Case No. 16-2011

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Appealed From the United States District Court for New Mexico
District Court No. 15-CV-604-KG/WPL
District Court Judge: Kenneth J. Gonzales]

BOARD OF EDUCATION FOR THE GALLUP-MCKINLEY COUNTY SCHOOLS,

Plaintiff-Appellant,

v.

HENRY HENDERSON, ET AL

Defendants-Appellees

APPELLANT'S REPLY TO APPELLEES ELEANOR SHIRLEY ET AL'S ANSWER BRIEF

Respectfully submitted,

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PLAINTIFF/APPELLANT'S RESPONSE TO DEFENDANTS/APPELLEES' SUPPLEMENTAL STATEMENT OF THE CASE

Navajo Nation Defendants/Appellees do not dispute the School District's Statement of Facts or Statement of the Case. However, their Response Brief ("Resp. Br.") includes a section entitled "Supplemental Statement of the Case" that describes how the Nation enforces the Navajo Preference in Employment Act ("NPEA"). It is important to note that the Supplemental Statement of the Case cites statutes from the Navajo Nation Code and a case from the Navajo Nation Supreme Court, none of which bind federal courts of the United States. Accordingly, this Court should disregard the Supplemental Statement of the Case.

PLAINTIFF/APPELLANT'S REPLY TO ARGUMENT IN RESPONSE BRIEF

The Response Brief employs immaterial facts, non-binding authority, and circular arguments, avoiding any discussion of the central problem with the Navajo Nation Defendants/Appellees' argument and the District Court's decision. The parties agree that the School District has exhausted its tribal remedies, but now that those remedies are exhausted, the Navajo Nation Defendants/Appellees argue that since the tribal court ruled on the matter on other grounds, the School District lacks standing. As explained in the School District's Opening Brief, the District Court

cites *Bailon v. Central Cons. School Dist. No. 22,* 8 Nav. R. 501 (Nav. Sup. Ct. 2004) for the proposition that because language in the trust land lease at issue in that case did not waive application of the NPEA, the Navajo Nation had jurisdiction over the state public school board's employment decision. Aplt. App. 145. Here, the District Court erroneously ruled that once the School District, a public entity of the State of New Mexico, received an adverse ruling from the Navajo Nation Supreme Court ("NNSC"), there is no more case or controversy. As explained further in the Opening Brief, decisions of a tribal court are not binding upon the United States federal district courts. Op. Br. at 29. Indeed, if such decisions were binding upon the federal courts, *Nevada v. Hicks,* 533 U.S. 353, 362 (2001) (instructing that "when state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land") and *MacArthur v. San Juan County,* 497 F.3d 1057, 1073-74 (10th Cir. 2007) (ruling that the Navajo Nation did not possess regulatory authority over employment-related claims by terminated employees of a special health services district that was a political subdivision of the State of Utah) never would have been decided in the federal appellate courts at all. The Response Brief fails to mention, let alone distinguish, either *Hicks* or *MacArthur*, both of which control here.

As noted in the Opening Brief, the federal courts recognize four exceptions to the requirement of exhaustion of tribal court remedies, and one of those

exceptions is where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction. *See Brown v. W. Sky Fin., LLC*, 84 F. Supp. 3d 467, 477-78 (M.C.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). Op. Br. at 24-25. The Response Brief fails to address the Opening Brief's explanation of the catch-22 situation that would result if the Navajo Nation Defendants/Appellees' theory regarding standing was followed.

Under this theory, exhaustion of tribal remedies before the Navajo Nation Labor Commission ("NNLC") and/or the Office of Navajo Labor Relations ("ONLR") would be futile because of the lack of adequate opportunity to challenge the tribal court's jurisdiction; the Navajo Nation would simply engage in a circular argument that a pending administrative action is required for standing and then again assert the requirement for exhaustion. As such, an exception to the tribal court exhaustion doctrine would apply.

The Response Brief fails to mention or distinguish *Montana v. United States*, 450 U.S. 544, 563-65 (1981) (Indian tribes have no inherent sovereign powers over the activities of non-members); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 544 U.S. 316, 319-20 (2008) (the sovereign powers of an Indian tribe do not extend to nonmembers of the tribe); or *Crowe & Dunlevy, P.C. v. Stidham*,

640 F.3d 1140, 1150 (10th Cir. 2011) (same), all of which cases control here because, as explained in the Opening Brief, tribal authority over employment relationships between tribe members and a state's political subdivision is limited to situations where (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). Op. Br. at 25-27. Here, as explained in detail in the Opening Brief, the School District's relationship with the Navajo Nation is neither consensual nor commercial, but is compulsory pursuant to the State constitutionally imposed mandate to operate a public school within the reservation boundaries, and furthermore, tribal jurisdiction is not necessary to avert catastrophic consequences that imperil the subsistence of the tribal community. Op. Br. at 25-27.

The Response Brief does not dispute the compulsory nature of the School District's relationship with the Navajo Nation, or the claim that there are no

catastrophic consequences imperiling the subsistence of the Navajo Nation tribal community if the Navajo Nation is prohibited from forcing the School District to comply with the NPEA and thereby to violate federal and state employment laws. The Response Brief's lengthy discussion of the procedures by which NPEA cases wend their way through the Navajo Nation's administrative agencies and courts (Resp. Br. at 13-15) is immaterial to the question of whether the School District has standing to contest the Nation's assertion of jurisdiction over the School District with regard to the School District's personnel actions, decisions, and procedures.

The Response Brief fails to address the District Court's factual finding regarding an alleged lease that was neither presented to the District Court nor made part of the District Court's record. As explained in the Opening Brief, the District Court's factual finding regarding this lease was made without an evidentiary basis and consequently is reversible error. Op. Br. at 27. As also explained in the Opening Brief, the District Court's finding regarding the lease contributed to the District Court's conclusions regarding standing and jurisdiction, such as whether the School District is subject to a real threat of future injury. *See* Op. Br. at 27-29. Consequently, the District Court's reversible error is not harmless.

As explained in the Opening Brief, the District Court correctly noted that that "federal courts have determined that the Navajo Nation does not have

jurisdiction over other state public school boards' employment decisions," citing to the cases of *Window Rock Unified School Dist. v. Reeves*, 2013 WL 1149706 (D.Ariz. March 19, 2013); *Red Mesa Unified School Dist., et al., v. Yellowhair, et al.*, 2010 WL 3855183 (D.Ariz. September 28, 2010); *Belcourt Public School Dist.*, 786 F.3d 653, 659 (8th Cir. 2015); and *Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 669 (8th Cir. 2015). Op. Br. at 31; *see also* Aplt. App. 144-145, and 146 ("federal courts have already determined that the Navajo Nation lacks jurisdiction in cases similar to this one"). The Opening Brief points out that (1) instead of relying on these authorities, the District Court relied upon a non-binding NNSC case addressing a trust land lease even though no trust land lease was before the District Court; and (2) the District Court erroneously ruled that once the School District, a public entity of the State of New Mexico, received an adverse ruling from the NNSC, there was no more case or controversy. Op. Br. at 31. The Response Brief fails to explain how the federal courts lack jurisdiction if the cases cited by the District Court control (which the District Court indicated that they do).

As to *Window Rock Unified School Dist. v. Reeves*, the Response Brief states that the U.S. Court of Appeals for the Ninth Circuit heard oral argument on September 27, 2015, and that a "ruling may be issued at any time." Resp. Br. at 14, n.7. The district court in the *Window Rock* case held that the NNLC has no

regulatory and adjudicative authority to review personnel decisions made by state public school districts in Arizona, finding that "[t]he dispositive factor is . . . the fact that the state's considerable interest, arising from outside of the reservation, in providing for a general and uniform public education is very much implicated." *Window Rock*, 2013 WL 1149706 at *5; Op. Br. at 16-17.

The Response Brief speculates that the outcome of the *Window Rock* case "*may* have a direct effect on the Nation's continued assertion of employment jurisdiction, though technically restricted to the area of the Nation within the Ninth Circuit" (Resp. Br. at 14, n.7 (emphasis added)), and that the Nation "*might* amend the NPEA to exempt school districts regardless of the outcome" of pending cases on appeal in the U.S. Court of Appeals for the Ninth Circuit. Resp. Br. at 14-15 (emphasis added). Meanwhile, however, the Response Brief cites numerous Navajo Nation Code sections and asserts that the NPEA applies to all persons employed on the Navajo Nation. Resp. Br. at 3, 4, 12, 13, and 15.

The Response Brief states that "[i]f this Court reverses the District Court on the issue of standing, the Nation will make all arguments concerning its jurisdiction." Resp. Br. at 18. Thus, the Navajo Nation Defendants/Appellees indicate that the Nation will continue to assert jurisdiction over the School District and other school districts within the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit even if the U.S. Court of Appeals for the Ninth Circuit rules that

the Navajo Nation has no regulatory or adjudicative authority to review personnel decisions made by state public school districts. Demonstrably, therefore, until and unless the NPEA is amended to exempt state public school districts, there is a real threat of future injury to the School District, and the District Court erroneously found otherwise.

The Navajo Nation Defendants/Appellees attempt to characterize "the Nation's jurisdiction [as] a merits question, which is not at issue in this appeal." Resp. Br. at 10. On the contrary, however, the Statement of Issues in Appellant's Opening Brief, which Navajo Nation Defendants/Appellees do not dispute, expressly includes jurisdiction in Issues 2, 3, and 5. Op. Br. at 3-4. The Statement of the Case, which Navajo Nation Defendants/Appellees also do not dispute, centers on the Navajo Nation's exercise of jurisdiction over a New Mexico public school district's employment decisions and practices conducted on the lands of the Navajo Nation. Op. Br. at 4-6. The Statement of the Case also describes in detail the School District's exhaustion of tribal remedies regarding the Navajo Nation's alleged jurisdiction over the School District and the State of New Mexico regarding such employment matters. Op. Br. at 4-6; 8-10. Furthermore, personal and subject matter jurisdiction were squarely before the District Court. Op. Br. at 13-15; Aplt. App. 67-141.

Navajo Nation Defendants/Appellees' reliance upon *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) is misplaced and misleading, because the plaintiffs in that case failed to exhaust their tribal remedies before filing suit in federal court. *Id.* at 857 (ruling that "§ 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction, and [such] exhaustion is required before such a claim may be entertained by a federal court."). Here, by contrast, the School District has exhausted its tribal court remedies regarding jurisdiction, so the District Court could entertain the question of whether the tribal court had exceeded the lawful limits of its jurisdiction over a State governmental entity. Aplt. Appx. 58-62. The District Court avoided the jurisdictional question with its erroneous ruling that the School District lacked standing.

In the Response Brief, Navajo Nation Defendants/Appellees cite *Arizona State Legislature v. Arizona Independent Redistricting Comm'n,* 135 S.Ct. 2652, 2663 (2015) for the proposition that "standing is one element of the 'case or controversy' limitation on federal judicial authority arising from Article III of the United States Constitution." Resp. Br. at 8. That case involved a lawsuit by the Arizona State Legislature seeking a declaration that a redistricting map adopted by an independent commission violated the Elections Clause of the U.S. Constitution. *Arizona State Legislature,* 135 S.Ct. at 2658-59. The dispute arose from a voter

proposition (Proposition 106) amending the Arizona Constitution to remove congressional redistricting authority from the Arizona State Legislature and vesting that authority in the Arizona Independent Redistricting Commission ("AIRC"). *Id.* at 2661. The AIRC argued that the Legislature's alleged injury was insufficiently concrete to meet the standing requirement absent some "specific legislative act that would have taken effect but for Proposition 106." *Id.* at 2663 (internal quotation marks omitted).

The U.S. Supreme Court disagreed with the AIRC, ruling that "the Arizona Legislature's suit is not premature, nor is its alleged injury too 'conjectural' or 'hypothetical' to establish standing. . . . To establish standing, the Legislature need not violate the Arizona Constitution and show that the Secretary of State would similarly disregard the State's fundamental instrument of government." *Arizona State Legislature*, 135 S.Ct. at 2663-64. Instead of requiring such a violation, the Supreme Court proposed to resolve the dispute "'in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'" *Id.* at 2665-66, *quoting Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

Analogously, in order to establish standing here, the School District should not be required to violate State constitutional, statutory, and/or administrative mandates regarding employment in New Mexico public schools and to show that

the Navajo Nation would disregard those constitutional, statutory, and administrative requirements. As in the *Arizona State Legislature* case, the District Court here should have resolved the dispute in a concrete factual context conducive to a realistic appreciation of the consequences of its judicial action, recognizing the lack of adequate opportunity to challenge the tribal court's jurisdiction. The School District's damages cannot be considered speculative if the School District loses standing when it exhausts its tribal remedies.

As discussed in the School District's Opening Brief and herein, the School District demonstrated that it has standing in federal court to seek injunctive relief as well as declaratory relief. Navajo Nation Defendants/Appellees' argue, without citing supporting authority, that the School District must show "certainty" that the Navajo Nation Labor Commission "would accept jurisdiction over any future employment claim filed against the School District" in order to establish standing. Resp. Br. at 6, 12. Navajo Nation Defendants/Appellees' reliance on *Baser v. State Farm Mut. Auto. Ins. Co.*, 560 Fed.Appx. 802, 803 (10th Cir. 2014) (unpublished) is unavailing, because tribal jurisdiction was not at issue in that case. *Baser* involved a non-party to an insurance contract trying to bring an action against an insurance company. Here, however, the School District is, and has been, a party to the action brought by Henry Henderson, as well as, the action brought by Emma H. Benallie. *See* Aplt. App. 7-108, 109-141.

Navajo Nation Defendants/Appellees agree, as they must, that past wrongs are evidence of whether there is a real or immediate threat of repeated injury, citing *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004) for the proposition that the threatened injury "must be 'certainly impending' and not merely speculative." *Id.* (internal citation omitted). However, their reliance upon *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998) is misplaced given the *Steel Co.* Court's ruling that the plaintiffs lacked standing not because of any lack of an injury-in-fact, but because their complaint "fail[ed] the third test of standing, redressability." *Id.* at 104. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Id.* at 107. Here, in the District Court, the Navajo Nation Defendants/Appellees only argued that the School District did not meet the injury-in-fact requirement for standing (*see* Aplt. Appx. 146), so cases turning on the causation and redressability elements of Article III's case-or-controversy requirement are inapplicable in the case at bar.

CONCLUSION

For all of the reasons set forth in its Opening Brief and herein, the School District respectfully requests that this Court reverse the Final Order of Dismissal and remand this matter to the District Court for further proceedings.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December 2016, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court for the Tenth Circuit Court of Appeals using the CM/ECF system, which will send notification to the following attorney(s), and the undersigned also forwarded to the following attorney(s) a hard copy of the above-referenced Appellant's Opening Brief:

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CERTIFICATE OF COMPLIANCE WITH FED.R.APP.P. 32(a)

This brief complies with the type-volume limitation of FED.R.APP.P. 32(a)(7)(B) because it contains 3,204 words, excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii). The brief has been prepared with Microsoft Word using 14-point Times New Roman, which is a proportionally spaced typeface.

Date: December 5, 2016 */s/ Andrew M. Sanchez*
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CERTIFICATE OF DIGITAL SUBMISSION REGARDING APPELLANTS' REPLY BRIEF

I hereby certify that with regard to the Appellants' Reply Brief that was e-filed with the Court on December 5, 2016, all required privacy redactions were made, and, with the exceptions of those redactions, every document submitted in digital form or scanned PDF format was an exact copy of the written document filed with the Clerk by use of the ECF filing system. I also certify that the digital submission of Appellants' Reply Brief to the Court on December 5, 2016 was scanned for viruses with the most recent version of a commercial virus-scanning program, Sophos Endpoint virus software version 11.5.0. I further certify that, according to the commercial virus-scanning program, this digital submission was submitted to the Court free of viruses.

Date: December 5, 2016 */s/ Andrew M. Sanchez*
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