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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BOARD OF EDUCATION FOR THE GALLUP-MCKINLEY COUNTY SCHOOLS, Plaintiff, v. HENRY HENDERSON, et al., Defendants.	No. 1:15-cv-00604-KG-WPL

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE OF COURT TO FILE FIRST AMENDED COMPLAINT

Defendants Eleanor Shirley, Former Members of the Navajo Nation Supreme Court, Richie Nez, Casey Watchman, Ben Smith, Blaine Wilson, Former Members of the Navajo Nation Labor Commission, Eugene Kirk, Reynold R. Lee, and Former Members of the Office of Navajo Labor Relations, collectively the "Navajo Nation Defendants," file their response in opposition to Plaintiff Board of Education for the Gallup-McKinley Schools' Motion for Leave of Court to File First Amended Complaint.

FACTUAL BACKGROUND

The Board of Education for the Gallup-McKinley Schools (Gallup School Board) filed a Complaint against the Navajo Nation Defendants and Henry Henderson (Henderson) on July 10, 2015. Doc. 1. That Complaint alleges that the Navajo Nation Supreme Court, the Navajo Nation Labor Commission (Commission) and the Office of Navajo Labor Relations (ONLR) are asserting jurisdiction over Henderson's claims against the School Board under the Navajo Preference in Employment Act. *Id.* In response to the Complaint, the Navajo Nation Defendants filed a Motion to Dismiss on August 18, 2015. Doc. 18. In the Motion, the Navajo Nation Defendants ask this Court to dismiss the Complaint because the School Board lacks standing, as it has no "injury in fact," since the Navajo Nation Supreme Court previously dismissed Henderson's claim as untimely. *Id.* at 2-6. The School Board filed a response opposing the Motion on September 3, 2015. Doc. 19. The Navajo Nation Defendants filed a reply and Notice of Completion of Briefing on September 10, 2015. Docs. 20, 21. The Motion is pending for this Court's ruling.

Before this Court ruled on the Motion to Dismiss, the School filed a Motion for Leave of Court to File First Amended Complaint (Motion) on September 15, 2015.[1] Doc. 22. In its Motion, the Gallup School Board asks the Court to allow it to amend its Complaint to add a new claim concerning an ONLR Charge filed by Emma Benallie. *Id.* at 2. As discussed more fully below, ONLR closed Benallie's case on September 21, 2015, and Benallie has not filed a complaint with the Commission. *See* Notice of Right to Sue, Exhibit 1. The School Board also proposes amending the Complaint to add a new co-plaintiff, the Central Consolidated

[1] The Gallup School Board did not seek the Navajo Nation Defendants' position on its motion to amend before filing the motion. Local Rule 7.1(a) requires a party to seek the opposing party's position on a motion. Under that rule, "a motion that omits recitation of a good-faith request for concurrence may be summarily denied."

Schools (Central Consolidated), which has a separate case pending before the Commission involving Greg Bigman. Motion, Doc. 22, at 2. The First Amended Complaint (Proposed Complaint) submitted with the Motion includes allegations on these two cases, and continues to include allegations concerning Henry Henderson. Proposed Amended Complaint, Doc. 22-1.

LEGAL STANDARD

Under Rule 15(a) of the Federal Rules of Civil Procedure, a plaintiff may amend a complaint. If the proposed amendment is filed more than twenty-one days after the filing of a motion to dismiss under Rule 12, as here, the complaint may only be amended by the defendant's consent or by leave of the court. *Id.* Whether to grant an amendment of the complaint is in the court's discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971).

While the court has general discretion to grant or deny an amendment, one recognized reason to deny it is if the amendment is "futile." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993). This means that an amendment can be denied if the amended complaint would not survive a motion to dismiss. *Jefferson Cty. Sch. Dist. v. Moody's Investor's Services*, 175 F.3d 848, 859 (10th Cir. 1999).

ARGUMENT

I. THE COURT SHOULD DENY ANY AMENDMENT TO THE COMPLAINT THAT INCLUDES CLAIMS CONCERNING HENRY HENDERSON, AS THE SCHOOL BOARD STILL LACKS STANDING TO BRING THOSE CLAIMS.

The Gallup School Board's Proposed Complaint continues to include allegations about Henderson's case previously dismissed by the Navajo Nation Supreme Court. Doc. 22-1, ¶¶ 1-4, 10, 22-39, 62(b), (e)-(f), 66. As discussed in the Navajo Nation Defendants' pending

Motion to Dismiss, the Gallup School Board lacks standing to litigate those claims, as it has no "injury-in-fact" when the Navajo Nation Supreme Court dismissed Henderson's case before the School Board filed its federal complaint. Doc. 18, at 2-6. The Gallup School Board appears to recognize this deficiency in its Proposed Complaint, as it states in a paragraph justifying its request for declaratory relief that "a case of actual controversy exists between Bigman and CCSD and Benallie and GMCS." Doc. 22-1, ¶ 20. Tellingly, the Gallup School Board omits any claim in that paragraph that there is a case of actual controversy between it and Henderson.

To avoid repetition, the Navajo Nation Defendants adopt by reference their previous arguments in their pending Motion to Dismiss. *See* Doc. 18, at 2-6. Based on those arguments, the Court should deny amendment of that portion of the Complaint that continues to assert claims concerning Henderson. Amendment of that portion of the Complaint would be futile, as it would be dismissed for lack of standing. Therefore, even if this Court allows amendment of the Complaint to add the Gallup School Board's claims against Emma Benallie, Henderson should be excluded as a defendant. Further, as members of the Navajo Nation Supreme Court are named as defendants solely because of their opinion in Henderson's case, Proposed Complaint, Doc. 18, ¶¶ 2-4, Eleanor Shirley and Former Members of the Navajo Nation Supreme Court should also be excluded as defendants.

II. THE COURT SHOULD DENY AMENDMENT OF THE COMPLAINT ADDING CLAIMS CONCERNING EMMA BENALLIE.

A. The Gallup School Board lacks standing to challenge jurisdiction over Emma Benallie's claims, as ONLR has closed her case.

On September 21, 2015, ONLR issued a Notice of Right to Sue to Emma Benallie, closing her case. Exhibit 1. Under the Navajo Preference in Employment Act (NPEA), ONLR

issues that document when it closes its investigation of the employee's Charge. 15 N.N.C. § 610(H)(1)(a) (2005). It may issue the Notice with or without finding probable cause that the employer violated the NPEA. 15 N.N.C. § 610(H)(1)(a)(2), (3).[2] In Benallie's case, ONLR did not make a probable cause finding, but issued the Notice because it concluded it could not decide probable cause within the 180 days the NPEA allows it to make that finding. Exhibit 1; *see* 15 N.N.C. § 610(H)(1)(a)(3).

As the Notice of Right to Sue has been issued, there is no current case pending before ONLR. Further, to continue her case, Emma Benallie must affirmatively file a complaint before the Commission; there is no automatic review by the Commission once ONLR closes its investigation. 15 N.N.C. § 610(J). Benallie has 360 days from the filing of her Charge to file a complaint before the Commission. 15 N.N.C. § 610(J)(1)(c). As of the time of this Response, Benallie has filed nothing with the Commission, and indeed may never file a complaint.

As neither ONLR nor the Labor Commission is asserting jurisdiction over Emma Benallie's claims, the Gallup School Board lacks standing to seek a declaratory judgment or an injunction concerning her.[3] For the same reasons discussed in the pending Motion to Dismiss,

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[2] Contrary to the assertions in the Gallup School Board's Motion and proposed amended complaint, Doc. 22, at 2; Doc. 22-1, ¶ 7, ONLR does not issue judgments or decide cases on the merits, and does not have authority to mandate damages or any other actual relief. ONLR investigates a Charge filed by an employee, attempts settlement of the Charge, and concludes whether there is probable cause that the NPEA was violated. *See* 15 N.N.C. §§ 610(C)-(H). It cannot direct employers to do anything, as any such binding relief must be issued by the Labor Commission under a complaint filed by the employee after ONLR has closed its investigation. *See* 15 N.N.C. §§ 610; 612.

[3] As ONLR closed the case before the filing of an approved amended complaint, the issue is one of standing, not mootness. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190-91 (2000) (discussing distinction between standing and mootness based on timing of complaint). However, even if the question was one of mootness, the closure of the only Navajo Nation action involving Benallie renders the Gallup School Board's claims moot. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of*

the lack of any pending actions in the Navajo system means that the Gallup School Board has no injury-in-fact, as there is no "continuing injury or . . . a real and immediate threat of being injured in the future." *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004); *see* Doc. 18, at 2-6. Amendment of the Complaint to add claims concerning Emma Benallie is then futile, as that portion of the Complaint would be dismissed for lack of standing.

B. The School Board's claim against Emma Benallie cannot be heard because the Board has not exhausted its Navajo Nation remedies.

Even if the Gallup School Board has standing to enjoin ONLR and the Commission from hearing a non-existent case about Benallie, it has not exhausted its remedies before the Commission or the Navajo Nation Supreme Court.

A plaintiff attacking tribal jurisdiction must exhaust tribal court remedies before filing in federal court. *See National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). Absent exceptional circumstances, the federal plaintiff must present its jurisdictional arguments before the tribal trial court and any tribal appellate court before filing a federal action. *See Nevada v. Hicks*, 533 U.S. 353, 369 (2001); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) ("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"); *Crowe & Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1149 (10th Cir. 2011). Exhaustion is required even if there is no pending tribal court case, as in Benallie's situation here. *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991).

The exhaustion requirement has four narrow exceptions. Exhaustion is not necessary only if: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted

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Florida, 63 F.3d 1030, 1046, n.50, n.57 (11th Cir. 1995) (tribal court dismissal of case renders federal challenge to tribal authority moot).

in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction; or (4) it is clear that the tribal court lacks jurisdiction and that judicial proceedings would serve no purpose other than delay. *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1236 (10th Cir. 2014). To invoke the exceptions, a party must make "a substantial showing of eligibility." *Id.* Further, the court must apply the exceptions narrowly, as tribal courts are typically only barred from first determining their jurisdiction when a federal court has exclusive jurisdiction over the case. *Id.* Indeed, when the activity at issue arises on a reservation, as it does here, comity concerns "almost always dictate that the parties exhaust their tribal remedies before resorting to the federal forum." *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1507 (10th Cir. 1997).

Exhaustion of tribal court remedies serves several important policy purposes. First, exhaustion furthers the congressional policy of supporting tribal sovereignty. *National Farmers*, 471 U.S. at 856-57; *Kerr-McGee*, 115 F.3d at 1507. Second, the tribal court's legal analysis assists the federal court by providing "the benefit of [its] expertise" on tribal jurisdictional questions. *Id.* Third, exhaustion allows the tribal court to develop "a *full* record" before federal review. *Id.* (emphasis added).

The third policy purpose is especially implicated here, where there has been no fact-finding on Benallie's claims. In jurisdiction cases like this one, the tribal court is responsible for developing a full factual record to serve "the orderly administration of justice in the federal court." *National Farmers*, 471 U.S. at 856-57; *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990) (quoting *National Farmers*). Thus, the federal district court serves a quasi-appellate role in tribal jurisdiction cases, not acting as a fact-finder, but as a reviewer of

legal error on questions of purely federal law. *See Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996) (discussing federal district court's standard of review for tribal court decisions); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 817 n.9 (9th Cir. 2011). Consistent with this unique role, the federal district court reviews tribal factual findings for clear error, and defers completely on questions of purely tribal law. *Mustang*, 94 F.3d at 1384; *FMC*, 905 F.2d at 1313 ("The [clearly erroneous] standard accords with traditional judicial policy of respecting the factfinding ability of the court of first instance.").

As there has been no fact-finding on Benallie's case, the Navajo Nation courts must have the first opportunity to hear the Gallup School Board's challenge to Navajo Nation jurisdiction.

The Gallup School Board's exhaustion in Henderson's case is insufficient to excuse exhaustion for Benallie's claims. The facts of her case differ in potentially significant ways. Most significantly, Benallie's claims arise from actions taken at Crownpoint High School, a different piece of land than where the Henderson claims arose at Navajo Pine High School. *See* Proposed Amended Complaint, Doc. 22-1, at ¶¶ 22, 40. Though not precisely stated in the Proposed Complaint, both parcels are, most likely, Navajo trust land, and are therefore occupied by the Gallup School Board pursuant to federally-approved leases with the Nation. Leases negotiated at different times may have significantly different provisions on jurisdiction. The Proposed Complaint does not even specify the land where Crownpoint High School is located, its status, or whether there is a lease, but instead states ambiguously that Benallie is employed "at Crownpoint High School, a . . . school located *on the Navajo Nation or its trust lands*." Proposed Complaint, Doc. 22-1, ¶ 40 (emphasis added).

Factual findings are at the very least necessary on the status of the land where the school sits, whether there is a current lease, and, if so, what it does or does not say about Navajo jurisdiction over employment at that site. Fact-finding may also be necessary on potential extrinsic evidence on the parties' intent if such lease language is ambiguous. *See* Restatement Second of Contracts, § 214(c) (evidence of negotiations relevant to meaning of contract). The existence, or not, of explicit consent to jurisdiction in the Crownpoint lease may make be material in a jurisdictional analysis. *See Montana v. United States*, 450 U.S. 544, 565 (1981) (including a lease of tribal land as one type of "consensual relationship" generally justifying tribal jurisdiction over non-Indians); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001) (requiring "nexus" between consensual relationship and assertion of tribal jurisdiction); *Office of Navajo Labor Relations ex rel. Bailon v. Central Consolidated School Dist. No. 22*, 8 Nav. R. 501, 505-07 (Nav. Sup. Ct. 2005) (finding employment jurisdiction over school district based on specific consent language in lease). Under the exhaustion doctrine, such facts must be made by the Navajo Nation courts, and the Gallup School Board is required to exhaust its remedies on at least those points.

The Gallup School Board alleges in its Proposed Complaint that it is not required to exhaust Navajo Nation remedies, but not based on any of the four narrow exceptions to exhaustion. Specifically, the Gallup School Board states:

> The doctrine of exhaustion of tribal judicial remedies does not apply to GMCS in this case because it is clear that the issue of the Navajo Nation's assertion of jurisdiction over New Mexico public schools has already been ruled upon by the highest court in the tribal courts in the case of *Henry Henderson vs. Gallup McKinley County Schools*, NNSC No. SC-CV-38-11, *See* Notice of Judgment at **Exhibit 11**.

Proposed Amended Complaint, Doc. 22-1, ¶ 8.

The Navajo Nation Supreme Court's ruling on jurisdiction under the specific circumstances in *Henderson* is not a reason to excuse exhaustion under the four recognized exceptions. *See Stidham*, 762 F.3d at 1236 (stating exceptions).[4] Even if prior decisions were relevant, as discussed above, the potentially different factual scenarios do not excuse exhaustion of jurisdictional claims concerning Benallie. Therefore, exhaustion is required.

Respect for the authority of the Navajo Nation's courts to decide the jurisdictional questions in Benallie's case dictates exhaustion. As the Gallup School Board has not exhausted its Navajo Nation remedies, amendment of the Complaint to add claims concerning Benallie is futile. This Court should then deny the amendment to add the Benallie claims.

III. AS THE GALLUP SCHOOL BOARD CANNOT AMEND THE COMPLAINT FOR ITS OWN CLAIMS, IT CANNOT ADD CENTRAL CONSOLIDATED'S CLAIMS.

If this Court denies amendment of the Gallup School Board's claims, it should not allow amendment to include Central Consolidated's claims. If the Gallup School Board's complaint cannot be amended to support its own claims, the complaint cannot continue with a proposed new plaintiff. *See Summit Office Park, Inc. v. United States Steel Corp.*, 639 F.2d 1278, 1283-84 (5th Cir. 1981) ("Where a plaintiff never had standing to assert a claim against the defendants, it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs . . . and a new cause of action."); *Turner v. First Wisconsin Mortgage Trust*, 454 F.Supp. 899, 913 (E.D. Wis. 1978); *Schwartz v. The Olympic, Inc.*, 74 F.Supp. 800, 801 (D.C.Del. 1947) ("If [a plaintiff] cannot maintain his own complaint, he has

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[4] In contrast to the Gallup School Board's claim, the Central Consolidated Schools assert elsewhere in the Proposed Complaint that Navajo Nation jurisdiction is "plainly lacking" under the fourth exception. Proposed Complaint, Doc. 22-1, ¶ 6. That is also incorrect, but at least Central Consolidated attempts to fit its argument within an actual recognized exhaustion exception.

no right to amend it."). Here, as the Gallup School Board's amendments to the complaint concerning Henderson and Benallie are futile, the amendments to the entire complaint should be denied. A plaintiff should not be able to add a whole new plaintiff to an otherwise futile complaint. Central Consolidated may file its own complaint if it wishes to attack the Nation's jurisdiction over its employment activities.

IV. AS CENTRAL CONSOLIDATED IS NOT YET A PARTY TO THIS CASE, THE NATION RESERVES ITS DEFENSES TO CENTRAL CONSOLIDATED'S CLAIMS STATED IN THE PROPOSED COMPLAINT.

As discussed above, Central Consolidated should not be allowed to enter the case through the Proposed Complaint when all of the Gallup School Board's proposed amendments to its own claims are futile. However, if this Court allows amendments to Gallup School Board's claims, it has the discretion to allow an amendment for Central Consolidated to enter the case. Until that happens, it is premature for the Navajo Nation Defendants to comment on the validity of Central Consolidated's claims. They will raise any objections to Central Consolidated's claims through a motion to dismiss if and when Central Consolidated becomes a party. *See Pessotti v. Eagle Manufacturing Co.*, 774 F.Supp. 669, 677-78 (D. Mass. 1990) (lack of objection to amendment of complaint does not waive defense raised in response to amended complaint).

RESPECTFULLY SUBMITTED this 2nd day of October, 2015.

By: /s/ Paul Spruhan

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of New Mexico using the CM/ECF system on October 2, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Paul Spruhan

Exhibit 1

BEFORE THE OFFICE OF NAVAJO LABOR RELATIONS

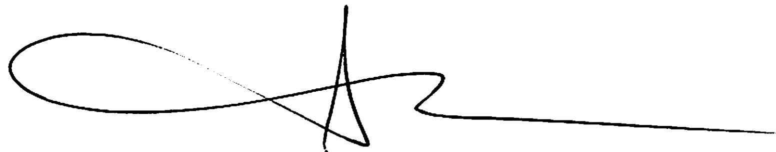
IN RE: INDIVIDUAL CHARGE BY	)	INDIVIDUAL
EMMA H. BENALLIE AGAINST	)	CHARGE
THE CROWNPOINT HIGH SCHOOL	)	CPIC15-048

NOTICE OF RIGHT TO SUE

To: Emma H. Benallie
Post Office Box 1948
Crownpoint, New Mexico 87313

Pursuant to 610 B. (4) of the Navajo Preference in Employment Act (Act), on July 20, 2015 the Office of Navajo Labor Relations (ONLR) accepted your Individual Charge and initiated an investigation into claims the Crownpoint High School violated the Act; however notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the Individual Charge was filed. Thereby ONLR, pursuant to Section 610 H. (1) of the Act, authorizes you to initiate a proceeding before the Navajo Nation Labor Commission (Commission) should you wish to appeal the dismissal. Further, you are given notice ONLR has dismissed your Individual Charge effective on this date. Lastly, pursuant to 610 H. (3) of the Act a copy of the Employment Charge Form and copy of the Rules and Procedures for filing with the Commission are enclosed. You may retain an Attorney to help you with the proceeding before the Commission.

Dated this day 21st of September, 2015.



Gililand "Gil" Damon, Labor Compliance Officer
OFFICE OF NAVAJO LABOR RELATIONS

Cc: Individual Charge file
REF: AD15-971

THE NAVAJO NATION

RUSSELL BEGAYE PRESIDENT
JONATHAN NEZ VICE PRESIDENT

September 21, 2015 AD15-971

Emma H. Benallie
Post Office Box 1948
Crownpoint, New Mexico 87313

Subject: Individual Charge CPIC15-048

Dear Ms. Benallie:

The purpose of this letter is to update your on the status of the Individual Charge you filed against Crownpoint High School alleging a violation of the Navajo Preference in Employment Act ("Act").

Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, the Office of Navajo Labor Relations (ONLR) certifies it will be unable to complete one or both of these steps within 180 days after the date on which the Individual Charge was filed. Therefore you are hereby given notice that your individual charge has been officially dismissed on the date of this letter.

However, ONLR encloses a Notice of Right to Sue, which authorizes to proceed with your claims before the Navajo Nation Labor Commission (Commission) should you wish to appeal the dismissal. Also enclosed is a copy of the Employment Charge Form you filed with ONLR, including the Commission's Rules and Procedures for filing before the Commission.

The Commission is located in the Navajo Nation Training Center building herein Window Rock, Arizona. The Commission's telephone number is (928) 871-6805. (**NOTE: Initiation of a Commission proceeding must be filed with the Commission within 360 days after the date (June 25, 2015) the ONLR accepted your Individual Charge, or before May 30, 2016. Also be aware that if you file a proceeding with the Commission the Commission requires a filing fee**). Thank you.

Sincerely,

Gililand "Gil" Damon, Labor Compliance Officer
OFFICE OF NAVAJO LABOR RELATIONS

ENCLOSURE:

Cc: Respondent
Individual Charge file
Chrono file

OFFICE OF NAVAJO LABOR RELATIONS
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