IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

BOARD OF EDUCATION FOR THE
GALLUP-MCKINLEY COUNTY SCHOOLS,

Plaintiff,

v. No. CV-2015-00604 KG/WPL

HENRY HENDERSON, 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,
FORMER MEMBERS OF THE OFFICE OF
NAVAJO LABOR RELATIONS, AND
JOHN AND JANE DOES.

Defendants.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE OF COURT TO FILE FIRST AMENDED COMPLAINT

I. DEFENDANTS' RESPONSE

The Defendants respond in opposition to the Motion to Amend (*Doc 22*) that the Gallup Schools' proposed amendments are futile and that the Central Schools cannot otherwise join a futile complaint in order to be a party to the action[1]. *See Doc 23* at 11-12. However, Defendants' position is premised on the incorrect presumption, as to standing, that so long as there are no pending administrative or court actions before the Navajo Nation Supreme Court

[1] With regard to D.N.M. LR-CIV. RULE 7.1, counsel for the Gallup Schools understood that legal counsel for the Board of Education for Central Consolidated Schools would be contacting Defendants' Counsel regarding this Motion. Undersigned counsel was not informed from that contact that Defendants' Counsel would concur and allow the amendments, and nonoccurrence was expected in light of Defendant's Motion to Dismiss and the anticipated position that amending the complaint would also be subject to a motion to dismiss. As such, the Motion was not a surprise and concurrence could have been provided to legal counsel to Central Schools preventing the filing of this Motion and the necessity of a response by Defendants.

(the "NNSC"); the Navajo Nation Labor Commission ("NNLC"), or the Office of Navajo Labor Relations ("ONLR") the Gallup Schools nor the Central Schools have an "injury in fact" to support standing. *See Doc 23* at 5.

In addition, the Defendants incorrectly assert that the Gallup Schools and the Central Schools must exhaust tribal remedies in the cases of *Emma H. Benallie v. Gallup-McKinley County Schools (Crownpoint High School)*, No. CPIC15-048 and of *Greg Bigman v. Central Consolidated School District No. 22*, No. NNLC-2014-056, in order to have standing. *See Doc 23* at 6. However, Defendants simply choose to ignore that the NNSC has already established under tribal law the jurisdiction of the administrative agencies of the Navajo Nation over public school employment in *ONLR, ex rel. Jones v. CCSD*, 8 Nav. R. 234 (Nav. S. Ct. 2002) and *ONLR ex rel. Bailon v. CCSD*, 8 Nav. R. 501 (Nav. S. Ct. 2004), and ruled that this holding is binding as *res judicata*. *Tsosie v. CCSD*, No. SC-CV-34-06 (Nav. S. Ct. 2009). The NNSC has also asserted jurisdiction over state public schools in *Cedar Unified Sch. Dist. v. NNLC*, No. SC-CV-53-06 (Nav. S. Ct. 2007), *Red Mesa Sch. Dist v. NNLC*, No. SC-CV-54-07 (Nav. S. Ct. 2007), *Hasgood v. Cedar Unified Sch. Dist.*, No SC-CV-33-10 (Nav. S. Ct. 2011) and specifically over the Gallup Schools in *Henry Henderson vs. Gallup McKinley County Schools*, NNSC No. SC-CV-38-11 (Nav. S. Ct. May 13, 2015). These cases clearly establish that the Navajo Nation, by and through its courts, have already adjudicated its subject matter jurisdiction under tribal law and further appeals each spanning years to technically satisfy exhaustion in each and every new case on the same issue would not change further assertion of jurisdiction by the Navajo Nation over New Mexico Public Schools. *See United States ex rel. Kishell v. Turtle Mountain Housing Auth.*, 816 F.2d 1273, 1276 (8th Cir. 1987) ("a federal court should stay its hand until tribal remedies are exhausted and the tribal court has had a full opportunity to

determine its own jurisdiction"). As such, the Gallup Schools and the Central Schools have standing requiring liberal amendments to the Complaint under FED.R.CIV.P. 15.

II. ARGUMENT

A. NEW MEXICO PUBLIC SCHOOLS ON NAVAJO NATION LANDS HAVE STANDING.

The Gallup Schools and the Central Schools have standing to challenge the current and repeated assertion of jurisdiction by the NNSC, the NNLC and the ONLR over the employment matters of New Mexico public school districts that are fulfilling the State governmental function of providing uniform public education on the lands of the Navajo Nation. To avoid repetition in this Reply and similar to the Defendants, the Gallup Schools incorporates into this Reply Brief its Response to Defendants Motion to Dismiss (*Doc 19*), which sets forth the standing of the Gallup Schools under the original Complaint.

When asserting there can be no "injury in fact" without a pending matter before the agencies of the Navajo Nation, the Defendants have simply ignored the fact that "[t]he 'injury in fact' requirement is satisfied differently depending on whether the plaintiff seeks prospective or retrospective relief." *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004), *citing City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983). The fact that the *Henderson* case has been dismissed by the NNSC and the assertion that the NNLC and ONLR have dismissed or declined jurisdiction over the *Benallie* case does not alter the standing of the Gallup Schools to prospective relief. *See Doc 23* at 6. The threat of being injured in the future establishing standing under *Tandy* is not confined to only the reassertion of jurisdiction by the Navajo Nation in the cases of *Henderson* and/or in *Benallie*. Defendants are simply misapplying the law.

The Gallup Schools and the Central Schools are subject to the same injury in the future, in that the unlawful assertion of administrative and regulatory jurisdiction by the Navajo Nation.

The Response does not address at all the repeat assertion of the jurisdiction over the state school districts in the future by the NNDC, NNLC and ONLR and also the Navajo Nation's enforcement of the provisions of the Navajo Preference in Employment Act when another employee of the Gallup Schools or of the Central Schools assert an employment claim under tribal law. *See Doc 1-10* at 3.

As the case law provides, "a plaintiff may 'demonstrate that an injury is likely to recur'[2] by showing 'that the defendant had, at the time of the injury, a written policy, and that the injury stems from that policy.'" *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004), *quoting Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001). "Where the harm alleged is directly traceable to a written policy [such as a tribal statute] there is an implicit likelihood of its repetition in the immediate future." *Id.* Here, the Navajo Nation maintains the Navajo Preference in Employment Act ("NPEA") setting forth employment obligations on employers located on the Navajo Nation and has repeatedly acted to enforced and regulate the Gallup Schools and the Central Schools under its provision by and through its administrative agencies[3]. This injury of the assertion of unlawful jurisdiction over the Gallup Schools and Central Schools stems directly from this tribal statute and, as a consequence, is likely to recur. *See id.*

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[2] The legal standard is that the Gallup Schools and the Central Schools must establish the each is "suffering a continuing injury or be under a real and immediate threat of being injured in the future." *Tandy*, 380 F.3d at 1283, *quoted in Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d 1228, 1257 (D.N.M. 2011).

[3] Defendant ONLR is a department within the Division of Human Resources of the Navajo Nation established under 15 N.N.C. § 201, to "monitor and enforce the Navajo Preference in Employment Act," "to act as an administrative agency for matters relating to the enforcement of employment preference in hiring, recruitment, promotion, layoff, termination, transfer and other areas of employment," and "to gather information from employers, employees, labor organizations, and governmental agencies relating to employment, compensation, and working conditions." 15 N.N.C. § 202.

Defendant NNLC was established to "act as the administrative hearing body under the [NPEA]", and to "conduct and hold administrative hearings in accordance with Navajo Nation laws concerning Navajo employment preference." 15 N.N.C. § 302.

In evaluating the likelihood of a claimed threat of enforcement of a statute, the Court should consider the following three factors: (1) whether the Plaintiff has articulated a "concrete plan" to violate the tribal law in question; (2) whether the prosecuting tribal authorities have communicated a specific warning or threats to initiate proceedings against the Plaintiff; and (3) the history of past prosecution or enforcement under the challenged regulation. *See Wright v. Incline Vill. Gen. Imp. Dist.*, 597 F. Supp. 2d 1191, 1202 (D. Nev. 2009), *citing Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (*citing San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126–27 (9th Cir. 1996)). In cases in which constitutional rights are potentially at risk, "plaintiffs need not suffer or risk suffering prosecution under a statute to demonstrate injury from it." *Wright*, 597 F. Supp. 2d at 1201, *quoting S.O.C., Inc. v. County of Clark*, 481 F.Supp.2d 1122, 1126 (D.Nev. 2007) (*citing Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 617–18 (9th Cir. 1999)). "Instead, plaintiffs can meet the standing requirement "even if a prosecution is remotely possible." *Id.*, *quoting Culinary Workers Union v. Del Papa*, 200 F.3d 614, 618 (9th Cir. 1999). Here, even applying these three factors, the Court should conclude that Gallup Schools and the Central Schools have demonstrated a genuine threat of prosecution sufficient to satisfy the "injury-in-fact" component of the standing inquiry.

As to the first factor, the Gallup Schools and the Central Schools have consistently and repeated challenged the subject matter jurisdiction of the NNSC, NNLC and ONLR in every proceeding and case (*see, supra*) demonstrating a "concrete plan" to challenge and refuse the application of administrative and regulatory jurisdiction by the Navajo Nation over New Mexico public schools performing state governmental functions. *See Macarthur v. San Juan County,* 497 F.3d 1057, 1073-74 (10th Cir. 2007); *see also Red Mesa Unified School Dist., et al., v.*

Yellowhair, *et al.*, 2010 WL 3855183, at *3 (D. Ariz. September 28, 2010); *Window Rock Unified Sch. Dist. v. Reeves*, 2013 WL 1149706, at *5 (D. Ariz. March 19, 2013). This plan is further demonstrated by the filing of this action seeking federal relief. As such, this factor favors the Gallup Schools and the Central Schools.

As to the two remaining factors, the past actions of the Navajo Nation to take action to consistently enforce the provisions of the NPEA and the absence of any assertion here by Defendants regarding future actions to enforce the NPEA demonstrate a sufficient threat to continued enforcement of the NPEA on state public schools. In addition, there are now numerous examples of the Navajo Nation's intent to do so, including matters in federal litigation in the State of Arizona. As such, these factors also favor standing for the Gallup Schools and the Central Schools. Thus, the cases of *Henderson, Benallie*, *rel. Jones*, *ex rel. Bailon*, *Tsosie*, *Hasgood* and *Bigman* (*see, supra*) are subject to repetition involving the same parties as to the issue of tribal jurisdiction, and it is disingenuous for the Navajo Defendants to assert that the Gallup Schools' standing is somehow extinguished by virtue of a judgment by the NNSC in *Henderson* or alleged dismissal in *Benallie*. Therefore, the Motion to Amend should be granted.

The Defendants also challenge standing for the proposed amendments alleging that the Gallup Schools have not exhausted tribal remedies in the *Benallie* matter (*see Doc 23* at 6-10), and it is logical to assume that the Defendants are reserving this argument as to the Central Schools in the *Bigman* matter arguing that the Central Schools cannot join a futile complaint filed by the Gallup Schools and presumably file for dismissal should the Central Schools should file a separate complaint. *See Doc 23* at 10-11. However, the consolidation of the same claims and issues applying the same law by similarly situated state public school districts against the Navajo Nation conserves judicial and litigant resources and promotes judicial economy. It

would prevent the necessity of further motions practice for consolidation under FED.R.CIV.P. 42(a). *See Lindley v. Life Investors Ins. Co. of Am.*, 2009 WL 2601949, at *3 (N.D. Okla. August 20, 2009) (district court has the discretion to consolidate separate actions for pretrial proceedings or trial if the cases involve a common issue of law or fact), *citing American Emp. Ins. Co. v. King Resources Co.*, 545 F.2d 1265 (10th Cir. 1976); *Skirvin v. Mesta*, 141 F.2d 668, 672 (10th Cir. 1944).

The Court has the discretion to determine if the Navajo Courts have had a sufficient opportunity to decide the issue of the jurisdiction of its courts and of the Navajo Nation's administrative and regulatory agencies over New Mexico public schools located on the lands of the Navajo Nation. *See Henry Henderson vs. Gallup McKinley County Schools*, NNSC No. SC-CV-38-11 (Nav. S. Ct. May 13, 2015) at *Doc 1-10* and *Doc 1-11*. "The doctrine of tribal exhaustion is a judicially created rule, dictated by comity rather than jurisdiction concerns, which requires federal courts to defer to the tribal courts whenever federal and tribal courts have concurrent jurisdiction over a claim, in order to encourage tribal self-government." *Fine Consulting, Inc. v. Rivera*, 915 F. Supp. 2d 1212, 1221 (D.N.M. 2013); *see Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 813 (7th Cir. 1993) ("the doctrine of tribal exhaustion does not deprive a district court of subject-matter jurisdiction."); *Rosebud Sioux Tribe of S. Dakota v. Driving Hawk*, 534 F.2d 98, 101 (8th Cir. 1976) ("exhaustion of tribal remedies is not an iron-clad requirement…" when it "would be a futile gesture and would cause irreparable harm…"). "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." *Veeder v. Omaha Tribe of Nebraska*, 864 F. Supp. 889, 901 (N.D. Iowa 1994), *quoting Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). The "[p]romotion of tribal self-government and self-determination required

that the Tribal Court have 'the first opportunity to evaluate the factual and legal bases for the challenge' to its jurisdiction." *LaPlante*, 480 U.S. at 15-16, *quoting Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Here, it is clear that the Navajo Courts, specifically its highest appellate court, have had ample opportunity to determine its jurisdiction and that of the Navajo Nation over public school districts located on Navajo Nation lands under the Navajo Preference in Employment Act. Here, there are common facts and law to each incident of the assertion of jurisdiction over the Gallup Schools and over the Central Schools by the NNDC, NNLC and ONLR. Thus, the Motion to Amend should be granted as this Court has subject matter jurisdiction.

Applying Defendants own argument of the need for a pending action before the NNLC or ONLR to have standing, the Gallup Schools would be subject to an exception to the requirement to exhaust tribal remedies[4]. Under the Defendants' theory, exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction where the Navajo Nation would simply reargue in a circular argument that a pending administrative action is required for standing and then again assert the requirement for exhaustion. As such, the exception would apply. *See Brown*, 84 F. Supp. 3d at 477-78; *see also* Note 4.

More important the Proposed Amended Complaint is supported by the allegations that there is no federal grant of authority for "tribal governance of nonmembers' conduct on land

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[4] The federal courts have created parameters to the tribal court exhaustion doctrine.

> There are four recognized exceptions to the requirement for exhaustion of tribal court remedies where: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule.

Brown v. W. Sky Fin., LLC, 84 F. Supp. 3d 467, 477-78 (M.D.N.C. 2015), *quoting Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir.), *cert. denied,* — U.S. ——, 134 S.Ct. 825 (2013) (internal citations and footnote omitted).

covered by *Montana's* main rule[5]." *See Doc 22-1* at ¶¶ 48, 54-58. Employment relationships between tribe members and a state's political subdivision are not "**private** consensual relationships … and do not fall within the first *Montana* exception." *MacArthur*, 497 F.3d at 1074; *see Doc 22-1* at ¶¶ 48, 54-58. To satisfy the second *Montana* exception, "[t]he conduct must do more than injure the tribe, it must **imperil the subsistence** of the tribal community" such that "tribal power must be **necessary to avert catastrophic consequences**." *Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653, 660 (8th Cir. 2015) (emphasis in original) (internal quotations omitted).

Tribes lack jurisdiction over employment-related claims brought by tribe members against state-run public school districts operating schools on tribal land because (1) the public school district's relationship with the tribe is neither consensual nor commercial, but rather compulsory pursuant to the "constitutionally-imposed mandate to operate a public school within the reservation boundaries," and (2) in such employment cases, tribal jurisdiction is not necessary to avert catastrophic consequences that imperil the subsistence of the tribal community. *Id.* at 659, 661; *see also Red Mesa Unified Sch. Dist.*, 2010 WL 3855183, at *5 (holding that the Navajo Nation "has no regulatory or adjudicative jurisdiction" over employment claims brought by tribe members against two Arizona public school districts operating schools on tribal land, and barring both the former employees and the NNLC from further pursuing the claims before the NNLC or the NNSC). Therefore, the fourth exception to

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[5] Tribal nations presumptively lack civil jurisdiction over non-Indians. *Montana v. United States*, 450 U.S. 544 (1981). Under federal common law, a tribal nation cannot exercise jurisdiction over activities or property of nonmembers of the tribal nation unless (1) the nonmembers entered "*consensual* relationships with the tribe or its members, through *commercial* dealing, contracts, leases or other arrangements," or (2) the conduct of non-Indians on fee lands within the reservation "threatens or has some direct effect upon the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66 (emphasis added). "'The burden rests on the tribe' to establish that one of the *Montana* exceptions applies." *Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653, 658 (8th Cir. 2015); *quoting Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008).

exhaustion of tribal remedies applies. *See Brown*, 84 F. Supp. 3d at 477-78; *see also* Note 4. As such, the Motion to Amend (*Doc 22*) should be granted.

III. CONCLUSION

WHEREFORE Plaintiff Board of Education for the Gallup-McKinley County Schools respectfully moves this Court for an order granting this Motion for the reasons set forth above and requests any other relief the Court feels is just, appropriate, and consistent therewith.

Respectfully submitted,
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ATTORNEYS FOR BOARD OF EDUCATION FOR THE GALLUP-MCKINLEY COUNTY SCHOOLS

I HEREBY CERTIFY that on the 16th day of October, 2015, the foregoing pleading was electronically filed through the Court's CM/ECF system, which caused the foregoing parties or counsel of record to be served by electronic means as more reflected on the Notice of Electronic Filing and by means of the U.S. Mail:

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