UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WINDOW ROCK UNIFIED SCHOOL DISTRICT; PINON UNIFIED SCHOOL DISTRICT, Plaintiffs/Appellees, vs. ANN REEVES; KEVIN REEVES; LORETTA BRUTZ; MAE Y. JOHN; CLARISSA HALE; MICHAEL COONSIS; BARBARA BEALL, and RICHIE NEZ; CASEY WATCHMAN; BEN SMITH; 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.	No. 13-16259 13-16278 (CONSOLIDATED) Arizona District Court No. 3:12-cv-08059-PGR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

ANSWERING BRIEF

Patrice M. Horstman, Bar #005841
HUFFORD, HORSTMAN, MONGINI, PARNELL & TUCKER, P.C.
120 North Beaver Street
Post Office Box B
Flagstaff, Arizona 86002
(928) 226-0000
pmh@h2m2law.com

Georgia A. Staton, Bar #004863
Eileen Dennis GilBride, Bar #009220
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue, Suite 800
Phoenix, Arizona 85012
(602) 263-1700
gstaton@jshfirm.com
egilbride@jshfirm.com

Attorneys for Plaintiffs/Appellees
Window Rock Unified School District and Pinon Unified School District

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES (continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

REGULATIONS

CONSTITUTIONAL PROVISIONS

APPENDIX

JURISDICTIONAL STATEMENT

Plaintiffs agree with the Navajo Nation Labor Commission's jurisdictional statement.

STATEMENT OF THE ISSUES

Plaintiffs are Arizona public school districts – political subdivisions of the State of Arizona – which are mandated by Arizona's federal Enabling Act and Arizona's Constitution to provide a general and uniform public school system in Arizona, including on the Navajo reservation. In the course of fulfilling that mandate, the districts made employment decisions regarding their employees, the Individual Defendants herein, most (but not all) of whom were Navajos. The employees want to challenge those decisions.

1. Did the district court correctly determine that tribal jurisdiction over the state school districts' employment decisions is plainly lacking?

2. Because tribal jurisdiction was plainly lacking, did the district court correctly determine that exhaustion of tribal remedies was unnecessary?

STATEMENT OF THE CASE

The Individual Defendants, current or former school district employees, were dissatisfied with the employment decisions of their employers, the Plaintiff school districts. One group of Defendants either were not hired for district positions for which they applies, or were terminated from their district positions. But none of them utilized the state-mandated appeal process for those decisions. Instead, these employees filed complaints with the Navajo Nation Labor Commission ("NNLC"),[1] alleging that the districts' employment decisions violated the Navajo Preference in Employment Act ("NPEA"). In pertinent part, the NPEA requires employers to give preference in employment to Navajos and provides for termination only upon good cause.

Another group of Individual Defendants (who were complaining about the districts' decisions that they were not entitled to "Proposition 301" money) did take their complaint to state court, and lost in the court of appeals. Rather than seek review with the Arizona Supreme Court, they filed complaints in the Navajo tribal court in an attempt to get that court to simply issue the opposite ruling.

---

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

The school districts moved to dismiss each of the cases for lack of tribal jurisdiction, citing *Red Mesa Unified School Dist. v. Yellowhair*, 2010 WL 3855183 (D. Ariz. Sept. 28, 2010) (as a matter of law, Navajo Nation has no regulatory or adjudicative jurisdiction over Arizona school districts' employment-related decisions). But the NNLC, instead of dismissing for lack of jurisdiction, ordered an evidentiary hearing to take place. The NNLC wanted to hear extensive evidence on such things as whether the school districts' leases with the Navajo Nation are "government to government compacts" between sovereigns, and the ethnic composition of the school districts. [ER 66-69.] The NNLC consolidated all the Individual Defendants' claims for purposes of this evidentiary hearing. [*See* ER 75-79, ¶¶ 21, 26, 33, 38.]

The districts believed such an evidentiary hearing would serve no useful purpose, as it planned to misfocus on facts not determinative of the jurisdictional issue and would significantly delay the ultimate resolution of the jurisdictional issue. The result is that the school districts are required to keep re-litigating employment decisions they validly made pursuant to Arizona law. The districts therefore filed this complaint for declaratory and injunctive relief against the NNLC and the Individual Defendants. [Dkt. #1.] The districts alleged that exhaustion of tribal remedies was not necessary because tribal jurisdiction was "plainly lacking." *Strate v. A-1 Contractors*, 520 U.S. 438, 459

n. 14 (1997) (exhaustion not required "when . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule . . . .").

Defendants moved to dismiss for the districts' failure to exhaust their tribal remedies, arguing that tribal jurisdiction was plausible. [Dkt. ##12, 19.] The districts responded and cross-moved for summary judgment, arguing that not only was tribal jurisdiction not plausible, but it was plainly lacking as a matter of law. [Dkt. ##26-29.] The Individual Defendants moved for Rule 56(d) relief. [Dkt. #34.] No defendant controverted the school districts' facts. But all defendants had ample opportunity to brief the cross-motion for summary judgment. [Dkt. ##31, 34, 35.]

The district court, Hon. Paul Rosenblatt, denied Defendants' motion to dismiss and granted the districts summary judgment, concluding that tribal jurisdiction was plainly lacking. [ER 3-22.] The court did not broadly rule that Arizona school districts are "completely free of Navajo Nation jurisdiction." [NNLC OB, p. 6.] Nor did the court rule that the tribe was divested of authority over "all education-related activities" on the reservation, or attack the "inherent right of the Tribes to govern the educational welfare of their children," as the Navajo Nation Supreme Court posits. [NNSC amicus, pp. 2, 20.] The court ruled that "the Navajo Nation has no regulatory or adjudicative jurisdiction over

the plaintiff school district's employment-related decisions underlying this action." [ER 20.] Defendants timely appealed. [Dkt. #54.]

STATEMENT OF RELEVANT FACTS

In the districts' view, the facts presented by the NNLC and the Individual Defendants are not the salient ones for the purpose of addressing the jurisdictional issue. [*See* NNLC OB, pp. 6-11, discussing primarily the history of the Treaty of 1868, Arizona's Enabling Act, and the NPEA; Individuals' OB, pp. 3-4.]

The facts material to the jurisdictional issue are (1) the status of the Plaintiffs as non-Indians – i.e., Arizona political subdivisions who were haled into tribal court as defendants, *MacArthur v. San Juan County*, 497 F.3d 1057, 1070 (10th Cir. 2007) (" . . . the only relevant characteristic for purposes of determining *Montana*'s applicability in the first instance is the membership status of the individual or entity over which the tribe is asserting authority); and (2) the fact that the districts' conduct at issue – employment decisions made in the scope of their constitutional obligation to provide a general and uniform public school system – is not connected to tribal lands. *See Smith v. Salish Kootenai College*, 434 F.3d 1127, 1131 (9th Cir. 2005) (recognizing, for jurisdictional purposes, the importance of the status of the parties and the connection between the cause of action and Indian lands). These facts are established, undisputed, and not "thin," as the NNLC asserts. [NNLC OB at 6, 19.]

The Arizona Constitution, Art. 11, §1, mandates that the legislature shall provide for the establishment and maintenance of a general and uniform public school system. [Appendix p. 14 hereto.] Pursuant to that constitutional mandate, Plaintiffs Window Rock Unified School District and Pinon Unified School District operate within the geographical boundaries of the Navajo reservation on land leased from the Navajos. [ER 34, ¶ 1.] The Districts are political subdivisions of the State of Arizona, organized under and governed by Arizona laws for the purpose of the administration, support and maintenance of public schools. A.R.S. § 15-101(21).[2] The NNSC amicus errs in asserting that the districts' governing boards are not answerable to any state authority "other than the state annual single audit." [NNSC amicus, p. 11.] Because the districts have only the powers granted them by the legislature, *see* A.R.S. § 15-341, their governing boards *must* comply with state law; and as such, those boards ultimately are answerable for doing so to the voters, and to all those with whom they deal.

[2] At least eight public school districts are located within the boundaries of tribal reservations in northern Arizona, including Cedar Unified, Red Mesa Unified, Ganado Unified, Kayenta Unified, Pinon Unified, Tuba City Unified, Window Rock Unified, and Chinle Unified.

A. The Reeves case.

Defendants Ann Reeves, Kevin Reeves, Loretta Brutz, and Mae John ("the Reeves Defendants") are employees of Plaintiff Window Rock USD, but are not certified teachers. [ER 34, ¶ 2.][3] Window Rock USD determined that these individuals were not entitled to receive school district monies funded by Arizona Proposition 301 ("301 money") – merit pay for teachers – because they are not "teachers" within the meaning of Proposition 301. [*Id.*, ¶ 5.][4] The Reeves Defendants sued in state court over the issue and lost. The Arizona Court of Appeals held that the Reeves Defendants are not entitled to receive

[3] Ann Reeves is a school psychologist. Kevin Reeves is a physical therapist. Loretta Brutz is a speech therapist/pathologist. Mae John is a speech language pathologist. Neither Ann Reeves nor Kevin Reeves is an enrolled member of the Navajo Nation. Kevin Reeves is a member of another tribe. Ann Reeves is not Indian. [*Id.*, ¶¶ 2-5.] The Navajo Supreme Court allows non-Indians to file in tribal court. *Staff Relief, Inc. v. Polacca*, Navajo S. Ct. No. SC-CV 86-98.

[4] In November 2000, voters approved Proposition 301 which, in part, required all districts to adopt a performance-based pay plan for teachers. *See* A.R.S. § 15-977(A), (B). Proposition 301 increased the state sales tax by six-tenths of 1 percent for 20 years to fund educational programs, and defined the priorities for the use of Proposition 301 money, including funding the Classroom Site Fund. The Classroom Site Fund is limited to three major uses: (a) 20% for base increases to teacher salaries, (b) 40% for performance-based pay for teachers, and (c) 40% for strategies for struggling students (e.g., dropout prevention, class size reduction, professional development). *Id.* The tradeoff inherent in Proposition 301 for schools is more resources in exchange for more accountability for student performance. The measure remains in effect through 2021.

"301 money" because they are not certified teachers. *Reeves v. Barlow*, 227 Ariz. 38, 251 P.3d 417 (Ct. App. 2011).

The Reeves Defendants did not seek review in the Arizona Supreme Court. Instead, they filed separate but identical complaints in tribal court asking that they be included as "teachers" in the distribution of state 301 money, and claiming that the reason the district failed to pay them 301 money was "in retaliation" for their having filed the state court action – though they had filed their state court action *after*, and as the result of, the non-payment of 301 money to them ("the Reeves Claim"). [ER 34, ¶ 7.] The NNLC dismissed all but the "retaliation" portion of the claim. [*Id*., ¶ 8.]

Window Rock USD moved to dismiss the retaliation claim for lack of tribal jurisdiction, citing *Red Mesa Unified School Dist. v. Yellowhair*, 2010 WL 3855183 (D. Ariz. Sept. 28, 2010) (as a matter of law, Navajo Nation has no regulatory or adjudicative jurisdiction over Arizona school districts' employment-related decisions). Instead of dismissing for lack of jurisdiction, the NNLC ordered an evidentiary hearing to take place. [ER 35, ¶¶ 8-9.] The NNLC wanted to hear extensive evidence on such things as whether the school district's lease with the Navajo Nation is a "government to government compact" between sovereigns, and the ethnic composition of the school district:

> [The *Yellowhair* decision] did not address the issue of whether the lease between the Navajo Nation and the

> school districts constituted a government to government compact between two sovereigns. What is the nature of government to government compacts between two sovereigns? How do such compacts affect the jurisdiction of the Navajo Nation? The Commission requests the parties to research the history of government to government compacts between the Navajo Nation and the state of Arizona and how each of those sovereigns negotiate terms and conditions of their compacts. Does the first Montana exception even apply to government to government compacts? The parties are also requested to submit information regarding the demographics of the school district, including the percentage of Navajo students that comprise the population of students, the ethnic composition of the school board, administrators, and teachers.

[ER 64-69.][5]

[5] Of course, a lease signed by a school superintendent on behalf of a school district is not a "government to government compact" between sovereigns, as school districts are local governments, not sovereigns or arms of the State. *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036 (9th Cir. 2003). A compact is an agreement between two or more states, entered into for the purpose of dealing with a problem that transcends state lines. When adopted by a state, a compact is not only an agreement between that state and the other states that have adopted it, but it becomes the law of that state as well. *State Dep't of Econ. Sec. v. Leonardo*, 200 Ariz. 74, 77, 22 P.3d 513, 516 (Ct. App. 2001). Neither the county school superintendent nor the school district's governing board has the authority, on behalf of the State, to enter into a State-tribal compact that will become the law for the entire State of Arizona. A.R.S. §§ 15-302 (powers of superintendent); 15-341 (powers of governing board). Indeed, when the legislature has authorized Arizona to enter into a compact with a tribe, it has required the signature of the Governor on behalf of the State. *See, e.g.*, A.R.S. §§ 5-601; 15-901; 41-101.02.

B. The Coonsis case.

Defendant Michael Coonsis was an employee of Plaintiff Window Rock USD. [ER 36, ¶ 10.] He filed an employment charge with the Office of Navajo Labor Relations (ONLR) alleging that Window Rock USD violated the NPEA by failing to hire him for two other positions in the district for which he believed he was the most qualified Navajo. [Id., ¶ 11.] The ONLR said it lacked jurisdiction because Defendant Coonsis's charge was untimely. [*Id*., ¶ 12.] Nevertheless, Coonsis filed a complaint with the Navajo Nation Labor Commission. [*Id*., ¶ 13.] Window Rock USD moved to dismiss the case for lack of tribal jurisdiction. [*Id*., ¶ 14.] The NNLC consolidated the Coonsis case with the Reeves case and ordered the evidentiary hearing referred to above. [*Id*., ¶ 15.]

C. The Hale case.

Defendant Clarissa Hale is also a former employee of Plaintiff Window Rock USD (a data technician). [*Id*., ¶ 16.] Hale filed an employment charge with the ONLR alleging that Plaintiff violated the NPEA by failing to hire her for another position in the district for which she believed she was the most qualified Navajo. [*Id*., ¶ 17.] Hale resigned but claimed that the resignation was due to intimidation, harassment and a hostile work environment at Window Rock USD. [ER 37, ¶ 18.]

The ONLR found no probable cause to conclude that Window Rock USD had violated the NPEA. [*Id*., ¶ 19.] But Hale filed a complaint with the NNLC, which Window Rock USD moved to dismiss for lack of jurisdiction. [*Id*., ¶ 20.] The NNLC consolidated the Hale case with the Reeves and Coonsis cases, and ordered the evidentiary hearing described above. [*Id*., ¶ 21.]

D. The Beall case.

Defendant Barbara Beall is a former employee of Plaintiff Pinon USD. [ER 37, ¶ 22.] Pinon USD terminated Beall as a teacher for her continual and repeated failure to comply with school district policies and procedures and for unprofessional conduct. [*Id*., ¶ 24.] Beall unsuccessfully appealed her termination to a hearing officer. After that, under state law, Beall's exclusive remedy for appealing the Board's termination was to file an appeal in Arizona state court. A.R.S. § 15-543(A). But rather than appeal her termination to the superior court, Beall filed an employment charge with the ONLR, alleging that Pinon USD violated the NPEA provision stating that employers may not fire Navajo employees without just cause. Beall claimed that she was terminated without just cause. [*Id*., ¶ 26] The ONLR issued a Notice of Right to Sue letter, indicating that that the Navajo Nation does not have authority over school employees' personnel decisions pursuant to *Yellowhair*, but stating that the NPEA's procedures allow her to proceed to the Navajo Nation Labor

Commission. [ER 38, ¶ 27.] Defendant Beall filed a complaint with the NNLC. [*Id.*, ¶ 28.] Plaintiff Pinon USD moved to dismiss the case for lack of tribal jurisdiction. [*Id.*, ¶ 29.] The NNLC consolidated the Beall case with the Reeves, Coonsis and Hale cases and ordered the evidentiary hearing referred to above. [*Id.*]

E. The Individual Defendants' employment contracts.

The Reeves Defendants' employment contracts state: "The Employee agrees to abide by the applicable laws of the State of Arizona, the policies, rules and regulations now in force and which may be adopted by the State Board of Education and the Board of Education for the District . . . ." [Dkt. #22-1, pp. 2-5; SER 1-5.]

The Coonsis contract states: "The Board and the Employee shall be subject to all applicable conditions, obligations, responsibilities, rights and privileges defined by federal and state laws, rules and regulations and the policies and procedures of the Board." [*Id.*, p. 51; SER 6-8.]

The Hale contract states: "This contract shall be governed exclusively by the laws of the United States and the State of Arizona, and District policies, rules and regulations now in force or as they may be modified. Employee agrees that the Arizona State and federal courts shall exercise exclusive

jurisdiction over any and all matters arising out of this contract." [Dkt. #22-2, p. 2; SER 9-12.]

And the Beall contract states: "This contract shall be governed by the laws of the United States and the State of Arizona, together with District policies, rules, and regulations now in force or as they may be modified. Employee agrees that the Arizona State and federal courts shall exercise exclusive jurisdiction over any and all matters arising out of this contract." [Dkt. #22-2, pp. 20, 22; SER 13-17.]

F. The school districts' leases.

The Pinon lease does not contain any promise to abide by Navajo law. [ER 55-61.]

The Window Rock USD lease provision is set forth in the NNLC's Opening Brief (p. 9). [ER 45, 53.] Notably, the lease states that the district's agreement to abide by Navajo law "shall not forfeit rights which the Lessees and Lessees employees . . . 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." [*Id*.]

SUMMARY OF THE ARGUMENT

The presumption is against tribal jurisdiction over non-members. Defendants had, and continue to have, the burden of overcoming that presumption and demonstrating that tribal court jurisdiction exists. Defendants have not met that burden.

1. The Treaty of 1868 is not a source of tribal jurisdiction. The Treaty protects the Tribes' freedom from either (a) states' attempts to assert broad authority over tribal lands, or (b) states' interference with the tribes' retained power to regulate their own internal and social relations. This case does not involve a state's attempt to assert broad authority over tribal lands, or a state's attempt to interfere with the tribe's internal affairs (which the Supreme Court described as, for example, "enforc[ing] their criminal laws against tribe members," "determin[ing] tribe membership," "regulat[ing] domestic relations among tribe members," or "prescrib[ing] rules for the inheritance of property." *United States v. Wheeler*, 435 U.S. 313, 322 (1978)).

In addition, the Tribe does not have the power to exclude political subdivisions who are constitutionally mandated to perform a governmental function on the reservation. This constitutional mandate derives from Arizona's federal Enabling Act, which required the State to establish and maintain a

system of public schools "which shall be open to all the children of said State, " and which "shall forever remain under the exclusive control of the said State."

Even if the Navajos had a Treaty right to exclude the districts from the reservation, it has been abrogated and waived by the Navajos' agreement to allow state officials on the reservation to enforce the State's compulsory school attendance laws. This agreement presumes that districts are providing school services on the reservation.

The exercise of tribal jurisdiction over Arizona public school districts' employment decisions has also been "withdrawn by implication" as inconsistent with the Tribes' dependent status. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (some aspects of tribal sovereignty are withdrawn "by implication as a necessary result of their dependent status" – in addition to those that might be withdrawn by treaty or statute). Because the federal Enabling Act requires Arizona to provide – and exclusively control – a general and uniform free public education to Navajo children on the reservation, and because the Navajos have accepted that benefit as part of their dependent status, the exercise of tribal jurisdiction over the districts' employment decisions is "withdrawn by implication."

2. The tribe does not have a common law right to exclude the school districts under *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642

F.3d 802 (9th Cir. 2011). *Water Wheel* held that "where the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play," the tribe had the inherent authority to exclude the private non-Indians. *Id*. at 804. That is not this case. This case does not involve the tribe's power to exclude or manage land, and there are competing state interests at play.

Truth be told, by attempting to hale the school districts into tribal court, the *Navajos* are attempting to exercise tribal civil jurisdiction *over non-members* – indeed, not only non-members, but state political subdivisions making employment decisions over their own employees. This the Tribe cannot do. *Montana v. United States*, 450 U.S. 544, 563-65 (1981). In this circumstance, *Nevada v. Hicks* applies: "When . . . state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, ..." 533 U.S. 353, 362 (2001).

3. Tribal jurisdiction is plainly lacking under *Montana*, 450 U.S. at 563-65 (Indian tribes have no inherent sovereign powers over the activities of nonmembers). As Plaintiffs are clearly nonmembers, *Montana*'s general "no jurisdiction" rule applies. Furthermore, neither exception to the *Montana* rule applies. As for the first exception, the existence of leases in this context does not create the kind of consensual relationship *Montana* envisioned. And even if

they did, the Window Rock USD lease in this case stated that the district's agreement to abide by Navajo law would not operate to forfeit the district's federal rights, or affect its rights and obligations as an Arizona public school district under state law. And in any event, the requisite nexus is missing between the leases and the employment decisions at issue here.

There is no colorable jurisdiction under the second *Montana* exception as well. The exception applies only where tribal power is necessary to avert catastrophic consequences. Ruling that school district employees will have to take their employment complaints to state court and follow state law due process procedures will not seriously imperil the tribe's ability to control its internal relations.

4. Based on the foregoing, exhaustion of tribal remedies was not necessary. The facts Defendants wanted to develop were not material to resolving the jurisdictional issue. The key facts are the Indian or non-Indian status of the parties, and the type of decision being made, both of which are undisputed here.

5. Finally, the Navajo Nation Supreme Court conflates the issues. This case does not implicate "tribal-federal" or "tribal-state government to government" dealings. While Plaintiffs agree that it would be beneficial for the State and the Tribe to meet and confer on issues of mutual concern, the State is

not a party to this case, and peacemaking efforts between the State and the Tribe cannot answer the legal question before the Court. All Plaintiffs can do is follow Arizona law in Arizona courts, as all political subdivisions are required to do, and expect not to have to spend the significant time and money relitigating those decisions when claimants sue them in tribal court.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

The districts agree that the standard of review is de novo. [*See* NNLC OB, p. 12.]

II. THE PRESUMPTION IS AGAINST TRIBAL JURISDICTION; AND DEFENDANTS BEAR THE BURDEN OF OVERCOMING THAT PRESUMPTION.

Whether a tribal court has exceeded the lawful limits of its jurisdiction is an issue of federal law. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985). And federal law imposes a presumption *against* tribal jurisdiction over nonmembers. *Plains Commerce Bank v. Long Family Land and Cattle Co*., 554 U.S. 316, 330 (2008). Defendants had, and continue to have, the burden of overcoming that presumption and demonstrating that tribal court jurisdiction exists. *Id*.

The Supreme Court has "never held that a tribal court has jurisdiction over a nonmember defendant." *Nevada v. Hicks*, 533 U.S. 353, 358, n.2 (2001). "This speaks volumes." *Rolling Frito-Lay Sales LP v. Stover*, 2012 WL 252938, *2 (D. Ariz. Jan. 26, 2012). The district court properly determined that Defendants failed to meet their burden of overcoming the presumption against tribal jurisdiction. Exhaustion was not colorable or plausible; in fact, it was plainly lacking as a matter of law.

III. THE TREATY OF 1868 IS NOT A SOURCE OF TRIBAL JURISDICTION

The district court correctly determined that the Treaty of 1868 is not a plausible source of tribal jurisdiction here. The Treaty does state that "no persons except those herein so authorized to do, . . . shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." And the Navajos' power to exclude persons from tribal lands includes the lesser power to "place other conditions on the non-Indian's entry or continued presence on the reservation." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 144 (1982); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 592 (9th Cir. 1984). But for the several reasons set forth below, the Treaty does not give the Navajos the right to exclude the political subdivision school districts from fulfilling their federally authorized and constitutionally mandated obligation to provide a general and uniform system of public education on the reservation at State expense. As such, there is no concomitant right to tribal administrative control over the districts' employment decisions.

A. Defendants read the Treaty too broadly.

Defendants first err in arguing that tribal jurisdiction exists because school districts are not among the "narrow subset of federal officials" the Treaty specifically allows to enter the reservation, thus the Navajos may exclude them. [NNLC OB, pp. 22-23.] The Treaty naturally does not address

Arizona state officials (or political subdivisions), because the Treaty was signed forty years before Arizona even became a state.[6] But the fact that school districts are not listed among the narrow subset of federal officials authorized to enter the reservation is not determinative, because Defendants read the Treaty's import too broadly.

The import of the Treaty is that a state may not assert authority over tribal lands or internal affairs. The NNLC's own case citations make this point. Indeed, all of the NNLC's cited cases [NNLC OB, p. 24] stand for this proposition: the Treaty of 1868 means that tribes are separate sovereigns with the concomitant ability to regulate *their internal affairs*; and states cannot *assert authority over tribal lands* unless Congress has expressly granted that authority. *See*:

1. *Williams v. Lee*, 358 U.S. 217, 221-22 (1959) (Article II of the Treaty of 1868 means that "the internal affairs of the Indians remain[ ] exclusively within the jurisdiction of whatever tribal government existed"; in non-Indian's collection action against Navajos, the exercise of state court jurisdiction over the Navajo defendants "would undermine the authority of the tribal courts over Reservation Affairs");

[6] So the "circumstances surrounding negotiation of the Treaty" would not, as the NNLC argues, inform us about the Navajos' understanding of how the Treaty would affect Arizona school districts. [NNLC OB, p. 25.]

2. *Organized Village of Kake v. Egan*, 369 U.S. 60, 67-68 (1962) ("[I]n *Williams v. Lee*, 358 U.S. 217, 220, 223, we declared that the test of whether a state law could be applied on Indian reservations there was whether the application of that law would interfere with reservation self-government.").

3. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 165, 179 (1973) ("The Williams [v. Lee] test . . . provid[es] that the State could protect its interest up to the point where tribal self-government would be affected."; state could not tax income of Indian who lived and worked on reservation and whose income was earned entirely on reservation: "Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves.").

4. *Equal Employment Opportunity Comm'n v. Peabody W. Coal Co.*, 2012 WL 5034276, *6 (D. Ariz. Oct. 18, 2012) (Indian tribes maintain sovereignty over their members, territory, and internal affairs);

5. *Donovan v. Navajo Forest Products Indus.*, 692 F.2d 709, 712 (10th Cir. 1982) (OSHA does not apply to Indian tribal business owned and operated by Navajo tribe on reservation; "in Article II of the Treaty, United States Government agreed to leave Navajos alone on their reservation to

conduct their own affairs with a minimum of interference from non-Indians, *and then* only by those expressly authorized to enter upon the reservation.") (emphasis in original).[7]

6. *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (landfill site within boundaries of reservation was on land ceded to the United States, thus subject to environmental laws of South Dakota).

These cases establish that the Treaty of 1868 protects the Tribes' freedom from either (a) states' attempts to assert broad authority over tribal lands, or (b) states' interference with the tribes' retained power to regulate their own internal and social relations. This case does not involve a state's attempt to assert broad authority over tribal lands, or a state's attempt to interfere with the tribe's internal affairs (which the Supreme Court described as, for example, "enforc[ing] their criminal laws against tribe members," "determin[ing] tribe membership," "regulat[ing] domestic relations among tribe members," or "prescrib[ing] rules for the inheritance of property." *United States v. Wheeler*, 435 U.S. 313, 322 (1978)). For this reason, the district court correctly held that

[7] The *Donovan* court said that because the employer was a tribal business owned and operated by the tribe on the reservation, for the purpose of employing Navajo people, providing additional income to the tribe, and promoting the advancement of social, economic and educational goals for the Navajos, 692 F.2d at 710, this enterprise constituted the tribe's "conducting its own affairs" – an endeavor with which the United States had agreed in the Treaty not to interfere. *Id*. at 712.

the Treaty is not a source of tribal jurisdiction here.[8] *See also* Op.Atty.Gen. No. I84-125 (stating, in answer to the question whether the NPEA applies to Arizona public school districts located on the Navajo reservation, "There is no authority for the assertion of tribal jurisdiction over the political and governmental functions of the state.") [Appendix pp. 1-3 hereto.][9]

Truth be told, by attempting to hale the school districts into tribal court, the *Navajos* are attempting to exercise tribal civil jurisdiction *over non-members* – indeed, not only non-members, but state political subdivisions making employment decisions over their own employees. This the Tribe cannot do. *Montana v. United States*, 450 U.S. 544, 563-65 (1981) (Indian

---

[8] The district court did not improperly look for "express" Treaty words about school districts in order to authorize tribal jurisdiction, as the NNLC argues. [NNLC OB, p. 30.] Rather, the court agreed with the districts' statement of the Navajos' Treaty rights– i.e., to control their internal affairs, and to protect tribal lands from broad state authority; and then reasoned that the employment decisions at issue here simply do not implicate those Treaty rights. [*See* Order, ER 9.]

[9] The Individuals also misplace reliance on *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969). [Indiv. OB at 16-17.] There, Arizona sought extradition to Oklahoma of a reservation Indian who had committed a felony in Oklahoma. Instead, the Navajo tribal court released him, as Navajo law did not allow extradition to Oklahoma. Arizona then tried to forcibly seize him on the reservation. The court rejected this, stating that "control of the extradition process" has an "essential and intimate" relationship with the right of self-government. *Id*. at 685-86. The case dealt with Article I of the Treaty, not Article II.

tribes have no inherent sovereign powers over the activities of nonmembers).[10] In this circumstance, *Nevada v. Hicks* applies: "When . . . state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, ..." 533 U.S. 353, 362 (2001).

Nevada v. Hicks, 533 U.S. 353, 358, 414 (2001), directs that tribal jurisdiction is not plausible. There, the Court held that no tribal jurisdiction existed over a suit by a tribal member against state game wardens who entered tribal land to search the member's home. Even though the wardens' conduct took place on tribal land, the state's interest in executing process is considerable, and tribal regulation of these state officers is not essential to tribal self-government or internal relations. In fact, the Court held the lack of tribal jurisdiction so plain that the wardens need not have exhausted their tribal

[10] The Supreme Court did not find "in *Montana* itself" that a similar treaty provision allowed the "Nation [to] regulate non-Indians on tribal trust land," as the NNLC argues. [NNLC OB, p. 25.] *Montana* recognized, from that treaty's establishment of a reservation for the Crow tribe, the tribe's "authority to control fishing and hunting on those [reservation] lands" – i.e, its freedom from broad state regulation over its land. *Montana v. U.S.*, 450 U.S. 544, 558-59 (1981). Notably, the Court reiterated that "exercise of tribal power beyond what is necessary to protect *tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes," *id*. at 564, and that "regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations." *Id*. (emphasis added). In any event, any discussion of tribal authority over non-members must be viewed in light of *Nevada v. Hicks*, 533 U.S. at 358-60, 363 (2001), which came after *Montana*.

remedies. *Nevada v. Hicks*, 533 U.S. at 369 ("Since it is clear, as we have discussed, that tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties, adherence to the tribal exhaustion requirement in such cases "would serve no purpose other than delay," and is therefore unnecessary.").

Here, too, though the employment decisions took place on leased land, the state has a considerable interest (indeed a constitutional mandate) to provide a general and uniform public education on the reservation – one that conforms to and is protected by the due process procedures that state law and district policy require.[11] Equally important is the state interest in ensuring that the districts' employment decisions remain effective, binding, and not subject to potentially conflicting tribal court rulings.[12] Supplanting the State's due process system with a process that permits an employee to bypass his

[11] *See* A.R.S. § 15-341(A)(1) (requiring district governing boards to "prescribe and enforce policies and procedures for the governance of the schools, not inconsistent with law or rules prescribed by the state board of education"); A.R.S. §§ 15-539, 15-543 (statutory procedures ensuring that a certificated teacher or administrator subject to dismissal receives sufficient notice and an opportunity to be heard).

[12] *See, e.g., MacArthur San Juan Cnty.*, 497 F.3d 1057, 10660-61 (10th Cir. 2007) (after political subdivision employees were terminated, Navajo district court ordered employees reinstated with backpay; Tenth Circuit subsequently held no tribal jurisdiction).

administrative remedies[13] and avoid the state-imposed burden of proof[14] would seriously infringe upon the State's interest in fulfilling its constitutional mandate to educate all Arizona's children uniformly, in the manner that the Legislature has determined will best achieve that goal. Tribal regulation of these decisions is simply not essential to tribal self-government or internal relations. *See also* Section V.B.3 below.

B. The Tribe does not have the power to exclude political subdivisions constitutionally mandated to perform a governmental function on the reservation.

Another reason the tribe cannot exclude the school districts is that the political subdivision districts are federally directed and constitutionally mandated to enter the reservation to provide a general and uniform education at State expense. The constitutional mandate derives from the federal Enabling Act, Act of June 20, 1910, c. 310, 36 U.S. Stat. 557, 568-579, which authorized creation of the State of Arizona. That federal Act required, as a condition of Arizona's admission to the United States, the State's adoption of a constitution requiring "the establishment and maintenance of a system of public schools

---

[13] *See* A.R.S. § 12-901 (requiring exhaustion of administrative remedies)

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

which shall be open to all the children of said State." Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 570 (emphasis added). [App. p. 5 hereto.] Section 26 of the federal Enabling Act requires "That the schools, colleges, and universities provided for in this Act shall forever remain *under the exclusive control of the said State*" (emphasis added). [App. p. 9 hereto.] The Court need look no further for congressional direction restricting tribal authority here. *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1068 (10th Cir. 2007) (The upshot of Congress's plenary power over the tribes is that it may "enact legislation that both restricts, and in turn, relaxes ... restrictions on tribal sovereign authority.").

Arizona's Constitution, Article XI, fulfills the promise of the Enabling Act. [App. pp. 15-17.] As a matter of federal and constitutional mandate, then, the state must provide and exclusively control a general and uniform system of public education to all children of this state, including those children located on the Navajo reservation. *Meyers v. Bd. of Educ. of the San Juan School District*, 905 F. Supp. 1544, 1555 (D. Utah 1995) (providing an education at a remote facility does not fulfill the obligation to provide a free public education to reservation children equivalent to that received by other students in the district). This mandate to provide a free public education *on the reservation*, coupled with the federal Enabling Act's requirement of "exclusive control" over public

schools, leads to the very conclusion the district court reached: "whatever the outer scope of the Navajo Nation's treaty-based right of exclusion may be, [it is not] expansive enough to grant tribal jurisdiction" over state school districts' employment decisions on the reservation. [ER 9.] *See also Prince v. Bd. of Ed. of Cent. Consol. Indep. Sch. Dist. No. 22*, 88 N.M. 548, 554, 543 P.2d 1176, 1182 (N.M. 1975) (holding that school district could use bond proceeds to build schools on reservation without losing "exclusive control"; "We interpret 'control' [in New Mexico's similar constitution] to mean control over the curriculum, disciplinary control, financial control, administrative control and, in general, control over all of the affairs of the school. The fact that some of the schools to be constructed from the proceeds of the bond issue will be located on Reservation lands leased from the Navajo tribe will not prevent the state from exercising exclusive control over such schools."). Defendants have not cited any authority holding that "exclusive control" means something else, or is ambiguous, as the NNLC argues. [NNLC OB, p. 29.][15]

Notably, the *Prince* court also recognized that state exclusive control over such schools would not impinge on Navajo tribal self-government:

---

[15] Even if Congress's original purpose in selecting those words was to prevent sectarian control over public schools, as the NNLC posits [*Id.*], this would not change the result. The state still must maintain exclusive control over "the curriculum, disciplinary control, financial control, administrative control and, in general, control over all of the affairs of the school."

> We fail to see how Navajo tribal self-government, or the rights granted or reserved by federal law would be in conflict with the state's operation and exclusive control of the schools located on Reservation lands leased by the District with the approval of both the Navajo tribe and the Secretary of the Interior.

Id. at 555, 543 P.2d at 1183.

Finally, the fact that federal law *permits* the tribe to lease its land for educational purposes does not make the case for the tribe's ability to exclude (and thus tribal jurisdiction), as the NNLC argues. [NNLC OB, pp. 34-35.] The tribe has no power to unilaterally terminate such a lease. It must obtain Secretary of the Interior approval to terminate such a lease. *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1073 (9th Cir. 1983). Further, the federal regulations require any such lease to comply with relevant state and federal authority, including any federal court determination that state law must apply in a particular circumstance. 25 C.F.R. §162.014(a).

C. Any right to exclude school districts from the reservation has been abrogated and waived.

Because the tribe has no Treaty-based right to exclude the political subdivision school districts, there is no need to address the NNLC's abrogation argument. [NNLC OB, pp. 26-31.] Likewise, its argument that the district court used the Arizona Constitution and federal Enabling Act to "evade the

Treaty" is in error. [*Id*., p. 26.][16] But Plaintiffs will address the arguments in any event, as they lack substantive merit as well.

Even if the Navajos had a Treaty right to exclude the districts from the reservation, it has been abrogated and waived. In Article VI of the Treaty, the Navajos specifically agreed not only to the federal provision of educational services on the reservation, but also to compel their children to attend school. Treaty of 1868, art. VI, 15 Stat. 667, 669. In Arizona's federal Enabling Act, Congress specified that the State's schools "shall forever remain under the exclusive control of the said State." [App. p. 9.] In 1929, Congress enacted 45 Stat. 1185, chap. 216, authorizing "the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein . . . to enforce compulsory school attendance of Indian pupils, as provided by the law of the State, ..." [App. p. 17 hereto.] That statute was amended in 1946 to require tribal council consent before such entry could occur. 60 Stat. 962.

The Navajo Tribal Council **did** consent. *See* Navajo Tribal Code Title 10, § 503 ("The Navajo Nation Council consents to the application of state

[16] The district court did not use the later-enacted Enabling Act or the Arizona Constitution to "define the meaning of the Treaty itself," as the NNLC argues. [NNLC OB, p. 30.] The court simply disagreed with the NNLC's broad interpretation of the Treaty, and recognized that the employment decisions at issue here do not implicate the Tribe's Treaty rights to control its internal affairs and protect its proprietary interest in its land.

compulsory school attendance laws to the Indians of the Navajo Nation and their enforcement on Indian lands of the Navajo Nation wherever an established public school district lies or extends within the Navajo Nation."). [App. p. 18 hereto.] These provisions establish that any Treaty-based right to exclude that might have existed with respect to Plaintiffs have been abrogated and waived. If state officials can enter the reservation to enforce state compulsory school laws, then there must be state schools on the reservation to provide those services. *See Meyers v. Bd. of Educ. of the San Juan School District*, 905 F. Supp. 1544, 1563, n.21 (D. Utah 1995) ("the federal legislation involved in this case does not preclude but expressly provides for state involvement in Indian education, and the interests of the state, federal and tribal governments involved are identical, namely, the interest in a well-educated citizenry."); *Cnty. of Lewis v. Allen*, 163 F.3d 509, 514 (9th Cir. 1998) ("the Nez Perce Tribe ceded its 'gatekeeping right,' by consenting to and receiving the benefits of state law enforcement protection. The tribe gave up its landowner's right to exclude state officials engaged in law enforcement activities on the reservation. This is a significant alienation of tribal sovereignty and control.").

Defendants err in arguing that the disclaimer in Arizona's Enabling Act (adopted into its constitution) – of "all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribe" – supports

tribal jurisdiction here. [NNLC OB at 26-27; Individuals' OB at 9-10.] This language forever disclaims the state's proprietary interest in Indian land, not its governmental or regulatory authority over that land. *Organized Village of Kake v. Egan*, 369 U.S. 60, 69-70 (1962) ("The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest.").[17] Here the State is not "claiming proprietary rights" to Navajo land or trying to "control [tribal] lands," or even attempting to assert regulatory authority over tribal lands.

D. Tribal sovereignty over school districts' employment decisions is withdrawn by implication.

The foregoing demonstrates yet another reason the Treaty is not a source of tribal jurisdiction here: the exercise of tribal jurisdiction over Arizona public

[17] *Compare* the NNLC's cited cases [NNLC OB, pp. 26-27], most of which confirm the tribe's fishing and/or hunting rights on its land – a right closely connected with a proprietary claim to "right and title to lands held by Indian tribes." *See, e.g., United States v. Dion*, 476 U.S. 734 (1986) (Endangered Species Act constitutes federal abrogation of Indian right to hunt bald and golden eagles on reservation property); *White Mountain Apache Tribe v. State of Ariz., Game and Fish*, 649 F.2d 1274 (9th Cir. 1981) (Indian tribe can prevent state from enforcing state hunting and fishing license requirements against non-Indians on a reservation with the tribe's permission); *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 175, ("this Court has interpreted the Navajo treaty to preclude extension of state law-including state tax law-to Indians on the Navajo Reservation."). *Cf. Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (the state has power to regulate off-reservation fishing by Indians); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 139 (1984) (tribe can maintain suit in state court against engineering firm that designed and built water supply system on reservation).

school districts' employment decisions is "withdrawn by implication" as inconsistent with the Tribes' dependent status. The U.S. Supreme Court recognizes that some aspects of tribal sovereignty are withdrawn "by implication as a necessary result of their dependent status" – in addition to those that might be withdrawn by treaty or statute. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). In fact, those areas in which "such implicit divestiture of sovereignty" have occurred, said the Court, are "those involving the relations between an Indian tribe and nonmembers of the tribe." *Id*. at 326. *See also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) ("the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.'") Because the federal Enabling Act requires Arizona to provide – and exclusively control – a general and uniform free public education to Navajo children on the reservation, and because the Navajos have accepted that benefit as part of their dependent status, the exercise of tribal jurisdiction over the districts' employment decisions is "withdrawn by implication."

For the foregoing reasons, the Treaty of 1868 is not a source of tribal jurisdiction here.

IV. THE *WATER WHEEL* "INHERENT AUTHORITY" PRECEPT DOES NOT APPLY

Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802 (9th Cir. 2011), does not support the argument that the tribe has a common law right to exclude the school districts. [NNLC OB, pp. 31-36.] *Water Wheel* focused on a tribe's inherent authority to exclude from tribal land a private non-Indian person/company whose private, consensual relationship with the tribe had gone sour. 642 F. 3d at 804. The Court held that under those circumstances, "where the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play," the tribe had the inherent authority to exclude the private non-Indians. *Id*. Indeed, the case involved the tribe's attempt to physically evict non-Indians from its land, after the non-Indians allegedly breached their lease with the tribe and were therefore trespassing on tribal land, operating a business without either paying rent or sharing profits. *Id*. at 804. Thus, the tribe's status as landowner played a vitally important role in the jurisdictional outcome. *Id*. at 807, 811, 812, n.7, 814, 818-19. *See also* NNLC's other cited case, *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc*., 715 F.3d 1196, 1204 (9th Cir. 2013) ("We must once again address the subject of tribal court

jurisdiction over disputes arising when non-Indians choose to do business in Indian country.")[18]

The tribe's status as landowner does not play a vital role in this case, and Defendants fail to adequately explain why it does. [NNLC OB, p. 32.][19] This case has nothing to do with a tribe's attempt to evict from tribal land a non-Indian who is allegedly privately profiting from conducting business there. Furthermore, the *Water Wheel* court specifically acknowledged an exception to the "inherent authority to exclude" precept which would apply here – that is, the *Nevada v. Hicks* situation where the state has a "considerable interest" in coming onto tribal land, and where land ownership is not dispositive. 642 F.3d

---

[18] "The dispute arose out of an agreement related to the development, operations, and management of the Skywalk, an asset located in Indian country." *Id*. at 1205.

[19] The NNLC argues there is a nexus between the lease and employment decisions because the lease "anticipates(s) operation of schools, and therefore requir[es] employees." [NNLC OB, p. 38, n.9.] This is not a nexus because the employment decisions still have nothing to do with the lease. Furthermore, the NNLC and the Individual Defendants are strangers to the lease. *See Strate v. A-1 Contractors, 520 U.S. 438* (1997) (no tribal jurisdiction; issue in lawsuit did not arise out of one party's subcontract with tribe); *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc*., 569 F.3d 932, 942 (9th Cir. 2009) (no tribal jurisdiction where "there is no nexus between these contacts and the activity giving rise to this lawsuit"). So even if the districts' leases constituted a consensual relationship, tribal jurisdiction would still be lacking over the districts' employment decisions. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001) ("A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another—it is not "in for a penny, in for a Pound.").

at 809.[20] Here, of course, the school districts have not only a considerable interest in coming onto tribal land, they also have a constitutional mandate to do so at State expense.[21] And land ownership is not dispositive of the employment claims at issue; it is not even relevant. If *Water Wheel*'s analysis applies,[22] then

---

[20] *Water Wheel* did not limit the *Nevada v. Hicks* exception to "the exact situation" in that case, as the NNLC posits. [NNLC OB, p. 32.] *Water Wheel* said the *Nevada v. Hicks* exception applies "when the specific *concerns* at issue in that case exist." 642 F.3d at 813 (emphasis added). Those concerns were that "state officers [were] enforcing state law" on the reservation. *Water Wheel*, 642 F.3d at 813; *Nevada v. Hicks*, 533 U.S. at 358, n.2 ("Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law."). That is similar to the concern here – political subdivisions enforcing the mandatory application of state law to their employment decisions.

Nor did *Nevada v. Hicks* rest its holding on the fact that the officers' entry was "brief and for a specific purpose." [NNLC OB, p. 32; NNSC amicus, pp. 10, 23.] The Court found tribal jurisdiction plainly lacking because the tribe's ownership of the land at issue was simply not "dispositive in the present case, when weighed against the State's interest in pursuing off-reservation violations of its laws." 533 U.S. at 370.

[21] The Navajos have in fact sued to make sure they obtain the benefit of this constitutional mandate. *Meyers v. Bd. of Educ*., 905 F. Supp. 1544, 1551-56 (D. Utah 1995).

[22] One federal district court has held that *Water Wheel*'s analysis cannot be squared with the U.S. Supreme Court's post-*Montana* decisions, which **reject** the idea that *Montana* applies only to non-Indian fee land within a reservation. *Rolling Frito-Lay Sales LP v. Stover*, 2012 WL 252938, *3 (D. Ariz. Jan. 26, 2012) (applying *Montana* to find no plausible jurisdiction over non-Indian's claim against non-Indian company for slip and fall on tribal property; "To the extent that the *per curiam* opinion in *Water Wheel* departs from Supreme Court jurisprudence in the area of Federal Indian Law, we are constrained by the Supremacy Clause, Art. VI, and Article III ('one supreme Court') to follow the Supreme Court."). *See Hicks*, 533 U.S. at 360 ("*Montana*

this case falls within the *Nevada v. Hicks*-type exception. Here, where the state interest is compelling and land ownership not relevant, the tribe does not have the inherent power to exclude the school districts as it would a private person trespassing on tribal land for private gain. Jurisdiction is plainly lacking under *Water Wheel*.

V. TRIBAL JURISDICTION IS PLAINLY LACKING UNDER THE *MONTANA* TEST.

Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States*, 450 U.S. 544 (1981). *Nevada v. Hicks*, 533 U.S. 353, 358 (2001). *Montana*'s general rule is that Indian tribes have no inherent sovereign powers over the activities of nonmembers like Plaintiffs. *Montana*, 450 U.S. at 563-65. And as Plaintiffs are clearly nonmembers, *Montana*'s general "no jurisdiction" rule applies.[23] Therefore, to

---

applies to both Indian and non-Indian land"); *see also id*. at 388 (O'Connor, J., concurring in part) ("[T]he majority is quite right that *Montana* should govern our analysis of a tribe's civil jurisdiction over nonmembers both on and off tribal land."); *and id.* at 381 (Souter, J., concurring) ("After *Strate*, it is undeniable that a tribe's remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted.").

[23] The NNLC errs in suggesting that the Plaintiff school districts might actually be tribal members because their board members and employees are largely Navajo. [NNLC OB at 20.] While such an analysis might apply to private companies, *see, e.g.*, *Smith v. Salish Kootenai Coll*., 434 F.3d 1127, 1134 (9th Cir. 2006), it has no application to state political subdivisions, which

show "plausible" jurisdiction, Defendants bear the burden of demonstrating that one of the two exceptions to *Montana*'s general rule applies. *Id*. at 564-67.

A. There is no colorable jurisdiction under the first *Montana* exception.

1. The existence of leases in this context does not create the kind of consensual relationship *Montana* envisioned.

Under *Montana*'s first exception, a tribe may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 564. The district court below reiterated its ruling in *Yellowhair* (which Defendants did not appeal) that regardless of any leases or employment contracts, Arizona school districts' presence on tribal property is simply not the kind of consensual relationship that falls within *Montana*'s first

---

are clearly not tribal members. The NNLC's citation to *MacArthur* on this point is unavailing. [*Id*.] There, the plaintiff Indians went to district court trying to *enforce* a tribal injunction against specified individuals, one of whom was a tribal member. Even though the individual was a tribal member, the Court found it unclear whether the tribal court had jurisdiction over the member defendant, given that he was acting "exclusively in his capacity as a state official." *MacArthur*, 497 F.3d at 1070. But the Court nevertheless refused to enforce the injunction against him, in part because "the lawsuit against Mr. Atcitty stems completely from his status as a government employee of the State of Utah. Thus, the same considerations which lead us to conclude that the tribes do not possess jurisdiction over States qua States on state land lead us to conclude that enforcement against Mr. Atcitty should be refused." 497 F. 3d at 1075-76. We have no individual member plaintiffs in this case.

exception. *Red Mesa Unified School Dist. v. Yellowhair*, 2010 WL 3855183 (D. Ariz. Sept. 28, 2010).

The district court was correct. School districts are not "like [every] other lessee." [NNLC OB, p. 37.] *See Nevada v. Hicks*, 533 U.S. 353, 372 (2001) ("The [*Montana*] Court ... obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into."); *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1074 (10th Cir. 2007) ("The employment relationships at issue were entered into exclusively in SJHSD's governmental capacity, and those relationships were part and parcel of SJHSD's duty to provide medical services to residents . . . . [T]he employment relationships between SJHSD and Mr. Riggs and Mr. Dickson were not "private consensual relationships" in any sense of the term and do not fall within the first Montana exception.").

2. The leases themselves are not plausible sources of tribal jurisdiction.

Even if the leases were part of the equation, which they are not, their language does not justify tribal court jurisdiction, as the NNLC asserts. [NNLC OB, pp. 39-40.] The Pinon lease does not even contain a promise to abide by Navajo law. [ER 55-61.] And the Window Rock lease states that the district's

agreement to abide by Navajo law shall not operate to forfeit the district's federal rights, nor affect its rights and obligations as an Arizona public school district under state law. [ER 45, 53.] The school district's non-forfeited federal rights include the right to enter the reservation to enforce compulsory education and to "exclusively control" its schools. Its unaffected state obligations are to provide a public school system that is "general and uniform," (i.e., "on" the reservation), and to abide by Arizona statutory procedures for making and reviewing employment decisions. And its unaffected state rights include (a) enjoying the protections of the state's due process procedures; (b) having its employees exhaust their state law administrative remedies, and (c) having the burden of proof placed on the employee on appeal, not the employer.[24] The exercise of tribal jurisdiction and application of Navajo law would do more than affect these rights and obligations – it would obliterate them. In addition, as the district court correctly noted, school districts cannot discriminate in favor of Navajos and against other Indians in their employment decisions without violating Title VII. *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998) (general Indian preference policies

[24] The NNLC incorrectly characterizes these rights and obligations as one unspecified right "to exclusive adjudication of all employment claims under Arizona state law" [NNLC OB, p. 41], and suggests conclusorily that words like "affect," "right," "obligation" and "applicable Arizona law" are unclear. [*Id.*, p. 42.]

were not intended to allow distinctions among different tribes; discrimination on the basis of tribal affiliation can give rise to a national origin claim under Title VII).

3. The leases have no nexus to the employment decisions.

Even if the leases created the kind of consensual relationship *Montana* envisioned, tribal jurisdiction is still lacking because there is no nexus between the leases and the employment decisions at issue here. *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc*., 569 F.3d 932, 942 (9th Cir. 2009) (no tribal jurisdiction where there is no nexus between contracts and activity giving rise to lawsuit). *See* argument *supra*, pp. 32-33 and n.18.

In fact, if the Court wanted to look at contractual provisions (which Plaintiffs believe is unnecessary, as the court recognized in *Yellowhair*), all of the Individual Defendants in their employment contracts agreed to be governed by Arizona law; and some agreed to the state court's exclusive jurisdiction over employment contract matters. If any contract has a connection to the employment decisions at issue, it would be these Individuals' employment contracts, not the school districts' leases.[25]

[25] And because words are sacred in Navajo culture [NNSC amicus, p. 9], the Individual Defendants should have abided by these words in their employment contracts.

B. There is no colorable jurisdiction under the second *Montana* exception.

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

Under *Montana*'s second exception, a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. The second exception envisions situations where the conduct of the nonmember poses a direct threat to tribal sovereignty. *Philip Morris USA, Inc. v. King Mountain Tobacco Co*., 569 F.3d 932, 943 (9th Cir. 2009). The exception does not broadly permit the exercise of civil authority wherever it might be considered necessary to self-government. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 n.12 (2001). Indeed, to fall under this exception, "tribal power must be necessary to avert catastrophic consequences." *Plains Commerce Bank*, 554 U.S. at 341.

This test is not vague, as the NNLC argues. [NNLC OB, p. 43.] In *Strate v. A-I Contractors*, 520 U.S. 438, 459 (1997), the Court explained that the second *Montana* exception applies to these types of issues: "'Indian tribes retain their inherent power to [punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe

rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations.'" This Circuit also recognizes the importance of land to a tribe: "Whether tribal courts may exercise jurisdiction over a nonmember defendant may turn on how the claims are related to tribal lands." *See Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848, 849-50 (9th Cir. 2009) (finding plausible tribal jurisdiction over tribe's suit against individual who set Chedeski forest fire); *Rogers-Dial v. Rincon Band of Luiseno Indians*, 2011 WL 2619232, *7 (S.D. Cal. July 1, 2011) (finding tribal jurisdiction plausible where evidence showed Plaintiffs' conduct threatened tribe's groundwater resources); *Donius v. Mazzetti*, 2010 WL 3768363, *5 (S.D. Cal. Sept. 21, 2010) (finding tribal jurisdiction plausible where conduct on Plaintiff's property posed inherent threats to the Tribe's sole water source for its water system and member groundwater wells).

On the other hand, tribal jurisdiction is not plausible under *Montana*'s second exception where the nonmembers enter tribal land for an important state purpose that does not affect tribal self-government and where land ownership is not particularly relevant to the issue, *see Nevada v. Hicks*, 533 U.S. 353, 358, 414 (2001), or where the conduct at issue is the employment decisions of a state or political subdivision over its employees when conducting its sovereign

duties. *State of Montana Dep't of Transp. v. King*, 191 F.3d 1108, 1114-15 (9th Cir. 1999) (no colorable tribal jurisdiction to regulate State's employment practices in performing construction work on a state highway crossing the reservation; State's activity on highway was within the "scope of the purpose of the right of way as well as the State's sovereign duty."); *MacArthur v. San Juan County*, 497 F.3d 1057, 1074-75 (10th Cir. 2007) (no plausible tribal jurisdiction over Utah political subdivision's employment decisions as to tribal members; relationships were part and parcel of District's duty to provide medical services to residents of San Juan County; "While the Navajo Nation undoubtedly has an interest in regulating employment relationships between its members and non-Indian employers on the reservation, that interest is not so substantial in this case as to affect the Nation's right to make its own laws and be governed by them.").[26]

2. Defendants have not met their burden of showing colorable jurisdiction.

Based on the foregoing, the district court correctly found tribal jurisdiction not colorable – and indeed plainly lacking – under *Montana*'s

[26] While it is true that the activities in *MacArthur* occurred on fee land within the reservation, the court did not find this point compelling. 497 F.3d at 1069 ("The notion that Montana's applicability turns, in part, on whether the regulated activity took place on non-Indian land was finally put to rest in *Hicks*."). *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border.").

second exception. The school districts' employment decisions over their employees (who may avail themselves of state law due process procedures) do not impinge on tribal land, do not involve a trespass or destruction of natural resources, and do not strike at the heart of tribal self-governance. Ruling that the tribe lacks jurisdiction over the school districts' employment decisions will not seriously imperil the tribe's ability to control its internal relations. *See King*, 191 F.3d at 1114 ("The Community's assertion of authority over the State's own employees goes beyond the "internal functioning of the tribe and its sovereignty" and instead impinges on one of the State of Montana's sovereign responsibilities—maintaining Highway 66 and the right of way at its own expense."). In *King*, this Court held there was no tribal jurisdiction under the second *Montana* exception, even though "poverty stalks the reservation," seventy percent of the tribe's members were unemployed, and the high levels of unemployment on the reservation harmed the tribe. *Id*. at 1111, 1114. Because the tribe had consented to the right of way so the state could construct the public highway at its own expense, the imposition of the ordinance impinged on one of the state's sovereign responsibilities – maintaining the public highway. *Id*. at 1114.

This situation is similar. Though it does not involve a property transfer or a right of way, the tribe not only consented to the State providing schools on

the reservation at State expense, but the Navajos (and the federal Enabling Act and Arizona Constitution) have required the provision of those schools. Under these circumstances, tribal regulatory and adjudicatory goes far beyond the tribe's internal functioning and sovereignty concerns. *See also Glacier County School District No. 50 v. Galbreath*, 47 F. Supp. 2d 1167, 1169 (D. Mont. 1997) (school expelled Indian student; student sought tribal court order compelling his readmission and tribal court held it had jurisdiction; school sought injunctive relief in federal district court; district court held that second *Montana* exception did not justify the exercise of tribal authority over the school district's administration and operation). The *Galbreath* court reasoned:

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

> **contrary, necessary to protect tribal self government**.

Id. at 1171-72 (emphasis added); *Meyers v. Bd. of Educ. of the San Juan Sch. Dist*., 950 F. Supp. 1544, 1563 (D. Utah 1995) ("The provision of such services does not impose any 'additional burden' on those on the reservation but benefits them. It does not interfere with but is in accordance with federal policy, which is to see that Indians receive proper education. And it is justified by the benefits the state receives from a better-educated populace.").[27] The same is true here, especially with respect to Defendants Ann and Kevin Reeves, who are not even members of the Navajo Nation.[28]

---

[27] *Meyers* thus stands for the precept that states with Enabling Acts like Arizona's (and Utah's) are constitutionally mandated to provide schools on the reservations. Nowhere does the opinion state that "the Navajo Nation must first consent in order for the State to be held to its mandate." [NNSC amicus, p. 9.] To the contrary, the court said: "While these limitations on the District's powers [its inability to condemn property, to appropriate water, etc. on the reservation] may affect the scope of the District's duty and may require the cooperation of the Navajo Nation and the United States in providing educational services to Navajo children living on the reservation, they do not excuse altogether the District's constitutional obligation to provide a system of public schools open to all the children of the District, including the children of Navajo Mountain." *Meyers*, 905 F. Supp. at 1558. Acknowledging that the Navajos must cooperate to provide water and land for their schools does not turn into a holding that the districts cannot fulfill their constitutional mandate unless the tribe consents.

[28] Contrary to the NNLC's assertion [NNLC OB, p. 18], many other cases have found no plausible tribal jurisdiction where the conduct at issue could not have any significant impact on tribal sovereignty. *See, e.g., Philip Morris, USA v. King Mountain Tobacco Co*., 569 F.3d 932, 943 (9th Cir. 2007)

3. Tribal jurisdiction would impinge on important state interests both on and off the reservation.

As is noted in Section III.A above, when "state interests outside the reservation are implicated, States may regulate the activities even of tribal members on tribal land." *Hicks,* 533 U.S. at 362. The precept applies with force here. Indeed, the "[e]ducation of its citizenry" is one of the State's most important functions. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351, 35 P3d 105, 112 (Ct. App. 2001).

(no colorable tribal jurisdiction over Philip Morris's trademark infringement claims against Indian company selling similar cigarettes; "Pursuit of federal and state trademark claims hardly poses a [direct threat to tribal sovereignty]."); *Boxx v. Long Warrior*, 265 F.3d 771 (9th Cir. 2001) (holding exhaustion not necessary, tribal jurisdiction under second exception not plausible over members' tort action arising from accident on fee land within reservation); *Burlington N. R. Co. v. Red Wolf*, 196 F.3d 1059, 1066 (9th Cir. 1999) ("Because tribal courts plainly do not have jurisdiction over this controversy pursuant to *Montana* and *Strate*, the Railroad was not required to exhaust its tribal remedies before proceeding in federal court); *Rolling Frito-Lay Sales LP v. Stover*, 2012 WL 252938 (D. Ariz. Jan. 26, 2012) (holding tribal jurisdiction not colorable over non-Indian's slip and fall claim against non-Indian owner of store on tribal property); *Chiwewe v. Burlington N. and Santa Fe Ry Co*., 239 F. Supp. 2d 1213 (D. N.M. 2001) (holding exhaustion not required; tribal jurisdiction under second exception not plausible over Indians' claim against railway for wrongful death on railway right of way). *See also Dolgencorp Inc. v. Miss. Band of Choctaw Indians*, 846 F. Supp. 2d 646 (S.D. Miss. 2011) (no tribal jurisdiction under *Montana*'s second exception; non-member's alleged molestation of Indian boy at store on tribal property did not "'imperil the subsistence' of the tribal community" and tribal jurisdiction thus was not necessary to avert catastrophic consequences).

The Plaintiff school districts simply want to be able to make employment decisions over their employees pursuant to state law, as they are required to do, without having those decisions second-guessed, re-litigated, or undone in tribal court. But the NNLC advocates otherwise, suggesting that we should allow a school district employee to "elect" whether to use the state-mandated system of adjudicating employment disputes (implying that the employee also can elect *not* to use that system); and/or allow an employee who lost in state court to re-litigate that decision in tribal court; and then let the tribal court decide whether or not to apply principles of res judicata. [NNLC OB, p. 28.][29]

The suggestion is untenable. Neither school districts nor their employees can elect an appeal process other than that mandated by state statute; and school districts must give employees, and are entitled to the protections of, the due process for which the legislature provided by statute. *Godbey v. Roosevelt School District No. 66*, 131 Ariz. 13, 638 P.2d 235 (Ct. App. 1981) (school has only those powers specifically or impliedly granted it by statute). Furthermore, the Constitution mandates uniformity in the state's public education system. Allowing only those employees located on the Navajo reservation to avoid that state statutory process destroys the requisite uniformity. Further, it would

[29] The NNSC complains about spending its limited resources "defending its governmental authority over and over again." [NNSC amicus, p. 20.] The Plaintiff school districts agree that they should not have to do so, either.

seriously disrupt the districts' ability to carry out their constitutionally mandated duty if the NNLC were to order districts on the reservations to re-hire employees previously terminated in accordance with Arizona law, on the ground that the NNLC disagrees with the just cause determination or because the NPEA requires employers to give employment preference to Navajos. Not only would this create disorder in the process, but it would unfairly subject the districts to potential liability if, after being re-hired, the employee again engages in negligent or more culpable conduct in the course and scope of his employment. District liability in such cases can be vicarious,[30] or direct based on a claim that the district negligently hired, re-hired, and/or retained the employee, knowing of the employee's propensity to act improperly. A.R.S. § 12-820.05(B).[31] The district could be responsible for defending such claims and paying any judgment awarded to a claimant even though it was not the school district's choice to re-hire the employee. Contrary to the NNLC's argument, then, there clearly are competing state interests at play here. [NNLC

[30] *See, e.g., Doe v. Gilbert Unified School Dist*., 200 Ariz. 174, 24 P.3d 1269 (2001) (parents sued District and State for alleged molestation of son by teacher); *Nolde v. Frankie*, 192 Ariz. 276, 279, ¶8, 964 P.2d 477 (1998) (former students sued school district for alleged molestation by coach).

[31] "A public entity is not liable for losses that arise out of and are directly attributable to an act or omission determined by a court to be a criminal felony by a public employee unless the public entity knew of the public employee's propensity for that action. . . ."

OB, p. 33.] For the same reasons, the NNLC's suggestion of "concurrent jurisdiction" is also not plausible. [NNLC OB, p. 28; NNSC amicus, p. 22.] This is tantamount to ruling that Defendants have overcome the presumption against tribal jurisdiction, which they have not. Tribal jurisdiction either exists or it does not.

Defendants' "parade of horribles" argument also lacks merit. [NNLC OB, pp. 31, 38, 40; NNSC amicus, pp. 2-3, 18-20.] The district court has ruled that tribal jurisdiction is lacking over these school districts' employment decisions. It has not ruled, as the NNLC suggests, that school districts are "entirely free from any form of Navajo Nation authority," or that "a state actor can never consent to an Indian nation's jurisdiction" [NNSC amicus, p. 2]; nor has it "gut[ted] the Nation's right to exclude." [*Id*., p. 24.] It did not rule that the tribe is divested of its authority "over the education of their children." [NNSC amicus, pp. 3, 19-20.] It did not rule that the Navajos have no control over the content of the courses that Navajo children are taught. [NNSC amicus, pp. 18-19.] This case is not about "the inherent right of Tribes to govern the educational welfare of their children within their own territory." [*Id*., p. 20.] Indeed, the outcome would be different if there were ever a case involving an impingement on the Navajos' right of self-government or their right to protect their land ownership. *Nevada v. Hicks*, 533 U.S. 353, 372 (2001) ("Whether

contractual relations between State and tribe can expressly or impliedly confer tribal regulatory jurisdiction over nonmembers-and whether such conferral can be effective to confer adjudicative jurisdiction as well-are questions that may arise in another case, but are not at issue here.").

Finally, *Nevada v. Hicks* also disposes of the NNLC's argument [NNLC OB, p. 34] that affirmance will allow "all persons acting under color of state law to be free of the Nation's jurisdiction."

> We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis. Moreover, even where the issue is whether the officer has acted unlawfully in the performance of his duties, the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- and state-law rights.

Nevada v. Hicks, supra at 373. Tribal jurisdiction is lacking under *Montana*'s second exception.

VI. EXHAUSTION OF TRIBAL REMEDIES WAS NOT REQUIRED

The district court correctly ruled that the districts need not exhaust their tribal remedies before filing this lawsuit. Exhaustion of tribal court remedies is not required "when it is 'plain' that tribal court jurisdiction is lacking, so that the exhaustion requirement 'would serve no purpose other than delay.'" *Elliott*

v. White Mountain Apache Tribal Court, 566 F.3d 842, 847 (9th Cir. 2009) (quoting *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)). When it is plain that a tribal court lacks jurisdiction, "the otherwise applicable exhaustion requirement must give way." *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997). That was exactly the case here. As is shown above, tribal jurisdiction was clearly lacking – under the Treaty of 1868, the precept of inherent sovereignty, and the *Montana* test.

The record needed no additional developing, as Defendants argue. [NNLC OB at 16-21, 43-44; Individuals' OB at 5-7.] The Court does not need a factual record on "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 . . . and the fact-intensive exceptions to *Montana* . . . ." [NNLC OB, p. 17; Individuals OB, pp. 6-7.] The former are all legal issues, not factual ones; and courts have frequently found exhaustion unnecessary in cases assessing the *Montana* exceptions. *See* n. 25, *supra*. Further, the facts Defendants say should have been developed in tribal court are not relevant to the jurisdictional issue. For example, the NNLC suggests we need a factual record on:

> 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. . . . Additionally, there are not facts on the members of the districts' boards.

[NNLC OB, p. 20.][32] The NNLC does not explain, however, why these facts make any difference to the analysis. It is undisputed that school districts are Arizona political subdivisions. Why does it matter how they "are organized" or how "they were established on the Nation"? What is the relevance of federal funding? It is undisputed that, as a legal matter, they are political subdivisions constitutionally mandated to provide a free public education on the reservation. That relationship either is, or is not, a consensual relationship. It either does, or does not, affect the Navajos' ability to govern its internal relations.

The circumstances of the leases are also not relevant, as the district court determined in *Yellowhair*. Neither the individuals' employment contracts nor the leases establish tribal jurisdiction under *Montana*'s first exception; because as is argued above, the dispositive factor is that the districts are not private

[32] Neither set of defendants attempts to justify the NNLC's order seeking evidence on "whether the lease between the Navajo Nation and the school districts constituted a government to government compact between the two sovereigns." [ER 66.] This is understandable. *See* n. 5, *supra*.

actors. They are on the reservation making employment decisions over their own employees while providing constitutionally mandated governmental services.

Finally, the cultural or ethnic makeup of the governing boards, the student population, and the employee population are not relevant. The district court assumed the boards, the students, and the employees were mainly Navajo. Given that assumption, whether tribal jurisdiction over employment decisions is necessary to avert catastrophic consequences is an issue of law, not fact. And it is an issue of law whose resolution does not – indeed cannot – turn on the demographics of the school district, the student population, or the school board, as the NNLC suggests. [NNLC OB at 20.] Jurisdiction is not a flighty, case-by-case issue that might exist if one particular district's school board, students or teachers are mainly Navajo, but might not exist if another Arizona school district employs a number of non-Indian teachers or administrators. The key facts are the Indian or non-Indian status of the parties, and the type of decision being made – not district's demographics.

A state political subdivision's decision to terminate or not promote an employee (who might or might not be Navajo, as this case demonstrates), or to not pay 301 money, done in compliance with state law – under the same procedures applied to every other school district in the State, and giving the

employees the same full measure of due process rights enjoyed by every other school district employee in the State – simply does not strike at the heart of tribal self-governance. It strikes at the districts' ability to fulfill the federal Enabling Act's command to have "exclusive control" over public schools and their constitutional mandate to provide a general and uniform public school system in accordance with state law to all citizens.

Defendants cite cases vastly different from this one, in which the development of a factual record on *Montana*'s second exception *was* appropriate. *See, e.g., Rincon Mushroom Corp. v. Mazzetti*, 490 F. App'x 11, 13 (9th Cir. 2012) (tribe offered four declarations explaining how activities on Rincon Mushroom's property could contaminate the tribe's sole water source and increase the risk of forest fires that could jeopardize its casino (its principal economic investment)); *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 774 (9th Cir. 2003) (issue was validity of tribal tax on value of railroad property; plaintiff railroad ran an average of 26 trains per day through the reservation; development of factual record appropriate to show whether use of right-of-way threatened serious harm

to tribe due to derailment incidents, fires and accidents with attendant property damage and sometimes fatalities).[33]

The NNLC also misplaces reliance on *City of Wolf Point v. Mail*, 2011 WL 2117270 (D. Mont. 2011), and *Ford Motor Co. v. Todecheene*, 488 F.3d 1215 (9th Cir. 2007), in arguing that a factual record needs to be developed. [NNLC OB, pp. 16-18, 44.] In *Wolf Point*, the parties' tribal status was disputed, and it was unclear where the conduct took place. *Id*. at *2. We do not have such uncertainties here.

In *Todecheene*, which involved the death of a Navajo law enforcement officer on a tribal road, the cause of death was unclear. Ford asserted that Todecheene was not wearing a seatbelt, and the Todecheenes believed the vehicle was defective. They filed a product liability lawsuit in tribal court, which found jurisdiction under *Montana*'s first exception – based on the consensual relationship between the manufacturer and the tribe through vehicle lease-sale contracts and advertising targeted toward tribal residents. After Ford sued in federal court, this Court ultimately held, without extended reasoning,

[33] As concurring Judge Gould noted, "if the trains crossing a tribe's reservation carry toxic or dangerous chemicals, nuclear waste, biological dangers, or other threats to the reservation, then the tribe has a right to know what company it keeps, and then to assess whether any taxing strategy could fairly cover the tribe's protective costs." *Id*. at 776. This case does not involve any similar concerns.

that exhaustion was required. Its case citation suggests that tribal jurisdiction was plausible under *Montana*'s first (not second) exception. *Ford Motor Co. v. Todecheene*, 394 F.3d 1170 (9th Cir. 2005), *withdrawn*, 474 F.3d 1196 (9th Cir. 2007).

In truth, while the Court should analyze the districts' specific alleged conduct, *Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 938 (8th Cir. 2010), that alleged conduct is undisputed here and shows tribal jurisdiction plainly lacking as a matter of law.[34]

---

[34] The Individual Defendants' argument that the Navajos are suffering from rampant unemployment, and that the NPEA was designed to ameliorate this problem, does not change the analysis. [Indiv. OB at 5-6.] *Montana*'s second exception is interpreted much more narrowly to require that the conduct at issue directly threatens and is catastrophic to tribal self-government. *Philip Morris USA, Inc. v. King Mountain Tobacco Co*., 569 F.3d 932, 943 (9th Cir. 2009); *Montana Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999). The exception does not broadly permit the exercise of civil authority wherever it might be considered necessary to self-government. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 n.12 (2001). Indeed, under the Claimants' analysis, the second exception would swallow the rule because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe. "The exception was not meant to be read so broadly." *County of Lewis v. Allen*, 163 F.3d 509, 515-16 (9th Cir. 1998) ("The exception must be read to 'sufficiently protect Indian tribes while at the same time avoiding undue interference with state sovereignty.'"). Equally unavailing is the Claimants' (unsupported) assertion that the Navajo Claimants "derive their income wholly from reservation sources." [Dkt. #34, p. 8.] While a hopeful District employee could certainly derive his or her income from reservation sources, this case does not implicate *those* sources. District

VII. RESPONSE TO THE NAVAJO SUPREME COURT'S AMICUS

With all due respect, the Navajo Nation Supreme Court's amicus brief conflates many concepts.

First, this case does not implicate "tribal-federal" or "tribal-state government to government" dealings. [NNSC amicus, p. 1, 16.] The Plaintiff school districts are not "primary special purpose governments" or "autonomous primary governments" [*Id*., pp. 3, 10-12]; and the Locally Controlled School Act, A.R.S. §§ 15-321 to -354, does not turn them into sovereigns for any purpose. Plaintiffs are Arizona state political subdivisions, bound to follow Arizona law, and have only those powers granted to them by the legislature. *See* A.R.S. § 15-341(A). Those powers include the ability to enter into a lease for a school building. A.R.S. § 15-342(9), (25). Those powers do *not* include the power to waive state jurisdiction. *Id*.

Second, the school districts are not "federally-funded to fulfill the education responsibility" of the federal government. [NNSC amicus, pp. 3, 5, 6.] The State receives federal Impact Aid solely to make up for the loss of property taxes the State incurs when the federal government occupies land for which it does not pay property tax – tax money the State would have used to

---

employees – which this case is about – derive their income from the political subdivision districts.

fund its education activities. In other words, Federal Impact Aid money is a substitute for the state property taxes the federal government does not pay. The State receives Impact Aid not just for the Indian reservations which are under federal control, but also for property like national parks and military bases. *See, e.g.*, 20 U.S.C.A. §§ 7701, 7703. This Aid has nothing to do with the federal government's statutory or trust responsibilities to the tribes. By accepting Impact Aid, the school districts are basically collecting property taxes. They are not "step[ping] into the shoes of the Federal Government" for purposes of this case. [NNSC amicus, p. 6.]

Third, the waiver provision in the Navajo Nation Code is of no moment. [NNSC amicus, pp. 12-13.] If there is no tribal jurisdiction over school districts' employment decisions, as Plaintiffs maintain, then it does not advance the jurisdictional argument to ask why the districts did not use Navajo law's waiver provision for these Individual Defendants. [NNSC amicus, pp. 13, 15.] This is not non-cooperation, as the NNSC asserts. [*Id.*, p. 15.] It is a function of the fact that Arizona school districts must act like Arizona school districts and follow Arizona law.[35] The fact that districts need not, but sometimes do go

[35] It is doubtful that any school district in this State could, consistent with Arizona law, apply a generally applicable state statute to one employee but vote not to do so for another. Furthermore, the waiver provision does not broadly apply to the NPEA; it is limited and applies only to "individual

through the motions of voting to use the waiver, does not say anything about, let alone establish, tribal jurisdiction.

Fourth, the NNSC's Sequester argument is inappropriate here. [NNSC amicus, pp. 15-16.] The NNSC seems to be suggesting that Navajo law would prevent Arizona school districts on the reservation from responding to federal budget cuts because doing so would substantially impact the tribe's economy. [*Id*., p. 16: "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."] Notwithstanding the doubtful proposition that Navajo law could prevent an Arizona school district from responding to federal budget cuts, the federal government's budgetary woes are not at issue here, and are not the school districts' doing. Indeed, the federal automatic spending cuts affected many needy people across the nation, including federal employees, head start programs, and those receiving federal unemployment benefits, to name a few. It also affected school districts on military bases.[36] The tribe's argument about the impact of the sequester should

---

employment, retention or promotion decisions." [10 NNC § 124(C), Appendix p. 19 hereto.]

[36] *See, e.g.,*

http://www.districtadministration.com/article/sequestration-hits-impact-aid-districts.

be posed to Congress, not the Plaintiff school districts. The school districts do not control the federal budget; and the resolution of jurisdictional issues does not depend on Congress's year-by-year budget votes.[37]

Fifth, the NNSC's discussion regarding the curriculum in schools on the reservation is not relevant to the jurisdictional issue here. [NNSC amicus, pp. 18-19.] The NNLC itself recognized as much when ordering the evidentiary hearing in tribal court. [*See* ER 68-69.] And as the NNSC itself states, curriculum issues are matters for discussions "between the Federal, State and Tribal governments, as governments." [NNSC amicus, pp. 19, 22.] Those issues are not before the Court here; nor are the federal or state governments parties to this case. This is not an appropriate forum for their discussion.

This leads to Plaintiffs' final point. The school districts appreciate the NNSC's suggestion that the "State and Tribe [should] come to an agreement over how employment on the reservation's public schools" should be handled.

---

[37] In any event, as the Court is likely aware, on December 18, 2013, Congress passed a government spending plan for which President Obama has signaled his support. The National Association of Federally Impacted Schools reports that this budget deal will replace $63 billion in sequester cuts over FY 2014 and FY 2015, split evenly between defense and non-defense discretionary (NDD) spending. For NDD spending, this means $22.5 billion in restored funding for FY 2014. This is 87% of the $25.8 billion in cuts that NDD took as a result of the sequester. http://media.wix.com/ugd/423d5a_ede460ee1ebe4e698908e0d859b33eb5.pdf?dn=NAFIS%2BNews%2B12-23-13.pdf [Appendix p. 20 hereto.]

[NNSC amicus, p. 23.] Plaintiffs agree that it would be beneficial for the State and the Tribe to meet and confer on issues of mutual concern. But the State is not a party to this case, and that peacemaking effort cannot answer the legal question before the Court. All Plaintiffs can do is follow Arizona law in Arizona courts and expect not to have to spend the significant time and money relitigating those decisions when claimants sue in tribal court. Plaintiffs continue to maintain that, for the reasons stated herein, as a matter of law tribal jurisdiction does not exist over their employment decisions.

CONCLUSION

For the foregoing reasons, Plaintiffs Window Rock Unified School District and Pinon Unified School District respectfully request the Court to affirm the summary judgment in their favor.

RESPECTFULLY SUBMITTED this 24th day of December, 2013.

JONES, SKELTON & HOCHULI, P.L.C.

By /s/ Eileen Dennis GilBride

Georgia A. Staton
Eileen Dennis GilBride
2901 North Central Avenue, Suite 800
Phoenix, Arizona 85012

Patrice M. Horstman
HUFFORD, HORSTMAN, MONGINI, PARNELL & TUCKER, P.C.
120 North Beaver Street
Post Office Box B
Flagstaff, Arizona 86002

Attorneys for Plaintiffs/Appellees
Window Rock Unified School District and Pinon Unified School District

CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 13-16278 / 13-16259 (CONSOLIDATED)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   _X_ this brief contains **16,230** words,* excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   ___ this brief uses a monospaced typeface and contains lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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:

   _X_ this brief has been prepared in a proportionally spaced typeface using Microsoft Word, 14 pt. Times New Roman*, or*

   ___ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)*with *(state number of characters per inch and name of type style).*

Signature /s/ Eileen Dennis GilBride

Attorney for Defendants/Appellees

Date December 24, 2013

* Permission to exceed page limitation pending

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of December, 2013, I electronically filed the foregoing ANSWERING BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users; all participants will be served by the appellate CM/ECF system, and are as follows:

David Robert Jordan
The Law Offices of David R. Jordan, PC
P.O. Box 840
Gallup, NM 87305-1744
Email: david@jordanlegal.com
Attorneys for Defendants/Appellants
(Employee Appellants)
Reeves, Reeves, Brutz, John, Hale, Coonsis and Beall

Paul Spruhan
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515
Email: pspruhan@nndoj.org
Attorney for Defendants/Appellants
Navajo Nation Labor Commission

Josephine Foo
Office of the Chief Justice
Judicial Branch of the Navajo Nation
P.O. Box 520
Window Rock, AZ 86515-0520
Email: fooferg@gmail.com
Attorneys for *Amicus Curiae*
Navajo Nation Supreme Court

/s/ Eileen Dennis GilBride

STATEMENT OF RELATED CASES

There are no known related cases pending in the Ninth Circuit Court of Appeals.