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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Trenton Indian Housing Authority, Plaintiff/Appellee, vs. Lisa Poitra and all other unknown occupants, Defendant/Appellant.	Supreme Court No. 20210302 53-2020-CV-00694

APPEAL FROM AN ORDER OF EVICTION
THE DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
WILLIAMS COUNTY, NORTH DAKOTA
THE HONORABLE JOSH RUSTAD

BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES

[1] I. Whether the District Court erred in determining the residential area managed by Trenton Indian Housing Authority, is not a Dependent Indian Community.

[2] II. Whether the District Court erred in determining the provision in the contract between Trenton Indian Housing Authority and the Turtle Mountain Band of Chippewa Indians requires this eviction matter to be handled by Turtle Mountain Tribal Court.

STATEMENT ON ORAL ARGUMENT

[3] This is a matter of first impression before this Court. It involves complex jurisdictional issues. Oral argument would be useful to the Court.

STATEMENT OF THE CASE

[4] TIHA made its first attempt to evict Ms. Poitra in early 2012 by filing in the Turtle Mountain Tribal Court, which resulted in a stipulation between the parties. On March 6th, 2018, Turtle Mountain Tribal Court granted Ms. Poitra a restraining order against TIHA Director Melissa Lee. June 2, 2020, TIHA brought a new action to evict Ms. Poitra this time in State District Court. From the beginning of this action, Ms. Poitra has maintained the State lacks jurisdiction to hear this matter. November 18, 2020, the District Court denied Defendant's Motion to Dismiss for lack of Jurisdiction (Index # 39). July 12, 2021, a subsequent hearing was held. At this hearing, Ms. Poitra renewed her motion to dismiss for lack of jurisdiction, and the Court decided to reconsider the Motion. October 21, 2021, the District Court denied Ms. Poitra's Motion to Dismiss for Jurisdiction and granted Plaintiff's request for an eviction (Index # 81).

[5] October 28, 2021, Ms. Poitra timely filed a Notice of Appeal and Order for Transcript (App. Pg. 165) (Index # 93). November 4, 2021, Ms. Poitra filed a Motion to Stay Execution of Order Pending Appeal and Petition to Waiving Filing Fees and Supersedeas Bond (Index # 86) (Index # 83). July 5th, 2022, a hearing was held at District Court and the Court Granted Defendant's Motion for Stay Pending Appeal but Denied Defendant's Motion for Waiver of Supersedeas Bond (Index # 118).

STATEMENT OF FACTS

[6] In 1972, Chippewa Tribal Members formed the Fort Buford Indian Development Corporation for the purpose of securing federal funding for housing, health, and employment programs. [1, 2] In 1975, the Fort Buford Indian Development Corporation sought designation as a formal extension of the Turtle Mountain Band by establishing the Trenton Indian Service Area (TISA) through Turtle Mountain Tribal Ordinance 28. *Id.* Ordinance 28 allows Turtle Mountain enrolled members to maintain their identity with the Turtle Mountain tribe. *Id.* TIHA is located within the TISA.[3]

[7] The Turtle Mountain Band of Chippewa Indians formally created TIHA with the passage of Ordinance 30 (Index # 23) (App. Pg. 68, Pg. 203, L. 7-11). Passage and implementation of Ordinance 30 requires following the exact format prescribed by U.S.

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[1] *Turtle Mountain*. (2022). North Dakota Studies. Retrieved January 20, 2022, from https://www.ndstudies.gov/curriculum/high-school/turtle-mountain

[2] The History and Culture of the Turtle Mountain Band of Chippewa. (1997). *North Dakota Department of Public Instruction*, *90.140.2*, pg. 25-26. https://www.indianaffairs.nd.gov/sites/www/files/documents/pdfs/History_and_Culture_Turtle_Mountain.pdf

[3] *Tribal Nations*. (2022). Indian Affairs Commission, North Dakota. Retrieved January 20, 2022, from https://www.indianaffairs.nd.gov/tribal-nations

Department of Housing and Urban Development (HUD), and approved by the U.S. Department of the Interior. [4] HUD requires Ordinance 30 to include the provisions, "governmental function of Tribal concern," and, "public property used for essential public and governmental purposes," and "exempt from all taxes and special assessments of the Tribe." [5] Without Ordinance 30, TIHA would not legally exist or be eligible to receive federal funds. (App. Pg. 203, L. 16-18).

[8] "The Authority shall be organized and operated in the Trenton Indian Service Area." (App. Pg. 70). The "area of operation" of the TISA, is defined on page 4 of the ordinance as, "all areas within the **jurisdiction of the tribe** within the confines of the Trenton Indian Service Area..." (emphasis added) (App. Pg. 71).

[9] TIHA receives approximately $270,000 in Indian Housing Block Grant (IHBG) federal funds. (App. Pg. 151, Pg. 203, L. 19-24). TIHA accepts its IHGBs through NAHASDA (Native American Housing Assistance and Self Determination Act of 1996, 25 USC 4140), with the approval of HUD (App. Pg. 205, L. 5-8).

[10] TIHA IHBG funds are used to build and/or maintain all of the properties owned by TIHA, which includes the unit occupied by Ms. Poitra. (App. Pg. 205, L. 9-15). Under Turtle Mountain Ordinance 30, all property TIHA owns is public property, which must be used for the essential government purpose of providing low-income housing with a preference to enrolled members of the Turtle Mountain Band of Chippewa Indians. (App. Pg. 68-70, Pg. 69, ¶ 4, Pg. 87, ¶ 6, Pg. 205, L. 16-25). NAHASDA requires property

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[4] Mark K. Ulmer, *The Legal Origin and Nature of Indian Housing Authorities and the HUD Indian Housing Programs*, 13 Am. Indian L. Rev. 109 (1988), pg. 120, https://digitalcommons.law.ou.edu/ailr/vol13/iss2/2

[5] *Id.* at 122.

owned by a tribally designated housing authority, built and/or maintained using federal funds, be used for low-income Tribal housing (25 USC 410 sect. 210).

[11] TIHA has established a preference policy for enrolled members of the Turtle Mountain Band of Chippewa Indians written into its housing plan, and most of the beneficiaries of TIHA are members of the Turtle Mountain Band of Chippewa Tribe. (App. Pg. 208, L. 4-11).

[12] Ms. Poitra is an enrolled member of the Turtle Mountain Band of Chippewa Indians. (App. Pg. 208, L. 16-18, Pg. 215, L. 9-11).

SUMMARY OF ARGUMENT

[13] This case involves the appeal of District Court decision denying Ms. Poitra's Motion to Dismiss for Lack of Jurisdiction and Order for Eviction (Index # 81) (App. Pg. 154). The Court failed to accurately weigh or analyze the factors for a finding of a Dependent Indian Community. *U.S. v. South Dakota*, 665 F.2d 837 (8th Cir. 1981). Additionally, this case involves only a Tribal housing program, and an enrolled member of the Tribe. The Court's Order undermines the Turtle Mountain Band of Chippewa Tribe's right to self-govern its internal affairs.

[14] The District Court erred in not finding the provision in the contract between Trenton Indian Housing Authority and the Turtle Mountain Band of Chippewa Indians requires this eviction matter to be handled by Turtle Mountain Band of Chippewa Tribal Court.

STANDARD OF REVIEW

[15] This appeal should be heard de novo for all issues. This matter involves a State Court ordering the eviction of a Tribal Member from a tribally owned and managed

housing program. The appellant maintains the State lacks jurisdiction and the order is void. The jurisdictional facts are not in dispute, Ms. Poitra is an enrolled member of the Turtle Mountain Band of Chippewa, she resides in a housing unit which is managed by the TIHA with oversight by the Turtle Mountain Band of Chippewa. There is an available forum in the Turtle Mountain Tribal Court to hear this matter, the Turtle Mountain Band of Chippewa sovereignty and federal interests in promoting Indian self-governance and autonomy are at issue. The state exercising its jurisdiction should not be allowed under the infringement test. *Gustafson v. Poitra*, 2018 ND 202, ¶ 5-6 (2018) (discussion of standard of review in Indian Country).

LAW AND ARGUMENT

I. Dependent Indian Community

[16] The principal issue is whether the rental property and the residential community which Ms. Poitra lives constitutes a "Dependent Indian Community." (Index # 81, ¶ 24). Congress under its jurisdiction, defines Indian Country as, "(a) all land within the limits of any Indian 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 . . ." 18 U.S.C. § 1151 (b).

[17] Ms. Poitra maintains *U.S. v. South Dakota* supports her argument the State District Court lacks jurisdiction to hear this matter. In *South Dakota*, the 8th Circuit held that an off-reservation Indian Housing project created by a Tribe and financed by Department of Housing and Urban Development (HUD) constitutes a Dependent Indian community.

United States v. State of S. D., 665 F.2d 837, 839, 842. The 8th Circuit considered four factors. The factors reviewed were: (1) whether the United States has retained "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting this territory," (2) "the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area," (3) whether there is "an element of cohesiveness ... manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality," and (4) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples," *Id.* at 839. In applying these four factors, the 8th Circuit considered the use of federal funds, federal oversight, and the role of the Tribe. *Id.* at 840-41. Applying the *South Dakota* standard, TIHA is a dependent Indian community.

[18] Initially, Plaintiff cites *Alaska v. Native Vill. of Venetie Tribal Gov't* to support their position TIHA is not a dependent Indian community (Index # 26). However, *Alaska* should not be followed. In *Alaska*, a Tribe brought an action in Tribal Court to collect taxes from a state contractor hired by the state to construct a school. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998). The school was built on land <u>without restrictions</u>. *Id.* at 949, 950-51, 955 (emphasis added). Unlike the facts of *Alaska*, here there is no private corporation, but instead a subordinate body created solely to benefit disadvantaged members of the Turtle Mountain Band of Chippewa Indians. (App. Pg. 203, L. 12-15). Further, the land in *Alaska* was private, fee simple land without restrictions, but unlike TIHA which sits on public land with significant restrictions. (App.

Pg. 205, L. 16-25, Pg. 206, L. 1-14). However, the August 12th, 2021 hearing, Plaintiff fully abandoned *Alaska v. Native Vill. of Venetie Tribal Gov't* and moved its argument to *Narragansett* (Index # 79). *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric*, 89 F.3d 908, 922 (1st Cir. 1 998).

[19] In *Narragansett*, the 1st Circuit Court of Appeals found land purchased by a Tribe with federal funds for the construction of a future Indian Housing project was not a Dependent Indian Community. 89 F.3d at 922. The property was not subject to significant federal requirements or oversight, given the project had not been built nor presently occupied by enrolled members receiving Tribal or federal support or social service programs, and the State interests at issue justified the assertion of State Authority. *Id.* The facts in this case do not support the *Narragansett* holding and instead the 8th Circuit should be relied upon.

A. Lands set apart for use, occupancy, and protection of dependent Indian peoples

[20] The fourth factor of the test considered by the 8th Circuit is whether the land had been set apart for the use, occupancy, and protection of dependent Indian peoples. *U.S. v. South Dakota*, 665 F.2d at 838.

[21] The Court erred when it relied on *Narragansett* for the proposition federal jurisdiction exists only, "where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area." 89 F.3d at 920. (Index # 81, ¶ 33). However, the United States Supreme Court did not follow the *Narragansett*'s Court standard, but declined the Government's guardianship over Indian tribes and their affairs

to satisfy the federal superintendence requirement. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 528 at n. 4 (quoting *Sandoval,* 231 U.S. 28, 46, 48). Other courts have found the federal set-aside requirement as described in *Venetie* require only the federal government set aside the land for tribal use in order to further tribal interests. *Citizens Against Casino Gambling in Erie Cty. v. Chaudhuri*, 802 F.3d 267, 281 (2d Cir. 2015). The United States Supreme Court in *United States v. John* found that regardless of whether the state exercised jurisdiction over Indian County, and federal jurisdiction had not been continuous, federal jurisdiction remained **despite the lack of pervasive** or continuous federal oversight. *United States v. John*, 437 U.S. 634, 652-53 (1978). The court in *South Dakota* also found had the state asserted jurisdiction over the location in the past, does not defeat Tribal jurisdiction. 665 F.2d 837, 842. This Court should not extend the ruling of *Narragansett* in regards to the "pervasive control" standard.

[22] The lower Court failed to follow the canons of construction which greatly favor Indian jurisdiction: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Bryan v. Itasca Cty.*, 426 U.S. 373, 392 (1976).

[23] Both the relevant laws at issue and history demonstrate the TIHA housing project is set aside for a particular use, particular occupancy, and particular protection of dependent Tribal members. The US Supreme Court in *Sandoval* found the public property was validly set aside by the Federal government due to the legislation of Congress enacted in the exercise of the government's guardianship over those tribes and their affairs. *United States v. Sandoval*, 231 U.S. 28, 48 (1913). The federal trust relationship doctrine set out

the federal government's legal responsibilities as trustee and guardian toward Indians and Indian tribes, and includes Tribal on-reservation and off-reservation housing. *St. Paul Intertribal Hous. Bd. v. Reynolds*, 564 F. Supp. 1408, 1411, 1413-14 (D. Minn. 1983). Ms. Poitra's housing unit is part of TIHA's low-income housing programs pursuant to NAHASDA (App. Pg. 206, L. 1-14). HUD consents to provide grants in the amount of approximate $270000 a year, loans, and technical assistance for the development and operation of TIHA. (App. Pg. 203, L.19-25, Pg. 204, L. 1-2). TIHA Director Lee testified federal funds had been used in the building and maintenance of Ms. Poitra's home, and the property had to be used for Indian purposes, particularly low-income housing. (App. Pg. 205, L. 9-15). Director Lee's testimony comports with NAHASDA, as "*Any funds for programs for low-income housing…are owned by, or in the possession or under the control of, the Indian housing authority…shall be considered assistance under this chapter and subject to the provisions of this chapter relating to use of such assistance*." *NAHASDA sect. 210.* Federal law requires Ms. Poitra's housing unit to be used for low-income housing with a preference for enrolled Turtle Mountain members. (App. Pg. 205, L. 16-25). Unlike the housing project in *Narragansett*, TIHA has existed for decades, *Narragansett* had no housing authority or buildings. 89 F.3d at 921. In sharp contrast, *South Dakota* found federally funded health and social programs actively provided to residents evidenced the federal government's intent to set the location apart for the use, occupancy, and protection of dependent Indian peoples. *See*, 665 F.2d at 842, ¶ 7. The programs provided by the federal government and the Turtle Mountain Tribe are as

significant as the programs in *South Dakota*. (App. Pg. 216, L. 1-12, L. 17-25, Pg. 217, L-14, Pg. 218, L. 2-8).

[24] The present circumstances, coupled with past history of TIHA, demonstrate TIHA to be validly set aside by the Federal government in the exercise of the government's guardianship over the Turtle Mountain Tribe and their affairs. In 1970s, The Turtle Mountain Band of Chippewa Tribe Members formed the TISA as well as the Fort Buford Indian Development Corporation to secure federal funding for housing, health, and employment programs. TIHA is fully encapsulated in TISA, federal assistance received by TIHA is born directly out of this federal program to provide funding for subsidizing low-income Indian housing. In 1973 North Dakota's congressional delegation proposed, "that the land remaining to the Trenton enrollees be designated a Federal Service Area eligible for federal assistance on the same basis as established reservations." [6] In other words, area within the TISA, including TIHA, are to be treated as equivalent to a reservation.

[25] However, when it came to deciding whether the land had been set apart for the use, occupancy, and protection of dependent Indian peoples, the *Narragansett* court did not make its ruling based on hypothetical(s), but on the present state of federal superintendence of the to-be-constructed housing project. 89 F.3d at 921. "The important consideration is what the land in question is now, not what it may become in the future." 665 F.2d at 842. It should not be a surprise the Court ruled against Tribal jurisdiction,

[6] Heitkamp, H. (1994). Letter Opinion. *Trenton Indian Service Area*, *94-L–174*, pg. 3.

since the only action taken by the federal government was to finance the purchase of the land, the housing project was never actually built. 89 F.3d at 911. There was no opportunity for federal laws regarding low-income housing to attach to the property, or subsequent federal programs to serve the dependent population. Unlike *Narragansett,* TIHA residential community has existed for decades and is composed of many properties which are thoroughly regulated by NAHASDA, and occupied largely by Turtle Mountain Tribal members, and receives Turtle Mountain Tribe's financial assistance.

[26] The *Narragansett* court surmised, had there been evidence of comprehensive federal superintendence, such as existed in *Housing Authority of Seminole Nation v. Harjo*, the court would have ruled that the housing project had been validly set apart for the use, occupancy, and protection of dependent Indian peoples, **despite the fact the property had not been placed in a trust with the federal government**, **nor did US have title to the property**. 89 F.3d 908, 921 (emphasis added). This is crucial if the same evidence of comprehensive federal superintendence exists at TIHA, this would show the TIHA housing project had been validly set apart for the use, occupancy, and protection of dependent Indian people. The court in *Narragansett* cited, "Although the United States did not have title to the deeded lands, it continued its "superintendence" of the property for the seventeen years of the programs, a role evident in the **comprehensive federal regulations governing the programs**. The court found the government controls virtually every foreseeable legal consideration touching the property until the program runs its course or sooner terminates." *Id*. at 920 (emphasis added).

[27] In *Harjo*, an Indian Housing Authority filed a forcible detainer in State District Court against an Indian occupant of a house deeded to the Housing Authority and built with federal money. The Supreme Court of Oklahoma ruled the location was a dependent Indian community set apart for the benefit of Indians, due to the federal government's role in funding the construction of the house, the comprehensive federal regulations that governed the project, and the federal health and social services program provided to enrolled members. *Hous. Auth. of the Seminole Nation v. Harjo*, 1990 OK 35, 790 P.2d 1098, 1103 (1990). In regards to exactly what constitutes "comprehensive federal regulations" for federal superintendence controls, "virtually every foreseeable legal consideration," the *Harjo* court made this persuasive statement:

> "All procedures for participation in the housing program administered by the Seminole Housing Authority are determined by HUD, a federal agency. These procedures are found in some 75 pages of federal regulations at 24 CFR Ch. IX (4–1–89 Ed.) §§ 905.101–905.430. The Housing Authority can only participate in this program after first being approved by both HUD and the Department of the Interior. See § 905.108. They provide for how each Indian Housing Authority must select applicants based on federal preferences for low-income Indian families on Indian reservations "and other Indian areas." See § 905.406(a). They provide that in the event of the death, mental incapacity, or abandonment of the home by the Indian homebuyer, such homebuyer may be succeeded only by a member of the homebuyer's family who is an authorized occupant of the home in accordance with the MHO Agreement. See § 905.425(b)(d). The regulations require compliance with federal laws involving environmental protections, wage controls and health and safety precautions. See § 905.107…[T]he U.S. Government through the HUD regulations controls virtually every foreseeable legal consideration touching the property until the MHO Agreement runs its course or sooner terminates." *Id.* at 1101.

[28] Here, all procedures for TIHA are determined by NAHASDA. (25 USC 4102). In order for TIHA to continue to receive federal funding, approval is required by HUD,

including approval of TIHA's agreement with the Turtle Mountain Band of Chippewa Indians. (App. Pg. 205, L. 5-8, Pg. 209, L. 9-19). Director Lee testified TIHA must get approval every year from HUD in order for TIHA to receive federal funding. (App. Pg. 209, L. 2-3). NAHASDA provides for how TIHA must select applicants based on federal preferences for low-income Indian families on Indian reservations "and other Indian areas." NAHASDA § 201(a)(1) and (b); NAHASDA § 302 (a) and (b); NAHASDA § 606 (b). Only low-income family members currently residing in the housing units can lease the properties for lease agreements. NAHASDA § 205(a)(b). The regulations also specifically require compliance with federal laws involving environmental protections, wage controls and health and safety precautions. NAHASDA § 104 (b), § 105, § 105 (d)(2), § 207 (a)(6), § 805, § 806, § 814 (a)(6). TIHA must be audited, to be evaluated for performance, and monitored for compliance by HUD. NAHASDA § 405, § 404, § 403. HUD must report to the federal government whether TIHA is complying. NAHASDA § 407. The period of time TIHA is required to comply with the provisions of NAHASDA are for the useful lives of the properties, which is significantly longer than the agreement with the federal government in *Harjo*. NAHASDA § 209, § 205, § 205 (b). The Federal government made clear that federal authority would supersede State authority in regards to low-income housing projects funded under the Act, when it declared that the State could not tax those projects. NAHASDA § 101(d). Provisions exempting or omitting lands from State taxes evidence the government intended Federal authority to supersede State authority. *Santa Rosa Band of Indians v. Kings Cty.*, 532 F.2d 655, 666 n. 17 (9th Cir. 1975); *see also Chase v. McMaster*, 573 F.2d 1011, 1018 (8th Cir. 1978); *City of*

Sault Ste. Marie v. Andrus, 532 F.Supp. 157, 166 (D.D.C. 1980).); *and see United States v. Candelaria*, 271 U.S. 432, 440-41 (1926). North Dakota law prohibits taxes from being levied on TIHA. NDCC § 23-11-28. In *Sandoval*, the Supreme Court found congressional legislation prohibiting taxation of the Pueblo's real and personal property was an indicator of federal superintendence, and went on to hold the Pueblo and their lands were under the power of Congress, not the state. *United States v. Sandoval*, 231 U.S. at 40, 48-49. Finally, in order for TIHA to exist and receive federal funds, Tribal Ordinance 30 is required. Ordinance 30 put a significant alienation on TIHA: all property acquired by TIHA was declared to be public property, and could only be used for essential public and governmental purposes. (Index # 23, pg. 20) (App. Pg. 87, L. 6, Pg. 206, L. 1-14). NAHASDA requires TIHA to comply with its regulations, which is that all assistance given must be used for low-income Tribal housing. NAHASDA § 210**,** § 201**,** § 302, § 606**.**

[29] NAHASDA fully intends Tribal governments have jurisdiction and control over housing authorities and corresponding dependent Indian communities. The very first sentence of NAHASDA reads, "To provide Federal assistance for Indian tribes in a manner that recognizes the right of tribal self-governance, and for other purposes." 25 USC 2101, pg. 1; *see also* 25 USC 4101 (7). NAHASDA also provides, "Federal assistance for Indian tribes for the right of tribal self-governance, housing-related services such as housing counseling, self-sufficiency services, energy auditing, and the establishment of resident organizations." 25 USC 4101. A plain reading of the terms "Indian County" and "Indian Area" in NAHASDA show federal lawmakers intend to

make affordable housing communities funded by federal support be subject to Tribal jurisdiction. “The primary objective of this act (1) to assist and promote affordable housing activities to develop, maintain, and operate affordable housing in safe and healthy environments on Indian reservations and in other Indian areas for occupancy by low-income Indian families.” 25 USC 4131(a)(1). “Indian area” means the area within which an Indian tribe operates affordable housing programs or the area in which a TDHE, as authorized by one or more Indian tribes, operates affordable housing programs. 25 USC 4103 (11).

[30] Given NAHASDA not only includes every regulation the court cited in *Harjo* for the court to conclude, “U.S. Government through the HUD regulations controls virtually every foreseeable legal consideration touching the property,” the *Harjo* court would conclude the US government controls virtually every foreseeable legal consideration touching Ms. Poitra’s property. If this Court accepts the *Narragansett* “pervasive standard” used in *Harjo*, the Court should follow the same lead by finding TIHA is governed by a comprehensive set of federal regulations through NAHASDA, demonstrating a sufficient level of federal superintendence for TIHA to have been validly set apart for the use, occupancy, and protection of dependent Indian peoples. 89 F.3d at 920. Thus, a finding of Tribal jurisdiction would be consistent with the *Narragansett* holding, but the lower Court erred when it did not find Turtle Mountain Tribal Court to have jurisdiction over Ms. Poitra’s eviction.

[31] The housing project in *Narragansett* was built under the *The Indian Housing Act of 1988*. *Id.* at 911. *The Indian Housing Act of 1988* is no longer law, and is therefore inapplicable. The lower Court erred when it did not find NAHASDA controlling.

[32] Unlike in *Narragansett,* where the entire issue in the case was whether the construction of a Tribal Housing Project must be subject to a certain State ecological regulation, there is no such law or regulation in this case. This case is an eviction action. An eviction of an Indian by an Indian housing authority does not require a State interest. "State jurisdiction is pre-empted by operation of Federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). NAHASDA preempts State jurisdiction, as such exercise of jurisdiction would be contrary to tribal interests in self-governance, and coupled with the State's limited interests at stake are undoubtedly insufficient to justify the assertion of its authority. In *Narragansett*, the housing site was located within Rhode Island's coastal zone, and the possibility existed that construction of the proposed project would affect Ninigret Pond, an important natural resource within the zone. *Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 878 F. Supp. 349, 355 (D.R.I. 1995). When the Rhode Island land was purchased, it was subject to a drainage easement related to CZMA or State law. *Id.* at 365. The CZMA or State law which the property was subject to, made clear that even federal agencies are subject to the State law, which required projects built at or near an important natural resource meet certain construction requirements or standards. *Id.* at 363. The federal government gave

the power to the States to enforce CZMA (Marine Resources and Engineering Development Act of 1996, § 302 et seq., as amended, 16 U.S.C.A. § 1451 et seq). Only a realistic possibility of off-site effects impacting important state interests was required to show that State law pre-empt Federal law or interests. *Id.* at 365. HUD's own regulations required compliance with this state law. *Id.* at 364. By contrast, the case before the Court is simply an eviction of an enrolled member by an Indian Housing Authority acting under the authority of the Turtle Mountain Tribal Code (App. Pg. 210, L. 4-10), no State interest or regulation at issue. There is no realistic possibility Ms. Poitra's forcible detainer would affect State law or how the State handles evictions. HUD does not require Tribal Housing Authority to bring an eviction action in State Court but instead favors the use of Tribal Courts under NAHASDA.

1. Intramural Jurisdiction

[33] For over 200 years, Courts have consistently held Tribes are a separate sovereign entity, possessing attributes of sovereignty over their members and territory. *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978). These attributes include the authority to regulate their internal and social affairs, legislate their own laws, and enforce them in their own forums. S*anta Clara Pueblo v. Martinez*, 436 U.S. 49, 55-66 (1978). Tribally created Housing Authorities are tribal agencies. *Dubray v. Rosebud Hous. Auth.*, 565 F. Supp. 462, 466 (D.S.D. 1983). Tribally created Housing Authorities are also considered to be an arm of the tribal government. *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.,* 797 F.2d 668, 671 (8th Cir. 1986). When an activity directly involves Indians, "state law is generally inapplicable, for the state's regulatory interest is likely to be minimal and federal interest

is encouraging tribal self-government is at its strongest." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 135, 144 (1993). Under the infringement test announced in *Williams v. Lee*, State court jurisdiction over certain claims are not allowed if that jurisdiction would, "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Williams v. Lee*, 358 U.S. 217, 223 (1959). The State's interest in regulating affairs of TIHA is minimal, and the chances of infringing on Tribal sovereignty or right to self-governance are high when the State Court inserted itself into this case. "Determination of whether application of state law to Indian tribe is preempted by federal law is influenced by factors including type of activity sought to be regulated, whether those engaging in activity are Indians or non-Indians, purpose for which jurisdiction is being asserted, nature of state's interest, existence of treaties…" U.S.C. Cont. Art. 1, § 8, cl. 3; Art 6, cl.2. Tribes are a "separate people with the power of regulating their internal and social relations." *McClanahan v. Arizon State Tax Comm'n*, 411 U.S. 164, 173 (1973). In a Letter Opinion, former Attorney General Heitkamp held an Indian facility serving Indians within the TISA is probably not within State Court jurisdiction.[7] The lower court chose to evict a low-income Indian from TIHA, this action will directly and meaningfully impact the Tribe's interest in internal self-governance. The Turtle Mountain Band of Chippewa Tribe specifically enacted Ordinance 30 to create TIHA under its laws to provide for the "health, morals, and economic security," and HUD specifically included the provision evictions are to be handled in Tribal Court, in order to protect the Tribe's low-income population. The

[7] Heitkamp, H. (1994). Letter Opinion. *Trenton Indian Service Area*, *94-L–174*, pg. 9-10

Turtle Mountain Band of Chippewa Indians has a much greater interest in adjudicating this matter and determining the future of its low-income and dependent population in TISA than the State, the Trial Court erred when it found the Turtle Mountain Band of Chippewa Indians lacked jurisdiction.

B. Title to the Land

[34] In *Narragansett,* the first factor the court analyzed was the title to the land. 89 F.3d 908, 919 (1st Cir. 1 998). *Narragansett* examined the holding of *South Dakota*, "who retains title to the property acquired by the housing authority," and found when another entity other than the government holds title to the property, this does not preclude Tribal jurisdiction. *Id.* at *918.* In *Narragansett*, although HUD provided financing for the purchase of the land, the Housing project itself was never actually built; therefore, HUD funds could not have been spent on managing the project or subsidizing rent. *Id.* at 911.

[35] The test to find a dependent Indian community cannot be applied to look only at parcels of fee land, rather than the entire community as a whole, and if the community is under federal government superintendence. *State v. Romero*, 2006-NMSC-039, ¶ 16, 140 N.M. 299, 304, 142 P.3d 887, 892, as revised (Sept. 12, 2006). The tests of 1151(b) refer to residential Indian communities under federal protection, not to types of land ownership or reservation boundaries. Fee land and rights-of-way within dependent Indian communities are within Indian country. *Id*. at 893. Fee land within a dependent Indian community is Indian country. *Id.* at 895. Ms. Poitra's property is fee simple, public property land. If this Court rules that Ms. Poitra's property is under State jurisdiction and

follows the guidance of *Romero*, then it must also rule that TIHA's entire residential community is under State jurisdiction, which sets up a direct conflict with Ordinance 30.

[36] Ordinance 30, all property TIHA acquires is public property, paid for by the federal government; TIHA *acquires and holds* the property for the public to be used for public purposes. It is a *steward* of the property. Director Lee testified as much. (App. Pg. 205-206). TIHA is not a private entity or corporation, it is a wholly subordinate body of the Turtle Mountain Band of Chippewa Indians. All of TIHA's property is public, the public owns all of the property acquired by TIHA, and if TIHA fails in its role as steward, HUD can remove TIHA and all of its board members from its stewardship role, and appoint a new Housing Authority with new members to steward the property. NAHADA § 410.

[37] In *Narragansett,* the Tribe had applied for the purchased property to be placed in a Trust with the federal government, but this property status or restriction never materialized. 89 F.3d at 911. In the lower Court's opinion of the same case, the court noted that the property had been privately held and purchased. *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Company*, 878 F.Supp. 349, 355. Again, as in *Alaska*, the appellate court in *Narragansett* treated the property as if it was privately held, and all of the cases it used to support its ruling the property was owned without restrictions and/or could be used by the Tribe for commercial, not dependent Indian community purposes, and the court analyzed the case from that perspective. 89 F.3d 908, 920-21; *Blatchford v. Sullivan*, 904 F.2d 542 (10th Cir. 1990); *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993). **By contrast**, TIHA's agreement under

Ordinance 30, all of the property TIHA acquires or has acquired is public property (App. Pg. 206, L. 1-14).

[38] Ms. Poitra's home is neither held in a trust nor privately held but instead communal property, thus *Narragansett* and the lower court's analysis is erroneous. The mere fact that TIHA and the Turtle Mountain Reservation are separated by miles is not a significant factor as *Sandoval* found communal lands hundreds of miles apart and far from any central reservation, held in fee simple ownership constituted dependent Indian communities, because the land was public property held by the community or Tribe and subject to federal oversight. This how the courts in *Alaska* and *United States v. Mound* interpreted *Sandoval*. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 528; *United States v. Mound*, 477 F.Supp. 156, 158, 160. Federal oversight is the comprehensive set of Federal regulations imposed by NAHASDA, which includes a restriction on alienation on all properties acquired by TIHA. The 10th Circuit in *Indian Country, U.S.A.* held Indian fee title and reservation status are not inconsistent concepts, and the fee land was still Indian country, because the fee title is public property subject to federal oversight. *Indian Country, U.S.A., Inc. v. State of Okl. ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 972-73, 975-76 (10th Cir. 1987).

[39] All of TIHA's property is subject to the significant restriction, it must be used for low-income Tribal housing. *NAHASDA sect. 210.* Director Lee testified federal funds had been used in the building and maintenance of Ms. Poitra's unit, and the property had to be used for Indian purposes, particularly low-income Tribal housing. (App. Pg. 205, L. 9-15).

[40] Unlike *Narragansett* where the "trust" status of the property never materialized and the land was privately held, in *Erie County*, the Tribe purchased the land in fee simple subject to a restraint on alienation pursuant to federal law. The court ruled the lower court did not have jurisdiction to hear the case. *See, Citizens Against Casino Gambling in Erie Cty. v. Hogen,* No. 07-CV-0451S, 2008 WL 2746566, at *38 (W.D.N.Y. July 8, 2008). Ms. Poitra's residence was purchased in fee simple and subject to alienation by NAHASDA. The lower Court failed to recognize this distinction.

[41] Land has been alienated or encumbered by the federal government, or cannot be taxed by the State, is subject to Tribal and Federal jurisdiction. 25 U.S. Code §1322 (b); 265 U.S.C. § 323. (*see* also 25 U.S.C. § 3501(12), 25 U.S.C. § 3703, 25 CFR § 1.4(b)). The same statute says, "Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section." 25 U.S. Code §1322(c). The ordinance applicable here is Ordinance 30. The Tribe gave up unfettered ownership in exchange for the tax emptions and NAHASDA governmental protections.

[42] Ms. Poitra's residence cannot be classified as trust land, allotment, fee simple without restriction, or privately held property. It could perhaps be considered 'restricted fee land.' Restricted fee land is a version of allotments, but are treated identically to trust land for jurisdictional purposes. *United States v. Ramsey*, 271 U.S. 467, 471 (1926). Restricted fee land mechanism is not created as would an allotment or trust land, but is

analogous to, and derives its effect or status from, the federal set-aside or federal superintendence factor. *See, Citizens Against Casino Gambling in Erie County v. Chadhuri,* 802 F.3d 267*,* 284 (2d Cir. 2015). Restricted fee lands are recognized as owned by the Tribe itself, subject to restriction against alienation imposed by federal law under 25 C.F.R. § 151.2(e): "(e) Restricted land or land in restricted status means land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations."

[43] In *Chadhuri*, the Seneca Nation of Indians had jurisdiction acquired off-reservation lands acquired in fee. 802 F.3d at 274. Seneca Nation was able to obtain jurisdiction over this off-reservation land because Congress demonstrated its intent that the land be subject to federal superintendence by providing for federal control in the process by limiting the alienability of this land once it attained restricted fee status. *Id.* "Land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the **approval** of the Secretary because of limitations contained in the **conveyance instrument** pursuant to Federal law or because of a Federal law directly imposing such limitations." 802 F.3d at 283(emphasis added). Land in particular is likely to pass to restricted fee status if there is a provision requiring the land to be exempt from State and local taxation, because that would strongly imply that Federal authority supersedes State authority over the property. *Id.* at 285. Land is particularly likely to be found to be restricted fee land if subject to restriction by the U.S. against alienation and

over which an Indian tribe exercises governmental power. *Id.* at 286. By contrast, in *Alaska v. Native Village of Venetie Tribal Government*, the lands were transferred without any restraints on alienation or significant use restrictions. 522 U.S. 520, 522-523. [44] Admittedly, the process by which the land attained this status in *Chadhuri* is unique, and the laws used to attain it are unlike at issue here. 802 F.3d 267, 274. Nonetheless, "fee restricted land" terminology, methodology, and status is strikingly similar to how TIHA holds the properties it has acquired for the public, and illustrative that Congress intended the same outcome or the same status for properties acquired by TIHA. *Id*. Ordinance 30 is required for TIHA to receive federal funds; thus, the Secretary **approved** the agreement and was also aware that baked into any **conveyance instrument**, any property TIHA acquired would be restricted under Ordinance 30 and NAHASDA, and agreed under this restriction, TIHA could acquire property for low-income Tribal housing pursuant to NAHASDA.[8] (*NAHASDA sect. 210*) (emphasis added) (App. Pg. 205, L. 5-8, Pg. 206, L. 11-14). "Notwithstanding any other provision of law, any trust or restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, subject to the approval of the affected Indian tribe and the Secretary of the Interior, for housing development and residential purposes." NAHASDA *sect. 702.50.* NAHASDA imposes this restriction on property acquired by TIHA, "assistance under eligible housing activities under this Act shall be limited to low-income Indian families on Indian reservations and other Indian areas." NAHASDA *sect. 210*(b)(1). When TIHA acquires

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[8] Mark K. Ulmer, *The Legal Origin and Nature of Indian Housing Authorities and the HUD Indian Housing Programs*, 13 Am. Indian L. Rev. 109 (1988), pg. 120, https://digitalcommons.law.ou.edu/ailr/vol13/iss2/2

any property using federal funds, it is immediately put under the restriction on alienation from Ordinance 30 and also NAHASDA. 25 USC 4101; NAHASDA *sect. 210*(b)(1); (App. Pg. 87, Pg. 207, L. 10-21). Ordinance 30 page 9 states, "[TIHA] must agree...to any conditions attached to Federal financial assistance relating to the salaries, wages, or in the development or operation of the projects," and page 20, "Each project developed or operated under a contract providing for Federal financial assistance shall be developed and operated in compliance with all requirements of such contract and applicable Federal legislation, and with all regulations and requirements prescribed from time to time by the Federal government in connection with such assistance," and also on page 20, "[TIHA] must comply with the right of the Federal government to pursue any remedies conferred upon it pursuant to the provisions of this ordinance." (App. Pg. 76, Pg. 87). This case has demonstrated Congress's intent all properties acquired by TIHA be subject to federal superintendence by providing for federal control by limiting the alienability of the property. Congress also demonstrated active control of the properties through Ordinance 30 and *NAHASDA*, which provides comprehensive, intrusive, and long-lasting guidelines that affect the legal consequences of the property indefinitely. As in *Chadhuri*, there are provisions in NAHASDA and Ordinance 30 requiring any properties or obligations acquired by TIHA be exempt from State and Tribal taxation, show the federal government to be the dominant authority. NAHASDA § 101(d). (App. Pg. 81, Pg. 88). Directly in contrast with *Alaska* and *Blatchford*, and as Director Lee testified, there are use and alienation restrictions, and the property must be used for low-income Tribal housing. (App. Pg. 205, L. 16-25, Pg. 206, L. 11-14, Pg. 207, L. 10-21, Pg. 209, L. 4-8).

[45] Director Lee's testimony is significant, because restricted fee lands are treated identically to trust land for jurisdictional purposes by the federal government and by virtually every other jurisdiction,[9]as well as by the federal government through the BIA.[10] *Citizens Against Casino Gambling in Erie Cty. v. Hogen*, No. 07-CV-0451S, 2008 WL 2746566, at *37 (W.D.N.Y. July 8, 2008)*; United States v. Ramsey*, 271 U.S. 467, 471 (1926); *Snohomish Cty. v. Seattle Disposal Co.*, 70 Wash.2d 668, 672 (1968).

[46] For purposes of federal jurisdiction, the test for determining a dependent Indian community is a flexible one, which does not depend on the label used in designating the property, nor in the manner in which the property is acquired. *Youngbear v. Brewer*, 415 F. Supp. 807, 809 (N.D. Iowa 1976), aff'd, 549 F.2d 74 (8th Cir. 1977). Congress may set land apart for Indians under federal superintendence in whatever manner it chooses; Congressional intent is therefore paramount in a finding that Federal or Tribal jurisdiction exists here, not status of the land. U.S. Const., art. I, § 8, cl. 3. The Courts in *US v. South Dakota* and *Alaska v. Native Village* used the same test to determine the existence of a de-facto or dependent Indian community, "for a finding of a dependent Indian community, these requirements are to be construed broadly and should be informed in the particular case by a consideration*…." United States v. South Dakota*; 665 F.2d 837, 839, 522 U.S. 520, 525 (1998). "The test for determining whether land is Indian country **does**

[9] Frechette, H., Wisconsin Legislator Briefing Book, 2011-124–4 (2010). Madison, WI; Wisconsin Legislative Council; https://docs.legis.wisconsin.gov/misc/lc/study/2012/special_committee_on_state_tribal_relations/010_july_18_2012_10_0_a_m_college_of_the_menominee_nation/bb_str_chq);

[10] Indian Affairs (IA). (000–01-00). Frequently Asked Questions | Indian Affairs. Bureau of Indian Affairs. See"Are there other types of Indian Lands." https://www.bia.gov/frequently-asked-questions

not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been, "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (emphasis added).

[47] To illustrate, in the case of *US v South Dakota*, the property in question was held in a deed by the United States, containing the following conditions,"(T)he land so transferred by this Corporation will be used exclusively for a Low Rent Housing Project and will not be used for any other purpose; 3. Any and all land or portion thereof transferred in this deed that is not used within five years from date of deed for said Low Rent Housing Project will revert to Grantor." 665 F.2d at 839. In all form in effect, this is exactly how title for the property is held at TIHA. The land or property at issue must be used exclusively for low rent housing and cannot be used for any other purpose, and if the property is not used for that purpose, the federal government may remove the current stewards in order to achieve the purpose of the law. *NAHASDA § 410*. By the holding of *Sandoval*, the fact TIHA is alienated by the federal government for a dependent Indian community purpose, should have lead the lower Court to conclude the Turtle Mountain Tribal Court has jurisdiction over this matter.

C. Nature of Area in Question

[48] It is best for the Court to properly complete the analysis by comparing Ms. Poitra's plight to *South Dakota* applying the standard, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." The 8th Circuit analyzed this factor by finding a housing project created under Tribal Ordinance

enacted pursuant to the Tribe's authority to provide for the health, safety, morals and welfare of the Tribe, which is the same here. 665 F.2d 837, 839 (8th Cir. 1981). As was in *South Dakota*, an Ordinance established a subordinate body, TIHA, with the stated purpose to remedy reservation problems of unsafe and unsanitary housing conditions and to alleviate the acute shortage of decent, safe and sanitary dwellings for families of low income. *Id.* Also, in the case of *South Dakota*, just as it is here, the housing project was built with federal funds obtained through HUD, funds specifically earmarked for Indian housing. *Id.* at 841.

D. Relationship of the Community to the Tribe

[49] Similar to the Tribe in *South Dakota*, TIHA is required to make an annual report, in TIHA's case it makes it to the Turtle Mountain Band of Chippewa Indians (App. Pg. 86). 665 F.2d at 840. In addition, members of the TIHA's Board are appointed solely by Turtle Mountain Tribal Council (App. Pg. 73) and may be removed by Council for cause (App. Pg. 74) (Index # 23, pg. 6-7). *Id.* In addition, pursuant to Tribal Ordinance 30, the Tribe agreed that it would not levy taxes on TIHA and its tenants (Index # 23, pg. 20), it would furnish all Tribal services to TIHA and its tenants (Index # 23, pg. 21), and Turtle Mountain Tribal Code would be amended to help TIHA's work (App. Pg. 87-88). *Id.* As was in *South Dakota*, the Turtle Mountain Band of Chippewa Indians provide a broad range of social services to the project. *Id.* For example, the Tribe pays for the children of enrolled members in the area to attend school in Trenton. The community also has a food bank and commodities program. (App. Pg. 216, L. 1-12, Pg. 218, L. 2-8). Post office boxes, funeral expenses, counselor services, Community Health Representatives for

Aging Services, gym and dietary services are located nearby and the cost of those programs are born solely by the Turtle Mountain Band of Chippewa Indians. (App. Pg. 216-218). There also exists a Trenton Indian Health Services Clinic, funded by U.S. Department of Health & Human Services, which provides a local clinic, medications, dental services, to enrolled Turtle Mountain Tribal members. (App. Pg. 216, L. 17-25, Pg. 217, L. 1-14). These medical and social services are equivalent to what would be received by Members living directly on the Turtle Mountain Reservation. *Id.* As was in *South Dakota*, evictions were required to be handled through Tribal court (Ordinance 30, pg. 21). *Id.* Unlike in *South Dakota*, Turtle Mountain provides the community with a significant part of its employment. Ms. Poitra and many other residents at TIHA, and many other community Tribal enrolled members are employed by the Grand Treasure Casino, an edifice directly adjacent to the TIHA residential community and owned by the Turtle Mountain Band of Chippewa Indians. (App. 215, Pg. 215, L. 12-25). Lastly, TIHA is located within the TISA, which was historically created for Trenton Indians to formalize their legal relationship and maintain their close identity with the Turtle Mountain Band of Chippewa.

E. Relationship of the Community to the Federal Government

[50] The court in *South Dakota* analysed this factor by finding that many of the Tribal programs mentioned in the previous paragraph are administered in cooperation with the federal government. 665 F.2d at 840-41. The court in *South Dakota* found that reimbursement of local services made through payments in lieu of taxes, or the fact that roads, water, and sewer lines were maintained by the City or County did not defeat Tribal

jurisdiction. *Id.* Here, as in *South Dakota*, the construction of the housing project was financed with money borrowed though HUD (App. Pg. 208, L. 19-25). *Id.* Here, as in *South Dakota*, the HUD Office of Indian Programs makes an annual contribution payment to the TIHA for debt service and overhead, to make up for the inability of the Housing Authority to collect enough rent to exist on its own (App. Pg. 209, L. 1-3). *Id.* Finally here, as in *South Dako*ta, these contribution funds are specifically earmarked for Indian housing (App. Pg. 209, L. 4-8). *Id.*

F. Relationship between the Federal Government and the State Government

[51] As in *South Dakota*, Federal law required HUD projects reach a cooperation agreement with local governments to obtain the basic governmental services to maintain the project. Reimbursement for these services is made through payments in lieu of taxes, and such payments have been made by TIHA for this project. 665 F.2d at 840. As was in *South Dakota*, here, the city of Trenton provides sewer and other services. *Id.* at 841. Here, as in *South Dakota*, the children in the project attend the local area school in Trenton, and tenants attend school functions. *Id.* Unlike in *South Dakota*, the local school was not built by the BIA or receives federal funds to assist in educating the Indian students, but the Tribe does pay schooling for Indian children living at TIHA. *Id.*

G. Composition of the Community

[52] Unlike in *South Dakota*, members of the TIHA Board are required to be members of the Tribe (App. 208, L. 12-15). 665 F.2d at 841. The 8th Circuit held although the South Dakota city provided many of the vital services to the community, these services were provided to the housing project because of inducements offered the city by federal

agencies or by the Housing Authority (here, the Housing Authority makes payments in lieu of taxes). *Id.* at 842. The TIHA is composed mostly of Indians, giving the character of the location as Indian, and the main beneficiaries of the project are members of the Turtle Mountain Band of Chippewa Indians (App. P. 208, L. 8-11). *Id.* at 841. The 8th Circuit found when the main beneficiaries of a housing project are members of the same Tribe, even though small in numbers and relying on the city for vital services, is enough to demonstrate the community shared cohesiveness and common interests. *Id.* at 842.

II. Jurisdiction by Contract

[53] Because of the written contractual agreement between TIHA and the Turtle Mountain Tribe requires TIHA to bring matters of eviction and contractual housing disputes to Turtle Mountain Tribal Court, jurisdiction by contract was created. Director Lee testified, she is required to follow Ordinance 30 (App. Pg. 203, L. 2-6). Ordinance 30, page 20 states, "The Tribe Government hereby declares that the powers of the Tribal Government shall be vigorously utilized to enforce eviction of a tenant or homebuyer for nonpayment or other contractual violations including action through appropriate courts." (App. Pg. 87).

[54] Agreements between the Turtle Mountain Tribe and TIHA must follow the exact format prescribed by HUD.[11] One of the provisions required by HUD is, "Tribal Courts shall have jurisdiction to hear and determine actions for eviction." [12] Because this same

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[11] Mark K. Ulmer, *The Legal Origin and Nature of Indian Housing Authorities and the HUD Indian Housing Programs*, 13 Am. Indian L. Rev. 109 (1988), pg. 120, https://digitalcommons.law.ou.edu/ailr/vol13/iss2/2

[12] *Id.* at 140.

provision is in every Tribal Housing agreement with HUD, Courts have found, “Of special interest here is the provision, “Tribal Courts shall have jurisdiction to hear and determine an action for eviction of a tenant or homebuyer”....and is even under the jurisdiction of the Tribe for eviction purposes.” *United States v. Mound*, 477 F.Supp. 156, 159, 160 (1979); *United States v. South Dakota*; 665 F.2d 837, 840.

[55] Additionally, the United States Supreme Court has made clear to waive tribal sovereign power should not be inferred lightly, “[S]overeign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms*.” Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148 (1982). Tribally created housing authorities are considered an arm of the tribal government, suits against them are normally barred absent a waiver of sovereign immunity. *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.,* 797 F.2d 668, 671 (8th Cir. 1986). These is no express showing Turtle Mountain waived its contractual jurisdiction over this matter, in fact Tribal Court has twice exercised its jurisdiction in disputes between Ms. Poitra and TIHA (App. Pg. 220, L. 8-16).

[56] Ordinance 30 created TIHA and defined the contractual relationship between TIHA and the Turtle Mountain Tribe. (App. Pg. 68). Ms. Poitra falls within the group of people that Ordinance 30 was designed to include: she is enrolled member of the Turtle Mountain tribe living within the boundaries of TISA being provided low-income housing with TIHA through NAHASDA, is being evicted by TIHA for nonpayment of rent and contractual violations. Why mention, “Tribal Courts shall hear matters of eviction,” in Ordinance 30, if matters of eviction are not intended to be heard in Tribal Court? If this

Court holds the Turtle Mountain Tribal Court lacks jurisdiction in this matter, it would pose a direct challenge to Ordinance 30. (App. Pg. 87). It is imperative to understand Turtle Mountain Tribal Ordinance 30 does not say, "District Court shall hear matters of eviction," or, "Matters of eviction may be brought to Tribal Court whenever the Authority chooses," but instead plainly states, "Tribal court **shall** be utilized in matters of eviction..." (Index # 23, pg. 20) (App. Pg. 87) (emphasis added).

[57] The Plaintiff argues the significant distance between TIHA and the Turtle Mountain Reservation, but this does not relieve TIHA from their contractual duty of bringing matters of eviction to Tribal Court. For example, *Carnival Cruise Lines, Inc. v. Shute*, the United States Supreme Court found that passengers who signed a contract with a clause stating that any disputes be brought to Florida's jurisdiction, those passengers were obligated to bring any disputes with the company to the specified court in Florida, even though many passengers were from the Washington State. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

[58] The Turtle Mountain Tribal Code supports a jurisdiction by contract argument. Tribal Code reads, "(T)he Tribal Court shall have general jurisdiction in all civil actions to the extent permitted by the Tribal constitution and by the laws of the United States." (Rule 2.0102 Jurisdiction) (App. Pg. 115). This provision constitutes as long-arm jurisdiction, further, the Turtle Mountain Tribal Code expressly provides, "(A)ny person subject to the jurisdiction of the Tribal Court and doing any of the following acts: 1. the transaction of any business of the TM Jurisdiction." (App. Pg. 118) (Rule 2.0406).

CONCLUSION

[59] The Residential area managed by TIHA, including Ms. Poitra's rental property, is a Dependent Indian Community. The State's exercise of jurisdiction undermines the Tribe's right to govern its internal affairs. The State's limited interest does not justify assertion of its exercise of jurisdiction in an eviction of a Tribal Member from a Tribal Housing Authority. Ordinance 30 is controlling. Ordinance 30 places a legal obligation on TIHA to bring this eviction action in Tribal Court. The lower Court erred when it did not properly interpret the law and ordered Ms. Poitra to be evicted.

PRAYER FOR RELIEF

[60] WHEREFORE, Lisa Poitra respectfully request the decision of the District Court be reversed and the matter be dismissed for lack of jurisdiction.

Dated this 6th day of February, 2022.

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IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Trenton Indian Housing Authority,	)	
	)	
Plaintiff/Appellee,	)	
vs.	)	Supreme Court No. 20210302
	)	
Lisa Poitra and all other unknown, occupants,	)	
	)	
Defendant/Appellant.	)	

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Appellant, in the above-matter, and as the author of the Appellant's brief, hereby, certifies compliance with Rule 32 of the North Dakota Rules of Appellant Procedure. Appellant's brief is compliant with the page length requirement under N.D. R. App. P. 32(8)(A), and Appellant's brief is 38 pages in length.

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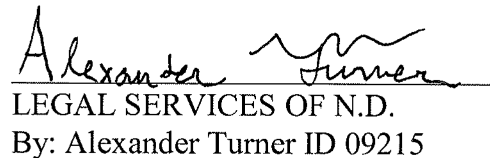
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Trenton Indian Housing Authority,	)	
	)	Supreme Court No. 20210302
Plaintiff/Appellee,	)	
vs.	)	
	)	CERTIFICATE OF SERVICE
Lisa Poitra and all other unknown occupants,	)	
	)	
	)	
Defendant/Appellant.	)	

The undersigned attorney, does hereby certify that a true and correct copy of the above and foregoing **Brief of Appellant, Appendix of Appellant, Certificate of Compliance** was served upon following persons by electronic mail and through the North Dakota Supreme Court E-Filing Portal on the 6th day of February, 2022:

Jordan Evert (ID #06969)
jordon@furusethlaw.com

Dated this 6th day of February, 2022.



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