In the
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Belcourt Public School District and Angel Poitra, Plaintiffs/Appellants, vs. Ella Davis and Turtle Mountain Tribal Court, Defendants/Appellees.	)	**No. 14-1541**
Belcourt Public School District, Plaintiff/Appellant, vs. Erika Malaterre and Turtle Mountain Tribal Court, Defendants/Appellees.	)	**No. 14-1542**
Belcourt Public School District and Chris Parisien, Plaintiffs/Appellants, vs. Mike and Judy Nelson on behalf of their Minor Child, S.N., and Turtle Mountain Tribal Court, Defendants/Appellees.	)	**No. 14-1543**

Belcourt Public School District, Roman Marcellais and School Board Members for the Belcourt Public School District, Plaintiffs/Appellants, vs. Bruce Allard, Martin Desjarlais, Jeff Laducer, Chad Marcellais, Robert St. Germaine and Turtle Mountain Tribal Court, Defendants/Appellees.	)	**No. 14-1545**
Belcourt Public School District, Roman Marcellais and School Board Members for the Belcourt Public School District, Plaintiffs/Appellants, vs. Steve Herman and Turtle Mountain Tribal Court, Defendants/Appellees.	)	**No. 14-1548**

On Appeal from the United States District Court for the District of North Dakota
(The Honorable Ralph R. Erickson)
District Court File Nos. 4:12-cv-00114, 4:12-cv-00115, 4:12-cv-00116, 4:12-cv-00117 and 4:12-cv-00118

APPELLANTS' OPENING BRIEF

PEARCE & DURICK

Jonathan P. Sanstead
Rachel Bruner-Kaufman
314 E. Thayer Avenue
P.O. Box 400
Bismark, ND 58502-0400
(701) 223-2890
jps@pearce-durick.com
rbk@pearce-durick.com
Attorneys for Plaintiffs-Appellants

April 29, 2014

SUMMARY OF THE CASE

The Belcourt Public School District, an entity of the State of North Dakota, operates schools within the Turtle Mountain Indian Reservation pursuant to its state constitutional duty to educate all children. The Appellees filed claims against the Appellants in the Turtle Mountain Tribal Court. After the Turtle Mountain Tribal Court of Appeals held that tribal court jurisdiction over a public school district exists, the Appellants brought declaratory judgment actions in the District Court on the issue of tribal court jurisdiction. Defendant Turtle Mountain Tribal Court and the Nelson Defendants have never plead or otherwise appeared to defend the declaratory judgment action. The District Court denied Plaintiffs/Appellants' motion for default judgment against the Defendants in the *Nelson* action, and later denied Plaintiffs/Appellants' motions for summary judgment in all the above-consolidated cases. The District Court incorrectly held that the Turtle Mountain Tribal Court has jurisdiction over the Belcourt Public School District and its employees.

The Plaintiffs/Appellants request thirty (30) minutes for oral argument due to the number of consolidated cases and the issues involved.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from the United States District Court for the District of North Dakota, which properly took jurisdiction under 28 U.S.C. § 1331 because whether a tribal court has jurisdiction over a nonmember is a question of federal law. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852–53 (1985). The District Court terminated the actions after it entered a final order on February 4, 2014, which remanded the cases to the Turtle Mountain Tribal Court. Addendum ("Add.") 008-019. Plaintiffs filed timely notices of appeal on March 5, 2014. This Court therefore has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the District Court erred in denying Plaintiffs/Appellants' motion for default judgment in Case No. 14-1543.

   Fed. R. Civ. P. 55(a), (b)

   Freeman v. State Farm Mut. Auto. Ins. Co., Inc., 436 F.3d 1033 (8th Cir. 2006)

   Johnson v. Dayton Elec. Mfg. Co., 140 F.3d 781 (8th Cir. 1998)

2. Whether the District Court erred in denying Plaintiffs/Appellants' motion for summary judgment, finding the Tribal Court has jurisdiction over claims against a North Dakota public school district and its employees, and remanding the case to the Turtle Mountain Tribal Court.

   Nevada v. Hicks, 533 U.S. 382 (2001)

Strate v. A-1 Contractors, 520 U.S. 438 (1997)

Montana v. United States, 450 U.S. 544 (1981)

STATEMENT OF THE CASE

The Belcourt Public School District (hereinafter "School District") is a political subdivision of the State of North Dakota and not a member of the Tribe. The School District operates within the geographical boundaries of the Turtle Mountain Indian Reservation. The Turtle Mountain Band of Chippewa Indians (hereinafter "Tribe") receives funding pursuant to 25 U.S.C. § 2501 et seq. These funds are to be used by the Tribe to operate schools within the Turtle Mountain Indian Reservation. Rather than operate a school on its own, the Tribe has arranged to have the School District operate schools on the reservation including the Turtle Mountain Community High School.

In 2006, the Tribe entered into a "Plan of Operations" with the School District for the Turtle Mountain Community High School, which educates grades 9-12 and gives the School District exclusive administrative authority over the day-to-day operations of the Turtle Mountain Community High School. Appendix ("App.") 042. In 2009, upon the expiration of the 2006 Plan of Operations, the School District and the Tribe entered into a second and similar Plan of Operations for the Turtle Mountain Community High School. App. 047.

The Appellees brought separate complaints against the School District and employees of the School District in the Turtle Mountain Tribal Court (hereinafter "Tribal Court"). The School District and its employees filed motions to dismiss the complaints in Tribal Court based on several reasons including the Tribal Court's lack of jurisdiction over a public school district and its employees acting within the scope of their employment. On June 9, 2010, the Tribal Court granted the School District's motion to dismiss *Davis v. Poitra*, finding that the Tribal Court lacks jurisdiction over a state political subdivision and its employees. App. 056-057. On July 13, 2010, the Tribal Court granted the School District's motion to dismiss *Malaterre v. Belcourt Pub. Sch. Dist.*, again finding that the Tribal Court lacks jurisdiction over a state political subdivision and its employees. App. 058. On March 17, 2011, the Tribal Court granted the School District's motion to dismiss *Nelson v. Parisien* for the same reasons. App. 059-060. An appeal to the Turtle Mountain Tribal Court of Appeals was filed by Malaterre and Davis, and later by the Nelsons. The Tribal Court stayed the other two other lawsuits included in this consolidation pending the tribal appellate court's decision in the *Davis* and *Malaterre* cases. On February 6, 2012, the Turtle Mountain Court of Appeals reversed the Tribal Court, finding that the Tribal Court can exercise jurisdiction over a public school district. App. 061-074.

On August 27, 2012, Appellants brought a declaratory judgment action against the Appellees and the Tribal Court in federal court, seeking (1) an order declaring that the Tribal Court lacks jurisdiction over the School District and its employees acting in their official capacity, and (2) an injunction prohibiting the Tribal Court from adjudicating the claims brought by the Appellees. On May 21, 2013, Plaintiffs/Appellants filed a request for entry of default under Fed. R. Civ. P. 55(a) in the *Nelson* action. App. 033. On May 22, 2013, the Clerk of Court entered default pursuant to Rule 55(a). App. 034. On July 16, 2013, Plaintiffs/Appellants filed a motion for default judgment pursuant to Fed. R. Civ. P. 55(b)(2). App. 035. On October 3, 2013, the District Court denied the motion for default judgment. Add. 001-006.

On September 23, 2013, Defendant/Appellee Malaterre filed a motion for summary judgment. On October 14, 2013, Plaintiffs/Appellants filed a cross-motion to Defendant/Appellee Malaterre's motion for summary judgment and a motion for summary judgment in all the remaining consolidated cases. On February 4, 2014, the District Court denied Plaintiffs/Appellants' motion for summary judgment and remanded the cases to the Tribal Court for consideration of the merits, finding that the Tribal Court has jurisdiction over the School District and its employees. Add. 007-019.

SUMMARY OF THE ARGUMENT

The District Court was faced with a legal question whether the Tribal Court lacks jurisdiction over a North Dakota public school district. The District Court, failing to apply and follow Supreme Court precedent, erred in (1) denying Appellants' motion for default judgment in Case No. 14-1543; and (2) denying Appellants' motion for summary judgment and granting Appellee Malaterre's motion for summary judgment, finding the Tribal Court has jurisdiction over the North Dakota public school district and its employees acting in their official capacities, and remanding the cases to the Tribal Court.

ARGUMENT

I. The District Court Erred in Denying Plaintiffs/Appellants' Motion for Default Judgment in the *Nelson* Action

This Court reviews the District Court's order on default judgment for an abuse of discretion. *Freeman v. State Farm Mut. Auto. Ins. Co., Inc.*, 436 F.3d 1033, 1036 (8th Cir. 2006).

The federal Summons and Complaint in Case No. 14-1543, *Belcourt Public School District et al. v. Mike Nelson et al.* (hereinafter "Nelson action"), were properly served upon Defendants on September 4, 2012. Rule 12(a) of the Federal Rules of Civil Procedure requires a defendant to serve an answer, or otherwise defend, within 21 days after being served with the summons and complaint. Fed. R. Civ. P. 12(a)(1)(A)(i). All of the Defendants/Appellees in the Nelson action

failed to plead or otherwise defend the action.[1] As such, default was entered pursuant to Fed. R. Civ. P. 55(a) on May 22, 2013. The District Court correctly noted, "The entry of a party's default is the official recognition that the party is in default." Add. 004 (citing *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 128 (2d Cir. 2011)).

On July 16, 2013, Plaintiffs/Appellants brought a motion for default judgment pursuant to Fed. R. Civ. P. 55(b). On October 3, 2013, the District Court[2] denied the motion for default judgment. Add. 001-006. The District Court incorrectly determined that the Plaintiffs failed to follow the proper procedure by first requesting the clerk enter default judgment before bringing a motion for default judgment. Regardless, the District Court did take the opportunity to rule on the motion for default judgment. Add. 005.

The District Court incorrectly determined that default judgment is not the appropriate avenue for the Plaintiffs to seek the specific relief requested – namely, declaratory judgment. Add. 005-006. The cases cited by the District Court hold that in a declaratory judgment action, the claim is not for a "sum certain" under Fed. R. Civ. P. 55(b)(1) and the clerk cannot enter a default judgment. *See W. World Ins. Co., Inc. v. Czech*, 275 F.R.D. 59, 62 (D. Mass 2011) (holding that

[1] Defendant Turtle Mountain Tribal Court has failed to plead or otherwise defend any of these consolidated actions.
[2] Honorable Daniel L. Hovland, District Court for the District of North Dakota.

pursuant to Fed. R. Civ. P. 55(b), the moving party must apply to the court for a default judgment if the claim is not for a "sum certain"); *Spence v. United States*, No. 1:10-cv-01754 LJO, CSA, 2010 WL 4806906 at *3 (E.D. Cal. Nov. 18, 2010) (same); *Northland Ins. Co. v. Cailu Title Corp.*, 204 F.R.D. 327, 330 (W.D. Mich. 2009) ("An entry of default and a default judgment are distinct concepts which must be treated separately."). However, in the *Nelson* action, the clerk did not enter a default judgment under Rule 55(b) but instead entered default pursuant to Rule 55(a) and the Plaintiffs/Appellants then correctly moved the Court for default judgment under Rule 55(b)(2). This is the required two-step process when seeking default judgment. *See Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 783 (8th Cir. 1998) (instructing that the entry of default under Rule 55(a) must precede the granting of a default judgment under Rule 55(b)). Therefore, the District Court erred in finding the Plaintiffs did not follow the appropriate procedure. The Plaintiffs did not request the clerk enter a default judgment but instead appropriately requested the clerk enter the Defendants' default as required under Fed. R. Civ. P. 55(a). App. 033. After the entry of default, the Plaintiffs filed a motion for default judgment pursuant to Fed. R. Civ. P. 55(b)(2). App. 035.

The District Court failed to address the default, but merely cited its broad discretion and incorrectly determined that default judgment is not appropriate for declaratory judgment claims. Add. 005. However, default judgment is allowed in

actions for declaratory relief under Fed. R. Civ. P. 55(b)(2). *See Freeman v. State Farm Mut. Auto. Ins. Co., Inc.*, 436 F.3d 1033 (8th Cir. 2006) (affirming default judgment in declaratory judgment action because defendant refused to appear or answer the complaint against her); *Nautilus Ins. Co. v. BSA Ltd. P'ship*, 602 F. Supp. 2d 641, 645-46 (D. Md. 2009) (awarding default judgment in a declaratory judgment action); *Am. Select Ins. Co. v. Taylor*, 445 F. Supp. 2d 681, 684 (N.D.W.Va. 2006) (same).

After default is entered pursuant to Rule 55(a), the defendant is deemed to have admitted all well pleaded factual allegations in the complaint. *Marshall v. Baggett*, 616 F.3d 849, 852 (8th Cir. 2010); *see also* Fed. R. Civ. P. 8(b)(6) (stating that any "allegation - other than one relating to the amount of damages - is admitted if a responsive pleading is required and the allegation is not denied"). Default judgment is appropriate when the defendant has engaged in intentional delays or the adversary process has been halted because of an unresponsive party. *Forsythe v. Hales*, 255 F.3d 487 (8th Cir. 2001); *S.E.C. v. Lawbaugh*, 359 F. Supp. 2d 418, 421 (D. Md. 2005). The District Court abused its discretion and misapplied the law by failing to address the unchallenged facts in the complaint and instead denying the motion for default judgment in the *Nelson* action.

II. The District Court Erred in Finding the Tribal Court Has Jurisdiction over a North Dakota Public School District and its Employees

The question of tribal court jurisdiction is a federal question of law, which is reviewed *de novo*. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852–53 (1985).

The District Court erred by finding that *Montana v. United States*, 450 U.S. 544 (1981) does not apply. Add. 016-017. The School District is a North Dakota political subdivision and not a member of the tribe. The Supreme Court has clearly held that the framework in *Montana* governs tribal civil jurisdiction over nonmembers and concluded that its decisions in *Nat'l Farmers Union*, 471 U.S. 845, and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) "do not expand or stand apart from" *Montana* but merely "enunciate only [a general] exhaustion requirement, a 'prudential rule,' based on comity." *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (internal citations omitted). This Court has reiterated, "The federal principles which govern tribal civil jurisdiction over nonmembers were set out in *Montana v. United States*, and that decision remains the 'pathmarking case on the subject.'" *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 935 (8th Cir. 2010) (quoting *Nevada v. Hicks*, 533 U.S. 353, 358 (2001)).

The District Court relied on *Iowa Mut. Ins. Co.*, 480 U.S. 9, and *Water Wheel Camp Recreatinoal Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011) in

determining that *Montana* does not apply. Add. 016. As discussed above, *Iowa Mut.* does not limit or expand the general proposition from *Montana*. Furthermore, the facts in *Water Wheel* are easily distinguishable – Plaintiffs/Appellants here are not private actors engaging in a commercial activity on reservation lands for economic gain; rather, they are a state political entity and its employees making decisions in the course of their duties mandated by North Dakota constitutional law to provide a public education for all children within the state.

The District Court also incorrectly emphasized the ownership of the land. Add. 015. Tribal land ownership is not the dispositive factor. Instead, "the fact that the state's considerable interest, arising from outside of the reservation, in providing for a general and uniform public education is very much implicated." *Window Rock Unified Sch. Dist. v. Reeves*, No. CV-12-08059-PCT-PGR, 2013 WL 1149706, at *5 (D. Ariz. Mar. 19, 2013). The appropriate emphasis "is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact." *Nevada v. Hicks*, 533 U.S. 353, 382 (2001) (Souter, J., concurring).

The general proposition from *Montana* is that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. As such, a tribe's efforts to regulate nonmembers are "presumptively invalid." *Plains Commerce Bank v. Long Family*

Land & Cattle Co., 554 U.S. 316, 330 (2008) (internal citations omitted). However, the Supreme "Court has recognized two categories of nonmember conduct which may be regulated by tribes, commonly termed the '*Montana* exceptions.'" *Attorney's Process*, 609 F.3d at 936. First, "[a] tribe may regulate, through taxation, licensing, or other means, 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 565-66. Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

The framework set forth in *Montana* applies to both regulatory and adjudicatory jurisdiction over nonmember activities, regardless of whether the land is owned by the tribe or a nonmember. *Attorney's Process*, 609 F.3d at 936. The two *Montana* exceptions are "limited ones, and cannot be construed in a manner that would swallow the rule, or severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330 (internal citations omitted). The presumption against tribal jurisdiction over nonmembers puts the burden for establishing that one of the *Montana* exceptions applies on the Appellees. *Id.*

A. Appellees Failed to Establish the First Exception under *Montana* Applies

The first exception to the general proposition that a tribe does not have jurisdiction over a nonmember relates to nonmembers who enter into consensual relationships with the tribe or its members: "A tribe may regulate, through taxation, licensing, or other means, 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 565-66.

The District Court erred in finding that even if *Montana* governs, the first exception would apply thereby allowing the Tribal Court to exercise jurisdiction over the nonmember School District and its employees. Add. 017. The type of relationship existing between a public school district and a tribe was not what the Supreme Court had in mind when it created the first exception in *Montana*. This exception does not apply to the circumstances here because public school districts are not private actors nor can they freely or voluntarily enter into a relationship with the tribe. Public school districts are mandated to educate all children living in the state regardless of whether the children are tribal members or live on an Indian reservation. *See* N.D. Const. art. VIII, § 1 ("public schools . . . shall be open to all children of the state of North Dakota."

Since *Montana*, courts have determined the first exception only applies to private parties who freely enter into agreements with the tribe. In *Strate*, the Supreme Court recognized,

> *Montana's* list of cases fitting within the first exception, *see* 450 U.S. at 565–566, 101 S. Ct. at 1258–1259, indicates the type of activities the Court had in mind: *Williams v. Lee*, 358 U.S. 217, 223, 79 S. Ct. 269, 272, 3 L.Ed.2d 251 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock*, 194 U.S. 384, 24 S. Ct. 712, 48 L.Ed. 1030 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority ... to prescribe the terms upon which noncitizens may transact business within its borders"); [*Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152–154 (1980)] (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status").

Strate, 520 U.S. at 457. The Supreme Court in *Hicks* also addressed these cases cited by *Montana* and held that 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 that they (or their employers) entered into." *Hicks*, 533 U.S. at 372. The Court noted that all of the cases cited by *Montana* for its first exception "involved private commercial actors." *Id.*

It is true that *Hicks* did not decide "[w]hether 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" because the questions were not at issue. *Hicks*, 533 U.S. at 372. However, cases following *Hicks* have further "adhere[d] to the distinction between private individuals or entities who voluntarily submit themselves to tribal jurisdiction and 'States or state officers acting in their governmental capacity.'" *MacArthur v. San Juan Cnty., Utah*, 497 F.3d 1057, 1073 (10th Cir. 2007); *see also Window Rock Unified Sch. Dist. v. Reeves*, No. CV-12-08059-PCT-PGR, 2013 WL 1149706, at *3-5 (D. Ariz. Mar. 19, 2013) (holding that the tribal court lacked jurisdiction over the public school district operating on tribal land regardless of a lease agreement); *Red Mesa Unified Sch. Dist. v. Yellowhair*, No. CV-09-8071-PCT-PGR, 2010 WL 3855183, at *3 (D. Ariz. Sep 28, 2010) (holding that the first *Montana* exception did not extend to the public school districts on the reservation, regardless of their leases with the tribe, since the school districts "made the employment decisions at issue while operating in their governmental capacities pursuant to their state constitutionally-imposed mandate to operate a public school system within the reservation boundaries"). The District Court[3],

[3] *Fort Yates Pub. Sch. Dist. #4 v. Murphy for C.M.B. et al.*, Case No. 14-1549, is currently on appeal and was initially consolidated with this appeal but the consolidation was terminated on March 25, 2014 on the court's own motion. Honorable Daniel L. Hovland, District Judge for the District of North Dakota, entered a temporary restraining order in the Fort Yates case on October

itself, has even previously stated that *Montana's* first exception does not apply to political subdivisions because they are public not private actors.

The Ninth Circuit Court of Appeals actually addressed this issue several years before the Supreme Court's decision in *Hicks*. In *Cnty. of Lewis, Idaho v. Allen*, 163 F.3d 509 (9th Cir. 1998) (en banc), a tribal member brought several tort claims against the county (a political subdivision of the state) and its employees relating to the tribal member's arrest and imprisonment pursuant to a law enforcement agreement between the tribe and the state. *Cnty. of Lewis*, 163 F.3d at 512. The Ninth Circuit explained:

> Under the Agreement, county law enforcement officers (as agents of the state) have an express right to come onto the reservation and exercise jurisdiction over Indians. . . . The logical consequence of this arrangement is that the officers should not be subject to tribal court civil jurisdiction for conduct arising directly out of their criminal law enforcement activities. This consequence does not mean that tribal members are without a remedy – they may file suit in state or federal court.

Id. at 514. The court determined that the circumstances in *Strate* are analogous and determined that since the tribe "ceded its 'gatekeeping right,' by consenting to and receiving the benefits of state law enforcement protection," it "cannot now assert tribal jurisdiction over non-Indian law enforcement officers for activates arising directly out of the arrangement." *Id.* The Ninth Circuit further held that

---

23, 2012, finding public entities like school districts are not subject to tribal court jurisdiction regardless if they have a contractual relationship with the tribe.

Montana's first exception did not apply, recognizing that "Montana's exception for suits arising out of consensual relationships has never been extended to contractual agreements between two governmental entities." *Id.* at 515.

The first *Montana* exception only applies to private parties who freely enter into agreements with the tribe. *Hicks*, 533 U.S. at 372. It is clear the School District is not a private party by virtue of their status as a North Dakota political subdivision. Furthermore, the School District did not freely enter into an agreement with the tribe. The District Court incorrectly determined that the Plan of Operations between the School District and the Tribe is the "only reason the school is on the reservation." Add. 015. However, this factual conclusion is incorrect and not supported by the record. The Plan of Operations that the District Court bases its decision on only applies to the high school. Even though no agreement exists, the School District also educates children grades K-8 on the reservation pursuant to its state constitutional duty to provide education for all North Dakota children.

In addition, the School District is prohibited under North Dakota law to enter into an agreement that enlarges tribal jurisdiction over it, and any such term which arguably does so would be inapplicable. Chapter 54-40.2 of the North Dakota Century Code authorizes public agencies, which include school districts, to enter into agreements with the tribal government for limited purposes. N.D.C.C. §§ 54-

40.2-01(1), 54-40.2-02. North Dakota law specifically provides that a school district cannot "[a]uthorize an agreement that enlarges or diminishes the jurisdiction over civil or criminal matters that may be exercised by either North Dakota or tribal governments located in North Dakota." N.D.C.C. § 54-40.2-08(1). Hence, the School District is prohibited from submitting itself to the jurisdiction of the Tribal Court in North Dakota.

Unlike a private individual or company that can freely enter into agreements with the tribe or a tribal member, the School District must provide an education to students living within the reservation boundaries pursuant to its state constitutional mandate. N.D. Const. art. VIII, § 1. Since the State has an affirmative duty to provide an education to the students, it cannot be said to have freely entered into an agreement with the tribe and *Montana's* first exception does not apply.

B. Appellees Failed to Establish the Second Exception under *Montana* Applies

The second exception under *Montana* provides, "A tribe may also 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. When interpreting *Montana's* second exception, the Supreme Court stated:

> Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "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."

Strate, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 564).

The Supreme Court has repeatedly demonstrated its concern that tribal courts not require nonmembers to defend themselves against ordinary claims in an unfamiliar court. *Strate*, 520 U.S. at 442 (finding that plaintiff could pursue her case in state court). Opening the tribal court for plaintiff's optional use "is not necessary to protect tribal self-government" when the state forum is open to all who sustain injuries through a public school district. *Id.* Furthermore, requiring nonmember defendants to defend in an unfamiliar court "is not crucial to 'the political integrity, the economic security, or the health or welfare of the [tribe]." *Id.*

The cases relied upon by the Supreme Court in *Montana* when formulating the second exception illustrate the Court intended the exception to apply only when the "State's (or Territory's) exercise of authority would trench unduly on tribal self-government." *Id.* at 458. In other words, *Montana's* second exception is only triggered by nonmember conduct that threatens the Tribe's ability to self-govern. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 n. 12 (2001). "[U]nless the

drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperils' the political integrity of the Indian tribe, there can be no assertion of civil authority . . ." *Id.* If a tribe were to have jurisdiction over every matter related to the health and welfare of the tribe, the exception would swallow the rule. *Strate*, 520 U.S. at 458.

The State of North Dakota has a strong interest in ensuring that its schools are operated in compliance with its laws. The allegations contained in the Defendants' tribal court complaints directly implicate the State's interests in how its schools are being operated. In this case, allowing the State to exercise its authority would not "trench unduly on tribal self-government." The claims against the School District would not "imperil the political integrity of the tribe" to justify application of the second *Montana* exception. Tribal self-government is not at issue in these cases, nor are these cases likely to affect any rights of the Tribe as it pertains to its right to educate tribal children. Furthermore, the Defendants are not without remedy absent Tribal Court jurisdiction – they could pursue their claims against the School District in state court.

CONCLUSION

North Dakota law and regulations govern the operation of the Belcourt Public School District, a political subdivision of the state. Pursuant to the Supreme Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Nevada v.*

Hicks, 533 U.S. 353 (2001), tribal courts do not have jurisdiction over state entities or officials for causes of action relating to the performance of official duties. The general presumption against tribal court jurisdiction has not been overcome in any of the cases being considered in this action. Therefore, the Plaintiffs/Appellants respectfully request that the District Court's orders on default judgment and summary judgment be reversed.

DATED this 29th day of April, 2014.

Respectfully submitted,

PEARCE & DURICK

/s/ Rachel Bruner-Kaufman

JONATHAN P. SANSTEAD, ND #05332
RACHEL BRUNER-KAUFMAN, ND #06418
Individually and as Members of the Firm
314 E. Thayer Avenue
P.O. Box 400
Bismark, ND 58502-0400
(701) 223-2890
jps@pearce-durick.com
rbk@pearce-durick.com
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 28(a)(11) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 4,629 words as determined by the word counting feature of Microsoft Word 2010.

Pursuant to 8th Circuit Rule 28A(h), I also hereby certify that electronic files of this Brief and accompanying Addendum have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

/s/ Rachel A. Bruner-Kaufman
RACHEL A. BRUNER-KAUFMAN
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, and 8th Circuit Rule 25A(a), I hereby certify that I have, this 29th day of April, 2014, filed a copy of Appellants' Opening Brief with the Clerk of the Court through the Court's CM/ECF system, which will serve electronic copies on the following registered participants:

Reed Soderstrom rsoderstrom1611@gmail.com

I further certify that some of the participants in the case are not CM/ECF users and that, upon acceptance of the filing of the Appellants' Opening Brief, I will mail the foregoing document by First Class Mail, postage prepaid, to the following non-CM/ECF participants:

Donald G. Bruce
PO Box 674
Belcourt, ND 58316

Turtle Mountain Tribal Court
PO Box 900
Belcourt, ND 58316-0900

Mike & Judy Nelson
653 Green Acres
Belcourt, ND 58316

I further certify that I have also filed with the Clerk of the Court three (3) paper copies of Appellants' Amended Appendix by sending them to the Court via Federal Express dated April 29, 2014.

/s/ Rachel A. Bruner-Kaufman
RACHEL A. BRUNER-KAUFMAN
Attorney for Plaintiffs-Appellants