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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Window Rock Unified School District; Pinon Unified School District,

Plaintiffs,

v.

Ann Reeves; Kevin Reeves; Loretta Brutz; Mae Y. John; Clarissa Hale; Michael Coonsis; Barbara Beall; Richie Nez; Casey Watchman; Ben Smith; Peterson Yazzie; Woody Lee; Jerry Bodie; Evelyn Meadows; and John and Jane Does I-V, Current or Former Members of the Navajo Nation Labor Commission,

Defendants.

NO. 3:12-cv-08059-PGR

NAVAJO NATION LABOR COMMISSION DEFENDANTS' REPLY TO PLAINTIFFS' REPSONSE TO NNLC DEFENDANTS' MOTION TO DISMISS AND RESPONSE TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

The Navajo Nation Labor Commission Defendants (Commission) hereby submit their Reply to Plaintiffs' Response to NNLC Defendants' Motion to Dismiss and Response to Plaintiffs' Cross-Motion for Summary Judgment.

I. CONSIDERATION OF THE MOTION FOR SUMMARY JUDGMENT IS PREMATURE AND THE MOTION SHOULD BE DENIED.

In filing a motion for summary judgment with a response to the Commission's

motion to dismiss for failure to exhaust, Plaintiffs Window Rock and Pinion School Districts (Districts) improperly combine two very different proceedings. As stated in the Commission's motion, for exhaustion to be required, the Nation's jurisdiction need only be "colorable." *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848 (9th Cir. 2009). Under this standard, the Commission is only required to establish that jurisdiction is "plausible," and the Court does not engage in a definitive determination of the question. *Id.* By adding their summary judgment motion to the response, the Districts seek an immediate final judgment on the merits of the Nation's jurisdiction, requiring the Commission to defend its jurisdiction definitively. Even if the motion to dismiss for lack of exhaustion was not pending, consideration of summary judgment is premature in the absence of an opportunity for the Reeves Defendants to engage in discovery. *See* Fed. R. Civ. P. 56(d). The Court at this stage of the case should only consider the preliminary question of whether jurisdiction is indeed plausible.

To the extent a response on summary judgment is necessary, the Commission asserts that it has no information to dispute the limited facts the Districts include in the Statement of Facts. Though the appropriate fact-finder in the first instance, the Commission has not had the opportunity to make any findings to the contrary, as the Districts filed the current action before any findings were made. Regardless, the facts asserted by the Districts concerning the merits of the underlying employment disputes are not material to the issues in this case. *See infra*, at 13-14. However, the Districts omit facts material to the applicability of the Treaty of 1868 and second exception of

Montana v. United States, which may very well be in dispute between the Districts and the Reeves Defendants. *See infra*, at 4, n.2, 12-14. If so, summary judgment should be denied.

II. THE NATION MAY EXCLUDE THE DISTRICTS, AND THEREFORE CONDITION THEIR USE OF ITS LANDS.

A. The Nation's right to exclude recognized by the Treaty of 1868 applies to the Districts, and neither the Enabling Act nor the Arizona Constitution exempts them.

The Districts assert that the Enabling Act and Arizona Constitution's education provision exempts them from the Nation's right to exclude recognized in the Treaty of 1868. [Dkt. # 27 at 20-22.] They do not dispute that the Treaty recognizes that right; they simply assert that such exclusion does not apply to them. The Districts provide no authority for this claim beyond the bare education provision, and the language of the Treaty, the Enabling Act and Arizona Constitution directly contradict their position.

The language of Article II of the Treaty recognizes the right of the Nation to exclude all outside persons except a narrow subset of federal officials:

> [T]he United States agrees 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.

Treaty between the United States of American and Navajo Tribe of Indians, June 1, 1868, art. II, 15 Stat. 667, 668 (emphasis added). As the United States Supreme Court has recognized, this provision affirms the Nation's exclusive sovereignty over the

Reservation. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 175 (1973). It also bars the application of Arizona state jurisdiction to those lands. *Id.* (Treaty precludes authority to impose Arizona state income tax to Navajo tribal member on Reservation); *see also Williams v. Lee*, 358 U.S. 217, 221-22 (1959) (state court jurisdiction over contract claim against Navajo citizen would infringe on right of self-government recognized in the Treaty). Under this provision the Nation can exclude anyone but those specific federal Indian affairs officials entering the Reservation to undertake their obligations to the Navajo people. *Donovan v. Navajo Forest Products Indus.*, 692 F.2d 709, 712 (10th Cir. 1982). The Nation may even exclude other federal officials not connected to Indian affairs. *Id.* (Nation may exclude federal OSHA officials from the Reservation). State-organized school districts clearly are not included, as they are not agents or employees of the federal government connected to Indian affairs, and therefore can be excluded.[1] Under this provision, the Districts' assertion of blanket immunity from exclusion cannot hold.[2]

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[1] As the State of Arizona did not exist in 1868, it would be surprising indeed that officials of state-organized school districts would have been included in those federal officials authorized by the Nation to enter the Reservation without the Nation's specific consent.

[2] Even if the scope of officials exempt from exclusion were somehow ambiguous, treaty provisions must be construed in favor the Nation, *McClanahan*, 411 U.S. at 174, and as the Navajo negotiators would have understood them, *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942). The Districts cite no ambiguity, and indeed make no argument at all that the text of the Treaty supports their view. Assuming an ambiguity, there are potential factual disputes that require exhaustion, or at the very least denial of summary judgment.

Absent clear and plain congressional intent to abrogate the right to exclude, the exclusion power remains intact. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *see also United States v. Dion*, 476 U.S. 734, 740 (1986) (stating that it is "essential" that there is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty"). Through that power, the Nation may regulate the conduct of non-members on trust land within the Nation, as recognized by the United States Supreme Court in *Montana* itself. *See* 450 U.S. 544, 558-59 (1981) (recognizing jurisdiction through almost identical provision in Crow Nation treaty). The Districts make no claim, and indeed cannot make the claim, that Congress subsequently abrogated the exclusion power. They only assert, without support, that the educational mandate incorporated into the Arizona Constitution through the Enabling Act by itself exempts them. However, even under the Enabling Act and the Arizona Constitution, that assertion is false. The Districts fail to mention another section of the Enabling Act also adopted into the State's constitution:

> [T]he people inhabiting said proposed state do agree and declare that they forever disclaim all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribe, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under absolute jurisdiction and control of the Congress of the United States.

Enabling Act, Law of June 20, 1910, ch. 310, § 20(2), 36 Stat. 557, 568; Ariz. Const., art. 20, § 5. Even under a narrow reading of this provision, the State of Arizona pledged not to claim any proprietary rights to Navajo land. *See Organized Village of Kake v. Egan*, 369 U.S. 60, 69 (1962) (interpreting similar disclaimer provision for Alaska as "disclaimer of proprietary rather than governmental interest"). The claim that the Districts cannot be excluded, and therefore can occupy Navajo land at the Nation's sufferance, is exactly what the State of Arizona expressly pledged not to do. However, in the context of the Treaty, this provision goes further, precluding *any* assertion of state governmental authority over Navajo land. *McClanahan*, 411 U.S. at 174-75, 176 n.15 (distinguishing *Kake*'s construction of state disclaimers because the Treaty recognizes the Nation's exclusive occupancy of Reservation); *see also Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 149, n.8 (1984) (recognizing distinction for Navajo Nation); *White Mountain Apache Tribe v. State of Ariz, Game and Fish*, 649 F.2d 1274, 1280 (9th Cir. 1981) (same). The educational mandate cannot override this separate promise that it would never assert the right to occupy Navajo land without consent. Indeed, these provisions can be reconciled, as the Districts have a responsibility to provide education, but must do so consistent with the conditions set by the Nation for the use of its lands. To hold otherwise would be a rejection of the fundamental sovereign right of the Nation, recognized and affirmed by the United States in the Treaty and explicitly acknowledged by the State of Arizona in its constitution, to control its own lands.

B. Even in the absence of a treaty right to exclude, *Water Wheel* acknowledges and affirms Indian nations' federal common law right to exclude non-members

Even if the Nation did not have the treaty right to exclude, the federal common law right to exclude, reaffirmed in *Water Wheel* after this Court's decision in *Red Mesa*, remains intact.[3] The rule in this Circuit is that the tribal right to exclude endows an Indian nation with broad jurisdictional authority over lessees, *Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 802, 811-812 (9th Cir. 2011), despite one judge's refusal to follow it in the specific context of a non-Indian tort claim against another non-Indian unconnected to either party's use of tribal land, *Rolling Frito Lay LP v. Stover*, 2012 WL 252938, at *3 (D. Ariz. January 26, 2012). As stated by the United States Supreme Court in *Merrion v. Jicarilla Apache*, and as reiterated in *Water Wheel*, an Indian nation may exclude non-members, and may condition non-member land use on their adherence to tribal laws. *Merrion*, 455 U.S. 130, 144 (1982); *Water Wheel*, 642 F.3d at 811; *cf. Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 593-94 (9th Cir. 1983) (Nation may condition car dealer presence on adherence to

[3] Contrary to the Districts' claim that the Commission concedes the applicability of *Montana* by requiring the parties to submit evidence on the exceptions, [Dkt. # 27, at 18], there is nothing inconsistent with the position that the exclusion power transcends *Montana's* rule. The Commission asked for such information on the possibility that this Court might rule, based on *Red Mesa*, that *Montana* nonetheless applies. Were such ruling made without appropriate fact-finding by the Commission, there would be no factual record to review once the Districts exhausted their Navajo court remedies. The Commission in no way concedes that *Montana* should apply simply by asking for additional facts to conclude whether, even under the more stringent standard of *Montana*, the Nation has jurisdiction over the Districts.

Nation's repossession laws). As discussed above, nothing in the Enabling Act or the Arizona Constitution contradicts this general rule, and indeed, both actually support it. Officials acting under state law are not exempt.[4] Land status is then not only relevant, but is dispositive in this case. *See Water Wheel*, 642 F.3d at 813 (noting that *Hicks* itself recognizes that tribal land status can be dispositive of tribal jurisdiction). In *Water Wheel*, the Ninth Circuit recognized only one exception to its general rule, the *exact facts* of *Nevada v. Hicks*. 642 F.3d at 813 ("[*Hicks*'] application of *Montana* to a jurisdictional question on tribal land should apply only when the specific concerns at issue in that case exist."). It did not adopt the rule proposed by the Districts, that any entity created under state law is automatically exempt from tribal jurisdiction, despite occupying tribal land by permission of the tribe, and, in the case of Plaintiff Window Rock School District, explicitly consenting to the application of the Nation's laws.

This federal common law right to exclude is further supported by the federal statutory law governing leases on tribal lands. Under the statute and its regulations, outside entities must enter into a lease with the tribal owners approved by the Bureau of

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[4] Nothing in *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007), contradicts this rule, even if it were otherwise persuasive to this Court. The state actors in *MacArthur* were on fee land owned by the State of Utah within the Navajo Reservation, not tribal trust land. *See* 497 F.3d at 1061. The Nation's jurisdiction in that case was not premised on its right to exclude, which did not apply to the land on which the state hospital operated. *See id.* at 1070 n.7 (stating that right to exclude was not at issue because plaintiff "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"). The reference to "trust land" in the footnote appears to be an error based on the prior statement of the court.

Indian Affairs to legally occupy tribal land.[5] 25 U.S.C. § 415; 25 C.F.R. § 162.104(d) (stating that "[a]ny other person or legal entity" than an Indian owner must have a properly granted lease "before taking possession"). Use of tribal land without an approved lease is a trespass. 25 C.F.R. § 162.106(a). State schools and state government agencies are explicitly included in these requirements. 25 U.S.C. § 415(a) (authorizing leases by tribes for "educational . . . purposes"); 25 C.F.R. § 162.604(b)(2) (authorizing nominal rent leases for educational purposes or to "agencies of federal, state or local governments"). There is no exception for schools operating under a state constitutional mandate. Indeed, the Districts have followed this requirement, entering into leases with the Nation and approval by the Bureau of Indian Affairs, and requesting and receiving extensions of those leases by the Nation and the Bureau. [Dkt. # 12-1-12-4.] The assertion of the Districts that they cannot be excluded is then also in direct contradiction to federal leasing requirements the Districts themselves have followed, and cannot stand.

C. Jurisdiction through the Nation's right to exclude is at the very least plausible, requiring exhaustion of the Nation's remedies.

At the very least, as discussed above, the Nation's jurisdiction through its right

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[5] The statute authorizes the Nation to enter into leases without Bureau of Indian Affairs approval under certain circumstances. 25 U.S.C. § 415(e). The Nation has taken full control of approvals for business site leases, but has not, as of yet, taken full control over schools leases, which therefore still require Bureau approval. Nonetheless, the statute's acknowledgment of the Nation's unique authority over leases of its land bolsters the conclusion that the Nation has the full authority to exclude, and therefore condition the use of its lands.

to exclude is "plausible." The Court therefore should require the Districts to at least exhaust their remedies in the Nation's legal system on the effect of these authorities.

III. EVEN ASSUMING *MONTANA'S* GENERAL RULE APPLIED, JURISDICTION IS PLAUSIBLE.

Even assuming the general rule of *Montana* applies despite the Nations' clear right to exclude, jurisdiction is at the very least plausible under both exceptions. Leases are one type of "consensual relationship" explicitly recognized under *Montana* itself. *See* 450 U.S. at 565. No later case, including *Hicks*, has stated that an actual lease is not such a consensual relationship merely because it is entered into by a school district, even it was "the State" for such purposes. *See* 533 U.S. 353, 359, n.3 (holding state law enforcement obtaining of tribal search warrant was not an "other arrangement" under *Montana*). Further, Plaintiff Window Rock Unified School District, despite the Districts' strained interpretation, has explicitly consented to the application of Navajo law. Finally, jurisdiction under the second exception is also plausible if the Commission makes appropriate factual findings.

A. Contrary to the Districts' construction of the Window Rock District's leases, the Window Rock School District has explicitly consented to the application of Navajo law, and must be held to that consent.

The Districts attempt to repudiate Window Rock School District's bargained-for consideration in its leases that it would abide by Navajo law. The Districts only mention the actual language of the Window Rock leases once in a footnote, and allege it states that all Navajo laws in conflict with federal or state law cannot apply. [Dkt. # 27 at 8, n.8], Their position suggests that Navajo laws not in conflict do in fact apply,

despite their general position that they can never consent. The relevant paragraphs in the leases do not actually say all Navajo laws in conflict with federal or state law are inapplicable. [Dkt # 12-1 at 6, and 12-2 at 5]. Nonetheless, the Districts apparently believe the specific consent in the first sentence of the paragraph is completely canceled out by the general reservation that "[t]he agreement to abide by Navajo laws shall not forfeit rights . . . under the Federal laws of the United States government," *id.*, because, according to them, federal law completely exempts them from ever complying with the Nation's laws. [Dkt. # 27 at 8, n.8.] That construction renders the whole paragraph superfluous, and is inconsistent with the clear intent of the schools to adhere to, at the very least, some Navajo laws. The Districts do not argue that some Navajo laws, such as the Navajo Preference in Employment Act, constitute a forfeiture of some specific federal right, only that they are absolutely exempt by virtue of their alleged general exemption as state-organized school districts. Such a strained interpretation, asserted long after negotiation and approval by the Nation and the Bureau of Indian Affairs of the original leases and subsequent renewals, is not supported by the text or general rules of contract interpretation, *see* 11 Williston on Contracts, § 32:5 (stating that every word, phrase, or term must be given effect); § 32.10 (stating specific phrases govern over general ones), and potentially results in a failure of consideration for the leases. The Window Rock Unified School District affirmatively consented to Navajo law; it cannot now claim that that consent is completely negated.

Under these paragraphs, the Commission asserts that the Commission's

jurisdiction over employment disputes does not result in a forfeiture of any specific federal right. The Districts do not assert otherwise. Therefore, the Nation has, at the very least, plausible jurisdiction over Plaintiff Window Rock Unified School District, even if a lease in and of itself is not sufficient for jurisdiction under *Montana's* first exception.

B. Further fact-finding after dismissal for exhaustion may show that the lack of employment jurisdiction is indeed catastrophic to the Nation's self-government.

The Districts assert that there are no facts that could possibly be found by the Commission that could establish the Nation's jurisdiction. [Dkt. # 27 at 15-16.] Indeed, their Statement of Facts includes only descriptions of the underlying employment cases. [*See* PSOF.] However, absent the actual opportunity to make the findings discussed in the Commission's orders, it cannot be said that *Montana's* second exception plainly is not met. Under the vague test set out in recent Supreme Court opinions, particularly *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008) (requiring tribal authority over non-member conduct to be "necessary to avert catastrophic consequences"), facts must be found to give such an abstract rule relevance in a given case. *Cf. Burlington Northern Santa Fe R. Co. v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 775 (9th Cir. 2003) (remanding case to district court for further fact finding on *Montana's* second exception). Indeed, the numerous cases cited by the Districts, including those concerning state actors, arise under starkly different factual scenarios, and demonstrate

that *Montana's* second exception requires a fact-specific analysis. *See, e.g., Glacier County School Dist. No. 30, East Glacier Park, Mont. v. Galbreath*, 47 F.Supp.2d 1167, 1171 (D. Mont. 1997) (ruling "under the facts herein" that tribe lacked jurisdiction under second exception over school district operating on fee land within reservation). However, the Districts simply state that "[r]uling that the tribe lacks jurisdiction over the School Districts' employment will not seriously imperil the tribe's ability to self-govern or control its internal relations." [Dkt. # 27 at 12.] That blanket conclusion with no fact-finding by the Nation's tribunal to rebut it renders the exhaustion requirement a nullity.

The Districts wrongly believe that the Commission intends to make factual findings on the merits of the employment claims as part of the jurisdictional analysis. [Dkt. # 27 at 16.]. The Commission agrees such facts are irrelevant to the jurisdictional question, despite the Districts' inclusion of such facts in their pleading and statement of facts. [Dkt. # 27 at 3-6; PSOF ¶¶ 2-29.] As stated in the orders requesting evidence, [Dkt. # 1-A and 1-B], the Commission seeks information on the demographics of the districts, which may show that the districts serve almost exclusively Navajo students, employ a significant number of Navajos, and that both school boards are made up of Navajo members. Indeed, even under the facts asserted by the Districts, all the claimants in the underlying cases, except for two, are Navajo members. [PSOF ¶¶ 2-5.] Further, facts on the history of arrangements made between the Nation and the Districts may show the Nation has strongly asserted the application of the NPEA to the districts,

and that they consented to the application of the NPEA through the negotiated lease provisions and other arrangements. Taken together, these facts may indeed show that the inability of the Nation to hear complaints by Navajos arising from employment decisions of Navajos on Navajo land, particularly where the exclusively or almost exclusively Navajo school board represented to the Nation and the Bureau of Indian Affairs that it would abide by Navajo law as a condition of using lands on the Nation's treaty reservation, indeed imperils or is "catastrophic" to the Nation's self-government. As similarly mandated by the Ninth Circuit in *Ford Motor Co. v. Todecheene*, which the Districts unsuccessfully attempt to distinguish,[6] the Nation should have the first opportunity to establish the necessary facts on *Montana's* second exception before this Court decides the issue. *See* 488 F.3d 1215, 1216-17.

CONCLUSION

Based on the above, the Commission reiterates that its Motion to Dismiss for Failure to Exhaust Tribal remedies should be granted. The Commission further requests that this Court deny the Districts' Cross-Motion for Summary Judgment, or otherwise stay consideration of it until appropriate in this action.

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[6] In their pleading, the Districts claim that the Ninth Circuit required exhaustion in *Todecheene* under the first *Montana* exception. [Dkt. # 27 at 16, n.17.] However, the actual order of the Ninth Circuit clearly states it was requiring exhaustion under the second: "The tribal court did not "plainly" lack jurisdiction *under the second exception*, recognized in *Montana* . . . As such, the appeal is stayed until Ford exhausts its appeals in the tribal courts." 488 F.3d at 1216-17 (emphasis added).

DATED, this 16th day of July, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2012 the original of this motion was filed electronically and served electronically on the following counsel:

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