14-1549, 14-1702

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 REPLY/RESPONSE BRIEF

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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. Appellant's 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's dismissal of Appellee/Cross-Appellant Murphy's motion to dismiss as moot was reversible error.

   Zamecnik v. Indian Prairie Sch. Dist. No. 207 Bd. of Educ., No. 07 C 1586, 2009 WL 805654 (N.D. Ill. Mar. 24, 2009)

   Fed. R. Civ. P. 17

2. Whether the District Court correctly determined that exhaustion of tribal remedies had either occurred or was not required before Appellant brought this action in federal court.

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

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Glacier Cnty. Sch. Dist. No. 50 v. Galbreath, 47 F. Supp. 2d 1167 (D. Mont. 1997)

3. 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)

4. 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 parties agree that the Fort Yates Public School District is not a member of the Tribe, but instead a political subdivision of the State of North Dakota. In 2003, the Tribe and the School District entered into a Joint Powers Agreement pursuant to N.D.C.C. ch. 54-40.2. App. 007. Prior to entering into the JPA, the Tribe and the School District had two separate schools on the Standing Rock Sioux Reservation. Under the JPA, the School District retained its individual autonomy and is to "continue to manage its affairs as a public corporation of the State of North Dakota" and comply with North Dakota law. App. 008. The School District and the

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Tribe each employ their own employees, including their own superintendent. The School District has a separate public school board, which is elected and governed under North Dakota law. The School District includes both children who are members of the Tribe and those that are nonmembers. The School District also employs both Tribal members and nonmembers.

In 2011, Appellee/Cross-Appellant Jamie Murphy for C.M.B. brought a complaint against the "Standing Rock High School" in Tribal Court. 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 be amended so the sole defendant was the School District. App. 022, 026.

On October 9, 2012, the School District brought a declaratory judgment action and a motion for temporary restraining order and preliminary injunction against Jamie Murphy for C.M.B. (a minor) and the Tribal Court in federal court. On October 23, 2012, the federal district court granted the School District's 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. The district court also *sua sponte* dismissed the Tribal Court as a party based on sovereign immunity. Jamie Murphy then filed a motion to dismiss, claiming she is not the correct party to the action since C.M.B. was no longer a minor. Upon reassignment of the case to Honorable Chief Judge Ralph Erickson on February 4,

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2014, the district court dismissed the action, finding that the Tribal Court has jurisdiction over the School District and dismissed Murphy's motion as moot. Add. 015-025.

The federal court action is not to adjudicate or try the actions from tribal court but instead the School District sought (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 Jamie Murphy on behalf of C.M.B. If the School District's relief is ultimately granted, the Tribal Court would be prohibited from adjudicating the claims brought by Jamie Murphy. Jamie Murphy and/or C.M.B. are not left without recourse – they could then bring an action in state court against the School District.

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's dismissal of Appellee/Cross-Appellant Murphy's motion to dismiss as moot was not reversible error, and the District Court correctly determined that exhaustion of tribal remedies had either occurred or was not required before Appellant brought this action in federal court. However, 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

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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's Dismissal of Murphy's Motion to Dismiss as Moot was Not Reversible Error

Appellee/Cross-Appellant Jamie Murphy claims that the District Court erred by failing to grant her motion to dismiss under Fed. R. Civ. P. 12(b)(7). Murphy further claims that she is not an appropriate party to this action because C.M.B. has reached the age of majority. Murphy also argued to the District Court that the School District could not join Corina Murphy-Bernal (C.M.B.) to this lawsuit, but instead argued the School District should "start over" by bringing a separate action naming Corina Muphy-Bernal as the defendant.

The School District brought this declaratory and injunctive action against Jamie Murphy for C.M.B. (a minor) because she is the party that brought the tribal court action. The School District is requesting, as part of this federal action, for a declaratory judgment that C.M.B. or anyone acting on her behalf is prohibited from asserting claims against the School District in tribal court. C.M.B. apparently turned 18 a few months before the School District filed this federal court action; however, there was no request by Murphy or C.M.B. for substitution in the tribal court action. If C.M.B. would have been substituted as the plaintiff in the tribal court action, the School District would have named her as the Defendant in this federal court action.

In the School District's brief in response to Murphy's Rule 12(b)(7) motion, the School District proposed a solution to this issue: Corina Murphy-Bernal should be substituted as Defendant in this federal action upon the tribal court affirming the substitution of Corina Murphy-Bernal as plaintiff in the tribal court action. *See Zamecnik v. Indian Prairie Sch. Dist. No. 207 Bd. of Educ.*, No. 07 C 1586, 2009 WL 805654, at *1 n.1 (N.D. Ill. Mar. 24, 2009) (child substituted for her parents as plaintiff when she reached the age of majority); *see also* Fed. R. Civ. P. 17(a)(3) (after substitution of the real party in interest, "the action proceeds as if it had been originally commenced by the real party in interest"). The School District requested that the district court issue an order allowing the Tribal Court to rule only on the issue of substitution of the plaintiff in the Tribal Court action. To find that Murphy's motion to dismiss should have been granted just to require the School District to then bring another declaratory and injunctive action naming C.M.B. as the defendant would be a waste of the parties' and judicial time and resources. Furthermore, unless and until C.M.B. was substituted as the plaintiff in the Tribal Court action, it would have been inappropriate to dismiss Jamie Murphy as the defendant in this federal court action.

Instead of ruling on the motion, the district court determined "the record is sufficiently developed to decide the jurisdictional issue . . ." Add. 025. Finding as moot Murphy's motion to dismiss is not reversible error. The district court could

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have first issued an order lifting the temporary restraining order for the sole purpose of the Tribal Court to rule on the issue of substitution of the plaintiff in the Tribal Court action, and then allowed substitution of the defendant in the federal court action. However, Murphy's motion to dismiss would have been denied or dismissed as moot at that point anyways.

II. Exhaustion of Tribal Remedies is Not Required

The Appellees both claim that the district court required the School District to exhaust its tribal remedies. However, the district court did not address exhaustion of tribal remedies but instead made its decision on whether a tribal court has jurisdiction over a state political subdivision. Exhaustion was not addressed in the School District's opening brief because exhaustion of tribal court remedies is not an issue that any party included in their Statement of Issues.

The Tribal Court lacks jurisdiction and exhaustion of tribal remedies is not required in this case. Exhaustion of tribal court remedies is generally required before a federal district court should consider relief in a civil case. However, the United States Supreme Court has recognized several exceptions to the exhaustion requirement, as noted in *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). The Supreme Court added a broader exception in later cases if the exhaustion requirement "would serve no purpose other than delay." *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). The Court in *Nevada v. Hicks*

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applied this exception to cases where it is clear that the tribal court lacks jurisdiction over state officials for causes of action relating to their performance of official duties, since adherence to the tribal exhaustion requirement would serve no purpose other than delay, and is therefore unnecessary. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001).

"One of the policy rationales favoring exhaustion is that it enables tribal courts to clarify the factual and legal issues relevant to evaluating any jurisdictional question." *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013) (citing *Nat'l Farmers Union*, 471 U.S. at 856-57). In the present case, the district court granted the School District's motion for temporary restraining order finding that exhaustion of tribal remedies was not required and that there is a strong possibility of success on the merits of the School District's claim regarding lack of tribal court jurisdiction. Add. 005-011. In the order finding the Tribal Court did have jurisdiction over the School District, the district court did not address exhaustion of tribal remedies but instead determined that "the record is sufficiently developed to decide the jurisdictional issue." Add. 025.

The federal district court in *Glacier Cnty. Sch. Dist. No. 50 v. Galbreath*, 47 F. Supp. 2d 1167 (D. Mont. 1997), held that a school district did not need to exhaust tribal court remedies before bringing an action in federal court seeking declaratory and injunctive relief. The district court quoted *Strate*:

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. [citation omitted]. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, . . . must give way, for it would serve no purpose other than delay.

Glacier Cnty. Sch. Dist., 47 F. Supp. 2d at 1172 (quoting *Strate*, 520 U.S. at 459, n.14).

In *Glacier Cnty. Sch. Dist.*, the court granted the school district's request for declaratory relief. The Glacier County School District is a political subdivision of the State of Montana and operates a school within the boundaries of the Blackfeet Indian Reservation. *Glacier Cnty. Sch. Dist.*, 47 F. Supp. 2d at 1169. The parents of a student brought an action in the Blackfeet Tribal Court, seeking an order compelling the school district to readmit their daughter after the school district expelled her. The tribal court rejected the school district's assertion that it lacked jurisdiction over the school district. *Id.* The school district then sought declaratory and injunctive relief in the federal district court, regarding the authority of the tribe to interfere with the administration and operation of the school district. The defendants (which included the tribal court) brought a motion to dismiss, claiming in part that the school district failed to exhaust tribal court remedies. The court denied the defendants' motion to dismiss and granted the school district's request

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for declaratory relief, noting that the State of Montana "is the authority responsible for safeguarding the inalienable right of children to a public education." *Id.* at 1171.

III. The District Court Erred In *Sua Sponte* Dismissing the Tribal Court as a Party

Appellee Standing Rock Sioux Tribal Court argues that sovereign immunity applies because it is an arm of the Tribe. The Tribal Court cites *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In *Santa Clara Pueblo*, the Court decided the narrow issue of whether the Indian Civil Rights Act subjects tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. The Court concluded that suits against the tribe under the ICRA are barred by the tribe's sovereign immunity from suit. *Santa Clara Pueblo*, 436 U.S. at 59.

Since *Santa Clara Pueblo*, the Supreme Court has recognized "that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 516 (1991) (Stevens, J. concurring). In a more recent case, *Comstock Oil & Gas v. Ala. & Coushatta Indian Tribes*, 261 F.3d 567 (5th Cir. 2001), the tribe itself was a named defendant. The Fifth Circuit Court of Appeals specifically held that the district court erred in concluding the tribe was entitled to sovereign immunity against the plaintiffs' claims for declaratory relief. *Comstock Oil*, 261 F.3d at 572.

When bringing an action regarding tribal court jurisdiction and seeking injunctive and declaratory relief in federal court, it is customary to name the tribal court as a defendant. *See Nevada v. Hicks*, 533 U.S. 353 (2001) (member of tribe and the tribal court were named defendants); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (the tribal council, the tribal court, and the tribe itself were all named defendants to the action).

The Tribal Court contends that sovereign immunity applies to an injunctive action against a tribal court but would not apply to an injunctive action against a tribal official acting in his/her official capacity. If this were true, then the School District should have been given the opportunity to amend its complaint. *See Chute v. Walker*, 281 F.3d 314, 319 (1st Cir. 2002) (quoting *Futura Dev. of P.R., Inc. v. Estado Libre Asociado de P.R.*, 144 F.3d 7, 13-14 (1st Cir. 1998) (holding that *sua sponte* "dismissals are erroneous unless the parties have been afforded notice and an opportunity to amend the complaint or otherwise respond.")).

IV. The District Court Erred in Finding the Tribal Court has Jurisdiction Over a North Dakota Public School District and its Employees

The School District, like all public school districts in North Dakota, has a clear obligation to educate all children who reside in the school district's boundaries. *See* N.D. Const. art. VIII, § 1 ("public schools . . . shall be open to all children of the state of North Dakota"); N.D.C.C. § 15.1-06-01 ("Each public school must be free, open, and accessible at all times to any child" who meets the enrollment age

requirements, providing a limited exception only for children of military families). There is no exception for children who reside on an Indian reservation.

The general proposition from *Montana v. United States*, 450 U.S. 544 (1981), and the cases that follow, is that 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). The Appellees argue that *Montana* does not apply.

The Tribal Court incorrectly focuses on land status in its brief. The Supreme Court in *Hicks* held that Indian ownership of land does not suspend the "general proposition" that "'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe' except to the extent 'necessary to protect tribal self-government or to control internal relations.'" *Hicks*, 533 U.S. at 359 (quoting *Montana*, 450 U.S. at 564-65). The Court went on to state that the *Montana* Court "clearly impl[ied] that the general rule of *Montana* applies to both Indian and non-Indian land." *Id.* at 360. "The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" *Id.* The appropriate emphasis "is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact." *Id.* at 382 (Souter, J., concurring); *see also Window Rock Unified Sch. Dist. v. Reeves*, No. CV-12-08059-PCT-PGR, 2013 WL 1149706, at

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*2-3 (finding that tribal court lacked jurisdiction over the public school district operating on tribally-owned lands); *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 tribal court lacked jurisdiction over the public school district operating on tribal trust land). Furthermore, whether the land is held in trust or fee is not part of the record.

The law is clear that the "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 *Hicks*, 533 U.S. at 358). The burden for establishing one of the limited exceptions to this general rule is on the Appellees. *Plains Commerce Bank*, 554 U.S. at 330.

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

The Tribal Court argues that even if *Montana* applies, the first exception would provide the Tribal Court with jurisdiction because of the Joint Powers Agreement. The JPA does not provide that the School District is subject to Tribal Court jurisdiction. Instead, the JPA specifically provides that the School District and the tribe will retain their individual autonomy and that neither waives jurisdiction. App. 008, 010. The JPA "neither diminishes nor expands rights or protections afforded other persons or entities under tribal, state or federal law." App.

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010. To allow a lawsuit against the School District in Tribal Court because it entered into the JPA would clearly go against the School District's and the Tribe's agreement.

While whether a contractual relation between a state and tribe can confer tribal jurisdiction over nonmembers was not at issue in *Nevada v. Hicks*, 533 U.S. 353, 372 (2001), the cases following *Hicks* "adhere 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).

The Tribal Court claims that the cases cited by the School District on this issue do not involve "such agreements." Appellee Tribal Court's Brief at 31. The Tribal Court is mistaken. *See MacArthur*, 497 F.3d at 1073 (holding that the political subdivision was not subject to tribal jurisdiction even though it entered into contractual employment relationships with tribal members); *Cnty. of Lewis, Idaho v. Allen*, 163 F.3d 509 (9th Cir. 1998) (holding that *Montana's* first exception did not apply even though a law enforcement agreement existed between the state and the tribe); *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 regardless of a lease agreement the school district entered into with the tribe which allowed the school district to place

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its schools on tribal land); *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 tribal trust land, 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 and the Appellees' arguments regarding the first *Montana* exception stem from the JPA. The Tribal Court has not pointed to any other agreement that would arguably subject the School District to the first *Montana* exception. In its brief, the Tribal Court states that the School District "infers it was somehow compelled" to enter into the JPA. Appellee Tribal Court's Brief at 32. The School District is not arguing it was compelled to enter into the JPA; however, the JPA cannot be held to enlarge or diminish the jurisdiction that may be exercised by the state of North Dakota or tribal government. N.D.C.C. § 54-40.2-08(1). Therefore, if the Tribal Court would not have jurisdiction over the School District absent the JPA, then it would be unlawful for the Tribal Court to have jurisdiction over the School District because of the JPA, since that would be an enlargement of the jurisdiction of the tribal government.

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

The district court did not find the second *Montana* exception applies and the Appellees failed to address the second exception in their briefs.

CONCLUSION

The Fort Yates Public School District #4 is a political subdivision of the State of North Dakota, and North Dakota law and regulations govern its operation. The general presumption against tribal court jurisdiction has not been overcome in this case. The Tribal Court does not have jurisdiction and exhaustion of tribal remedies was not required. Therefore, the Appellant/Cross-Appellee 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.

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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 3,815 words as determined by the word counting feature of Microsoft Word 2013.

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

/s/ Rachel A. Bruner-Kaufman
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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 on this 9th day of July, 2014, filed a copy of Appellants' Reply Brief with the Clerk of the Court through the Court's CM/ECF system, which will serve electronic copies on the following registered participants:

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