 1114. Because the tribe had consented to the

[14] In a superior court appeal from a termination decision, the **employee** has the burden of proving that the governing board erred. *See Guard v. County of Maricopa*, 14 Ariz. App. 187, 188-89, 481 P.2d 873, 874-75 (1971). In an NNLC action by an employee alleging that his or her discharge violated the NPEA, the **employer** has the burden of proving by a preponderance of the evidence that the discharge complied with the NPEA. *See* 15 N.N.C. § 611(B).

right of way so the state could construct the public highway at its own expense, the imposition of the ordinance impinged on one of the state's sovereign responsibilities – maintaining the public highway. *Id*. at 1114.

This case is similar. Though it does not involve a property transfer or a right of way, here the tribe not only consented to the state providing schools on the reservation at the state's own expense, but the Navajos (and the Arizona Constitution) have *required* the provision of those schools. To require the Districts to submit to tribal regulatory and adjudicatory jurisdiction, simply because the Districts are providing those mandated services on the reservation, goes far beyond the tribe's internal functioning and sovereignty concerns. As in *King*, imposing tribal jurisdiction in this situation would impinge on one of the state's sovereign responsibilities – providing a general and uniform public school system to all children in Arizona through its political subdivisions. *See also Glacier County School District No. 50 v. Galbreath*, 47 F. Supp. 2d 1167, 1169 (D. Mont. 1997) (school expelled Indian student; student sought tribal court order compelling his readmission and tribal court held it had jurisdiction; school sought injunctive relief in federal district court; district court held that second Montana exception did not justify the exercise of tribal authority over the school district's administration and operation). The *Galbreath* court reasoned:

> [T]he State of Montana, through its administrative agencies and courts, is the authority responsible for safeguarding the inalienable right of children to a public education. Accordingly, the public interest lies in ensuring the responsible state agencies are free to apply their expertise in resolving the various issues associated with providing an education to children of this State.
>
> The process established under the law of the State of Montana for the operation and administration of a public school system is available to all students within that system. **Once enrolled in the State of Montana's public school system, tribal members must comply with the procedures established by state law to resolve any resulting grievance or dispute. Opening the Tribal Court for the optional use of tribal members unhappy with the substance or pace of the proceedings mandated by Montana law is not, despite defendants' argument to the contrary, necessary to protect tribal self government**.

Id. at 1171-72 (emphasis added). The same is true here. Montana's second exception does not apply to confer tribal jurisdiction.

C. The Navajos' 1868 Treaty with the United States does not confer tribal jurisdiction over the School Districts' employment policies and decisions.

The power to exercise tribal civil authority over non-Indians can derive not only from the tribe's inherent powers of self-government and territorial management, but also from the power to exclude non-members from tribal land. Plaintiffs expect Defendants to argue that Title II of the Navajo Nation's 1868 Treaty with the United States allows the tribe to exercise jurisdiction over the School Districts. That section delineates the boundaries of the reservation, sets apart that land "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 provides that "no persons except those herein so authorized to do, . . . shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." This section of the Treaty does not subject the School Districts' employment decisions to tribal jurisdiction.

The power to exclude persons from tribal lands does include the lesser power to "tax or to place other conditions on the non-Indian's entry or continued presence on the reservation." *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 592 (9th Cir. 1984) (tribe has power to regulate non-Indians who come upon tribal land to repossess vehicles purchased off reservation), *citing Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-44 (1982). For example, nonmembers lawfully entering tribal lands pursuant to a contract with the tribe remain "'subject to the tribe's *power* to exclude them.'" *Id.* (emphasis in original). When it applies, then, the power to exclude persons from tribal lands "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation. When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian

complies with the initial conditions of entry." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 144 (1982).

The "power to exclude" in the tribe's 1868 Treaty with the United States does not operate to confer tribal jurisdiction over the School Districts, because the tribe does not *have* the power to exclude the Districts as it does for individuals voluntarily entering the reservation. The political subdivision Districts *must* enter the reservation in order to fulfill the constitutional mandate of providing a general and uniform public school system – including educating children on the Navajo and Hopi reservations. This constitutional mandate derives from the federal Enabling Act, Act of June 20, 1910, c. 310, 36 U.S. Stat. 557, 568-579, which authorized creation of the State of Arizona. That Act imposed certain conditions to Arizona's admission to the United States. *Roosevelt Elementary School District v. Bishop*, 179 Ariz. 233, 239, 877 P.2d 806, 812 (1994). One of those conditions required Arizona to adopt a constitution with provisions "for the establishment and maintenance of a system of public schools **which shall be open to all the children of said State**." Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 570 (emphasis added). Section 26 of the Act requires "That the schools, colleges, and universities provided for in this Act **shall forever remain under the exclusive control of the said State**" (emphasis added).

Arizona's Constitution, Article XI, fulfills the promise of the Enabling Act. As a matter of federal and constitutional mandate, then, the state must provide a general and uniform system of public education to *all* children of this state, including children on the Navajo and Hopi reservations. *Meyers v. Board of Education*, 905 F. Supp. at 155. And because the Enabling Act requires Arizona to educate all children in Arizona and maintain "exclusive" control over state public schools, *Roosevelt*, 179 Ariz. at 239, 877 P.2d at 812, the tribe's authority under the Treaty to exclude non-tribal members does not operate to extend tribal jurisdiction to state School Districts making employment decisions on the reservation. Plainly, the Plaintiff School Districts are not like the individuals in *Babbit Ford* who voluntarily entered onto the reservation to repossess

vehicles, thereby subjecting themselves to tribal regulation at the risk of being excluded.

MacArthur v. San Juan County, 497 F.3d 1057 (10th Cir. 2007), supports this conclusion. There, a health district that was a political subdivision of the state of Utah operating on tribal land terminated Navajo employees. The employees filed complaints with the Navajo ONLR seeking reinstatement. The federal district court had held that the Navajos possessed adjudicatory authority over the terminated members' claims arising out of their consensual employment relationship. The Tenth Circuit reversed. It first noted that Congress has not passed any law permitting the Navajos to exercise regulatory authority over nonmember entities who employ tribe members on the reservation; nor had it passed any broader statute arguably encompassing nonmember employers. 497 F. 3d at 1068. Consequently, if the tribe were to have any such regulatory authority, it would have to have existed, if at all, as a byproduct of its retained inherent sovereignty. *Id*. at 1068-69. The court held that there was no such jurisdiction. Instead, it "adhere[d] 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.'" 497 F.3d at 1073. Though the court was addressing the first Montana exception (consensual relationship) rather than the 1868 Treaty, the distinction remains important. State political subdivisions, like the School Districts here, that are providing mandated services on the reservation are simply not like private individuals or entities that voluntarily come to the reservation to do business, and thereby subject themselves to tribal regulation or risk being excluded. Under the Enabling Act, and Arizona's Constitution, the tribe cannot choose to prevent the Districts from carrying out their constitutional mandate on the reservation. Therefore, the 1868 Treaty provision allowing the exclusion of non-members does not apply to confer tribal jurisdiction.

CONCLUSION

For the foregoing reasons, tribal jurisdiction over Plaintiffs' employment practices and decisions is lacking as a matter of law. Plaintiffs respectfully request the Court to grant it summary judgment on its complaint, to declare that tribal jurisdiction

over the individuals' NNLR matters is lacking, and to enjoin any further tribal court proceedings with respect to employment decisions made by the Districts on the reservations.

RESPECTFULLY SUBMITTED this 15th day of January, 2010.

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