14-1549

In the
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Fort Yates Public School District #4,	)
	)
Plaintiff/Appellant,	)
	)
vs.	)
	)
Jamie Murphy for C.M.B. (a minor)	)
and Standing Rock Sioux Tribal Court,	)
	)
Defendants/Appellees.	)

On Appeal from the United States District Court for the District of North Dakota
(The Honorable Ralph R. Erickson)

District Court File No. 1:12-cv-00135

APPELLANT'S OPENING BRIEF

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May 5, 2014

SUMMARY OF THE CASE

Fort Yates Public School District #4, an entity of the State of North Dakota, operates within the Standing Rock Indian Reservation pursuant to its state constitutional duty to educate all children. Jamie Murphy brought claims against the School District, on behalf of her daughter C.M.B., before the Standing Rock Sioux Tribal Court. After the Standing Rock Sioux Tribal Court held that tribal court jurisdiction over a public school district exists, the School District brought a declaratory judgment action and a motion for temporary restraining order in the District Court on the issue of tribal court jurisdiction. The District Court granted the temporary restraining order and *sua sponte* dismissed the Standing Rock Sioux Tribal Court as a party. The District Court then further *sua sponte* dismissed the action and remanded the case to the Standing Rock Sioux Tribal Court. The District Court incorrectly held that the Standing Rock Sioux Tribal Court has jurisdiction over the Fort Yates Public School District and its employees.

The Plaintiff/Appellant requests thirty (30) minutes for oral argument due to the issues involved.

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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 action after it entered a final order on February 4, 2014, which remanded the case to the Standing Rock Sioux Tribal Court. Addendum ("Add.") 015-025. Plaintiff filed a timely notice 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 *sua sponte* dismissing the Standing Rock Sioux Tribal Court as a party based on sovereign immunity.

   Comstock Oil & Gas v. Ala. & Coushatta Indian Tribes, 261 F.3d 567 (5th Cir. 2001)

2. Whether the District Court erred in finding the Tribal Court has jurisdiction over claims against a North Dakota public school district and its employees, and remanding the case to the Standing Rock Sioux 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 Fort Yates Public School District #4 (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 Standing Rock Sioux Indian Reservation. In 2003, the School District and the Tribe entered into a Joint Powers Agreement ("JPA") "to combine the education, social, cultural and physical opportunities of all K-12 students" who attend the Standing Rock Community School (the tribal school) and the School District. Appendix (App.) 007. Before the JPA, the Tribe and the School District operated distinct and separate school systems in Fort Yates, North Dakota. App. 008.

In 2011, Jamie Murphy for C.M.B. (a minor) brought a complaint against the "Standing Rock High School" in the Standing Rock Sioux Tribal Court (hereinafter "Tribal Court"). The School District filed a motion to dismiss the complaint 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 March 7, 2012, the Tribal Court denied the School District's motion to dismiss, finding the Tribal Court has jurisdiction over a public school district and ordered that the caption of the action be amended so the sole defendant was the School District. App. 022, 026. The Tribal Court also

dismissed the Standing Rock Community School, finding it had sovereign immunity as an entity of the Tribe. App. 015.

On October 9, 2012, the School District brought a declaratory judgment action against Jamie Murphy for C.M.B. (a minor) 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 any claims involving the School District or its employees acting in their official capacity. Also on October 9, 2012, the School District filed a motion for temporary restraining order and preliminary injunction. On October 23, 2012, the District Court[1] granted the motion for temporary restraining order, restraining and enjoining anyone acting on C.M.B.'s behalf from prosecuting or pursuing her claims in Tribal Court. Add. 001-014. In the same order, the Court also *sua sponte* dismissed the Tribal Court as a party based on sovereign immunity. Add. 011-012.

On October 31, 2012, Jamie Murphy filed a motion to dismiss, claiming she is not the correct party to the action since C.M.B. was no longer a minor. On November 5, 2012, the Standing Rock Sioux Tribe filed an amicus curiae brief, claiming the action should be dismissed for failure to exhaust Tribal Court remedies. On February 4, 2014, the case was reassigned to Honorable Chief Judge

[1] Honorable Daniel L. Hovland, District Court for the District of North Dakota.

Ralph R. Erickson and the Court issued an order dismissing the case, remanding it to Tribal Court, and finding as moot Jamie Murphy's motion to dismiss. Add. 015-025. The District Court found that the Tribal Court has jurisdiction over the School District and its employees.

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 *sua sponte* (1) dismissing the Tribal Court as a defendant; and (2) finding the Tribal Court has jurisdiction over the North Dakota public school district and its employees acting in their official capacities, dismissing the action, and remanding the case to the Tribal Court.

ARGUMENT

I. The District Court Erred in *Sua Sponte* Dismissing the Tribal Court as a Party

This Court reviews *de novo* the District Court's *sua sponte* dismissal of the Tribal Court based on sovereign immunity. *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1182 (10th Cir. 2010) (reviewing district court's factual findings for clear error and its legal conclusions regarding tribal sovereign immunity *de novo*); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (reviewing *de novo* questions of sovereign

immunity and subject matter jurisdiction); *Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D., Inc.*, 50 F.3d 560, 562 (8th Cir. 1995) (reviewing *de novo* whether the tribe waived its sovereign immunity).

"Sua sponte dismissals are strong medicine, and should be dispensed sparingly." *Chute v. Walker*, 281 F.3d 314, 319 (1st Cir. 2002) (quoting *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 33 (1st Cir. 2001)). While *sua sponte* dismissals are appropriate in limited circumstances, "such dismissals are erroneous unless the parties have been afforded notice and an opportunity to amend the complaint or otherwise respond." *Id.* (quoting *Futura Dev. of P.R., Inc. v. Estado Libre Asociado de P.R.*, 144 F.3d 7, 13-14 (1st Cir. 1998)). The Tribal Court "must show that 'the allegations contained in the complaint, taken in the light most favorable to the plaintiff, are patently meritless and beyond all hope of redemption.'" *Id.* (quoting *Gonzalez-Gonzalez*, 257 F.3d at 37).

The District Court erred by *sua sponte* dismissing the Tribal Court based on sovereign immunity. In an action such as this, in which Plaintiffs are seeking declaratory relief only, the Tribal Court does not have sovereign immunity. *See Comstock Oil & Gas v. Ala. & Coushatta Indian Tribes*, 261 F.3d 567, 571-72 (5th Cir. 2001) (finding that the district court erroneously concluded that the tribe was entitled to sovereign immunity against the plaintiffs' claims for injunctive and declaratory relief); *Sprint Commc'ns Co., L.P. v. Native Am. Telecom, LLC*, CIV.

10-4110-KES, 2010 WL 4973319, at *8 (D.S.D. Dec. 1, 2010) (granting preliminary injunction which prohibits the tribal court from hearing an action in which it has no jurisdiction); *Red Mesa Unified Sch. Dist. v. Yellowhair*, No. CV-09-8071-PCT-PGR, 2010 WL 3855183, at *5 (D. Ariz. Sept. 28, 2010) (granting a school district's request for declaratory judgment against several defendants including current or former members of the Navajo Nation Labor Commission, a tribal administrative tribunal, in which no tribal jurisdiction existed). In *Comstock Oil & Gas*, the Fifth Circuit Court of Appeals noted that the difference between an action for damages and one for injunctive or declaratory relief matters, in that a tribe has "sovereign immunity from an award of damages only." *Comstock Oil & Gas*, 261 F.3d at 571 (quoting *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999)). As such, tribal sovereign immunity does not apply in this action in which Plaintiff is not seeking damages but only declaratory and injunctive relief.

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 *sua sponte* dismissing this action and finding that *Montana v. United States*, 450 U.S. 544 (1981) does not apply. Add. 023. 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. 022. As discussed above, *Iowa Mut.* does not limit or expand the general proposition from *Montana*. Furthermore, the facts in *Water Wheel* are easily distinguishable – Plaintiff/Appellant here is not a private actor engaging in a commercial activity on reservation lands for economic gain; rather, it is a state political entity 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. 021. 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. 023-024. 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, itself, has even stated that *Montana's* first exception does not apply to political subdivisions because they are public not private actors. Before the case was reassigned, the District Court held:

> Even though a contractual agreement exists here which would arguably place this case within the first *Montana* exception, the case law post-*Montana* discussed above has established that the first exception only applies to private entities that freely enter into agreements with the tribe. 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*. The facts of this case reveal that the Fort Yates Public School District is a North Dakota political subdivision, not a private actor, and is required to abide by North Dakota law in operating its schools. Therefore, the school district does not fall within Tribal Court jurisdiction under the first exception.

Add. 009.

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 *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 JPA between the School District and the Tribe is the "only reason the School District conducts business on the reservation." Add. 021. This factual conclusion is incorrect and not supported by the record. The School District does not conduct business but instead operates a public school system. Furthermore, before the JPA was entered into, both the Tribe and the School District operated separate schools on the reservation. The JPA was entered into because "the operation of distinct and separate schools systems in Fort Yates, Sioux County, North Dakota, has not maximized the student opportunities to succeed after high school." App. 008.

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). The JPA specifically references N.D.C.C. ch. 54-40.2. App. 007. The JPA

further provides that "no party waivers any rights, including treaty rights, immunities, including sovereign immunities, or jurisdiction" and the JPA "neither diminishes nor expands rights or protections afforded other persons or entities under tribal, state or federal law." App. 010.

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 Murphy’s tribal court complaint 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 is this case likely to affect any rights of the Tribe as it pertains to its right to educate tribal children. Furthermore, Murphy is not without remedy absent Tribal Court jurisdiction – she could pursue her claims against the School District in state court.

CONCLUSION

North Dakota law and regulations govern the operation of the Fort Yates 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 this case. Therefore, the Plaintiff/Appellant respectfully requests that the District Court's orders *sua sponte* dismissing the Tribal Court and *sua sponte* dismissing this action and remanding to Tribal Court be reversed.

DATED this 5th day of May, 2014.

Respectfully submitted,

PEARCE & DURICK

/s/ Rachel Bruner-Kaufman

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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 4,203 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 5th day of May, 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:

Chad C. Nodland cnod@nodlandlaw.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:

Christopher G. Lindblad
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I further certify that I have also filed with the Clerk of the Court three (3) paper copies of the Joint Appendix by sending them to the Court via Federal Express dated May 5, 2014.

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