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

APPELLEE STANDING ROCK SIOUX TRIBAL COURT'S RESPONSE BRIEF

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SUMMARY OF THE CASE

Under the tribal exhaustion doctrine, tribal court remedies – including tribal appellate court remedies – must be exhausted before a federal court may hear a case involving questions of tribal court jurisdiction. The Fort Yates Public School District No. 4 filed this action in federal district court without exhausting its tribal remedies. The District Court properly dismissed, to allow the Tribal action to go forward.

The underlying case arose at a high school located on trust lands on the Standing Rock Reservation. Jamie Murphy, a tribal member, claimed that her daughter was harmed by another student at the school, and blamed the school. The school is jointly administered by the School District and the Standing Rock Sioux Tribe – under a consensual agreement. The District Court properly held that the Standing Rock Sioux Tribal Court has jurisdiction – both as an aspect of tribal governmental authority over its trust lands, and under the consensual agreement between the School District and the Tribe. The District Court also properly held that the action against the Tribal Court is barred by sovereign immunity. Accordingly, while exhaustion requires dismissal of the action in its entirety, as to the Tribal Court, sovereign immunity provides an additional ground for dismissal.

The Appellee/Defendant Standing Rock Sioux Tribal Court requests thirty (30) minutes for oral argument.

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JURISDICTIONAL STATEMENT

This appeal is from the United States District Court for the District of North Dakota's order dismissing and remanding the case to the Standing Rock Sioux Tribal Court ("Tribal Court") and requiring the Fort Yates Public School District No. 4 ("School District") to exhaust its tribal remedies. App. 043-053. The District Court properly ruled that the action against the Tribal Court was barred by sovereign immunity and, accordingly, the District Court lacked jurisdiction over the Tribal Court. App. 38-39. The District Court otherwise had jurisdiction under 28 U.S.C. § 1331. School District filed a timely notice of appeal on March 5, 2014. App. 006. As this appeal involves a federal question, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

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STATEMENT OF ISSUES

1. Whether the District Court properly dismissed the Standing Rock Sioux Tribal Court as a party based on sovereign immunity.

   Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)
   Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751 (1998)
   Michigan v. Bay Mills Indian Cmty., No. 12-515, 2014 WL 2178337 (May 27, 2014).

2. Whether the District Court properly determined that exhaustion of tribal remedies is required where 1) a School District failed to avail itself of an available tribal appellate remedy, and 2) the tribal court had a substantial claim of jurisdiction over a matter arising on Reservation trust lands against the School District, which operates the school jointly with the Tribe, under a consensual agreement.

   Nat'l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985)
   Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987)
   DISH Network L.L.C. v. Laducer, 725 F.3d 877 (8th Cir. 2013)

3. Whether the District Court properly determined that the Tribal Court has jurisdiction as a matter of tribal inherent authority over its trust lands, and under a consensual agreement regarding the operation of the school on those trust lands.

   Montana v. United States, 450 U.S. 544 (1980)
   Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)
   Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802 (9th Cir. 2011)

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STATEMENT OF THE CASE

This case involves a school that is located on trust lands on the Standing Rock Sioux Reservation and that is jointly administered by the Standing Rock Sioux Tribe ("Tribe") and Fort Yates Public School District #4 ("School District"), a public school district. Since 2003, the school has been operated under a Joint Powers Agreement ("JPA") under which the Tribe and the School District agreed "to combine the educational, social, cultural and physical opportunities of all K-12 students." App. 007-012. As the District Court noted, "[u]nder the Agreement, two school boards – the Fort Yates Public School District #4 and a Tribal Community School Board[1] – operate an elementary school, middle school, and high school within the Standing Rock Sioux Reservation." App. 044. The JPA remains in effect.

In 2011, Jamie Murphy, an enrolled member of the Standing Rock Sioux Tribe, acting *pro se*, filed a claim on behalf of her daughter, C.M.B., in Standing Rock Sioux Tribal Court. App. 013. The Tribal Court is empowered to exercise the judicial authority of the Standing Rock Sioux Tribe, pursuant to the Tribe's Constitution. *See* Addendum to Appellee Standing Rock Sioux Tribal Court's Response Brief (hereafter "Addendum") at 001. The Tribe's judicial branch also

[1] Standing Rock Community School Board.

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includes the Supreme Court of the Standing Rock Sioux Tribe, which has exclusive jurisdiction over all appeals from Tribal Court. *See* Addendum at 002.

Murphy's complaint in Tribal Court alleged that her daughter was harmed in an altercation with another student in School. App. 028-029. Murphy named only "Standing Rock High School" as a party. App. 013. In response, the School District and the Standing Rock Community School ("Tribal School"), through their respective legal counsel, filed separate motions to dismiss. *Id.*

On March 7, 2012, the Tribal Court's Chief Judge, William Zuger ("Judge Zuger"),[2] entered an order dismissing the Tribal School on the grounds that, as an entity of the Standing Rock Sioux Tribe, it enjoyed immunity that had not been waived. App. 014-015 (citing *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040 (8th Cir. 2000).[3]

The Tribal Court denied the School District's motion to dismiss. App. 015-026. The Tribal Court found that the terms of the JPA – a consensual agreement to promote the "health, education and general welfare of the members of the Tribe" –

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[2] Judge Zuger left his position as Chief Judge of the Standing Rock Sioux Tribal Court in 2012. Subsequently, the Tribal Council, pursuant to Article XII of the Tribe's Constitution, appointed William Delmore to serve as the Tribal Court's Chief Judge. Judge Delmore was sworn into office on February 26, 2013.

[3] This ruling dismissing the Tribal School was not appealed to the Tribal Supreme Court, was not the subject of any claim in the complaint in the district court, and is not an issue here.

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provided a sound basis for jurisdiction under both prongs of the test identified in *Montana v. United States*, 450 U.S. 544 (1981). App. 021. The Tribal Court also determined that its exercise of jurisdiction was not foreclosed by *Nevada v. Hicks*, 533 U.S. 353 (2001), which left open the question of tribal jurisdiction pursuant to a voluntary agreement with state entities. App. 021. The tribal court proceedings were set for trial on October 16, 2012, but the parties filed a stipulation to continue the trial, which the Tribal Court approved. App. 029. The School District did not seek review in the Standing Rock Supreme Court of any aspect of the Tribal Court's ruling – including the denial of the School District's motion to dismiss.

Rather than exhausting its tribal appellate remedies, on October 9, 2012, the School District brought an action against Jamie Murphy and the Tribal Court in the District Court for the District of North Dakota (hereinafter "District 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. App. 043.

On October 23, 2012, the District Court dismissed the Tribal Court as a party based on sovereign immunity. App. 040. The District Court granted the School District's motion for temporary restraining order, enjoining anyone acting

on C.M.B.'s behalf from prosecuting or pursuing her claims in Tribal Court. App. 028-041.

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. App. 003-004 (docket entries 13, 15).

On November 5, 2012, the Standing Rock Sioux Tribe filed an amicus brief – with the consent of the attorneys for the School District and Murphy – arguing the federal action should be dismissed for failure to exhaust tribal court remedies. App. 004 (docket entries 18, 21 and 22).

The case was reassigned to Honorable Chief Judge Ralph Erickson, App. 5 (docket entry 39), and on February 4, 2014, the District Court issued an order dismissing the case, remanding it to Tribal Court, and finding as moot Jamie Murphy's motion to dismiss. App. 043-053. The District Court noted that there was nothing in the record to dispute that the school was on trust land and that this "favors jurisdiction in tribal court." App. 049. The District Court further stated that it is:

> [M]indful of two other significant principles that have not been abrogated by the Supreme Court: (1) the federal policy of promoting tribal self-government, which necessarily encompasses the development of a functioning tribal court system, Iowa Mut. Ins. Co., 480 U.S. at 16-17; and (2) because "tribal courts are competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to 'some deference.'" Water Wheel

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> Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 808 (9th Cir. 2011) (quoting FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313) (9th Cir. 1990)). Here, the tribal court has determined that it has jurisdiction over the claims against the School District. Upon an independent examination of the jurisdictional question, this Court is unable to discern any error in the tribal court's analysis.

App. 50.

The District Court found that the Tribal Court has jurisdiction both as an aspect of its self-governing authority over matters arising on its trust lands, and as a result of the consensual agreement reflected in the JPA. App. 50-51. Rejecting the School District's sweeping reliance on *Hicks*, the District Court found that the Tribal Court "has jurisdiction to adjudicate claims against the School District, whether the framework set forth in *Montana v. United States*, 450 U.S. 544 (1981) applies or not." App. 53.

This appeal followed.

SUMMARY OF THE ARGUMENT

The District Court applied well-established law in: (1) dismissing the Tribal Court as a defendant on sovereign immunity grounds; and (2) requiring the School District to exhaust its tribal remedies.

ARGUMENT

The doctrine of exhaustion of tribal court remedies – although largely ignored in Appellant's brief – clearly applies here. The underlying claim in this

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case was brought by a member of the Standing Rock Sioux Tribe (Jamie Murphy) on behalf of her daughter, regarding an alleged fight with another student that arose at a school located on trust lands on the Standing Rock Indian Reservation. The school is one of three jointly operated – pursuant to the JPA which constituted a voluntary, consensual agreement between the Tribe and School District. Under the JPA, the Tribe and the School District agreed to combine their resources and administer the schools together, to provide a better education for the students the schools serve (all of whom reside on the Reservation and the vast majority of whom are Indian). The school is thus a hybrid venture – partly Tribal and partly School District – operating together.

Ms. Murphy, acting *pro se*, filed her action in Tribal Court – alleging that the school was responsible for allowing the fight between two students to take place. The School District moved to dismiss on jurisdictional and other grounds. The Tribal Court denied the motion.

Although a Tribal appellate remedy – in the Standing Rock Supreme Court – was readily available, the School District chose not to appeal. Ignoring the requirement that tribal remedies be fully exhausted, the School District filed suit in the United States District Court for the District of North Dakota, arguing that the Tribal Court's jurisdictional ruling was incorrect. The District Court held that the Tribal Court does have jurisdiction over the matter – both as an aspect of the

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Tribe's authority over matters arising on its own trust lands, and from the consensual dealings reflected in the JPA – and remanded the case to Tribal Court for further proceedings.

On its appeal to this Court, the School District continues to contest Tribal Court jurisdiction. However, under the exhaustion doctrine, questions concerning Tribal Court jurisdiction are properly decided, in the first instance, by the tribal courts themselves. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985). Furthermore, exhaustion requires completion of the tribal court process, including tribal appellate review. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). That has not happened here.

This Court has recognized the importance of allowing the 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). Moreover, this Court has emphasized that exhaustion is required unless it is "plain" that the tribal courts lack jurisdiction. *Id*. Only where the "assertion of tribal court jurisdiction is frivolous or obviously invalid under clearly established law," is exhaustion not necessary. *Id*.

In this case, the Standing Rock Sioux Supreme Court has had no opportunity to review the jurisdictional issue at all. Moreover, two judges who examined the question – the Tribal Court's Chief Judge and the District Court's

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Chief Judge – both held that the Tribal Court does have jurisdiction over the underlying claim. Certainly those two well-reasoned rulings provide sufficient evidence to defeat any notion that the assertion of tribal jurisdiction here was "frivolous" or "obviously invalid."

As discussed in detail below, the District Court's ruling upholding the Tribal Court's jurisdiction is well-grounded and correct on the merits.[4] However, the threshold question here is not whether the Tribal Court has jurisdiction, but rather who should decide that question initially. As this Court has emphasized, for a party seeking to avoid exhaustion of Tribal Court remedies "the bar is quite high." *Id*. The School District cannot show that the assertion of tribal jurisdiction was frivolous, and therefore cannot meet this stringent requirement. In the absence of such a showing, under controlling rulings of the Supreme Court and this Court, exhaustion – including exhaustion before the Standing Rock Supreme Court – is required.

I. **The dismissal of the Tribal Court on sovereign immunity grounds should be affirmed.**

The District Court, applying well-established law, properly dismissed the Standing Rock Sioux Tribal Court as a party, based on sovereign immunity. App. 038-039. The School District's challenge to the District Court's ruling on

[4] The District Court also correctly dismissed the action against the Tribal Court.

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sovereign immunity is quite limited. The School District does not – and cannot – challenge the fundamental principle that tribes possess immunity from suit, upon which the District Court based its ruling. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Nor can the School District challenge the scope of sovereign immunity. In *Kiowa*, the Court upheld tribal sovereign immunity even in the context of off-reservation commercial activity. 523 U.S. at 758-60. In its most recent case on the subject, the Court reaffirmed *Kiowa*, holding that sovereign immunity bars an action by a state against a tribe seeking to enjoin operation of an off-reservation casino. *Michigan v. Bay Mills Indian Cmty.*, No. 12-515, 2014 WL 2178337, **11-12 (May 27, 2014). In this case, which involves on-reservation activity, there is no question that "[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 509.

Further, there is no issue of abrogation or waiver of immunity here. As the District Court properly noted, the School District "does not allege in its complaint that the Standing Rock Sioux Tribal Court has waived its sovereign immunity." App. 039. Moreover, School District does not challenge the Standing Rock Sioux

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Tribal Court's status as an arm of the Tribe that is generally entitled to sovereign immunity. The Tribal Court is a constituent branch of the Tribal government that, pursuant to the Tribe's Constitution, exercises the judicial power of the Tribe. Addendum at 001. Sovereign immunity clearly applies to actions against the Tribal Court– an arm of the Tribe - and the School District does not suggest otherwise. *See Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000); *Pink v. Modoc Indian Health Project*, 157 F.3d 1185, 1188 (9th Cir. 1998) (cert denied, 528 U.S. 877 (1999)).

Instead, the School District makes only two arguments regarding sovereign immunity. First, the School District suggests that the District Court should not have acted *sua sponte* in dismissing the Tribal Court. Appellant's Brief at 5. But this Court has clearly rejected that position, holding that sovereign immunity is jurisdictional and may be raised *sua sponte* by the Court at any time. *See Hagen*, 205 F.3d at 1044 (sovereign immunity is a jurisdictional prerequisite which may be asserted at any stage of the proceedings) (citations omitted); *Amerind Risk Mgmt.*

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Corp. v. Malaterre, 633 F.3d 680, 686 (8th Cir. 2011) (tribal sovereign immunity may be raised *sua sponte* by the court) (citations omitted).[5]

Second, the School District contends that its action is not barred by sovereign immunity because it seeks declaratory and injunctive relief. But that argument is foreclosed by *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). *Santa Clara* was an action for declaratory and injunctive relief under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301, et seq. 436 U.S. at 49. The Court held that the ICRA did not abrogate tribal sovereign immunity so as to "subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief." *Id.* at 59. In absence of a valid congressional abrogation of tribal immunity, the Court held that suits against tribes for injunctive or declaratory relief "are barred by [their] sovereign immunity from suit." *Id*.

Santa Clara makes it clear that an action against a Tribal entity – including an action for declaratory and injunctive relief – is barred by sovereign immunity, absent express Congressional abrogation or Tribal waiver. This principle is well established. *See Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 909; *Puyallup Tribe v. Dept. of Game of State of Wash.*, 433 U.S. 165, 172-73 (1977); *Wisconsin*

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5 While more than three months passed between the District Court's ruling dismissing the Tribal Court and its order remanding the cast to Tribal Court, the School District did not seek reconsideration or otherwise suggest to the District Court that it should not have acted *sua sponte* in dismissing the Tribal Court.

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v. Ho-Chunk Nation, 512 F.3d 921, 928 (7th Cir. 2008); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Matheson v. Gregoire*, 161 P.3d 486, 491 (Wash. Ct. App. 2007).

Santa Clara plainly distinguishes between a suit against a tribe and a suit against a named tribal official acting in his or her official capacity. As *Santa Clara* instructs, a suit against a tribe is barred by sovereign immunity (absent abrogation or waiver), while a suit seeking prospective injunctive relief against a named tribal official may, in appropriate circumstances, proceed. In *Santa Clara* itself, the action for injunctive relief against the Tribe was dismissed on sovereign immunity grounds, 436 U.S. at 58-59, while the same action against tribal officials was dismissed for lack of a federal right of action under the Indian Civil Right Act. *Id.* at 69-71. The Court separately addressed the action against the Tribe and the action against the Tribal officials – underscoring the importance of the distinction between the two. *See also, Bay Mills*, No. 12-515, 2014 WL 2178337, *8 (reaffirming the distinction between an action against a tribe and an action against named tribal officials).

The School District brought this action against an arm of the Tribe (the Tribal Court), but failed to name any tribal officials. The cases relied on by the School District are all fundamentally different from this case in this respect – as each of those cases named, among others, tribal officials in their official capacity

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as defendants. *See* Appellant's Brief at 5-6 (*citing Comstock Oil & Gas v. Ala. & Coushatta Indian Tribes*, 261 F.3d 567 (5th Cir. 2001); *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999); *Sprint Commc'ns Co., L.P. v. Native Am. Telecom*, LLC, CIV. 10-4110-KES, 2010 WL 4973319 (D.S.D. Dec. 1, 2010); and *Red Mesa Unified Sch. Dist. v. Yellowhair*, No. CV-09-8071-PCT-PGR, 2010 WL 3855183 (D. Ariz. Sept. 28, 2010)).

Whatever the proper contours of an action against tribal officials, the Court need not address that here – where no tribal officials were named. As *Santa Clara* makes plain, who is named as a defendant matters, and this action, against a branch of the Tribe's government, is barred by sovereign immunity.

II. **Exhaustion of tribal remedies is required.**

In this case, the School District seeks a ruling regarding the jurisdiction of the Standing Rock Sioux Tribal Court – without allowing the Tribal judicial process to complete its own determination of that question. Moreover, nowhere in its opening brief does the School District even seek to address the tribal court exhaustion doctrine – under which analysis of questions of tribal court jurisdiction "should be conducted in the first instance in the Tribal Court itself." *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985). The School District's efforts to ignore the exhaustion doctrine and evade the tribal appellate process should be rejected.

The doctrine of tribal exhaustion was first articulated in *Nat'l Farmers Union*, a case much like this one. *Nat'l Farmers Union* dealt with the issue of whether a tribal court could exercise jurisdiction over a personal injury action brought against a public school district. *Id*. at 847. In that case, a minor child, who was an enrolled member of the Crow Tribe of Indians, suffered injuries after being struck by a motorcycle in the parking lot of Lodge Grass Elementary. *Id*. The minor child, through his guardian, filed suit against the Lodge Grass School District No. 27, a political subdivision of the State of Montana, in the Crow Tribal Court and obtained a default judgment. *Id*. at 847-48. The Lodge Grass School District and its insurer subsequently filed a complaint and a motion for temporary restraining order in the federal district court seeking to prevent the minor child from executing the default judgment against the Lodge Grass School District. *Id*. at 848.

In *Nat'l Farmers Union*, the Supreme Court recognized that "the question of whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under [28 U.S.C.] § 1331." *Id.* at 852. At the same time, the Supreme Court emphasized that tribal court exhaustion is required as a matter of comity both (1) to promote tribal self-

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government and (2) to serve the orderly judicial administration of justice in federal court. *Id.* at 856. As the Court stated:

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made.

Id. at 856-57 (footnotes omitted).

In *LaPlante*, the Supreme Court clarified that the doctrine of exhaustion of tribal remedies requires parties to exhaust available tribal appellate remedies. 480 U.S. at 16-17. *LaPlante* involved an insurance claim arising from an injury sustained by a member of the Blackfeet Indian Tribe in a motor vehicle accident on the Blackfeet Indian Reservation. *Id*. at 11. The tribal court held that it had jurisdiction over the claim. *Id*. at 12. Rather than appealing to the tribal court of appeals, the insurance company filed suit in federal court – arguing that the tribal court had no jurisdiction. *Id*. at 12-13. As the Court stated:

> As *National Farmers Union* indicates, proper respect for tribal legal institutions requires that they be given a "full opportunity" to consider the issues before them and "to

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> rectify any errors." The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. In this case, the Tribal Court has made an initial determination that it has jurisdiction over the insurance dispute, but Iowa Mutual has not yet obtained appellate review, as provided by the Tribal Code, ch 1, § 5. Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.

Id. at 16-17 (internal citations omitted).

The well-established principles of comity that require exhaustion of tribal court remedies have often been invoked by this court. *See, e.g., Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849-50 (8th Cir. 2003); *Krempel v. Prairie Island Indian Cmty.*, 125 F.3d 621, 622 (8th Cir. 1997); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1419-20 (8th Cir. 1996); *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994) (*citing City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993)); *United States ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1276 (8th Cir. 1987); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 674 (8th Cir. 1986).

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This Court has recently reaffirmed that exhaustion requires the completion of tribal appellate review. *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020, 1024 (8th Cir. 2014). Further, this Court has recognized the importance of allowing the 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). Moreover, this Court has emphasized that exhaustion is required unless it is "plain" the tribal court lacks jurisdiction. *Id*. Only where the "assertion of tribal court jurisdiction is frivolous or obviously invalid under clearly established law," is exhaustion not necessary. *Id*.

Here, it is clear that Tribal remedies have not been exhausted. Standing Rock's court system, pursuant to the Tribe's Constitution, provides parties with appellate remedies. Article XII of the Constitution of the Standing Rock Sioux Tribe established the Standing Rock Sioux Supreme Court. Addendum at 001. Chapter 2 of Title I of the Standing Rock Sioux Tribal Code of Justice governs the Standing Rock Sioux Supreme Court. Addendum at 002-005. Tribal law establishes that the Standing Rock Sioux Supreme Court has "exclusive jurisdiction of all appeals from final orders and judgments of the Standing Rock Tribal Court." Addendum at 002. Section 1-206(b) of the Code of Justice provides a right of appeal under which "[a]ny party who is aggrieved by any final order or judgment of the Standing Rock Sioux Tribal Court may file a petition requesting

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the Supreme Court to review that order or judgment as provided in Section 1-208." Addendum at 003-004. Despite these available tribal appellate remedies, and the clearly-established appellate jurisdiction of the Standing Rock Sioux Supreme Court, it is undisputed that no tribal appellate review has yet been sought or obtained by the School District in this case.[6]

Since tribal remedies have concededly not been exhausted, the only question is whether exhaustion is excused because the assertion of jurisdiction by the Tribal Court was "frivolous" or "obviously invalid."[7] As the well-reasoned Tribal Court and District Court opinions reflect, the School District cannot show that the

[6] In addition, the Tribal Court was only asked to address whether there was a *per se* rule that precluded Tribal Court jurisdiction over the School District. To the extent additional facts may be relevant to the jurisdictional analysis, under the exhaustion doctrine, the Tribal Court should be afforded the first opportunity to address such facts.

[7] The Supreme Court has identified three narrowly-drawn exceptions to exhaustion:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith,"…or where the action is patently violative of express jurisdiction prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

Nat'l Farmers Union, 471 U.S. at 856, n.21. (citations omitted). None of these apply here and the School District does not contend otherwise.

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exercise of Tribal Court jurisdiction was "frivolous" – so exhaustion is plainly required.

III. **The Tribal Court has jurisdiction here.**

A central feature of tribal jurisdiction is the authority to adjudicate matters arising on a tribe's own trust lands. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). Consistent with well-established principles regarding tribal authority on trust lands, the District Court found that the Tribal Court has jurisdiction here –independent of the *Montana* test. The District Court also held that, in the alternative, even if the *Montana* test does apply, the Tribal Court has jurisdiction, as reflected in the consensual agreement contained in the JPA. The District Court was correct in both respects.

Tribal authority over matters arising on trust land has long been recognized as a key aspect of tribal sovereignty. In *Montana* itself, the Supreme Court easily upheld that Tribe's authority to regulate non-Indian conduct on tribal lands, stating that the "Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding, we can readily agree." 450 U.S. at 557 (internal citation omitted). Having thereby upheld Tribal authority on trust lands, the Court proceeded separately to address the remaining question – the scope of tribal authority on "lands no longer owned by the tribe." *Id*. at 565. It was in this

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latter context – analysis of tribal authority over non-Indians on fee lands – in which the Court advanced the *Montana* exceptions. *Id.*[8]

Subsequent Supreme Court decisions reinforce the view that the *Montana* exceptions apply to conduct on fee lands (or its equivalent). In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Court stated: "we 'can readily agree,' in accord with *Montana*, that tribes retain considerable control over nonmember conduct on tribal land." 520 U.S. 438, 454 (1997). The Court contrasted that understanding of tribal authority on trust lands with the right of way at issue in *Strate* – which was open to the public and as to which the Tribe "cannot assert a landowner's right to occupy and exclude." *Id.* at 456. Having determined that the right of way was tantamount to fee lands for these purposes, the Court applied the *Montana* exceptions. *Id. See also South Dakota v. Bourland*, 508 U.S. 679, 688 (1993) (*Montana* "concerned an Indian Tribe's power to regulate non-Indian hunting and fishing on lands located within a reservation but no longer owned by the Tribe or its members."); *Plains Commerce Bank v. Long Family Land and*

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[8] The exceptions identified by the Court in *Montana* are: (1) "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"; and (2) "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." 450 U.S. at 565-66 (citations omitted).

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Cattle Co., 554 U.S. 316, 328 (2008) ("[O]nce tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it").

Likewise, the Court has analyzed questions of tribal authority on trust lands, and has done so without relying on the *Montana* exceptions. For example, in *Merrion v. Jicarilla Apache Tribe*, the Court upheld a Tribe's authority to impose a severance tax on minerals extracted from trust lands by non-Indians. 455 U.S. 130 (1982). As the Court stated, "[t]he Tribe has the inherent power to impose the severance tax on petitioners, whether the power derives from the Tribe's power of self-government or from its power to exclude." *Id.* at 149. While it was decided after *Montana*, *Merrion* addressed the Tribe's authority without any reference to the *Montana* exceptions. *See Plains Commerce Bank*, 554 U.S. at 333 (noting that *Merrion* was decided after *Montana, and* "upheld as within the tribe's sovereign authority" the imposition of the severance tax).

As the District Court noted, this framework – including the proposition that the *Montana* exceptions apply on fee lands – now itself has an exception:

> With the exception of *Hicks*, the Supreme Court has applied *Montana* 'almost exclusively to questions of jurisdiction arising on non-Indian land or its equivalent.'" *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wu Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013).

App. 049.

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Hicks involved state law enforcement officials who, in connection with their duties to pursue an off-reservation crime, entered tribal land to execute a search warrant. 533 U.S. at 355-56. The question in *Hicks* was whether the Tribal Court had jurisdiction over a suit claiming that the state officers' action in executing the search warrant was wrongful. *Id. at* 356-57. The Court found that, in this limited context – where the state had a strong interest in pursuing an off-reservation crime – the Tribal Court did not have jurisdiction. *Id*. at 364-65.

Hicks recognized the continued importance of land status in questions regarding tribal authority over non-members – and, indeed, the Court noted that presence of trust land "may sometimes be a dispositive factor." *Id*. at 360. *Hicks* also favorably quoted *Merrion*'s language that the "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government," at least as to "tribal lands" on which the tribe "has . . . authority over a nonmember." *Id*. at 361 (quoting *Merrion* at 137, 142). But even as it noted the importance of trust lands in questions of tribal authority, the *Hicks* Court was nevertheless unwilling to recognize tribal court authority in the presence of a particular countervailing state interest – the enforcement of state criminal law regarding off-reservation crimes. *Id*. at 364. In that narrow context, the Court found that the state's interest in law enforcement outweighed the Tribe's interest in tribal self-government. *Id*. *Hicks* may be understood as leaving intact prior

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caselaw regarding tribal authority over non-Indian activity on trust lands – except to the extent necessary to accommodate a compelling off-reservation state interest.

Consistent with that understanding, the District Court here reviewed all the relevant interests including 1) the location of the School on trust lands; 2) the terms of the JPA under which the School District voluntarily agreed to come onto trust lands to run the school cooperatively with the Tribe; 3) the factual distinctions between this case and the facts in *Montana*, *Strate* and *Plains Commerce*; 4) the fundamental federal policy promoting tribal self-determination; 5) the tribal interest in providing a forum for civil claims such as these; and 6) the competing state interest. App. 045-053. Balancing these interests, the District Court held that *Montana* does not apply.[9]

[9] The District Court noted that "the State interest in *Hicks* – protecting state law enforcement officers who entered tribal land to execute a search warrant – are very different than the state or tribal interests at stake in this case." App. 052. While briefly stated, the District Court's point is clearly correct. In *Hicks*, the state interest involved insuring that off-reservation law enforcement activities were not stymied by the presence of persons or evidence on the Reservation. That interest required, in the Court's view, access to trust lands, as law enforcement needs to go where the evidence is located. But here, the State (or School District) interest is different. The School District is only present on trust lands because it voluntarily agreed to be there under the JPA. The School District need not be on trust lands to fulfill its educational (or other) interests. To the contrary, if the School District had no access to trust lands at all, it could simply fulfill its mission by running a school on fee lands – as other public school districts do on the Reservation. In short, the voluntary presence of the School District on trust lands is not the kind of interest that may outweigh the Tribe's strong interest in Tribal self-determination and self-governance.

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In concluding that *Montana* does not apply here, the District Court joined the Ninth Circuit, which has similarly rejected the view the *Hicks* generally extends *Montana* to matters arising on trust lands. As the Ninth Circuit has stated:

> As a general rule, both the Supreme Court and the Ninth Circuit have recognized that *Montana* does not affect this fundamental principle as it relates to regulatory jurisdiction over non-Indians on Indian land. *See Bourland*, 508 U.S. at 688-89, 113 S.Ct. 2309 (describing *Montana* as establishing that when tribal land is converted to non-Indian land, a tribe loses its inherent power to exclude non-Indians from that land and thereby also loses "the incidental regulatory jurisdiction formerly enjoyed by the Tribe"); *see also Merrion*, 455 U.S. at 144-45, 102 S.Ct. 894 (upholding a tribal tax on non-Indians operating a business on tribal land as a condition of entry derived from the tribe's inherent power to exclude, without applying *Montana*); *Strate*, 520 U.S. at 456, 117 S.Ct. 1404 (noting that the land in question was equivalent to non-Indian land and that "*Montana*, accordingly, governs this case"); *Mescalero Apache Tribe*, 462 U.S. at 330-31, 103 S.Ct. 2378 (determining that *Montana* did not apply to the question of a tribe's regulatory authority over nonmembers on reservation trust land because "*Montana* concerned lands located within the reservation but not owned by the Tribe or its members"); *McDonald v. Means*, 309 F.3d 530, 540 n.9 (9th Cir.2002) (as amended) (rejecting the argument that *Montana* applies to tribal land because *Montana* limited its holding to non-Indian lands and *Strate* confirmed that limitation); *Burlington N.R. Co. v. Red Wolf*, 196 F.3d 1059, 1062-63 (9th Cir.1999) ("The threshold question in this appeal is whether *Montana*'s main rule applies, that is, whether the property rights at issue are such that the land may be deemed 'alienated' to non-Indians.").

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Water Wheel, 642 F.3d at 812. The Ninth Circuit emphasized that "*Hicks* is best understood as the narrow decision it explicitly claims to be" and that applying *Montana* to tribal lands "would impossibly broaden *Montana*'s scope beyond what any precedent requires and restrain tribal sovereign authority despite Congress' clearly stated federal interest in promoting tribal self-government." *Id*. at 813. *See also Grand Canyon Skywalk Dev. LLC v. 'Sa' Nyu Wu, Inc*., 715 F.3d 1196, 1205 (9th Cir. 2013).[10]

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[10] This Court, in *Attorney's Process and Investigation Serv., Inc. v. Sac and Fox,* recognized that *Montana* "was about tribal regulatory authority over nonmember fee land within the Reservation…" 609 F.3d 927, 936 (8th Cir. 2010). The Court emphasized the "critical importance of land status" and that "Tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner." *Id*. at 940. While this language appears to be consistent with continued application of traditional principles of tribal authority on trust lands, the Court also suggested that the Supreme Court "indicated" in Hicks that *Montana* applies on trust lands, and that *Montana* sets the "outer limits" of tribal jurisdiction over "nonmember activities on tribal and nonmember land." *Id*. at 936.

For the reasons described in the text above, the principle that Tribal authority remains at its "zenith" on trust lands supports an understanding that inherent tribal authority continues to provide a basis for tribal jurisdiction on trust lands – unless strong off-reservation state interests outweigh the tribe's interests, as was the case in *Hicks*. Viewed in the context of the broader Supreme Court jurisprudence on tribal jurisdiction, *Hicks* supports a balancing test, not a *per se* rule, with respect to the application of *Montana* on trust lands. *Hicks* recognizes the tribes' ongoing "right…to make their own laws and be ruled by them…" *Hicks*, 533 U.S. at 361. Here, the Tribe's right to self-government is broadly implicated, including the right to adjudicate disputes involving wrongs allegedly suffered by tribal children at a joint tribal-public school, located on trust lands on the Reservation. The School District interest in avoiding Tribal Court jurisdiction

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Like the Ninth Circuit, the District Court here rejected the notion that *Hicks* broadly undermines long-established principles supporting tribal self-government. As the Court stated:

> Tribal courts are important to the protection of significant tribal interests. The Court shares the tribal court's concern that if the tribal court lacks jurisdiction over civil claims such as these, tribal members may be left without recourse against non-Indian entities that operate on the reservation when they have legitimate grievances. Contrary to the School District's contention that the tribal court clearly lacks jurisdiction, the Eighth Circuit has concluded, in the context of a preliminary injunction motion, that "[i]t is not 'plain' that a tribal court lacks authority to exercise jurisdiction over tort claims closely related to contractual relationships between Indians and non-Indians on matters occurring on tribal lands." *DISH Network Services L.L.C. v. Laducer*, 725 F.3d 877, 885 (8th Cir. 2013).

App. 050. In short, the District Court properly held – based on a nuanced balancing of interests – that the Tribal Court has jurisdiction here as an aspect of its sovereign authority over matters arising on trust land. *See Merrion*, *supra*.

The District Court went on to determine that even if *Montana* applied, the Tribal Court would still have jurisdiction here. *Montana*'s first exception provides

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for such a dispute is insufficient to deny the Tribe the right to self-government in this context, as the District Court properly held.

To the extent that *Sac and Fox* may be read to prohibit such a balancing of tribal and state interests, we respectfully request that this Court reconsider that aspect of its opinion.

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that a tribe has civil jurisdiction over non-members who enter "consensual relationships with the tribe or its members." *Montana*, 450 U.S. at 565. As the District Court stated "[i]ndisputably the Tribe and School District have entered into a contractual relationship to educate students on the Standing Rock Sioux Indian Reservation. The facts of this case fit squarely within the circumstances identified by the Supreme Court in *Montana*." App. 051.

The School District argues that while it entered a consensual agreement with the Tribe to join in a partnership to run the school together, that agreement cannot provide a basis for tribal jurisdiction under *Montana*'s first exception. The School District argues that the application of *Montana*'s first exception to the School District is absolutely foreclosed by *Hicks*. But the School District's position is wrong – as *Hicks*, read as a whole, clearly leaves open the question of whether a tribal court may have jurisdiction over on-reservation conduct by a state entity in connection with a consensual agreement with a tribe.

Justice O'Connor, in her concurrence in *Hicks*, suggested that Justice Scalia's majority opinion spoke too broadly, and emphasized the importance of tribal-state agreements as a potential basis for Tribal jurisdiction over state entities:

> State governments may enter into consensual relationships with tribes, such as contracts for services or shared authority over public resources. Depending upon the nature of the agreement, such relationships could provide official consent to tribal regulatory jurisdiction.

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> […]
>
> Whether a consensual relationship between the Tribes and the State existed in this case is debatable, . . . but our case law provides no basis to conclude that such a consensual relationship could never exist. Without a full understanding of the applicable relationships among tribal, state, and federal entities, there is no need to create a *per se* rule that forecloses future debate as to whether cooperative agreements, or other forms of official consent, could ever be a basis for tribal jurisdiction.

Hicks, 533 U.S. at 393-94 (O'Connor, J., concurring) (emphasis added).

Justice Scalia responded that Justice O'Connor was misreading his opinion – and he confirmed that he was not intending to create a *per se* rule. Rather, Justice Scalia clarified that the question of whether a tribal-state agreement could give rise to Tribal Court jurisdiction remained open. As Justice Scalia wrote, Justice O'Connor's concurrence suggested that:

> [The majority in *Hicks*] would invalidate express or implied cessions of regulatory authority over nonmembers contained in state-tribal cooperative agreements, including those pertaining to mutual law-enforcement assistance, tax administration assistance, and child support and paternity matters. This is a great overreaching. The footnote does not assert that "a consensual relationship [between a tribe and a State] could never exist," *ibid*. (opinion of O'CONNOR, J.). It merely asserts that "other arrangements" in the passage from *Montana* does not include state officers' obtaining of an (unnecessary) tribal warrant. 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

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> jurisdiction as well – are questions that may arise in another case, but are not at issue here.

Id. at 372 (emphasis added) (internal citation omitted).

As this exchange reflects, in *Hicks* there was a dialogue within the Court, but ultimately the question of whether a tribal court may exercise jurisdiction in connection with a consensual agreement between a tribe and a state entity was left open. While the School District cites *Hicks* for its claim that "[t]he first *Montana* exception only applies to private parties who freely enter into agreements with the tribe," Appellant's Brief at 13, that is not a fair reading of *Hicks*. Further, the lower court cases relied on by the School District in this regard also do not involve such agreements. *See* Appellant's Brief at 11-13 (citing *MacArthur v. San Juan Cnty., Utah*, 497 F.3d 1057 (10th Cir. 2007); *Window Rock Unified Sch. Dist. v. Reeves*, No. CV-12-08059-PCT-PGR, 2013 WL 1149706 (D. Ariz. Mar. 19, 2013); *Red Mesa Unified Sch. Dist. v. Yellowhair*, No. CV-09-8071-PCT-PGR, 2010 WL 3855183 (D. Ariz. Sept. 28, 2010); *Cnty. of Lewis, Idaho v. Allen*, 163 F.3d 509 (9th Cir. 1998)). None of those cases address the issue of Tribal Court jurisdiction in the context of an agreement between a tribe and a state entity. *Hicks* and the other cases relied on by the School District do not resolve – or even purport to resolve – the underlying jurisdictional issue in this case regarding the JPA.

The School District also contends that the Tribal Court does not have jurisdiction by virtue of a consensual agreement because, in effect, it did not enter

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a consensual agreement at all. While the School District does not deny the existence of the JPA or its effectiveness, it oddly states that "[s]ince the State has an affirmative duty to provide 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." Appellant's Brief at 15. But while the School District infers it was somehow compelled to enter the Joint Powers Agreement, that is clearly not so. Other public schools operate on the Standing Rock Sioux Reservation without entering agreements with the Tribe, and the Fort Yates Public School District No. 4 itself did so for many years prior to entering an agreement with the Tribe. The School District cites no legal authority suggesting that it was required to enter the JPA, and no such authority exists. The School District's general obligation to provide education is separate and distinct from its free and voluntary determination to do so jointly with the Tribe, pursuant to a consensual agreement.

Under Article II of the Joint Powers Agreement, the School District agreed "to combine the educational, social, cultural and physical opportunities of all K-12 students" together with those of the Tribe. App. 007. The School District agreed that the operation of separate schools by the School District and the Tribe in Fort Yates "has not maximized the student opportunities," so it agreed to a joint operation "to improve the academic achievement of all students." App. 008. The School District agreed to work with the Tribe to provide increased joint school

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funding "to greatly enhance the educational opportunities for all students involved." *Id.* Under Article VII of the JPA, the School District agreed that the combined school would be jointly administered by the Tribe and School District and agreed that property purchased under the agreement "shall be the joint property of the Standing Rock Sioux Tribe and the Fort Yates Public School District No. 4," unless otherwise specified. App. 010. Under the Article X of the JPA, the School District and the Tribe declared their intent to "seek to strengthen their collective ability to successfully educate students. . . ." *Id.* And, each party to the Agreement "recognized the sovereignty of the other. . . ." *Id.*

As the Joint Powers Agreement reflects, the School District and the Tribe have determined that it is in their common benefit to establish a framework under which they jointly operate the school on trust land on the reservation. To be sure, the School District and the Tribe maintain a measure of autonomy – for example, each retains its own school board. But the JPA creates the foundation on which the education systems are combined together.[11]

The case law described above underscores that the Tribal Court has jurisdiction over this matter under the Tribe's sovereign authority over its trust

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[11] Indeed, the High School that is the site of the matters alleged in Jamie Murphy's Tribal Court complaint is <u>primarily</u> a tribal school – as a significant majority of the funding for the school arises as a result of the Tribe's participation, and the vast majority of the students are Indians.

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lands. Those legal principles provide an important backdrop for the JPA, which reflects and reinforces this same understanding. So, when the JPA states that "no party waivers [sic] any rights, including treaty rights, immunities, including sovereign immunities, or jurisdiction" this reflects agreement of the parties that Tribal jurisdiction which pre-existed the JPA is retained. *See* App. 010. For this same reason, the School District's reliance on N.D.C.C. § 54-40.2-08(1) is unavailing. That measure provides that a tribal-school district agreement does not "enlarge[] or diminish[] the jurisdiction" of a tribe or the State. The Tribe, which already had jurisdiction based on existing law, cannot have its jurisdiction diminished as a result of the JPA. The baseline legal principles discussed above inform an understanding of the JPA – which incorporates those principles and provides an additional basis for affirming Tribal jurisdiction.

In short, a public school district has voluntarily joined with a tribal school to operate a combined school. The underlying claim in this case was brought by a Tribal member, alleging that the administration of the school harmed her daughter, who was a student there. As this is an action regarding on-Reservation conduct by a School operated under a consensual agreement as a partnership between the Tribe and the School District, the Tribal Court properly asserted jurisdiction over the matter. In any event, if it wishes to avoid the requirement that it exhaust tribal remedies, the School District must establish that the assertion of tribal court

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jurisdiction was "frivolous" or "obviously invalid." *DISH Network*, 725 F.3d at 883. The School District cannot meet that standard. Accordingly, while Tribal Court jurisdiction was clearly proper, to the extent that this Court may entertain any doubts in that regard, the proper result would still be to affirm and require exhaustion of tribal remedies.

CONCLUSION

For the foregoing reasons, the Standing Rock Sioux Tribal Court respectfully requests that the District Court's order be affirmed.

DATED this 5th day of June, 2014.

Respectfully submitted,

BY: */s/ Christopher G. Lindblad*________

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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 tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 8,808 words as determined by the word counting features of Microsoft Office Word 2007.

Pursuant to the Eight 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.

Dated this 5th day of June, 2014.

BY: */s/ Christopher G. Lindblad*________

Christopher G. Lindblad, ND # 06480
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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system, which will serve electronic copies on the following registered participants:

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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 foregoing brief, I will mail said documents by First Class Mail, postage prepaid, to the following non-CM/ECF participants:

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Dated this 5th day of June, 2014.

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