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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case Number 13-16259
Case Number 13-16278

Window Rock Unified School District;
Pinon Unified School District,

Plaintiffs-Appellees,

v.

Ann Reeves, Kevin Reeves, Loretta Brutz, Mae Y. John, Clarissa Hale, Michael Coonsis, Barbara Beall; and 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-Appellants.

NAVAJO NATION LABOR COMMISSION APPELLANTS' OPENING BRIEF

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STATEMENT OF JURISDICTION

The District Court's jurisdiction was based on 28 U.S.C. § 1331, as, according to the United States Supreme Court, the scope of an Indian nation's authority over non-Indians is a federal question. *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985). The District Court issued an order granting Appellees' motion for summary judgment and subsequently issued a judgment permanently enjoining the Navajo Nation Labor Commission from hearing the underlying employment disputes. The judgment is then final and appealable under 28 U.S.C. § 1291. The District Court's order was issued on March 19, 2013. Its judgment was issued on May 22, 2013. Commission Appellees filed their Notice of Appeal on June 18, 2013. Under FRAP 4(a)(1)(A), the appeal is timely. The case subsequently was consolidated with a separate appeal timely filed by the individual employee Appellees and docketed as Case No. 16278.

STATEMENT OF THE ISSUES

The issues in the case are (1) whether a federal district court can determine that an Indian nation's jurisdiction is "plainly lacking" when it denied the Nation's courts the opportunity to create a full factual record and instead decided the case on summary judgment without discovery, (2) whether the Navajo Nation's employment jurisdiction over state-organized school districts that lease trust land is

"plainly lacking" when it has a treaty right to exclude them, (3) whether the Navajo Nation's employment jurisdiction over state-organized school districts that lease trust land is "plainly lacking" when it has a federal common law right to exclude them, and (4) whether the Navajo Nation's employment jurisdiction is "plainly lacking" under the first exception of *Montana v. United States*, when state-organized school districts entered into leases for the use of trust land, and when one of the districts affirmatively consented to the application of Navajo law, and (5) whether the Navajo Nation's employment jurisdiction is "plainly lacking" under the second exception of *Montana v. United States* if further facts can show that the Nation's ability to regulate the districts is necessary for its self-government.

STATEMENT ON ADDENDUM

Pursuant to 9th Cir. R. 28-2.7, a separately- bound addendum of pertinent provisions of the United States Constitution, the Navajo Nation Treaty of 1868, the Arizona State Constitution, and federal statutes and regulations is filed concurrently with this brief.

STATEMENT OF THE CASE

This case concerns the Navajo Nation's employment jurisdiction over lessees occupying tribal trust land with the Nation's consent under federally-

approved leases. In this case, the lessees happen to be school districts organized under Arizona state law.

The current dispute arises from several employee claims filed in the Navajo Nation Labor Commission ("Commission"), the administrative tribunal that hears employment disputes under the Navajo Preference in Employment Act (NPEA). As more fully discussed below, despite its name, the NPEA is a general labor and employment statute governing employer-employee relations within the Navajo Nation. Appellees Ann Reeves, Kevin Reeves, Loretta Brutz, Mae John, Clarissa Hale, Michael Coonsis, and Barbara Beall filed claims alleging violations of the NPEA for various employment actions by the districts. School District Statement of Facts at ¶¶ 7, 13, 20, 28, NNER 35, 36, 37, 38. The districts moved to dismiss the claims for lack of subject matter jurisdiction and the Commission consolidated the cases for purposes of ruling on the jurisdictional question. *Id.*, ¶¶ 9, 29, NNER 35, 38.

In 2010, Federal District Court Judge Paul Rosenblatt, the same judge who issued the judgment currently on appeal, issued a decision involving two other Arizona-organized school districts, *Red Mesa Unified School Dist. v. Yellowhair*, No. CV-09-8071-PCT-PGR, 2010 WL 3855183 (D.Ariz. September 28, 2010). In that decision, Judge Rosenblatt concluded the Nation lacked employment jurisdiction over specific employment actions by the Red Mesa Unified School

District and the Cedar Unified School District. *Id.* at *5. Members of the Commission were named as defendants in the federal case, and were enjoined by the judgment. *Id.* However, as the decision only enjoined the Commission from proceeding in those specific cases, and did not enjoin it from hearing any future cases involving the same districts, much less other Arizona-organized school districts, *see id.*, the Commission did not appeal the decision. The individual employees who were named as defendants in the federal action did not file an appeal either, and consequently this Court did not rule on the case.

Based on *Red Mesa*, the Pinon and Window Rock School Districts argued to the Commission that the Nation lacked jurisdiction. Order at 3, NNER 5. The Commission, believing there were unresolved factual issues material to its jurisdiction, requested evidence from all parties. Commission Order of September 1, 2011; Commission Order of February 7, 2012, Complaint, Exhibits A and B, NNER 63-69. It issued two orders requesting the parties provide that evidence, and intended to hold an evidentiary hearing to make detailed factual findings. *Id.*, Order at 3, NNER 5. Before it could do that, the districts filed this action in the Federal District Court of Arizona naming the individual employee claimants and members of the Commission assigned to the cases, Richie Nez, Casey Watchman, Ben Smith, Peterson Yazzie, Woody Lee, Jerry Bodie, and Evelyn Meadows, as defendants. Complaint, NNER 70-82. The districts requested that the court

permanently enjoin the individual employees and the members of the Labor Commission from proceeding in the cases. *Id.* at 10; NNER 82. The districts alleged in their joint complaint that jurisdiction was "plainly lacking" and therefore there was no need to exhaust their remedies in the Navajo Nation courts. *Id.* at 3, ¶ 8, NNER 74.

Before the Federal District Court, the Commission defendants filed a motion to dismiss, asserting that due to the lack of Navajo factual findings and based on the sovereign authority of the Nation, the Commission's authority was not "plainly lacking." The individual employee defendants joined the Commission motion. The districts countered the motion through filing a motion for summary judgment, asserting there was no dispute of fact, and submitting a statement of facts primarily discussing the underlying employment claims. School Districts Statement of Facts, NNER 33-38. In their reply, the Commission defendants objected to the filing of summary judgment, arguing it was premature and improper while an exhaustion motion was pending and in the absence of any fact-finding by the Commission, and at the very least in lieu of the opportunity for the individual employees to engage in discovery at the federal level. Navajo Nation Labor Commission Defendants' Reply to Plaintiffs' Response to NNLC Defendants' Motion to Dismiss and Response to Plaintiffs' Cross-Motion for Summary Judgment, at 1-2, NNER 31-32. In their response, the individual employee defendants also asserted

that at the very least they should be allowed to conduct discovery before the Court ruled on summary judgment. Response to Motion for Summary Judgment and Motion Pursuant to Rule 56(F) Fed.R.Civ.P., at 2-4, NNER 28-30. The District Court denied the Commission defendants' motion, granted the districts' motion, and permanently enjoined the individual employees and the Commission from proceeding in the underlying employment cases. Order at 19, NNER 21; Judgment at 2, NNER 2. The Commission defendants filed this appeal, while the individual employee defendants filed a separate appeal. Commission Defendants' Notice of Appeal, NNER 23; Individual Employee Defendants' Notice of Appeal, NNER 25. On motion by the Commission Appellants, this Court consolidated the cases.

STATEMENT OF THE FACTS

As discussed in more detailed below, there is a thin factual record to set the proper background for the case. The District Court believed the case to simply concern the alleged right of a state-organized school district to be completely free of Navajo Nation jurisdiction. It therefore denied any further fact-finding, and granted summary judgment with minimal facts material to the jurisdictional question. However, it is not so simple.

The Navajo Nation is a federally-recognized Indian nation with a sovereign-to-sovereign relationship with the United States under two treaties ratified by the United States Senate in 1850 and 1868. In the 1860s, the United States Army

forcibly marched the Navajo people from their homeland to a military camp in southeastern New Mexico called Bosque Redondo. *Williams v. Lee*, 358 U.S. 217, 221-22 (1959). The United States government's intent was to permanently exile the Navajos. *Id.* After United States officials determined the camp could not permanently sustain the Navajos, they negotiated a treaty through Lieutenant General William Tecumseh Sherman with Navajo leaders, including Barboncito and Manuelito. *Id.* In the 1868 treaty, the Nation's leaders reserved land for the exclusive use and occupancy of the Navajo people. Treaty between the United States of America and Navajo Tribe of Indians, June 1, 1868, art. II, 15 Stat. 667, 668, NNADD 3. At the time of the treaty the State of Arizona did not exist. As part of the treaty the Navajos ceded land outside the boundaries of the new reservation. *Id.*, art. IX, 15 Stat. at 669-70, NNADD 4-5. Further, the United States agreed in the treaty that only those federal officials specifically authorized to undertake their duties to the Navajo people were authorized to enter the Reservation without the permission of the Nation. *Id.*, art. II, 15 Stat. at 668, NNADD 3. The Navajo people then returned to their homeland within the new Navajo Reservation to govern its lands as a sovereign Indian nation. *Williams*, 358 U.S. at 221-22.

Arizona was admitted to the union as a state in 1912. As a condition of becoming a state, Congress through the Enabling Act required the state

constitutional convention to promise certain things. Enabling Act, Law of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 569, NNADD 8; Ariz. Const., art. 20, NNADD 10. One promise was to disclaim any rights to Indian land within the new state, including the treaty lands of the Navajo Reservation. Enabling Act at § 20(2), NNADD 8. Another was to establish public schools. *Id.* at § 20(4). Congress required the convention to pass an irrevocable ordinance making those assurances, and those provisions became part of the Arizona State Constitution. *Id.* at § 20, NNADD 8; Ariz. Const., art. 20, §§ 4, 7, NNADD 10, 11. Congress has never authorized their rescission, and those assurances remain in the state constitution to this day.

As in other parts of the state, school districts were organized on the Navajo Reservation to establish and operate schools. Owning little or no land within the Navajo Reservation to build schools, the districts must seek permission of the Navajo Nation and the federal Bureau of Indian Affairs to use Navajo trust lands. 25 U.S.C. § 415, NNADD 12. Consequently, the Nation entered into leases with several school districts, including Appellees Window Rock Unified School District and Pinon Unified School District, which included provisions requiring the districts to comply with numerous federal and Navajo Nation land use requirements. Lease between the Navajo Tribe of Indians and the Window Rock Unified School District, September 22, 1983, NNER 40-47; Lease between the

Navajo Tribe of Indians and the Window Rock Unified School District, November 8, 1985, NNER 48-54, Lease between the Navajo Tribe of Indians and the Hopi Public School District No. 25, April 27, 1982, NNER 55-61. In the case of Window Rock Unified School District, the two leases at issue in this case went further, with a provision in which the district explicitly consented to the application of Navajo Nation regulatory law:

> 16. AGREEMENT TO ABIDE BY NAVAJO LAWS
>
> The Lessee and Lessee's employees, agents, and sublessees and their employees and agents agree to abide by all laws, regulations, and ordinances of the Navajo Tribal Council now in force or effect or may be hereafter in force or effect. This agreement to abide by Navajo laws shall not forfeit rights which the Lessees and Lessees employees, agents, and sublessees and their employees, and agents enjoy under the Federal laws of the United States Government, nor shall it affect the rights and obligations of Lessee as an Arizona public school district under applicable laws of the State of Arizona.

Lease of September 22, 1983 at 6, NNER 45; Lease, November 8, 1985, at 5, NNER 53. Pursuant to those leases, these two school districts operate schools on the Nation's trust land that educate primarily Navajo students, employ primarily Navajos as teachers, staff, and administrators, and are governed by all-Navajo or virtually all-Navajo boards.[1] Order at 17, NNER 19. Under the districts' dispute resolution policies, teachers and staff may file grievances challenging employment

[1] As discussed further below, lacking a full factual record, it is unclear the proportion of students, employees and board members of the districts that are Navajo citizens, but the District Court did not dispute that for the two districts all three categories were "primarily Navajos." Order at 17, NNER 19.

decisions under procedures deriving from Arizona state law. *Id.* at 14-15, NNER 16-17.

Through its sovereign authority, the Navajo Nation government has passed several employment laws to govern employers operating on its trust lands. Among those is the Navajo Preference in Employment act, passed in 1985 and amended in 1990. 15 N.N.C. §§ 601, *et seq*. (2005), NNADD 22-55. Though titled "Navajo Preference in Employment," the NPEA is actually a general labor and employment code, regulating the relationship between employers and employees within the Nation. *See id.* Among other things, the NPEA requires employers to give preference to citizens of the Nation and their spouses when qualified for a position, and to discipline or terminate all employees, whether Navajo or not, only for "just cause." *Id.*, §§ 604(A)(1), (B)(8), 614, NNADD 26, 28; *Staff Relief, Inc. v. Polacca*, 8 Nav. R. 49, 56 (Nav. Sup. Ct. 2000) (holding employee claims may be filed with the Commission by any employee regardless of Navajo citizenship). The Nation established the Commission to hear claims for violations of the NPEA's requirements. *See* 15 N.N.C. § 611, NNADD 49-50. A five-member panel of Commission members hears claims under due process procedures mandated by the NPEA, the Navajo Bill of Rights, and the Indian Civil Rights Act. 15 N.N.C. § 303, NNADD 19-20. The Commission takes and weighs evidence through witnesses and exhibits, and issues written decisions that may be appealed to the

Navajo Supreme Court. 15 N.N.C. §§ 304, 613, NNADD 20-21, 52-53. The Navajo Supreme Court is a full-time appellate court made up of three justices appointed by the Navajo Nation President and confirmed by the Navajo Nation Council. 7 N.N.C. §§ 354(B), 355(A), NNADD 16-18. It hears appeals under the Navajo Rules of Civil Appellate Procedure, and issues written opinions published in its own official Navajo Reporter and through West's American Tribal Law Reporter.

SUMMARY OF THE ARGUMENT

The District Court erred when it concluded the Navajo Nation's employment jurisdiction over the school districts was "plainly lacking," and the Court was required to stay or dismiss the case pending the school districts' exhaustion of its remedies in the Navajo Nation courts. Under the plainly lacking exception, this Court requires exhaustion of tribal remedies when jurisdiction is "plausible" or "colorable." Under the circumstances of the case, which concerns treaty rights, tribal-state relations, and the fact-intensive rules of *Montana v. United States*, 450 U.S. 544 (1981), the District Court could not have made that determination without a robust factual record created by the Navajo courts. Further, jurisdiction is not plainly lacking under the Treaty of 1868, which recognizes the sovereign right of the Nation to govern its own lands through exclusion. Under the federal common law right to exclude recognized by this Court in *Water Wheel Recreation Area, Inc.*

v. LaRance, 642 F.3d 802 (2011), the Nation's jurisdiction over the school districts is also, at the very least, plausible. Finally, the Nation's jurisdiction is plausible under the two exceptions to *Montana v. United States*, as a lease is a paradigmatic "consensual relationship" and, with additional fact-finding, it can be shown that the ability to regulate employment at the districts is necessary for the Nation's self-government. For any or all of those reasons, this Court should require the school districts to exhaust their remedies in the Navajo Nation system before presenting the case to the federal courts on the merits of the jurisdictional question.

ARGUMENT

I. REVIEWABILITY AND STANDARD OF REVIEW

The Commission Appellants raised all the issues in the District Court through its Motion to Dismiss for Failure to Exhaust Tribal Remedies and their Reply to Plaintffs' Response to NNLC Defendants' Motion to Dismiss and Response to Plaintiffs' Cross-Motion for Summary Judgment. Questions of an Indian nation's jurisdiction and exhaustion of tribal court remedies are legal questions this Court reviews de novo. *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013).

II. UNDER THE "PLAINLY LACKING" EXCEPTION TO TRIBAL EXHAUSTION, APPELLEES MUST EXHAUST NAVAJO NATION REMEDIES IF THE NATION'S JURISDICTION IS "PLAUSIBLE"

A plaintiff attacking an Indian nation's jurisdiction must exhaust tribal court remedies before filing in federal court. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). Absent one of four exceptions, the federal plaintiff must present its jurisdictional arguments before an Indian nation's trial court and appellate court before being allowed to file a federal action. *See Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (stating exceptions); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) ("At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts."); *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9th Cir. 2009) (same). A federal court should not make a ruling on tribal jurisdiction until those remedies are exhausted. *Grand Canyon Skywalk*, 715 F.3d at 1200. Exhaustion reflects the federal court's respect for comity and deference to an Indian nation's courts as the appropriate tribunals to hear challenges to their jurisdiction in the first instance. *Id.* The exhaustion requirement also implements the congressional policy of promoting the sovereignty of Indian nations by providing the forum "whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *National Farmers*, 471 U.S. at 856. Under these principles, a federal court must construe exceptions to the exhaustion doctrine narrowly.

Appellees invoked the fourth exception, that exhaustion is not required "when it is plain that tribal court jurisdiction is lacking, so that the exhaustion requirement would serve no other purpose than delay." *Elliott*, 566 F.3d at 847 (internal quotation marks omitted); *see Strate v. A-1 Contractors*, 520 U.S. 438, 459 n. 14 (1997) (announcing exception). An Indian nation's jurisdiction is not "plainly lacking" if it is at least "colorable" or "plausible." *Elliott*, 566 F.3d at 848. Accordingly, the exception applies "only if the assertion of tribal court jurisdiction is frivolous or obviously invalid under clearly established law." *Dish Network Service, L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013). The standard is lower than if the federal court were hearing the case directly on the merits of the jurisdictional question. *Rincon Mushroom Corp. v. Mazzetti*, 490 Fed.Appx. 11, 13 (9th Cir. 2012). In this context, the District Court erred in concluding the Nation jurisdiction was "plainly lacking," as there is an inadequate factual record, and the relevant treaty, statutory, and federal common law rules make Navajo employment jurisdiction at the very least "plausible."

III. FACTUAL FINDINGS BY THE NAVAJO LABOR COMMISSION ARE REQUIRED BEFORE A FEDERAL COURT CAN DECLARE THE NATION'S JURISDICTION IN THIS CASE IS "PLAINLY LACKING."

As a threshold matter, for the Nation's jurisdiction in this case to be "plainly lacking," there first must be a Navajo Labor Commission ("Commission") factual

record to review. Exhaustion of an Indian nation's court remedies serves two main purposes. First, the court's legal analysis provides "the benefit of [its] expertise" on tribal jurisdictional questions. *See National Farmers*, 471 U.S. at 856-57. Second, and directly relevant here, exhaustion allows the court to develop "a *full* record" before federal review. *Id.* (emphasis added). Importantly, the U.S. Supreme Court announced these principles in a case involving tribal court jurisdiction over a state school district located on state-owned land within a reservation. *See National Farmers*, 471 U.S. at 847. Though the case involved a state school defendant in tribal court, the Court did not conclude that the Crow Nation's jurisdiction could never apply to the school, but instead required exhaustion before the federal courts could hear the case. *Id.* at 856.

Development of a tribal court record serves "the orderly administration of justice in the federal court.'" *Id.*; *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990) (quoting *National Farmers*). This reflects the quasi-appellate role of federal courts in tribal jurisdiction cases, not as a fact-finder, but as a reviewer of questions of purely federal law. *See FMC*, 905 F.2d at 1313-1314; *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 817 n. 9 (9th Cir. 2011) (rejecting evidence not submitted to the tribal court). Therefore, the Nation's courts are "in the best position to develop the necessary

factual record for disposition on the merits." *Burlington Northern R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 146 (9th Cir. 1991).

Based on these principles, the District Court should have stayed or dismissed Appellees' challenge to the Nation's jurisdiction pending the development of a full factual record by the Commission. Instead, there was no fact-finding at all, as the District Court enjoined the Commission from making any such findings before an evidentiary hearing on the jurisdictional facts had even taken place. The "plainly lacking" exception does not authorize a party challenging an Indian nation's jurisdiction to seek an injunction in federal court without any attempt at constructing a factual record in its courts. Indeed, lacking any Navajo record at all, the District Court had no ability to decide whether jurisdiction was "plausible" or not. *See Dish Network*, 725 F.3d at 883 ("In circumstances where the law is murky *or relevant factual questions remain undeveloped*, the prudential considerations outlined in *National Farmers Union* require that the exhaustion requirement be enforced.") (emphasis added); *Burlington Northern*, 940 F.2d at 146 (stating that without a tribal record the district court "faced an action based on . . . an obscure factual background."); *City of Wolf Point v. Mail*, 2011 WL 2117270 at * 1 (D.Mont. May 24, 2011)

(declining to conclude jurisdiction is plainly lacking in the absence of a full factual record).[2]

A robust factual record created by the Commission is particularly necessary in this case, where the Nation's treaty relationship with the United States, its unique historical relationship with the State of Arizona and state-organized school districts through the Enabling Act and Arizona Constitution, as discussed in detail in Section IV below, and the fact-intensive exceptions to *Montana v. United States*, 450 U.S. 544 (1981), are all at issue. *Cf. Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1216-17 (9th Cir. 2007) (Order) (remanding to Navajo Supreme Court when non-Indian plaintiff failed to exhaust Navajo court remedies on applicability of *Montana's* second exception). As recognized by the Supreme Court,

> the existence of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties, and elsewhere, and administrative or judicial decisions.

[2] The plaintiffs in *City of Wolf Point* were officials of a city government, a political subdivision of the State of Montana, and described as "state officials" in the decision. *See* 2011 WL 2117270 at *1. Despite the plaintiffs' arguments, similar to those made by the districts in this case, that there was a categorical bar to tribal jurisdiction over state officials pursuant to *Nevada v. Hicks*, 533 U.S. 353 (2001), the court dismissed the case for further fact-finding by the tribal court. *See id.* at *1-2.

National Farmers, 471 U.S. at 855-56; *see also Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir. 2006) (observing that "there is no simple test for determining whether tribal jurisdiction exists.") (internal citation omitted)). Accordingly, courts have applied the "plainly lacking" exception after full fact-finding by the tribal court. *See, e.g.*, *Strate*, 520 U.S. at 444, 459 n. 14 (concluding jurisdiction plainly lacking after tribal trial and appellate court decisions on issue); *Elliott*, 566 F.3d at 844 (concluding jurisdiction was plausible after tribal trial court ruled on motion to dismiss); *City of Wolf Point*, 2011 WL 2117270 at *1 (noting United States Supreme Court decided jurisdiction was plainly lacking in *Nevada v. Hicks* based on full tribal and federal factual record). The only time this Court concluded jurisdiction was plainly lacking without such findings is when a tribal court attempted to hear a federal trademark claim arising from activity on the internet and clearly outside its reservation. *See Phillip Morris, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 934-35, 943 (9th Cir. 2009).[3]

The districts' facts asserted in their motion for summary judgment are not an appropriate substitute for the Commission's fact-finding. In support of its motion for summary judgment the districts submitted their own facts allegedly material to the case. School Districts' Statement of Facts, NNER 33-39. Those

[3] There is also no evidence in the opinion that the tribal defendant argued that exhaustion was necessary due to the lack of a tribal factual record.

facts almost exclusively pertain to the merits of the underlying employment disputes, and provide no real background to the jurisdictional dispute at issue. *Id.* Despite this extremely thin factual record, the District Court concluded it had "all of the facts necessary to make its jurisdictional determination," Order at 5, NNER 7, and granted summary judgment to Appellees. In doing so, the District Court ignored the Reeves Appellants' and Commission's observation that, at the very least, if the case were not dismissed or stayed for exhaustion, even under federal summary judgment principles some form of discovery was necessary to bolster the factual record. Defendants' Reply to Plaintiffs' Response to NNLC Defendants' Motion to Dismiss and Response to Plaintiffs' Cross-Motion for Summary Judgment, at 1-2, NNER 31-32; Response to Motion for Summary Judgment and Motion Pursuant to Rule 56(F) Fed.R.Civ.P., at 2-4, NNER 28-30. Instead, the District Court both sanctioned the districts' complete end-run around the Commission's fact-finding prerogative, and denied any opportunity for discovery to provide an alternative factual context to the case. Further, by essentially converting the inquiry from exhaustion to summary judgment, the District Court required the Commission to prove up its jurisdiction under the higher merits standard deemed inapplicable by this Court in *Rincon Mushroom*. *See* 490 Fed.Appx. at 13.

The result is there is a plainly lacking ruling with no facts in the record on several key issues. These include how the school districts are organized under state law, how the districts' boards are selected, how many Navajos and non-Navajos the districts employ, how many Navajos and non-Navajo students attend the district schools, how the districts were established on the Nation, how they have interacted with the Nation, what funding they receive from the federal government and the Nation, how and under what circumstances the districts acquired lease rights to Navajo trust land, and what the intent of the districts and the Nation was when entering into those leases, including the intent behind the explicit consent provision in the Window Rock School District lease discussed in detail in Section VI(A) below. Additionally, there are no facts on the members of the districts' boards. In its decision the District Court stated that the districts are "indisputably non-Indian," Order at 3, NNER 5, with no discussion of the likely fact that all members of both boards are citizens of the Navajo Nation, and the ones who made the employment decisions at issue before the Commission. It is, at the very least, a colorable question whether an all-Navajo board is the real party in interest for an employment claim against a school district arising out of the decisions of that board, and therefore whether in such circumstances the districts are indeed "non-Indians" for purposes of responding to an employment claim in the Nation's courts. *Cf. MacArthur v. San Juan County*, 497 F.3d 1057, 1070 (10th

Cir. 2007) (holding Navajo member of state hospital board of trustees was not "the state" for jurisdictional analysis). That question alone should require exhaustion of the Commission process before the district may bring this action in federal court.

In declining to require exploration of these issues through fact-finding by the Nation's courts, the District Court eviscerated the exhaustion doctrine by deciding the scope of the Nation's jurisdiction based on minimal facts under a federal summary judgment standard. This case is too important to have been decided under such circumstances.

Based on the lack of any Navajo factual record, this Court should reverse the District Court and order the dismissal or stay of the case as premature. The District Court should have required Appellees to produce a full factual record in the Nation's courts before seeking review. The District Court therefore erred by not dismissing or staying the case as the Commission requested, and this Court should vacate its decision.

IV. THE TREATY OF 1868 PLAUSIBLY RECOGNIZES THE NATION'S RIGHT TO EXCLUDE, AND THEREFORE JURISDICTION, OVER APPELLEE SCHOOL DISTRICTS.

Assuming no further fact-finding is necessary, the District Court erred in rejecting the plausibility of the Treaty of 1868 ("Treaty") as a source of the Nation's jurisdiction over the school districts. Treaties with Indian nations are the "supreme law of the land" recognized by the United States Constitution. U.S

Const. Art. VI, cl. 2, NNADD 1. A treaty is not a grant of rights to an Indian nation, but a grant of rights from that nation to the United States; therefore all rights not surrendered are preserved. *United States v. Winans*, 198 U.S. 371, 381 (1905); *see United States v. Wheeler*, 435 U.S. 313, 327 n. 24 (1978) (applying rule to Navajo treaty); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 596 (9th Cir. 1983) (same). A treaty must be interpreted as tribal leaders would have understood it. *Minnesota v. Mille Lac Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). Further, any ambiguities must be resolved in favor of the Indian nation. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973) (stating in context of Navajo treaty that "any doubtful expressions . . . should be resolved in the Indians' favor"). In this context, for the Nation's jurisdiction to be "plainly lacking" under federal law, either the Treaty must clearly prohibit the exercise of jurisdiction, or that jurisdiction must have been clearly abrogated by subsequent congressional action.[4] Neither exists in this case.

Far from clearly prohibiting jurisdiction, the Treaty affirmatively recognizes the Nation's jurisdiction over all non-members present on the Nation's trust land. The Treaty was negotiated by Lieutenant General William Tecumseh Sherman

[4] As an agency of the signatory Navajo Nation, the Commission does not concede that the United States may unilaterally breach a provision of the Treaty. The Commission only states that under federal law Congress is recognized as having such power.

and Navajo leaders, including Barboncito and Manuelito, at Bosque Redondo, where the Navajos had been forcibly taken by United States troops with the intention they be permanently exiled from their homeland. *See Williams v. Lee*, 358 U.S. 217, 221-22 (1959). As a result of the negotiations, the United States abandoned its intended exile of the Navajos and agreed the Navajo people would return to the newly created Navajo Reservation and exercise sovereign authority over their lands. *Id.* The Navajo leaders sacrificed much in securing a return to their homeland, as they agreed to cede their right to a large area outside the bounds of the Reservation. *See* Treaty between the United States of America and Navajo Tribe of Indians, June 1, 1868, art. IX, 15 Stat. 667, 669-70, NNADD 4-5. However, as a result of their negotiation, Article II of the Treaty secures 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, art. II, 15 Stat. at 668, NNADD 3 (emphasis added).

As the United States Supreme Court has recognized, this provision affirms the Nation's exclusive sovereignty over the Navajo Reservation. *McClanahan*, 411

U.S. at 175. It also bars Arizona state jurisdiction over those lands without the Nation's consent. *Id.* (Treaty precludes authority to impose Arizona state income tax to Navajo tribal member on Reservation); *see also Williams*, 358 U.S. at 221-22 (state court jurisdiction over contract claim against Navajo citizen would infringe on right of self-government recognized in the Treaty). The Supreme Court reiterated this effect on state authority in *Nevada v. Hicks*, identifying the Treaty as an exception to the general rule that state sovereignty no longer ends at the reservation boundary. *See* 533 U.S. at 361 n.4 (citing *Williams*).[5] Further, as recognized by the Court, the Nation can exclude anyone but those specific federal Indian affairs officials entering the Reservation to undertake their obligations to the Navajo people. *Williams*, 358 U.S. at 221; *see also Donovan v. Navajo Forest Products Indus.*, 692 F.2d 709, 712 (10th Cir. 1982); *Equal Employment Opportunity Comm'n v. Peabody*, No. 2:01-cv-01050, 2012 WL 5034276, at *16-17, 19-20 (D. Ariz. 2012) (recognizing treaty right to require lessees to provide Navajo preference in employment).

State-organized school districts can be excluded under Article II, and therefore their officials can be required to conform to Navajo law when the Nation permits them to be present on Navajo trust lands. Their officials clearly

[5] The District Court quoted this passage from *Hicks* in support of its decision but made no mention of the Supreme Court's distinction for the Navajo Nation. Order at 10, NNER 12.

are not agents or employees of the federal government connected to Indian affairs. As the State of Arizona did not exist in 1868, it would be surprising indeed that the Navajo negotiators would have authorized those officials to enter the reservation without the Nation's consent. Appellees submitted no evidence that the Treaty was understood by Navajo negotiators to allow school districts to occupy Navajo land without any ability to regulate their conduct. Indeed, the circumstances surrounding the negotiation and the text of the Treaty suggest the opposite. At a bare minimum, jurisdiction over the school districts under the Treaty is plausible under such circumstances, and the District Court should have required Appellees to produce contrary evidence before the Commission.

Nothing in *Montana* and cases following its "main rule," *Strate*, 520 U.S. at 520, contradicts these principles. Indeed, the United States Supreme Court in *Montana* itself applied virtually identical language in the Crow Nation's treaty with the United States to recognize that nation's right to regulate non-Indians on tribal trust land. *See* 450 U.S. 544, 558-59 (1981) (holding Crow Nation may regulate non-Indian hunting and fishing on trust lands based on treaty right to exclude). Far from repudiating that holding, the Court reaffirmed it in later cases applying *Montana*. *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650 (2001) (reiterating treaty authority to regulate non-members on tribal trust land); *South Dakota v. Bourland*, U.S. 508 U.S. 679, 687-88 (1993) (recognizing right to

exclude from identical provision in Sioux treaty). This Court has as well. *See Elliott*, 566 F.3d at 848 (reiterating *Montana* holding). Therefore, the treaty-recognized right to exclude is not an "exception" to *Montana's* so-called "main rule," but is in fact *Montana's* main rule in this case.

Absent clear and plain congressional intent to abrogate the Nation's treaty right to exclude, it remains intact. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *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"). The Districts made no claim in the District Court, and the District Court did not independently conclude, that Congress abrogated the exclusion power. Indeed they could not, as there is no such abrogation.

The District Court's reliance on the Arizona Enabling Act and Arizona Constitution to evade the Treaty is misplaced, as neither abrogated the Nation's treaty right to exclude. Indeed, both further recognized and affirmed the Nation's authority over its own lands by disclaiming state jurisdiction:

> [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, 569, NNADD 8; Ariz. Const., art. 20, § 4, NNADD 10. Congress required this provision to be included in the Arizona state constitution as a condition of Arizona becoming a state. *See* Enabling Act, § 20, NNADD 8 (requiring state constitutional convention to, among other promises, disclaim right to Indian lands by an ordinance "irrevocable" except by consent of Congress). 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"). However, in the context of the Nation's Treaty, this provision goes further, precluding *any* assertion of state governmental authority over Navajo land without the Nation's consent. *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 District Court's conclusion that Arizona employment law is the exclusive

remedy for employees of the districts violates these long-standing principles. Indeed, the Commission does not argue that Arizona employment law can never apply to district employees. Employees aggrieved of actions by the districts' boards can elect to have their claims heard through the process the boards provide, which derive from Arizona state law. However, that does not mean Navajo law is inapplicable. As the Nation has, at the very least, plausible concurrent jurisdiction, its courts can decide when presented with a res judicata motion whether a claim is barred by prior adjudication in the district grievance process. *See Peabody Western Coal Co. v. Navajo Nation Labor Comm'n*, 8 Nav. R. 313, 318 (Nav Sup. Ct. 2003) (barring Commission action under res judicata when employee's claims were resolved in binding arbitration under collective bargaining agreement).

Regardless, the District Court rejected the Treaty as a plausible source of jurisdiction through a cursory analysis of two other provisions of the Enabling Act also incorporated into the Arizona Constitution, collectively the so-called "educational mandate." According to the District Court, "[w]hatever the outer scope of the Navajo Nation's treaty-based right of exclusion may be, the Court does not believe it is expansive enough to grant tribal jurisdiction under the specific circumstances present in this case." Order at 7; NNER 9. The District Court engaged in no detailed factual analysis to define the specific circumstances

of the case, but relied exclusively on those two provisions. One simply requires the state to provide for "the establishment and maintenance of a system of public schools which shall be open to all children of said sad state and *free from sectarian control*." Enabling Act, § 20(4) (emphasis added). A related provision requires the schools to remain "forever under the exclusive *control* of the said State[.]" *Id.*, § 26, NNADD 8 (emphasis added). "Control" is not defined in either provision, and it is not clear from the text that the term "control" in the second provision was intended to be broader than the "sectarian control" referenced in the first. Indeed, though not mentioned by the District Court, the second provision continues with the following phrase: "and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college or university." *Id.* Congress then appears to have been concerned with "control" of Arizona schools by religious organizations, not regulation by Indian nations on whose land the schools operate pursuant to leases. Contrary then to the bare conclusions of the District Court, there is no clear effect of those provisions on the unequivocal disclaimer of jurisdiction elsewhere in the Organic Act, much less the treaty-affirmed power to exclude.

The District Court explored none of these issues and failed to acknowledge any ambiguity in the term "control." Instead, the District Court believed that for

jurisdiction to be plausible, the Treaty had to "in and of itself expressly authorize[] the specific tribal jurisdiction at issue here." Order at 6; NNER 8. Even assuming that is the appropriate standard, which it is not, the Court concluded that the Treaty did not authorize jurisdiction by using the ambiguous phrase "control" in the mandate to interpret the meaning of the Treaty itself. The Court did not conclude that the mandate abrogated Article II, but that, based on the mandate, the Treaty power itself simply does not include the power to exclude and therefore regulate state-organized school districts. *See* Order at 6-7, NNER 8-9. How ambiguous provisions in a statute passed forty-two years after the Treaty could define the meaning of the Treaty itself is not explained.

The District Court's conclusion that the ambiguous term "control" overcomes both the Treaty and the disclaimer is 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 govern its own lands. According to the Court, the Nation, through the mere act of consenting to the use of its lands by a state-organized school district, forever surrendered its Treaty and congressionally-affirmed authority, even over its own citizens acting under the veil of a district school board. Under the District Court's reasoning, state-organized school districts can occupy large swaths of Navajo trust land, employ numerous Navajo citizens, be controlled by boards made up of

Navajo citizens, and, in the case of the Window District Court, affirmatively represent that it was consenting to Navajo law, but be entirely free from any form of Navajo Nation authority. According to the Court, these two terse provisions, though ambiguous in their use of the term "control" and ambiguous in their relationship with the disclaimer provision elsewhere in the Enabling Act, repudiate a solemn treaty agreement by the United States, rendering the Nation's jurisdiction "plainly lacking." The District Court erred.

V. THE NATION'S JURISDICTION IS NOT "PLAINLY LACKING" WHEN THE NATION POSSESSES THE RIGHT TO EXCLUDE RECOGNIZED BY THIS COURT IN *WATER WHEEL RECREATION AREA, INC. v. LARANCE*.

Even if the Nation did not have the treaty right to exclude, the federal common law right to exclude, recognized by this Court in *Water Wheel* and re-affirmed in *Grand Canyon Skywalk*, remains intact. This Court recognizes that the tribal right to exclude endows an Indian nation with broad jurisdictional authority over non-members' use of tribal land independent of the otherwise applicable restrictions of *Montana*. *Grand Canyon Skywalk*, 715 F.3d at 1204; *Water Wheel*, 642 F.3d at 811-812. As recognized by the United States Supreme Court in *Merrion v. Jicarilla Apache*, and as reiterated in *Water Wheel*, an Indian nation, even without a treaty, may exclude non-members, and may condition non-member presence on their adherence to tribal laws. *Merrion*, 455 U.S. 130,

144 (1982); *Water Wheel*, 642 F.3d at 811; *see also Babbitt Ford*, 710 F.2d at 593-94 (Nation may condition car dealer presence on conformance to 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, by reiterating as a condition of Arizona's statehood that Indian nations govern access to their lands. Officials acting under state law therefore are not exempt, and can excluded from tribal trust land and required to conform to tribal law as a condition of their presence. Land status is then not only relevant, but is dispositive in this case. *See Water Wheel*, 642 F.3d at 813 (noting that *Nevada v. Hicks* itself recognizes that tribal land status can be dispositive of tribal jurisdiction).

In *Water Wheel*, this Court recognized only one exception to its general rule, the *exact situation* in *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*." (emphasis added)). In *Hicks*, state law enforcement entered tribal trust land for purposes of searching a tribal member's home for evidence of an alleged off-reservation crime. 533 U.S. at 356. The entry was brief and for a specific purpose, and therefore quite different than the essentially permanent occupancy of Navajo land by the districts in this case. Under those factual circumstances, the Court concluded that the

restrictions and exceptions of *Montana* should apply to the Fallon Paiute tribal court's assertion of jurisdiction over state law enforcement's activities on its lands. *See id.* at 358. However, the Supreme Court itself recognized its holding was limited by the facts, and this Court similarly recognized that limitation in *Water Wheel*. *Hicks*, 533 U.S. at 357 n.2 ("Our holding in this case is limited to the question of tribal court jurisdiction over state officers enforcing state law."); *Water Wheel*, 642 F.3d at 813 (quoting same passage from *Hicks*).

Despite these clear limitations, the District Court distinguished *Water Wheel* and expansively interpreted *Hicks* to reject the Nation's jurisdiction. The District Court held that the right to exclude did not apply because the general principles of *Hicks* were "sufficiently applicable" to this case based on the "competing state interests at play." Order at 9; NNER 11. According to the District Court, the state has an interest in providing "a general and uniform public education[.]" *Id.* at 11; NNER However, even assuming that providing a general and uniform public education is an interest of the state somehow in conflict with the Nation's interests, it is not a "competing interest" here, as this case is about the Nation's authority to regulate employment, not curriculum or other pedagogical concerns.

The Court went even further, essentially interpreting *Water Wheel* as holding that jurisdiction based on the right to exclude only applies to private commercial actors, and not officials acting under state law. *See* Order at 11; NNER 13. Such

an expansive view guts the Nation's right to exclude, allowing state-organized school districts, and by implication all persons acting under color of state law, to be free of the Nation's jurisdiction while operating on trust lands, even when they negotiate leases stating otherwise. Nothing in *Hicks* or *Water Wheel* supports that conclusion.[6]

The District Court's ruling further ignored federal statutes and regulations governing leases on tribal lands, which also recognize Indian nations' right to exclude, including state-organized school districts. Under the federal leasing statute and its implementing regulations, outside entities must enter into a lease with the tribal owners approved by the Bureau of Indian Affairs to legally occupy tribal land.[7] 25 U.S.C. § 415, NNAD 12-14; 25 C.F.R. § 162.104(d), NNADD

[6] The District Court's ruling is also not supported by *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007). In that case the Tenth Circuit held that the Navajo Nation courts lacked jurisdiction over certain employment activities at a state-operated hospital. However, the state actors in *MacArthur* were on fee land owned by the State of Utah within the Navajo Reservation, not tribal trust land. *See id.* at 497 F.3d at 1061. The Nation's jurisdiction in that case was not premised on its right to exclude, which could not apply to the land on which the state hospital operated, as recognized by the court itself. *See id.* at 1070 n.7 (stating that right to exclude was not at issue because the employees "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").

[7] 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

15 (stating that "[a]ny other person or legal entity" than an Indian owner of 100% of the land or parents of a minor 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), NNADD 15. State schools and state government agencies are explicitly included in these requirements. 25 U.S.C. § 415(a), NNADD 14 (authorizing leases by tribes for "educational . . . purposes"); 25 C.F.R. § 162.604(b)(2), NNADD 15 (authorizing nominal rent leases for educational purposes or to "agencies of federal, state or local governments"). There is no exception for schools operating under an educational mandate from Congress or otherwise. Indeed, the Districts have followed this requirement, seeking 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. Leases, NNER 40-61; Letter of Bureau of Indian Affairs Regional Director to Patrice Horstman, November 14, 2007, NNER 62 (renewing Window Rock School Districts leases for additional 25 years).

The school districts in this case have no exemption from the Nation's right to exclude, and therefore the right to condition conduct while present on the Nation's trust lands. At the very least, the Nation's jurisdiction through its right to exclude is "plausible" under *Hicks* and *Water Wheel*, the standard the District

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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.

Court should have applied. Neither demonstrates that the Nation's jurisdiction is "plainly lacking." 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.

VI. THE NATION'S JURISDICTION IS NOT "PLAINLY LACKING" UNDER *MONTANA v. UNITED STATES*.

Even assuming the main rule of *Montana* applies, as held by the District Court, jurisdiction is at the very least plausible under both exceptions. Under *Montana,* in the absence of a treaty, for an Indian nation to have jurisdiction, a non-Indian must (1) have a "consensual relationship" with the Nation or one of its citizens, or (2) have engaged in conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565.

A. Jurisdiction is plausible under *Montana's* first exception because the school districts entered into leases for the use of Navajo trust land.

Leases are a paradigmatic "consensual relationship" under *Montana's* first exception. *See* 450 U.S. at 565 (listing leases among several other documents that create a consensual relationship). Therefore, by entering into a lease with an Indian nation, the lessee has consented to tribal jurisdiction. *Id.* Under the lease, an Indian nation permits the outside lessee to possess and use tribal trust land

consistent with tribal and federal law. The Indian nation acts as both a landowner to enforce the terms of the lease and a sovereign government to regulate the lessee's conduct. *See Merrion*, 455 U.S. at 146-47. A state-organized school district, though sharing some, but not all, the attributes of the State of Arizona, *see, e.g., Savage v. Glendale Union High School*, 343 F.3d 1036, 1040 (9th Cir. 2003) (state school districts are not "the state" for purposes of Eleventh Amendment sovereign immunity), similarly enters into a lease both as a governmental entity and as a land-user. However, as discussed above, the quasi-sovereign nature of a state-organized school district does not exempt it from following Navajo and federal land regulations, as the district must conform to those requirements on pain of trespass and ejection. Further, a school district, like any other potential lessee, can negotiate with the Nation the terms of its occupancy of trust lands, including the application of the Nation's laws. *Merrion*, 455 U.S. at 147-48 (recognizing sovereign power of Indian nation can only be waived in lease through "clear and unmistakable surrender" of that authority).[8] Consequently, like any other lessee, in the absence of a clear waiver by the Nation in the lease, the Nation's authority over the districts' conduct on

[8] Any purported waiver of the Nation's authority in a lease would also have to conform to the Nation's laws to be effective.

the leased lands remains. *Id.*[9]

The District Court concluded that *Montana* and *Hicks* recognize a general private/governmental distinction, and that therefore a state actor can never consent to an Indian nation's jurisdiction by entering into a lease. *See* Order at 12-13. No case, including *Hicks*, has stated that a lease is not a consensual relationship under *Montana* merely because it is entered into by a school district, even assuming it is "the state" for such purposes. The Court in *Hicks* simply held that a tribal search warrant obtained by Nevada state law enforcement was not an "other arrangement," a different type of document listed in *Montana* that can separately create a consensual relationship. 533 U.S. 353, 359, n.3.

Further, the two circuit court cases cited by the Court, *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007) and *County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998) do not hold that a state school district cannot consent through a lease. *See* Order at 13, n.10; NNER 15.[10] Both make broad statements

[9] There is a "nexus" between the Districts' consent by entering the lease and the regulation of employment at their facilities on the land. *See Atkinson*, 532 U.S. at 656 (requiring connection between non-member's consensual relationship and the regulation imposed by the Indian nation). As the leases clearly anticipate operation of schools, and therefore requiring employees, employment is sufficiently connected to the lease that the Nation's regulation of that employment is within the scope of the Districts' consent.

[10] The Court quoted directly from its prior decision in *Red Mesa* to support its reasoning. Order at 13 n. 10, NNER 15. However, as the prior *Red Mesa* decision

about state exemptions from tribal jurisdiction in the context of specific government-to-government agreements having no relation to use and occupancy of tribal trust lands. *See* 497 F.3d 1073-74 (holding mere employment by state health district of Navajo citizens on state-owned land within Reservation is not a consensual relationship); 163 F.3d at 515 (holding law enforcement agreement between county sheriff and Indian nation is not a consensual relationship). Indeed, in *MacArthur*, the Tenth Circuit actually disclaimed any effect of its holding on regulation of state activities on tribal trust land, and emphasized several times the fact that the state entity was operating on state-owned land within the Navajo Reservation. *See* 497 F.3d at 1073-74, 1073 n.9, 1074 n.10 ("We . . . express no opinion regarding the ability of the tribes to exercise regulatory authority over States qua States when the regulated activity occurs on Indian land."). These cases simply do not support the District Court's holding. Absent some clear statement in prior court opinions or federal statutes, there is no absolute exemption for state-organized school district lessees. This Court should not recognize one.

The District Court's blanket exemption for state school districts is particularly unsupportable for the Window Rock School District, which explicitly consented to the application of Navajo Nation law. In two separate leases the

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is not binding except for the specific employment cases it concerned, the source of the reasoning is irrelevant to this Court's review.

District agreed to the following language:

> 16. AGREEMENT TO ABIDE BY NAVAJO LAWS
>
> The Lessee and Lessee's employees, agents, and sublessees and their employees and agents agree to abide by *all* laws, regulations, and ordinances of the Navajo Tribal Council now in force or effect or may be hereafter in force or effect. This agreement to abide by Navajo laws shall not forfeit rights which the Lessees and Lessees employees, agents, and sublessees and their employees, and agents enjoy under the Federal laws of the United States Government, nor shall it affect the rights and obligations of Lessee as an Arizona public school district under applicable laws of the State of Arizona.

Lease of September 22, 1983 at 6, NNER 45; Lease, November 8, 1985, at 5, NNER 53 (emphasis added). Under this provision the District agreed to the application of Navajo law as bargained-for consideration for the use of Navajo trust lands. Under the District Court's reasoning, this consent is unenforceable. Such a conclusion renders the provision both ineffective and severable in the face of the clearly opposite intent of the parties to the lease. The District represented in good faith its ability and intent to consent, and the Nation allowed access to its trust lands based on that representation. Based on the District Court's reasoning, the District may repudiate that consent, and essentially permanently occupy significant areas of Navajo trust land free from any Navajo Nation authority.

Further, despite its conclusion that school districts could never consent, the District Court nonetheless went on to interpret the provision to clearly exclude Nation's employment laws from the District's consent. According to the Court,

the District and the Nation clearly agreed that Navajo employment laws would not apply under the second sentence's reference to the effect on the District's "rights" and "obligations" as an Arizona school district under "applicable" Arizona law. Order at 14; NNER 16. Under its analysis, the Commission's concurrent jurisdiction over employment disputes clearly would "adversely affect *various* rights and obligations of public school districts under Arizona law." *Id.* (emphasis added).

The Court did not enumerate the various rights and obligations, but claimed two "[b]y way of brief example" were adversely affected. *See id.* According to the Court, state-organized school districts have an absolute "right" to exclusive adjudication of all employment claims under Arizona state law. *Id.* at 15; NNER 17. The Court did not cite to any specific Arizona law that recognizes that alleged right, whether off or on Indians lands, but described in broad generalities the Arizona system for resolution of employment grievances. *See id.* The Court further alleged there was an "obligation" of school districts to "not base their employment decisions on discriminatory grounds." *Id.* The Court did not explain how the Commission's concurrent jurisdiction over employment claims results in discrimination.[11]

[11] The District Court cited two cases to support its statement on discrimination, *Civil Rights Div. of Arizona Dept. of Law v. Amphitheater Unified School Dist. No. 10*, 680 P.2d 517 (Ariz.App. 1983) and *Dawavendewa v. Salt River Project*

Lacking any clear definitions of "affect," right," "obligation," or "applicable" Arizona law, or other evidence of the parties' intent, the application of Navajo employment law is not clearly prohibited. In fact, under the appropriate standard, the Nation would have had to clearly and unmistakably surrender that authority for the Districts to be exempt. *See Merrion*, 455 U.S. at 147-48. The Nation's jurisdiction is therefore, at the very least, plausible, and evidence of the Nation's intent to waive employment regulation should be presented to the Commission in the first instance. The District Court erred when it interpreted the provision to clearly exclude Navajo employment law from the scope of the District's consent.

B. Regulation of employment at state-organized schools within the Navajo Nation is plausibly necessary for the Nation's self-government, fulfilling *Montana's* second exception.

Absent the opportunity for the Commission to make detailed factual

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Agricultural Improvement & Power Dist., 154 F.3d 1117 (9th Cir. 1998). Both unsurprisingly suggest school districts cannot discriminate in employment matters when applicable state or federal law prohibits it. However, there is no such discrimination here, as Navajo Nation employment law may apply to lessees of trust land without constituting prohibited discrimination. *See Equal Employment Opportunity Comm'n v. Peabody Western Coal Co.*, No. 2:01-cv-01050, 2012 WL 5034276 at *8 (D.Ariz. 2012) (distinguishing *Dawavendewa* and holding Navajo preference mandated in federally-approved lease is not discrimination in violation of Title VII of the Civil Rights Act of 1964). Further, for "just cause" disciplinary claims, all employees, whether Navajo citizens or not, may file claims before the Commission. *See Staff Relief, Inc.*, 8 Nav. R. at 56 (holding equal protection clause of Navajo Bill of Rights required all employees to have the right to just cause claims before the Commission).

findings, the District Court erred in holding that the Nation's authority is plainly lacking under *Montana's* second exception. Under the vague tests announced by the U.S. Supreme Court, *see Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 341 (2008) (stating that the non-member's conduct to "menace" or "imperil the subsistence of the tribal community" to fulfill second exception)[12]; *Strate*, 520 U.S. at 459 (stating second exception allows tribal jurisdiction only if "necessary to protect tribal self-government or control internal relations"), facts must be found to give such an abstract rule meaning in a given case. *See Rincon Mushroom*, 490 Fed.Appx. at 13 (remanding to tribal court for exhaustion on second exception based on factual declarations of tribe creating plausible jurisdiction); *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). Lacking such facts, the Nation's jurisdiction is at least plausible.

The District Court wrongly rejected the possibility that the Commission could make any findings that would alter its bare conclusion that jurisdiction was plainly lacking. To the contrary, once the Commission makes the appropriate findings, the facts may indeed show that the inability of the Nation to hear

[12] The language in *Plains Commerce Bank* is arguably dicta, as prior to its discussion of the second exception the Supreme Court held that the relevant non-Indian activity, selling non-Indian land to other non-Indians, was not "conduct" triggering *Montana's* exceptions at all. 554 U.S. at 340.

complaints by Navajos or other employees arising from employment decisions of all-Navajo school boards of districts essentially permanently occupying significant amounts of Navajo land, indeed imperils the Nation's self-government. As similarly mandated by this Court in *Ford Motor Co. v. Todecheene*, the Nation at least should have the first opportunity to establish the necessary facts and law relevant to *Montana's* second exception to demonstrate the significant impact on its sovereignty before this Court reviews that ruling on the merits. *See* 488 F.3d 1215, 1216-17. Absent that opportunity, it cannot be that the Nation clearly lacks authority.

CONCLUSION

For any or all of the above reasons, the Navajo Labor Commission on behalf of the Navajo Nation believes it should make the appropriate factual findings and legal conclusions in the first instance, as the Nation's jurisdiction is not "plainly lacking." This Court should therefore vacate the District Court's opinion and require the districts to exhaust their remedies before the Navajo Nation's courts.

Respectfully submitted this 25th day of October, 2013.

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STATEMENT OF RELATED CASES

This case has been consolidated with Case No. 16278, which is an appeal of the same judgment by the individual employee defendants, into one case. There are no other related cases.

Federal Rules of Appellate Procedure Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation,
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1. This brief complies with the type-volume limitation of Fed.R. App. P.32(a)(7)(B) because:

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(s) Paul Spruhan

Attorney for Commission Appellants

Dated: October 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that on October 25th 2013, the original of this brief was filed electronically with the Clerk of the Court through the CM/ECF system, with the following counsel receiving notice:

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