No. 13-16259 & No. 13-16278 (*Consolidated)*

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WINDOW ROCK UNIFIED SCHOOL DISTRICT, *et al,*

Plaintiffs-Appellees,

v.

ANN REEVES, *et al,*

Defendants-Appellants.

Appeal from the United States District Court for the
District of Arizona, No. 3:12-cv-08059-PGR
Hon. Paul G. Rosenblatt

CORRECTED BRIEF OF *AMICUS CURIAE* NAVAJO NATION SUPREME COURT IN SUPPORT OF APPELLANTS, URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Navajo Nation Supreme Court is the highest appellate court of the Navajo Nation, a federally recognized tribe listed at 77 Fed. Reg. 47870 (August 10, 2012). The Navajo Nation Supreme Court is not a nongovernmental corporate party, has no parent corporation, is not a publicly held corporation, and has no stock for any publicly-held company to own.

STATEMENT OF CONSENT TO FILE

All parties have consented to the filing of this brief.

STATEMENT OF AUTHORSHIP & FUNDING

Pursuant to Fed. R. App. P. Rule 29(c)(5), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no party, party's counsel, person or entity other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Navajo Nation Supreme Court is the highest appellate court of the Navajo Nation, whose jurisdiction over employment-related claims arising on its territory is at issue in this appeal. Our courts, located in the Judicial Branch, operate separately and independently from other branches of tribal government pursuant to 2 N.N.C. § 1. The Navajo Nation government assures our judicial independence, and the public is assured the right of access to fair and independent remedies, pursuant to 7 N.N.C. § 851.

We are an American tribal court in the federal system of American Indian governments. While it may be unusual for a court to submit a brief in its own name, even as an *amicus*, the uneven treatment by federal courts of tribal government and tribal courts *as* sovereign regulatory and adjudicative bodies requires strenuous explanation and advocacy of our sovereign status in the federal system. It has become apparent that such treatment stems largely from ignorance of how Tribal-Federal and Tribal-State government-to-government dealings are, in actuality, conducted.[1] *Amicus* submits this brief, with information on internal tribal laws, inter-governmental dealings, and community conditions, in support of the judgment's reversal.

[1] American Indian law judges at a 2010 law review symposium exploring the law governing federal, tribal and state relations concluded that the federal judiciary needs to be educated about law and life in Indian communities. Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1188 (2010).

STATEMENT OF THE CASE

The district court was called upon to adjudicate an employment claim. However, the judgment below is overbroad, divesting inherent tribal regulatory and adjudicatory authority over all education-related activities of an education provider on the Navajo Nation on the sole basis that the provider is a state actor performing a function set forth in a state's enabling act. The decision further determined that *Montana's*[2] first exception doesn't apply on the basis of governmental character and purpose, since a state actor performing a state function could not voluntarily consent to a relationship as contemplated under *Montana*. The court also suggested that State pre-emption applied at the election of the State. Finally, the decision held that *Montana's* second exception didn't apply to employment decisions in the area of education as it was not "catastrophic." The judge likened state-organized school districts on the Navajo Nation to state highways over which a State has been given right of way and thereby no longer counts as reservation territory for purposes of regulation and adjudication.[3]

If the decision stands, tribal authority over education-related employment decisions within the Navajo Nation is extinguished as to a significant on-reservation employer. The Navajo Nation will be divested of inherent sovereign

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[2] *Montana v. United States,* 450 U.S. 544, 565 (1981).

[3] *See Strate v. A-1 Contractors,* 520 U.S. 438 (1997).

authority over the education of their children whenever the education provider is a state actor. State law would also preempt Navajo Nation law for all on-reservation activities of state actors, including those permanently based on the reservation. Finally, the tribe will, in the future, have to show catastrophic consequences in order to assert any jurisdiction at all over the education of Navajo children if the education provider is a state actor. The decision creates incredible new barriers to Indian self-determination and has no basis in precedent. The sovereign would lose all authority over the employment decisions of a significant reservation employer. Additionally, whenever a Navajo child or teacher enters a public school building, they will have left the reservation and are accountable solely to the State of Arizona unless the tribe can show, on an activity-to-activity basis, the need to regulate an activity to avert catastrophic consequences.

SUMMARY OF THE ARGUMENT

Organized under the Arizona "Local Governance for Schools" statutes at A.R.S. §§ 15-321-354, the school districts are primary special-purpose governments with a separately elected governing body, are legally separate, and fiscally independent of other state and local governments. Additionally, the school districts are largely federal-funded to fulfill the federal education responsibility. No school districts may function on the reservation without the consent and cooperation of the tribe, and the State education mandate is only

one of several education mandates, none of which are exclusive, and all of which are inter-governmentally dependent. Finally, Indian business leaseholds are different from leases off-reservation as commonly understood. Even though no local taxes may be given a school district in exchange for a use guarantee, all Navajo Nation business leases require promises for specific purposes on behalf of the Navajo people to whom the land collectively belongs. These promises extend to the leasehold's specific use "in the best interest of the Navajo Nation" including preservation of the tribe's sovereignty, and, invariably, must consent to comply with the laws of the sovereign. *See* Navajo Nation Business Site Lease Regulations (BSLR), Section 106. Without a consent to preserve the sovereignty of the Navajo Nation and comply with its laws, no lease would never be approved.

The principle under current federal common law remains that Indians have the inherent right to make their own laws and be governed by them. While significant governmental interests may well require an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other, the presence of shared interests in no event results in divestiture of Tribal regulatory authority. An examination of the interests and government-to-government dealings is necessary, requiring discovery. In any case, the federal courts should not impose their judgment and

interfere with how a Tribe and State are required by circumstances on the ground to cooperate and deal with each other as governments, in actuality.

ARGUMENT

1. Local Education Agencies, Including the Plaintiffs-Appellants, Are Federally Funded to Fulfill the Federal Education Responsibility in an Indian Territory of Competing Educational Mandates, While Any State Duty is Predicated on Navajo Nation Consent and Cooperation.

The district court found it dispositive that the Plaintiff-Appellants school districts are classed as political subdivisions of the State of Arizona claiming their presence on the reservation is prescribed by the State's Enabling Statute at Arizona Constitution, Art. 11, §1, to provide "a general and uniform education" within the State over which the State has exclusive responsibilities. The reality is far more complex.

a. Competing Mandates and Navajo Nation Consent and Cooperation.

While they receive some funding from the State of Arizona, the bulk of reservation school district funding comes from a variety of federal funding sources. According to FY2013 District/Charter Annual Financial Reports for Window Rock USD and Pinon Unified Schools Districts (USDs) posted by the Arizona Department of Education, Window Rock and Pinon USD received over $25 million and $10 million in federal project revenues respectively, versus $25,075 and $237,343 respectively in state project revenues. More than 90% of the federal funding comes from the Federal Impact Aid Act, which is statutorily

provided "to fulfill the Federal responsibility to assist with the provision of educational services to federally connected children in a manner that promotes control by local educational agencies with little or no Federal or State involvement . . ." 20 U.S.C. § 7701 (emphasis added). The federal funding replaces taxes that states have no authority to collect from a reservation school district. Given for the specific purpose of fulfillment of the federal responsibility to educate reservation children "with little or no Federal or State involvement," *id.,* essentially, the recipient local agency steps into the shoes of the Federal Government.

Each of the three states (Arizona, New Mexico, Utah) over which the 25,000 square miles of Navajo Nation reservation extends, has almost identical public education mandates. Historically, the Federal Government was the comprehensive public education provider, fulfilling the federal education responsibility on the basis of the federal trust responsibility, statutes, and regulations. *See, e.g.,* 25 U.S.C. §§ 2001–2022b (1983 & Supp.1994) (establishing federal standards for and support of Indian education); 25 C.F.R. § 32.3 (1994) (expressly recognizing that "it is the responsibility and goal of the Federal government to provide comprehensive education programs and services for Indians . . ."; Exec. Order No. 13,096, 63 FR 42681 (August 11, 1998) (affirming the special historic responsibility of the Federal Government for the education of American Indian and Alaska Native children); etc. Before the last

third of the 20th century, reservation state schools were mostly "accommodation" schools, accommodating the children of non-Indian employees in the federal system and Anglos renting nearby land, while Indian children attended Bureau of Indian Affairs (BIA) day and boarding schools.[4] Passage of the Indian Education and Self-Determination Act of 1975, 25 U.S.C. §§ 450-450n, ushered in a federal policy of funding contract and grant schools (numbering 67 in 2011 and educating 10% of the school-age population), *id;* meanwhile, local agencies such as Plaintiffs-Appellees also began to be funded to fulfill the federal obligation and now educate the vast majority of reservation children.[5] Finally, on July 22, 2005, the Navajo Nation enacted the Navajo Nation Sovereignty in Education Act, 10 N.N.C. §§ 1 *et seq.*, asserting its "inherent right to exercise its responsibility to the Navajo People for their education by prescribing and implementing educational laws and policies applicable to all schools serving the Navajo Nation and all educational programs receiving significant funding for the education of Navajo youth or adults." 10 N.N.C. §1(A). Tribal or community-controlled schools were

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[4] Bob Roessel, *Navajo Education, 1948-1978: Its Progress and its Problems* (1979).

[5] Karina Roessel, *The Implications of the Navajo Nation Sovereignty in Education Act of 2005 on Arizona Reservation Public Schools,* dissertation, p. 29 (June 2011)

established dating from the beginning of the contract/grant school era and Education Act.

A 10th Circuit district court decision explores thoroughly these potentially competing mandates and what is required to fulfill them. *Meyers v. Bd. of Educ. of San Juan Sch. Dist.*, 905 F. Supp. 1544 (D. Utah 1995) concluded the responsibilities are shared and can only be fulfilled with government-to-government cooperation. In *Meyers*, Navajo parents and children sought to compel Utah to build and run a secondary school in the remote reservation community of Navajo Mountain. The school district had previously declined to build an elementary school, instead supported construction of a BIA facility. Secondary-school-age children from Navajo Mountain had to attend BIA boarding schools, reside in BIA dormitories near public schools off the reservation, or live with friends or relatives near public schools outside of Navajo Mountain in order to get an education. The school district provided no education services. *Id.* at 1553. Through the enactment of the Education Act, the Navajo Nation expressed its own education mandate, established a Board of Education and asserted its "inherent right to exercise its responsibility to the Navajo People for their education by prescribing and implementing educational laws and policies applicable to all schools serving the Navajo Nation and all educational programs receiving significant funding for the education of Navajo youth or adults." 10 N.N.C. §1(A). The Utah school district challenged the

existence of any duty because it lacked power on the reservation to perform as a sovereign, including: it could not condemn reservation property to acquire the land to build a school, could not enforce its compulsory attendance laws on the reservation without the consent of the tribe, *see* 25 U.S.C. § 231 (1983), and could not appropriate water from the reservation for school use without the consent of the tribe. *Meyers* at 1558. However, the district court stated that under Utah's Enabling Act, the State had "some duty," predicated on the cooperation of the Navajo Nation in withdrawing land, issuing leases and so forth. *Id.* at 1557-1558. In other words, the Navajo Nation must first consent in order for the State to be held to its mandate. The tribe's consent is given in the spirit of mutual consents and cooperation. In this case, there are leases. As will be discussed later in this brief, Navajo Nation leases are significantly different from how leases are understood off-reservation due to the trust nature of reservation land. The signed lease agreement represents a promise, on the part of both the Tribe and State, that the mutual understandings at the time the agreement was entered regarding how the parties will perform and deal with each other, will be honored. Words are sacred and never frivolous in Navajo thinking *(hazaad jidvsin)*. *See Smith v. Navajo Nation Department of Head Start,* 8 Nav. R. 709, 715 (Nav. Sup. Ct. 2005). When words are said, they are meant.

b. Plaintiff-Appellee School Districts are Primary Governments and Are Dealt With and Accommodated Accordingly by the Sovereign Navajo Nation.

The district court would liken Arizona's school districts on the reservation to the state game warden in *Nevada v. Hicks,* 533 U.S. 353 (2001), who worked off-reservation and entered the Fallon Paiute-Shoshone reservation in pursuit of a tribal member suspected of an off-reservation state crime. The *Hicks* decision expressed its fear that reservations would "become an asylum for fugitives from justice." *Id.* at 364 (citation omitted). Perhaps the greater fear of the United States Supreme Court, unexpressed, was that no state officer would want to come onto reservation land unless immune from systems of tribal justice that the Court was not familiar with. Fear of the unfamiliar and the concomitant suspicion of other justice systems make for bad law and bad neighbors. Nevertheless, governments that actually have dealings with particular tribes operate in an atmosphere of knowledge and mutual respect that has, in many cases, not yet reached the federal courts. We would state the obvious and say that a public school district permanently located and operating on the reservation is *not* like a state game warden briefly present on the reservation to serve a state search warrant. However, there are similarities, in that the *Hicks* game warden well understood the obligation to treat the Fallon tribe as a sovereign jurisdiction. That game warden obtained a tribal search

warrant twice for the same suspect, and was assisted by a tribal police officer both times in executing the warrant. *Hicks* at 356.

The Navajo Nation deals directly with each public school district governing board as a self-contained local government. In this case, the Navajo Nation entered leases with Plaintiff-Appellees directly. In fact, the school districts answer to no state authorities for anything other than the state annual single audit. A.R.S. § 15-914. Under local governance powers provided at A.R.S. §§ 15-321-354, each school district is an autonomous "primary government" as defined by the Government Accounting Standards Board; specifically, each school district is a "special-purpose government that has a separately elected governing body, is legally separate, and is fiscally independent of other state and local governments" as defined by that board.[6] Management of each school district is independent of other state and local governments, and the County Treasurer exerts no control over its expenditures. *Id.* A school district governing board's local governance powers and duties include, but are not limited to, the acquisition, maintenance, and disposition of school property; the development and adoption of a school program and the establishment, organization, and operation of schools. *Id.* Additionally, the locally-elected governing boards independently invest funds, collect interest, hire attorneys,

[6] GASB, *Financial Reporting Entity,* Statement No. 14, issued June, 1991. *See also, e.g.,* Pinon USD, FY2012 Comprehensive Annual Financial Report, in which the school district's primary governmental status is fully set forth.

press and defend suits, and may restructure and eliminate schools, and enter or break leases without state interference. In short, each reservation public school board is not unlike a local Navajo Nation township, which is imbued with primary governmental powers under the Navajo Nation Local Governance Act and able to independently contract with federal, state, and private entities as well as make its own regulations and policies within the confines of the Navajo Nation Code. *See* 26 N.N.C. §§ 1 *et seq*. The interests of the school districts are entirely within the reservation under the terms of their Federal Impact Aid funding source and under Arizona law as well.

We would emphasize that members of school boards, being elected locally, are all or almost all Navajos by anecdotal information.

Dialog between the school districts, local communities and the tribe is constant and ongoing. *See* ARS § 15-351, requiring that "individuals who are affected by the outcome of a decision at the school site share in the decision making process." Nowhere is shared decision-making more vital to the school district's very existence than on a reservation where the state would be unable to offer services and operate some facilities, be it justice courts, clinics, or schools, without tribal consent and cooperation.

Understanding the shared interests, the tribe has already accommodated the school districts. On the subject of the Navajo Nation Preference in Employment Act (NPEA), 15 N.N.C. §§ 604 *et seq*. specifically, to which

Plaintiffs-Appellees' objection is the basis of this suit, the Navajo Nation Council has enacted a waiver provision as part of the Education Act, which exempts school districts from the NPEA on a case-by-case basis by vote of the school districts' governing boards. *See* 10 N.N.C. § 124. The waiver was not used by Plaintiffs-Appellees in this case. Instead, they have preferred to claim that Navajo Nation law does not apply at all over their on-reservation employees, the vast majority of whom are Navajos.

The NPEA is one of the Navajo Nation's most important laws. The law prohibits employers from taking adverse action against any employee without just cause, 15 N.N.C. § 604(B)(8), and requires affirmative action plans for Navajo preference, 15 N.N.C. § 604(A)(1). Due to the reservation's entrenched poverty, the Council deemed an affirmative action plan necessary, stating that the ability of the Navajo people "to secure and retain employment within the territorial jurisdiction implicates the health, safety and welfare of the Nation[.][7] In adopting the NPEA, the Navajo Nation Council "recognized that the regulation of employment relations and the protection of workers are essential." *MacArthur v. San Juan Cnty.*, 391 F. Supp. 2d 895, 972 (D. Utah 2005) *aff'd in part, vacated in part, rev'd in part,* 497 F.3d 1057 (10th Cir. 2007) *citing Manygoats v. Cameron Trading Post,* 8 Nav. R. 3, 17 (Nav. Sup.

[7] Navajo Nation Council Resolution No. CO-73-90 (October 5, 1990) enacting the NPEA, whereas clause 2.

Ct. 2000) *citing* 15 N.N.C. § 602(A)(6). "[Powers over labor] are among the most important government powers generally, and it would be nonsense to assert that such authority is not an essential part of the Navajo Nation's powers." *Id.* citing Littlefield & Knack, NATIVE AMERICANS AND WAGE LABOR (1996). Inclusion of provisions for Navajo or Indian preference is required in all Federal or State governmental contracts. 15 N.N.C. § 604(A)(B)(4). Nevertheless, our courts have also recognized the ability of the Navajo Nation Council to waive governmental authority by "clear, unmistakable words." *Thinn v. Navajo Generating Station, Salt River Project and Gonnie v. Headwaters Resources,* No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 5 (Nav. Sup. Ct. October 19, 2007) (citations omitted). In regards to school districts, the waiver provision for school districts at 10 N.N.C. §124 is such a "clear, unmistakable" waiver.

Signed into law on July 22, 2005, the Education Act containing the waiver was passed one year after the events took place giving rise to the suit in *Red Mesa Unified Sch. Dist. v. Yellowhair,* CV-09-8071-PCT-PGR (D. Ariz. Sept. 28, 2010), a decision relied on for persuasive support by the court below. The Education Act asserts sovereignty over reservation education while also committing the Tribal Government to work cooperatively with all education providers. *See* 10 N.N.C. § 1(C) and (A). The Education Act elaborates on the underlying policy supporting Navajo preference, creates a separate category of

Indian preference, *see* 10 N.N.C. § 3(K), (O), and allows local school boards to waive these provisions by formal vote of the board in "individual employment, retention, or promotion decisions, as determined by the board on a case-by-case basis." 10 N.N.C. §124. By anecdotal information, many if not most Arizona public school districts on the reservation are complying with the Education Act and making use of the waiver. As an example, on August 7, 2012, the Shonto Preparatory School District governing board voted on the waiver in order to exempt an individual hire from Navajo and Indian preference.[8]

Perhaps counseled that tribal law no longer applies following *Red Mesa,* Plaintiffs-Appellants did not use the waiver opportunity. Perhaps it is cumbersome to convene governing boards to vote on such matters. *Red Mesa* and this decision has already resulted in an attitude of non-cooperation within Plaintiffs-Appellants' school districts toward the sovereign tribe on which their schools are built and in whose territory the schools function.

It is common knowledge that Plaintiff-Appellant Window Rock USD has made numerous employment decisions as a result of the Federal Sequester. The school district eliminated 40 staff positions in FY2012 in anticipation of significant federal cuts, and announced plans to cut 35 more teachers, 25 support staff and 5 administrative positions, plus close three of the USD's seven

[8] Shonto Governing Board of Education, Inc., Minutes of Regular Board Meeting, August 7, 2012p. 7, No. 4.

schools, this fiscal year.[9] It is unknown what the impact of these employment decisions is on the classrooms. With two-thirds of that district's 2,400 students "homeless or living in substandard housing," and reservation unemployment exceeding 50%,[10] the impact of these employment decisions on the Navajo Nation economy is no doubt substantial. It may be fairly guessed that the layoffs and restructuring were made by the school district without regard for the employee protections contained in the NPEA or other Navajo Nation laws. Surely, this is not the outcome foreseen by the district court.

2. A Delicate Balance of Government-to-Government Relations Must Be Maintained To Fulfill Shared Governmental Interests In the Best Interest of Indian Children.

When a federal court's decision on a limited activity sweepingly entangles all other interactions between the State and Tribal governments, it threatens to destroy the delicate and flexible structure needed for government-to-government dealings between the Tribe and the Federal and State governments.

The Navajo Nation is the second largest Native American tribe in the United States, extending into the States of Arizona, New Mexico and Utah, covering over 25,000 square miles, an area larger than the State of West Virginia. The reservation has a population of 173,667, 96% of whom are

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[9] U.S. Education Secretary Arne Duncan, *Sequestration Harms Education and Our Economy,* March 7, 2013, official blog of the U.S. Department of Education, www.ed.gov.

[10] Id.

Navajos and 33% of whom are children.[11] The tribe has a sophisticated three-branch government, each guaranteed independence under Title II of the Navajo Nation Code. Recent governmental conflicts between the legislative and executive branches resulted in solidifying judicial independence and governmental checks and balances as fundamental rights of the people. *See Office of the Navajo Nation President et al v. Navajo Nation Council et al. (Shirley v. Morgan),* No. SC-CV-02-10, slip op. at 10-30 (Nav. Sup. Ct. May 28, 2010) (strengthening the role of judicial review and affirming the doctrine of separation of powers while maintaining balance and harmony through shared leadership). Our courts are the largest tribal court system in the world, with 34,831 cases filed in FY 2012,[12] a fair number of which concern non-member contract claims. Our eleven trial courts and appellate court, the Navajo Nation Supreme Court *(amicus)* is described as the "flagship tribal judicial system" and studied and emulated by legal scholars and indigenous groups across the world.[13] While there is no doubt as to our economic poverty, we are nonetheless a sovereign government.

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[11] Arizona Rural Policy Institute, Northern Arizona University, *Demographic Analysis of the Navajo Nation Using 2010 Census and 2010 American Community Survey Estimates, (*undated).

[12] Judicial Branch of the Navajo Nation, *FY 2012 Annual Report.*

[13] See Michael Taylor, *Modern Practice in the Indian Courts,* 10 U. PUGET SOUND L. REV. 231, 236 (1987); see also Dale Beck Furnish, *Sorting Out Civil Jurisdiction in Indian Country after Plains Commerce Bank: State Courts & the*

Through the Education Act, the Navajo Nation has established an Education Department which pursues inter-governmental coordination in order to consolidate educational content and standards of the three states overlapping the Navajo Nation with those of the Navajo Nation. *See* 10 N.N.C. § 106(G)(3)(a) and § 109. By discussing the NPEA in the Education Act, while also including the NPEA waiver, the Navajo Nation Council acknowledges the importance of regulating the employments of teachers, who should mirror the student population they teach, to protect teachers from at-will firings in requiring "just cause, but also allows room for the school districts to apply local employment policies on individual case-by-case bases. *See also* 10 N.N.C. § 113(B) (duty to employ Navajo educators). The decision below would render inter-governmental cooperation efforts entirely at the option of the State.

An area of contention for many years has been Arizona's "English-only" law, the most stringent of any state, requiring more than four hours per day of English instruction, A.R.S. §15-756 (November 7, 2000). Federal policy protects Native languages through the Native American Languages Act of 1990, 25 U.S.C. § 2901 *et seq*., but merely encourages Indian education providers to include Native languages in educational programming. No part of the Languages Act is compulsory.

Judicial Sovereignty of the Navajo Nation, 33 AM. INDIAN. L. REV. 385, 387 (2008–2009) (lauding the Navajo Nation's development of a strong legal system and a vigorous, effective judiciary).

Through the Education Act, the Navajo Nation announced its determination to see that curriculums taught on the Navajo Nation will one day include Navajo culture, civics, history, language and social studies, *see* Education Act, 10 N.N.C. §§ 111-112. At this time, Arizona continues to lack a curriculum for Navajo language, history and culture.[14] Additionally, Arizona's ban on ethnic or cultural education in all Arizona schools has an exception for courses for Native American children only when required by federal law, *see* A.R.S. §15–112. No federal law presently requires such courses. However, by anecdotal information, some local school districts are implementing cultural courses. It is clear that there is a great deal to do. Much more negotiations and discussions between the Federal, State and Tribal governments, as governments, must be done to resolve these fundamental issues.

Until this case, inherent tribal sovereignty over the welfare of Native children was unquestioned. Congress has expressed that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," 25 U.S.C. § 1901(3). Tribes are accorded state status, with their jurisdictional findings given full faith and credit, when cases concern the custody or placement of Indian children. *See* Indian Child Welfare Act, 25 U.S.C. §1911(a) and (d); *and see* Uniform Child Custody and Support Act

[14] Karina Roessel, *The Implications of the Navajo Nation Sovereignty in Education Act of 2005 on Arizona Reservation Public Schools,* dissertation, p. 51.

(UCCJEA), adopted by Arizona at A.R.S. § 25-1004 (requiring that "a court of this state shall treat a tribe as if it were a state of the United States."). While these areas of child welfare concern their placement and custody, Congress has placed no limits on the areas of child welfare within a Tribe's concern. In fact, federal policy emphasizes a Tribe's need to participate and control its' children's education. Federal Indian education policy, expressed by both congress and the president, is geared toward maximizing tribal participation and control over the education of reservation children in both federal Indian schools and public schools with Indian populations.[15] The legislative intent behind the Indian Self-Determination and Education Assistance Act is also "to promote maximum Indian participation in the government and education of the Indian people."[16]

Yet, here we are, defending the inherent right of Tribes to govern the educational welfare of their children within their own territory.

No other type of American sovereign government must spend its limited resources defending its governmental authority over and over again, minute

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[15] *See* Special Subcomm. On Indian Education, Comm. On Labor and Public Welfare, *Indian Education: A National Tragedy—A National Challenge,* S.Rep. No. 501, 91st Cong., 1st Sess. 106 (1969)(recommendation for maximum tribal participation); and *see* Message from the President of the United States, H.R. Doc. No. 363, 91st Cong., 2d Sess. 6 (1970)(calling for increased Indian participation and control of Indian education programs).

[16] H.R. Rep. No. 1600, 93d Cong., 1st Sess. 1 (1974).

activity by minute activity. The burden in this case is particularly unnecessary, where an employment waiver was available and was not used.

In *Tracy v. Superior Court of Maricopa County,* 168 Ariz. 23 (1991), the Arizona Supreme Court stated that "tribes are similar to states in terms of their jurisdiction and power of self-government over matters occurring within their territorial boundaries." *Id.* at 32 (citation omitted). The court went on to describe tribes as "analogous to the territories of the United States, which are also subject to Congress' plenary power." *Id. citing Inter-Island Steam Nav. So. V. Hawaii,* 305 U.S. 306, 314 (1938); *and generally,* Comment, *Conflicts Between State and Tribal Law: The Application of Full Faith and Credit Legislation to Indian Tribes,* 1981 ARIZ. ST. L.J. 801, 808 and Clinton, *Tribal Courts and the Federal Union,* 26 WILLIAMETTE L. REV. 841, 858 (1990) (analogizing Indian tribes as the equivalent of territories such as Puerto Rico and the Virgin Islands). The court noted that a tribe "is not a foreign, but a domestic territory." *Id. citing United States ex rel. Mackey v. Coxe,* 59 U.S. 100 (1855). This holding remains the presumption in that state.

Arizona has an established policy of treating tribes as sovereigns, emphasizing tribal territorial self-government, and further emphasizing the government-to-government relationship between State and Tribal governments. *See* A.R.S. § 41-542 (Indian Affairs Commission); *and* Az. H.B. 2315, 50th Legislature (2011) (extending the role of the Commission "to enhance

government-to-government relations between the twenty-one Arizona Indian tribes or nations and this state.").

There is no infringement test for the kind of shared governmental interests presented in this case.[17] However, the only option need not be exclusive jurisdiction by State or Tribe in the face of shared interests. The thing need not be cut in half. Between a mindset of exclusive jurisdiction for one side or the other, there lies ample possibility for concurrent jurisdiction where Federal-State-Tribal governments talk to each other while respecting mutual sovereignty and interests.[18]

While *Nevada v. Hicks,* 533 U.S. 353 (2001) has been taken to stand for a first step into the divestiture of Indian governmental rights to adjudicate civil matters within its own territory, it is clear that *Hicks* intended itself to be narrowly construed. The U.S. Supreme Court believed it was dealing with the specter of suspect felons finding asylum on the reservation. It was also, in some

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[17] *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980), concerning whether federal law pre-empted assessment of state taxes against a non-Indian contractor working exclusively for an Indian tribe within the reservation is inapplicable in this case of shared governmental services and mandates.

[18] *See* Dale Beck Furnish, *Sorting Out Civil Jurisdiction in Indian Country After Plains Commerce Bank: State Courts and the Judicial Sovereignty of the Navajo Nation*, 33 AM. INDIAN L. REV. at 393 (quoting the dissent in *State v. Zaman,* 927 P.2d 347, 533 (Ariz. Ct. App. 1996) and advocating, on the basis of comity and respect for Navajo sovereignty, that the state show good judgment and respect in order to dictate an easier and better resolution than finding exclusive jurisdiction on one side or another).

measure, seeking to provide stability in terms of the game ward's expectations of the boundaries of his duties which, but for the specific and brief entry to serve a warrant, lie entirely outside the reservation.

This case is different. The school districts are local governance units, self-described as "primary governments." Employees live and permanently work on the Navajo Nation, a sovereign territory. In their day-to-day dealings, they understand they must comply with Navajo Nation law. Until *Red Mesa* and this case, there could be no expectation that, once they enter a school, their activities are immune from Navajo Nation law by inherent sovereign right. To the extent that the school district had signed a leasehold agreement to comply with Navajo Nation laws, any employee contracts should have duly reflected the requirement for an affirmative action. Discovery in this case is necessary to find out if the school did, in fact, file an affirmative action plan with the Navajo Nation Office of Labor Relations; whether other school districts did so; and whether the State's employment policy does, in fact, prohibit modifications when state employees serve in other territories. The proper course would be for the State and Tribe to come to an agreement over how employment on the reservation public schools must be jointly handled. *Hicks* hinted as much when it stated that, even if circumstances existed for the state to regulate within a reservation:

> That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the

> principle that Indians have the right to make their own laws and be governed by them requires "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other."

Hicks, 533 U.S. at 362 *citing Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134, 156 (1980).

Hicks would support a presumption of inherent sovereignty under the circumstances of this case, where federal, state and tribal interests are clearly shared. When shared interests are asserted, the principle is accommodation. In short, some kind of Navajo peacemaking would benefit the parties, meeting as governments, particularly in this case. (Navajo Nation common law allows for peacemaking any time the parties wish to settle. *See Manning v. Abeita,* No. SC-CV-66-08 (Nav. Sup. Ct. Aug. 11, 2011)).

3. Navajo Nation Leaseholds Require Occupancy and Use Promises, Including Compliance with Navajo Nation Laws and Preservation of Navajo Nation Sovereignty.

Unlike off-reservation leases, reservation leaseholds belong to the collective Navajo people. *See Gishie v. Morris,* No. SC-CV-36-06, slip op. at 3 (Nav. Sup. Ct. June 4, 2008) (noting that the Treaty of 1868 provides that Navajo lands "be set apart for the continued use and occupation for the Navajo tribe."). The court has elaborated on this, stating that a "land use decision by the people through their governments is the balance struck between the individual land user and the needs and desires of the community." *Navajo Nation v. Arviso,* 8 Nav. R. 697, 703 (Nav. Sup. Ct. 2005). The Navajo

Nation as lessor, and in this case the school districts as business site lessee, are bound by their promises and their freedom is tempered by the responsibility to manage and hold such leases for the collective good. *See* BSLR, Sections 103(A)(3) and (16), 106, and 305. In other words, the lessee has a duty to the Navajo people for the duration of the leasehold. Through the promises made when the leasehold was given, the lessee's interests, in this case Plaintiffs-Appellees school districts, are very much within the reservation with the Navajo People, not merely in the Arizona State Capital. Even without such a leasehold requirement, a school district's interests are necessarily within the school community itself.

Navajo Nation leases are both occupancy and specific use leases. *See* BSLR, Section 103(A)(16). Prior to approving a lease, the Navajo Nation must first ensure that the leasehold will be occupied and used "in the best interest of the Navajo Nation." BSLR, Section 106. "Best interest of the Nation" is defined as including "preserving the sovereignty of the Navajo Nation." BSLR, Section 103(A)(3). The requirement to preserve the sovereignty of the Navajo Nation is plainly written in the BSLR and is an implicit promise going into the lease signing. Additionally, there is the express and sacred promise to comply with Navajo laws within the lease itself:

> 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.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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Dated: November 2, 2013

Appendix A

Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains **6,688** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Sabon Greek in 14 point font.

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Appendix B

Certificate of Service

I hereby certify that the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, on the 2nd day of November, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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No. 13-16259 & No. 13-16278 (*Consolidated)*

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WINDOW ROCK UNIFIED SCHOOL DISTRICT, *et al,*

Plaintiffs-Appellees,

v.

ANN REEVES, *et al,*

Defendants-Appellants.

Appeal from the United States District Court for the District of Arizona, No. 3:12-cv-08059-PGR Hon. Paul G. Rosenblatt

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MOTION FOR LEAVE TO FILE CORRECTED BRIEF OF *AMICUS CURIAE* NAVAJO NATION SUPREME COURT

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1. On November 1, 2013, prospective *amicus* submitted a brief to the Court by consent of all parties.

2. After *amicus* had uploaded its brief but before pressing the "submit" button, *amicus* discovered typographical errors, errors in some table of content entries, and the unnecessary repeat of a non-substantive sentence in the "Summary of the Argument" section. *Amicus* made the corrections and re-loaded the corrected brief under the same document name, following which *amicus* electronically submitted the brief.

3. On November 2, one day later, *amicus* examined the electronically-stamped submitted brief and discovered that it was the wrong brief. The re-load in the CM/ECF was not successful.

4. This is the first time *amicus* has filed a brief in the Ninth Circuit and the first time using any CM/ECF Tool.

5. On November 2, 2013, *amicus* filed the corrected brief via CM/ECF.

6. The wording of all substantive sections remains the same but for the elimination of the repeat sentence. The word count is reduced by 16 words.

WHEREFORE, the Movant respectfully requests that this Motion for Leave to File a Corrected Brief be granted.

Respectfully submitted,

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Dated: November 2, 2013

Certificate of Service

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