

20170463

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
February 6, 2018
STATE OF NORTH DAKOTA

In The Supreme Court
State of North Dakota

Daniell S. Breland, State of North Dakota

Plaintiff/Appellee

v.

Daniel B. Peltier

Defendant/Appellant

Supreme Court No. 20170463

APPEAL FROM A DECISION IN THE DISTRICT COURT

NORTHEAST JUDICIAL DISTRICT

Rolette County Case No. 40-2014-DM-00235

Honorable Anthony Swain Benson

APPELLANT'S BRIEF
and Addendum

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Table of Content

Table of Authorities

Statement of Issues Para. 1

Statement of the Case Para. 2

Statement of Facts Para. 3

Argument Para. 5

Conclusion Page 24

Addendum

1. Turtle Mountain Band of Chippewa Indians Tribal Constitution
2. Turtle Mountain Band of Chippewa Tribal Court Criminal Justice Contract #434
3. Trust Lands Within Rolette County Map
4. Eligible for Membership document

TABLE OF AUTHORITIES

<u>Cases</u>	Paragraph
<i>Byzewski v. Byzewski</i> 429 N.W.2d 394 (N.D.1988).....	13, 14
<i>Gourneau v. Smith</i> , 207 N.W.2d 256 (N.D.1973).....	5
<i>Iowa Mut. Ins. Co. v. LaPlante</i> , 489 U.S. 9, 18 (1987).....	19
<i>Iowa Mut. Ins. Co. v. LaPlante</i> , 489 U.S. 9, 18 (1987) (citing <i>Montana</i> , 450 U.S. at 565-566).	10
<i>Jerome v. Jerome</i> Civil No. 51-07-C-1509.....	23
<i>Lone Wolf v. Hitchcock</i> 187 U.S. 553, 564, 23 S.Ct. 216, 220, 221, 47 L.Ed. 299, 305 37,.....	22, 24
<i>McKenzie County Social Services Bd. v. V.G</i> 392 N.W.2d 399 (N.D. 1986).....	16, 17
<i>McKenzie County Social Services Bd. v. C.G.</i> , 2001 ND 151, 16.....	16, 17
<i>M.L.M v. L.P.M.</i> , 529 N.W. 2d 184 (N.D. 1995).....	21
<i>Montana v. United States</i> (1981).....	10
<i>Rolette County Social Service Board and the North Dakota Department of Human Services as assignees of T.P. , and T.P., Individually, Plaintiffs and Appellants v. B.E., Defendant and Appellee</i>	20
<i>Williams v. Lee</i> , 358 U.S. 218. 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).....	11, 14, 22

Statutes

1. Turtle Mountain Band of Chippewa Indians

Tribal Constitution Article IX Rule a, Section 5.....	6
2. Turtle Mountain Band of Chippewa Indians	
Tribal Constitution Article XIV Section 3.....	7
3. Turtle Mountain Band of Chippewa	
Tribal Court Criminal Justice Contract #434.....	8, 11
4. Turtle Mountain Band of Chippewa Indians	
Tribal Constitution Article III, Section 1.....	9
5. Turtle Mountain Band of Chippewa Indians	
Tribal Constitution Article II Section 1.....	11
6. The United States Code, Title 18,	
Part 1, Ch. 53, Section 1151.....	12
7. Title 9 Domestic Relations & Child Support	
Enforcement, Section 9.0810, pg. 41 of 54.....	18
8. Public Law 90-284, 402 (25 U.S.C. 1322),	
406 (25 U.S.C. 1326),.....	22
9. N.D.C.C. Ch. 27-19.....	22

Other

1. Trust Lands within Rolette County.....	12
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STATEMENT OF ISSUES

[1] Issue 1. Did the district lack jurisdiction when the state suit involves: a) tribal members who reside on the Turtle Mountain Indian Reservation, b) the Turtle Mountain tribal court issued a paternity order, and c) a tribal forum exists to resolve child support

Issue 2. Did the State, as assignee, sue in the wrong court (state) for child support when a tribal order decided paternity, a tribal forum exists and tribal remedies should be exhausted?

STATEMENT OF THE CASE

[2] The Defendant requested the Court to dismiss for lack of subject matter jurisdiction, and requesting a preliminary injunction enjoining the State of North Dakota from continuing to have the Defendant's driver's license withheld, restricted or suspended (Doc. #57). District Judge Anthony Swain Benson presided over the case in Rolette County District Court. On October 30, 2017 (Doc. #88) the Court denied the defendants motion to dismiss for lack of subject matter jurisdiction and the request for a preliminary injunction. The state argued that concurrent jurisdiction exists in this matter. They also ruled that because subject matter jurisdiction is proper they denied the preliminary injunction. In the Defendant's district court ruling Judge Benson Jr. denied all three requests for the following relief:

1. Dismissal based upon a lack of complaint;
2. Dismissal based upon a lack of subject matter jurisdiction;

3. A preliminary injunction regarding the suspension of his client's driving privileges.

STATEMENT OF FACTS

[3] This case involves child support obligations against Daniel Peltier for a child that was conceived in Belcourt, ND, a town within the exterior boundaries of the Turtle Mountain Reservation. The child was born on February 6, 2008, in Belcourt. Daniel Peltier and the mother of the child are enrolled members of federally recognized Indian Tribes.

[4] In the District court ruling in Rolette County dated October 30, 2017 (Doc. #88), the Court judge denied the Defendants dismissal in part because he was not an enrolled Indian in the Turtle Mountain Reservation. He is an enrolled member on the Crow Reservation in Crow Agency, Montana, **but is eligible for enrollment through direct descendants** (Signed Letter from Tribal Operations (see attachment)). Both parties have resided on the Turtle Mountain Band of Chippewa Indian's tribal trust land, which is subject to tribal law, at all times pertinent to this matter (Doc. 59 Exhibit 1).

ARGUMENT

[5] The state has no jurisdiction in activities that took place on Tribal land. The Turtle Mountain Tribal Court has jurisdiction over all civil matters which arise on the reservation. As pointed out in *Gourneau v. Smith*, 207 N.W.2d 256 (N.D.1973), before the State may assume jurisdiction, the Indians on the reservation must act to give such jurisdiction to the State. Until the Indians on the reservation act to consent to State jurisdiction, such jurisdiction may not be assumed by the courts of the State of any cause

of action arising within the boundaries of the Indian reservation involving Indians. The Turtle Mountain Reservation has not accepted State jurisdiction.

1a. The district lacked jurisdiction over tribal members who reside on the Turtle Mountain Reservation.

[6] In the *Turtle Mountain Band of Chippewa Indians Tribal Constitution Article IX Powers of the Tribal Council, Rule a, Section 5* the Turtle Mountain Tribe has the authority

“to enact ordinances, subject to the review of the Secretary of the Interior, or his duly authorized representative, governing conduct of the members of the Band and Indians from other tribes on the reservation, providing for the maintenance of law and order and the administration of justice by establishing a police force and tribal court and defining their powers and duties; and regulating the inheritance of property of the members of the Band except trust land.

[7] In the *Turtle Mountain Band of Chippewa Indians Tribal Constitution Article XIV- Separation of Powers, Section 3 Powers* states

a)The Judicial Branch of government of the Turtle Mountain Band of Chippewa Indians shall have jurisdiction, as determined by legislative action pursuant to Chapter 1.05 and Chapter 2.01 of the Turtle Mountain Tribal Code and applicable federal law, to adjudicate actual cases and controversies that arise under the Turtle Mountain Constitution, statutes, resolutions, civil and criminal causes of action and legal decisions, and to ensure due process, equal protection, and protection of rights arising under the Indian Civil Rights Act of 1968, as amended, for all persons and

entities subject to the criminal and civil jurisdiction on the Turtle Mountain Tribe.

[8] The *Turtle Mountain Band of Chippewa Tribal Court Criminal Justice Contract* #434 states

“The Turtle Mountain Band of Chippewa Tribal court will provide due process to **enrolled members and Indian non-members** by developing and establishing a court system for the jurisdiction of **both civil and criminal cases** pursuant to the Tribal code and laws affecting its area of jurisdiction.”

[9] According to the *Turtle Mountain Band of Chippewa Indians Tribal Constitution Article III, Section 1. The membership in the Turtle Mountain Band of Chippewa Indians shall consist of:*

- a. All persons whose names appear on the roll prepared pursuant to Section 2 of the Act of May 24, 1940 (54 Stat. 219), and approved by the Secretary of the Interior on March 15, 1943.
- b. **All descendants of persons whose names appear on the roll defined in Section 1a of this Article, provided that such descendants possess one-fourth or more Indian blood, and provided further that such descendants are not domiciled in Canada.**

[10] *Montana v. United States* states “Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.” Exclusive jurisdiction is necessary to protect “tribal self-government or to control internal relations.” *Montana*, 450 U.S. at 564. As such, “civil jurisdiction over [on reservation activities] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.”

Iowa Mut. Ins. Co. v. LaPlante, 489 U.S. 9, 18 (1987) (citing *Montana*, 450 U.S. at 565-566). **All parties in this case are eligible for enrollment in the Turtle Mountain Band of Chippewa Indians and as such would fall under the jurisdiction of the Turtle Mountain Tribal court.**

[11] The Defendant disagrees with the District Courts decision to deny the Defendants motion to dismiss based on lack of subject matter jurisdiction. In the Defendants district court ruling Judge Benson Jr. argues that concurrent jurisdiction exists in this matter and that subject matter jurisdiction is proper. Under the infringement test set forth in *Williams v. Lee*, 358 U.S. 218, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), “state court jurisdiction over certain claims is not allowed if it would undermine the authority of the tribal courts over reservation affairs and thereby infringe on the right of the Indians to govern themselves.” The Turtle Mountain Chippewa Tribal Court has jurisdiction over **all Indian members and Indian non-members on the Turtle Mountain Reservation** (*Turtle Mountain Band of Chippewa Tribal Court Criminal Justice Contract #434*). According to the Turtle Mountain Band of Chippewa Indians Tribal Constitution Article II – Jurisdiction, Section 1 states:

Section 1: Band Territory, The Territory of the Band shall extend to all lands within the Turtle Mountain Reservation, all Lands outside the exterior boundaries of the Reservation including the public domain allotments wherever located, held by the United States for the benefit of the Band or the People, including all lands, air, skies above, surface and subsurface water, minerals, natural resources and any other interest therein notwithstanding the issuances of any patent or right of way by the U.S. Government or any other entity to the fullest extent allowable and consistent with Federal Law.

[12] In the Defendants District Court denial motion (Doc. 88) Judge Benson Jr. discussed how the Defendant was served by certified mail, return receipt requested, and the Defendant signed and received the Summons and Complaint at the Dunseith Post Office, which is located on state land. Dunseith, ND. Dunseith is made up of approximately 75% Native Americans who live on Tribal trust land and receive their mail in Dunseith. *The United States Code, Title 18, Part 1, Ch. 53, Section 1151*, has defined Indian country as

"Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

My address is 312 Tulip Lane, NE Dunseith, ND and is on Tribal Land governed by the Turtle Mountain Band of Chippewa Indians (*Trust Lands Within Rolette County Map*). In Doc. #75 (Response to Defendants Motion to Dismiss for Lack of Subject Matter jurisdiction and Motion for Preliminary Injunction) the State argued the Defendant would not suffer irreparable harm if he is denied a preliminary injunction because he lives on the Turtle Mountain Reservation. They went into further detail about how the Defendant would not need to leave the reservation to visit the child. The point I am making is, the state agrees the Defendant lives on the reservation. Where the Defendant receives his mail should not have been a reason to deny his motion to dismiss based on lack of subject matter jurisdiction.

1b. The district court lacked jurisdiction because the Turtle Mountain Tribal Court issued a paternity order.

[13] The Defendant argues that since the first order to show paternity was held in the Turtle Mountain Tribal Court, the Tribal Courts have jurisdiction over such matters. The Turtle Mountain Tribal Court provides due process to enrolled members and Indian non-members by developing and establishing a court system for the jurisdiction of both civil and criminal cases. In *Byzewski v. Byzewski* 429 N.W.2d 394 (N.D.1988) the Supreme Court made their decision, in part because of first-in-time temporary orders issued by tribal court. The first action taken against the Defendant was held in Turtle Mountain Tribal court.

[14] In the case of *Byzewski v. Byzewski*, 429 N.W.2d 394 (N.D.1988) the Supreme court concluded “that, under the circumstances of [Byzewski], in particular, because first-in-time temporary orders were issued by the tribal court and because the custodial domicile was the reservation, *Williams v. Lee* is applicable and that the exercise of jurisdiction by the state court interferes with the sovereignty of the Tribe.”

[15] In the Defendants District Court denial motion (Doc. #88) Judge Benson Jr. cited the Summons and complaint alleges that conception of the child occurred in the State of North Dakota, there is no affidavit from the mother establishing this fact, and the Defendant states that conception occurred within the Turtle Mountain Indian Reservation. The Defendant signed an Affidavit stating, “In 2007, Daniell S. Breland and I conceived W.B. within the exterior boundaries on the Turtle Mountain Reservation” (Doc. #59, Exhibit 1). According to the Turtle Mountain Tribal Court order on January 5, 2009 the Plaintiff provided that

b.) A party to the action is an **enrolled member of the Tribe or and enrolled member of any other federally Recognized Indian Tribe**; or
c.) The conception of the child for whom establishment of paternity is sought occurred within the exterior boundaries of the reservations; or d.) The child, for establishment of paternity is sought, was born within the exterior boundaries of the reservation, on trust land held by and tribal member wherever located on or tribal land whether currently or subsequently acquired.

[16] *McKenzie Co. Social Service Bd. V. C.G. , 2001 ND 151, 633 N.W.2d 157* pointed out in *McKenzie County Social Services Bd. v. V.G 392 N.W.2d 399 (N.D. 1986)* the Supreme Court held a tribal court had exclusive civil jurisdiction over a paternity claim where: (1) the mother, the child, and the alleged father were all members of the Three Affiliated Tribes of the Fort Berthhold Reservation; (2) the child lived with her mother on Fort Berthhold Reservation at the time the paternity claim was filed; and (3) there was nothing in the record to contradict the alleged father's assertion that the alleged paternity occurred on Fort Berthhold Reservation. In addition they concluded the mother's application for public assistance outside of the reservation boundaries and the father's occasional residences off the reservation were "insufficient to permit state court jurisdiction to hear and determine a claim between Indians for conduct on the reservation.

[17] The Defendant argues that the case in question and *McKenzie County Social Services Bd. v. V.G* are similar. The Defendant, Plaintiff, and child are all eligible for enrollment and are under the jurisdiction of the Tribal Court. The Plaintiff and child live on the Turtle Mountain Reservation. **Paternity has been established in the Turtle Mountain Tribal Court** (Doc. #60 Exhibit 2). "The determination of the parentage of a child of Indian tribal members is intimately connected with the right of reservation

Indians to make their own laws and be ruled by them.” *McKenzie County Social Services Bd. v. C.G.*, 2001 ND 151; *McKenzie County Social Services Bd. v. V.G.* 392 N.W.2d 399 (N.D. 1986)

1c. The district court lacked jurisdiction because a tribal forum exists to resolve child support.

[18] The State argues they have concurrent jurisdiction. The Turtle Mountain Tribe has a procedure called Title 9 Tribal Code to collect child support from its Tribal members. *Title 9 Domestic Relations & Child Support Enforcement, Section 9.0810*, pg. 41 of 54 discusses the Turtle Mountain Child Support Enforcement Act as:

1. “It is designed to regulate the establishment of paternity, the setting of child support obligations and the enforcement of those obligations **in the tribal court.** **This Act reflects the sovereign right of the Turtle Mountain Chippewa Tribe to determine its own internal relations, as well as the rights of those non-members who enter into consensual relations with tribal members or others located on the Turtle Mountain reservation. It also reflects the Tribe’s intent to operate its own child support enforcement program under Title IV-D of the Social Security Act.**
2. Statement of Policy. It is the public policy of the Turtle Mountain Tribe (hereafter, “the Tribe”) to ensure that the children of the Tribe receive adequate love, support and care. It is the purpose of the Act to provide a manner in which paternity can be established, thus allowing children the opportunity to identify with their natural parents and enjoy the benefits associated with enrollment into the Tribe. It also reflects the intent of the Turtle Mountain Tribe to provide for adequate child support for all children who are members **or eligible for membership with the Tribe**, or recognizing the severe economic conditions facing many absent parents who strive to support their children.

2: The State sued in the wrong court (state) for child support when a tribal order decided paternity, a tribal forum exists and tribal remedies should be exhausted.

[19] In *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) the District Court and Federal Court of Appeals concluded that the Tribal Court system should be permitted to initially determine its own jurisdiction. It went on to state how tribal remedies should be exhausted before proceeding to an outside court. All remedies through Tribal Court have not been exhausted. According to Turtle Mountain Tribal Code Title 9.0810 paragraph 1 the Turtle Mountain Tribe carry out its intent and jurisdiction to operate and enforce its own child support enforcement program under Title IV-D of the Social Security Act. It also states it is designed to regulate the establishment of paternity, the setting of child support obligations in the Tribal Court. All matters of collecting child support from enrolled members and non-enrolled Indians on a reservation are required to go through Tribal court.

[20] In reviewing *Rolette County Social Service Board and the North Dakota Department of Human Services as assignees of T.P. , and T.P., Individually, Plaintiffs and Appellants v. B.E., Defendant and Appellee* it stated "Our Supreme Court from 1986 to the present day has basically said that parentage as between tribal members where conception occurs on the reservation is exclusively a tribal matter even though it may involve collection of welfare benefits..

[21] In the case of *M.L.M v. L.P.M.*, 529 N.W. 2d 184 (N.D. 1995) both parents were Turtle Mountain Tribal members. The father held his primary residency on the reservation but worked off the reservation and the mother who received assistance from

Aid to Families with Dependent Children Program lived off the reservation. The courts ruled although the parents were enrolled members, the fact that the child was born off the reservation, that the mother lived off the reservation for a period of time, and that the alleged father lived off the reservation and was employed off the reservation **did not outweigh the right of Indians to govern themselves.**

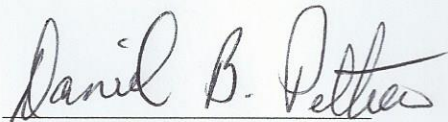
[22] In 1968, the United States Congress enacted *Public Law 90-284, 402 (25 U.S.C. 1322), 406 (25 U.S.C. 1326)*, which changed the method by which states could assume civil jurisdiction over actions involving Indian Parties and occurring within Indian country. Under this law, jurisdiction was obtained by a state only if the tribe, in a separate election, voted to consent to the state's assertion of jurisdiction. *Chapter 27-19, North Dakota Century code*, specifically provides that jurisdiction of the State shall be extended over all civil causes of action which arise on an Indian reservation "upon acceptance by Indian citizens in a manner provided by this chapter." In *Williams v. Lee*, "Only the Congress can take from the Indians their jurisdiction over their own reservation." *Lone Wolf v. Hitchcock, 1874 U.S. 553, 187 U.S. 564, 566.*

[23] The Defendant disagrees with the District Courts decision in Denying a preliminary injunction regarding the suspension of his driver's license. The Defendant argues the state does not have jurisdiction over this case. In *Jerome v. Jerome Civil No. 51-07-C-1509, Nov. 25, 2014* the court found it did not have jurisdiction to decide matters related to custody and child support. It further ordered that Jerome's motion to deny the State's request to suspend his driver's license for failure to pay child support was GRANTED.

Conclusion

[24] The Defendant argues this case should be under the jurisdiction of the Turtle Mountain Band of Chippewa Indians on the Turtle Mountain Reservation. The Turtle Mountain Tribal Court has exclusive jurisdiction over all controversies that arise on the reservation between enrolled members and non-enrolled members that reside on the reservation. Citing *Lone Wolf v. Hitchcock* 187 U.S. 553, 564, 23 S.Ct. 216, 220, 221, 47 L.Ed. 299, 305 37, the court said that if this power themselves is to be taken away from them it is for Congress to do it. The Tribe has exclusive jurisdiction and this case must be dismissed.

Dated February 6, 2018.



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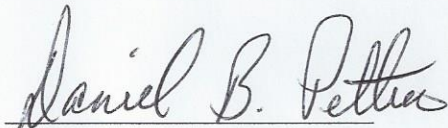
Certificate of Service

[1] I certify that Appellant's Brief and Appendix were filed with the ND Supreme Court, email supclerkofcourt@ndcourts.gov and a copy was mailed to the Plaintiff and an email to the attorney for the Plaintiff:

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