IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

JASON HANSON, et al.,	)	
	)	
Plaintiffs,	)	Civ. Action No. 3:22-cv-174
	)	
v.	)	**TRIBAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS**
	)	
JAMES PARISIEN, et al.,	)	The Honorable Peter D. Welte, Chief Judge
	)	
	)	**Oral Hearing Requested**
	)	
Defendants.	)	

Jason Hanson and Dakota Metal Fabrication (collectively, Plaintiffs) filed the instant Complaint against James Parisien of the Turtle Mountain Band of Chippewa Indians' Tribal Employment Rights Office, the Tribal Employment Rights Office (the "TERO Office"), the Turtle Mountain Tribal Court, the Turtle Mountain Appellate Court, and the Turtle Mountain Band of Chippewa Indians (the "Tribe"), alleging that the Tribe and its various agencies lack

jurisdiction to enforce the Tribe's Tribal Employment Rights Ordinance (the "TERO"), including the TERO-related taxes, against Plaintiffs.

This is not the first time this Court has seen this Complaint. Almost three years ago, Plaintiffs filed a nearly identical complaint with this Court in *Hanson v. Parisien,* 473 F. Supp. 3d 970 (D.N.D. 2020). This Court ruled that it lacks jurisdiction over the TERO Office, the Turtle Mountain Tribal Court, the Turtle Mountain Appellate Court, and the Tribe, that Plaintiffs had not alleged a waiver of immunity, and therefore, the Court lacked subject matter jurisdiction against those defendants. *Hanson v. Parisien,* 473 F. Supp. 3d 970, 975 (D.N.D. 2020). Nothing has changed. This Court still lacks jurisdiction over the Tribe and its agencies. Plaintiffs' Complaint does not even attempt to overcome this hurdle but instead recycles the previous allegations without accounting for this Court's prior order. The Court then ordered Plaintiffs to exhaust tribal administrative remedies. *Id.* at 977.

Plaintiffs' instant Complaint is fatally flawed against the remaining Defendant, the TERO Office Director (hereinafter, Defendant TERO Director) because it fails to state a claim upon which relief can be granted.[1] The Supreme Court has unequivocally held that tribes possess inherent sovereign authority to tax a non-native conducting business on tribal land, both as a necessary instrument of self-government and as a condition of entry derived from a tribe's power to exclude. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982). As Plaintiffs readily allege, Plaintiffs conducted business on tribal land and a condition of conducting business was compliance with TERO. Plaintiffs fail to allege any facts that would overcome this settled law.

[1] James Parisien, sued in his official capacity as the Director of the TERO Office, is retired. Pursuant to Rule 25 of the Federal Rules of Civil Procedure, this Court should substitute the current director, Sherry Baker as the proper Defendant. Fed. R. Civ. P. 25(d); *see also Sexton v. Hutton*, No. 3:06CV00163 BSM, 2008 WL 2328327, at *5 (E.D. Ark. June 4, 2008).

BACKGROUND

The Tribe's Tribal Employment Rights

This case is fundamentally about a non-Indian for-profit corporation that refuses to pay its taxes or otherwise comply with the Tribe's TERO as it was required to do by law. The Tribe enacted its TERO in order "to promote employment opportunities for Indians and business opportunities for Indian firms and contractors." *See Hanson v. Parisien*, 473 F. Supp. 3d at 973 (citing Turtle Mountain Tribal Code [TMBCI] § 32.0102). To sustain the program financially, TERO authorizes a fee assessment on certain businesses operating within the Reservation, including construction contractors. *Id*. (citing TMBCI § 32.0501). When awarded a contract, a contractor must remit a fee equal to 3% of the total contract amount to the TERO Office. *Id.*

The Tribe's TERO permits an employer to file an administrative complaint if aggrieved by an action of the TERO Office Director or the Commission. *Id*. (citing § TMBCI 32.0704). "The Director then investigates the complaint and attempts to procure an informal resolution." *Id.* "If that fails, the employer is entitled to a hearing before the Commission." *Id*. "Any party dissatisfied with a hearing decision may appeal directly to the Turtle Mountain Court of Appeals." *Id*. (citing TMBCI § 32.0901). "The ordinance disavows any waiver of tribal sovereign immunity. *Id*. (citing TMBCI § 32.0604).

The Project

This Court's prior order provides significant details on the Project, reiterated here for the Court's convenience. *Id.* at 973. The Project involved construction of a pre-kindergarten and wrestling facility in 2018. *Id.* "The School District occupies the facility pursuant to a memorandum of agreement with the Tribe, as approved by the Bureau of Indian Affairs." *Id*. The School District is not a tribal entity. *Id.*

"At first, the School District solicited bids for the project with the condition that TERO would apply." *Id.* Plaintiffs submitted a bid that factored in the anticipated TERO fees. *Id*. "But when all the bids came in over budget, the School District advertised for bids anew—this time purportedly without requiring TERO compliance." *Id*. At a pre-bid construction meeting—held before the second round of bids were due—the Tribe's then TERO Director warned contractors that despite the omission from the School District's advertisement, TERO would apply to contracts awarded for the project." *Id*. Plaintiff Dakota Metal Fabrication was in attendance, but nevertheless renewed its bid without including TERO fees. *Id. "*Justifying that decision, [Plaintiffs] relied on a letter from the School District's attorney." *Id.* at 973-74. Notably, the "letter explained that TERO did not apply to the School District itself but advised contractors to consult with their own attorneys to determine whether the ordinance applied to them." *Id*. at 974. The School District accepted Plaintiffs' bid without the inclusion of TERO fees and work commenced. *Id*. On January 16, 2018, the TERO Office assessed a $44,640 fee on Plaintiff Dakota Metal Fabrication. *Id*. Plaintiffs refused to pay the fee. *Id.*

Procedural History

This Court outlines the procedural history of this case in *Hanson v. Parisien,* 473 F. Supp. 3d at 974, starting from the inception of the dispute through this Court's 2020 Order remanding the case to the Tribe. In the 2020 Order, this Court held that "sovereign immunity shields the four tribal government entities." *Id* at 975. The Court also determined that, pursuant to *Ex parte Young*, 209 U.S. 123 (1908), a private party can sue a tribal officer in his official capacity to enjoin a prospective violation of federal law. *Id.* at 976. This Court did not reach the merits of any claim against Defendant TERO Director, because it also held that Plaintiffs failed to exhaust their administrative remedies. *Id*.

In accordance with this Court's 2020 Order, a Commission Hearing took place on April 14, 2021. Complaint ¶ 5. The Commission ruled consistent with previous Tribal Court rulings, and Plaintiffs appealed to the Turtle Mountain Appellate Court. Complaint ¶ 7. On May 13, 2022, the appeals court ruled that the TERO Office has "jurisdiction to regulate and tax non-Indians" that operate on tribal land. Complaint ¶ 7.

Defendants now respectfully move to dismiss this action on the following grounds:

1. This Court lacks jurisdiction as to the Tribe and Tribal Agency Defendants because Plaintiffs have not pled a waiver of sovereign immunity.
2. The Complaint fails to state a claim upon which relief can be granted.

LEGAL STANDARDS

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges a court's subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). This Court must dismiss this case for want of jurisdiction unless the Plaintiffs meet their burden to establish subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-103 (1998); *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). In considering a motion to dismiss under Rule 12(b)(1), the Court is not limited to the facts pled in the complaint but can weigh evidence and determine facts in order to satisfy itself as to its power to hear the case. *Osborn*, 918 F.2d 724, 728 n.4.

Tribal sovereign immunity can be raised in a motion to dismiss. Fed. R. Civ. P. 12(b)(1); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (citing *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995)). Sovereign immunity bars suit against Indian tribes unless a federal statute expressly and clearly waives this immunity, or a tribe

agrees, clearly and expressly, to waive its immunity. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). To be sure, sovereign immunity is a non-discretionary jurisdictional bar to any claims against a tribe, irrespective of the merits of the claim. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Chemehuevi Indian Tribe v Cal State Bd. of Equalization*, 757 F.2d 1047, 1051, 1052 n.6 (9th Cir. 1985) (immunity applies "irrespective of the merits of the claim") (citations and quotation marks omitted); *see also State of California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) ("Sovereign immunity involves a right which [a] court[] [has] no choice, in the absence of a waiver, but to recognize."). Tribes are, therefore, shielded not only from suits for money damages, but also from declaratory and injunctive relief. *Fort Yates Pub. Sch. Dist. #4 v. Murphy*, 786 F.3d 662, 670-671 (8th Cir. 2015) ("The Supreme Court has made clear, however, that a tribe's sovereign immunity bars suits against the Tribe for injunctive and declaratory relief.") (citing *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782 (2014)).

A motion to dismiss pursuant to a FRCP 12(b)(6) is a challenge to the sufficiency pleadings. "To survive [a] motion to dismiss for failure to state a claim," a complaint must "alleg[e] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *OmegaGenesis Corp. v. Mayo Found. for Med. Educ. & Research*, 851 F.3d 800, 804 (8th Cir. 2017) (citations and quotation marks omitted). A claim is plausibly pleaded when its "factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Plaintiffs are required to provide "more than labels, conclusions, and formulaic recitations of the elements of a cause of action" to survive such challenge. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

ARGUMENT

I. This Court Lacks Jurisdiction Over Defendants Because of Sovereign Immunity.

A. The Turtle Mountain Band of Chippewa Indians, the TERO Commission, and the Tribal Courts Are Immune from Suit.

As this Court has previously held, it lacks "jurisdiction over all the Defendants—with the exception of [Defendant TERO Director]—on the basis of sovereign immunity." *Hanson*, 473 F. Supp. 3d at 975. In its prior order, this Court reviewed the law and applied it to the facts of this case:

> Applying these principles, sovereign immunity shields the four tribal government entities. In addition to the Tribe itself, sovereign immunity extends to tribal administrative agencies and tribal courts, including for suits seeking declaratory and injunctive relief. *See Fort Yates Pub. Sch. Dist. # 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 670-71 (8th Cir. 2015). Nothing indicates that Congress abrogated the Tribe's sovereign immunity when enforcing TERO. And the Plaintiffs do not plead waiver at all, much less identify a clear and unequivocal expression of consent to suit. To the contrary, TERO overtly disclaims such a waiver. Doc. No. 16-4, § 32.0604. The TERO Office, the Tribe, the Turtle Mountain Tribal Court, and the Turtle Mountain Court of Appeals therefore retain immunity from suit. The Court lacks jurisdiction over the claims against them as a result. *See id.* at 670 (stating that sovereign immunity is a threshold jurisdictional limitation).

Id.

Plaintiffs' instant Complaint seeks relief identical to the relief contemplated in the complaint filed in *Hanson v. Parisien*. Congress has not abrogated the Tribe's immunity when enforcing TERO. Plaintiffs have alleged no facts that could even possibly be construed as a waiver, implied or otherwise, by the Tribe, the TERO Commission, the tribal courts, or any of these Tribal agencies' employees or officials. Plaintiffs have not met their burden to plead waiver. Thus, the Tribe and its agencies are immune from suit.

B. Defendant TERO Director is Immune from Suit.

Sovereign immunity extends to employees when carrying out official duties on tribal land. *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *see also Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 170-73 (1977) (claim permitted against tribal officials, who were acting as fishermen, rather than tribal government officers when they had engaged in challenged activities).

Although *Ex parte Young* created an exception to sovereign immunity for employees carrying out official duties, this exception is limited. Individuals who:

> as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined in federal court of equity from such action.

Ex parte Young, 209 U.S. 123, 155-56 (1908). In other words, state officers may be sued to prevent enforcement of an unconstitutional law if such officers have enforcement authority and are threatening and about to commence proceedings. *See Balough v. Lombardi*, 816 F.3d 536, 540, 544 (8th Cir. 2016). Where a complaint fails to "make clear what those ongoing violations are," or how injunctive relief would remedy such a violation, the exception does not apply. *Boler v. Earley*, 865 F.3d 391, 412 (6th Cir. 2017).

Ex Parte Young does not extend to suits such as these, where there is a clear instrumentality of the state at issue and where the Complaint does not allege a violation of federal law. *Verizon Md. Inc. v. Public Serv. Comm'n of Md.,* 535 U.S. 635, 645 (2002). First, the "Tribal TERO law has been in effect for [more than 40] years." *See Hanson v. Parisien*, No. 3:19-cv-00270 (filed Dec. 6, 2019), ECF No. 1-1 (Turtle Mountain Court of Appeals Order). As expressed by this Court in *Hanson v. Parisien*, Defendant TERO Director has the authority to

"investigate" aggrieved parties' complaints and "attempt[] to procure an informal resolution." 473 F. Supp. 3d at 973. It is a proper exercise of the TERO Director's authority to assess TERO fees. This is an "administrative" or ministerial function of the TERO office. *See Hanson v. Parisien*, ECF No. 1-1.

Second, as discussed in detail in Section II below, the TERO Director acted within his authority pursuant to federal precedent regarding Tribal jurisdiction on tribal land, therefore, there is no ongoing violation of federal law. Thus, *Ex parte Young* does not apply and Defendant TERO Director enjoys the Tribe's sovereign immunity.

II. Plaintiffs' Complaint Fails to State a Claim Upon Which Relief Can Be Granted.

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the complaint must "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Eighth Circuit Court of Appeals has interpreted this standard to mean that, to survive a motion to dismiss for failure to state a claim, the plaintiff's complaint must plead more than "labels and conclusions," or a "formulaic recitation" of the elements of a cause of action, or "naked assertions" devoid of factual enhancement. *Hamilton v. Palm*, 621 F.3d 816, 817–18 (8th Cir. 2010) (quotations and citations omitted). Determining whether a claim is plausible is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

A grant of dismissal pursuant to Rule 12(b)(6) "serves the very valuable function of saving judicial and party resources in cases where it simply would not be productive to proceed." *Worthington v. Subaru-Isuzu Auto., Inc.*, 868 F. Supp. 1067, 1068 (N.D. Ind. 1994). If every claim were allowed to proceed to trial, "the costs generated thereby would be enormous and there would be little benefit in the way of increased accuracy in the results." *Gomez v.*

Illinois State Board of Educ., 811 F.2d 1030, 1039 (7th Cir. 1987). When it is "obvious well before trial that the defending party is entitled to judgment…there is no need to expend further the resources of the parties and the court." *Id*.

Federal law has recognized that tribal nations have significant authority over their land. As the Supreme Court has explained, "tribes … possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands." *Duro v. Reina*, 595 U.S. 676, 696 (1990). This principal is commonly referred to as the exclusion doctrine. Furthermore, tribal nations have the inherent authority to tax a non-native conducting business on tribal land derived from the power to exclude. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Even the dissent in *Merrion* noted that "this 'power to exclude' has logically been held to include the lesser power to attach conditions on a right of entry granted by the tribe to a non-member to engage in particular activities within the reservation." *Id.* at 173.

Here, the Tribe has the power to control economic activity within its jurisdiction and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. Nonmembers, like Plaintiffs, Complaint ¶ 8, who refuse to comply with tribal law, *see generally* Complaint, when conducting business on tribal land, *id.* ¶ 8, may be excluded from tribal lands. The Tribe has the regulatory authority to tax Plaintiffs' commercial dealings pursuant to the exclusion doctrine.

A. The Tribe Has the Power to Manage its Own Lands Under the Exclusion Doctrine.

The Tribe has regulatory authority over non-members pursuant to the "right to exclude, which generally applies to nonmember conduct on tribal land." *Window Rock Unified District v. Reeves*, 861 F.3d 894 (9th Cir. 2017). The power to exclude is an independent source of tribal regulatory jurisdiction that exists *in addition to* the sovereign authority to regulate nonmember

conduct on tribal land that intrudes on a tribe's power to preserve self-government or internal relations. *Id.* at 903.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Supreme Court upheld the tribe's authority to impose a severance tax on a nonmember company extracting oil and gas from tribal property, in addition to the negotiated royalty payments under the lease. 455 U.S. at 159. The Court found the jurisdiction to tax nonmembers on tribal land derived from the tribe's power, as a landowner, to exclude nonmembers and its "general authority, as sovereign, to control economic activity within its jurisdiction and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Id.* at 137.

Subsequently, the Supreme Court and U.S. Courts of Appeals have consistently reviewed the extent of a tribe's civil authority over non-Indians on tribal land, and acknowledged the long-standing rule that Indian tribes possess inherent sovereign powers, including the authority to exclude, *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 333 (1983) ("A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is ... well established."), unless Congress clearly and unambiguously says otherwise, *United States v. Lara,* 541 U.S. 193, 200 (2004) (recognizing that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive' " (citations omitted)); *Santa Clara Pueblo v. Martinez,* 436 U.S. at 58, 60 (recognizing Congress's "superior and plenary control" over matters of tribal sovereignty and noting that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent"); *see also* William C. Canby, Jr., *American Indian Law in a Nutshell* 101 (5th

ed. 2009) ("Although the doctrine of plenary power of Congress over tribal sovereignty has its critics, it remains in full strength in the courts, so long as Congress makes its intent to limit sovereignty clear." (internal citation omitted)); *see also Water Wheel Camp Recreational Area, Inc. v LaRance*, 642 F.3d 802, 809 (9th Cir. 2011).

Indeed, the Supreme Court reiterated theses fundamental principles as recently as last year. *United States v. Cooley*, 141 S. Ct. at 1644 ("In *Duro* we traced the relevant tribal authority to a tribe's right to exclude non-Indians from reservation land. But tribes 'have inherent sovereignty independent of th[e] authority arising from their power to exclude…'" (citing *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 426–430 (1989) (plurality opinion)). In *United States v. Cooley*, the Supreme Court held that tribal law enforcement officers had the right to search and detain any person that he or she believes may commit or has committed a crime. 141 S. Ct. 1638, 1643. The Court reasoned that denying tribes this right would make it difficult for tribes to protect themselves against ongoing threats. *Id*.

"From a tribe's inherent sovereign powers flow lesser powers, including power to regulate non-Indians on tribal land." *Water Wheel* at 808-09 (citing *South Dakota v. Bourland,* 508 U.S. 679, 689 (1993) (recognizing that a tribe's power to exclude includes the incidental power to regulate). This includes the authority to set conditions on entry through regulations. *Id*. at 811 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982)); *see United States v. Cooley*, 593 U.S. __, 141 S. Ct. 1638, 1644 (2021) ("Indian tribes may, for example … exclude others from entering tribal land") (citing *Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U. S. 316, 327–328 (2008).

In *Water Wheel Camp Recreational Area, Inc. v LaRance,* the Ninth Circuit considered tribal jurisdiction, and acknowledged tribes' "inherent sovereign powers, including the authority

to exclude." 642 F.3d at 808. There, a non-tribal lessee of tribal lands failed to make payments as required by the lease and failed to vacate the premises when the lease expired, and the tribal nation sought to remove the lessee and collect unpaid rent and damages from the use of the property. *Id.* at 805. After review by both the tribal court and the federal district court, the Ninth Circuit upheld the tribe's jurisdiction. *Id.* at 812 ("We must therefore conclude that the [tribe's] right to exclude non-Indians from tribal land includes the power to regulate them unless congress has said otherwise, or unless the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self government.") (citing *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987) ("Tribal authority over activities of non-Indians on reservation lands is an important part of tribal sovereignty." (internal citations omitted)); *Merrion,* 455 U.S. at 146 (noting the "established views that Indian tribes retain those fundamental attributes of sovereignty ... which have not been divested by Congress or by necessary implication of the tribe's dependent status"); *Santa Clara Pueblo,* 436 U.S. at 56 ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government *which the tribes otherwise possess*." (emphasis added)).

Here, the land in question is tribal land. Complaint ¶¶ 8, 24. Because tribes maintain "considerable authority over the conduct of both tribal members and nonmembers on Indian land," *McDonald v. Means,* 309 F.3d 530, 536 (9th Cir. 2002), the Tribe and its TERO office are empowered to control economic activity within the Tribe's jurisdiction and to recover the costs of providing governmental services from the regulated entity. Plaintiffs fail to allege facts that can overcome this established federal precedent.

B. The Tribe's Right to Exclude Provides the Tribe with the Right to Tax Plaintiffs for Work They Conducted on Tribal Land.

The Tribe's right to exclude provides the Tribe with the right to set conditions on entry to tribal land, including the right to require contractors to pay a fee for working on tribal land. In *Attorney's Process and Investigation Services v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927 (8th Cir. 2010), the Eighth Circuit addressed questions of land status in determining whether a tribal court could exercise jurisdiction. The court noted that "a tribe's traditional and undisputed power to exclude persons from tribal land ... gives it the power to set conditions on entry to that land. Tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner." *Id.* at 940 (internal quotations and citations omitted).

To be sure, the Supreme Court has limited tribal civil jurisdiction in *Montana v. U.S.*, 450 U.S. 544 (1981). However, the parameters of *Montana* do not apply to this case, because *Montana* and its progeny relate to privately-owned fee lands. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (concluding that *Montana* does not apply to determine a tribe's regulatory authority over nonmembers on tribal land). *Nevada v. Hicks*, 533 U.S. 353 (2001) is the only exception to the general rule that *Montana* does not apply to jurisdictional questions arising from a tribe's authority to exclude non-Indians from tribal land. In *Hicks* the Supreme Court held that a state had a competing interest in executing a warrant for an off-reservation crime such that the tribe's regulatory jurisdiction did not supersede the state's crime-fighting interests. *Id*. at 364.

In construing *Hicks,* the Ninth Circuit established the following rule:

> In this instance, where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and

> manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction.

Water Wheel at 814.

More recently in *Knighton v. Cedarville Rancheria*, 922 F.3d 892 (9th Cir. 2019), the Ninth Circuit also found the right to exclude was an independent source of regulatory jurisdiction over non-member conduct on tribal land:

> [A]n Indian tribe has power to regulate nonmember conduct on tribal land incident to its sovereign power to exclude nonmembers from tribal land, regardless of whether either of the *Montana* exceptions is satisfied … a tribe's power to regulate nonmember conduct on tribal land flows from its inherent power to exclude and is circumscribed only to the limited extend that the circumstances in *Hicks*—significant state interests—are present.

Id. at 903.

For the purposes of this case, the Tribe has regulatory jurisdiction because it has the power to "manage its own lands" and Plaintiffs have interfered directly with this inherent power. There is no competing state interest at play in this case: the state is not a party to this case, nor has it or the School District intervened in this case or *any* of the predecessor cases.[2] The state simply does not have a dog in this fight.[3]

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[2] While the Complaint attempts to allege a state interest by claiming that the School District would be divested of funds were the Tribe's TERO upheld, Plaintiffs do not have standing to raise that interest and they have not alleged facts sufficient to explain how the School District would be divested of funds when it is Plaintiffs who are subject to TERO, Complaint ¶ 21 (TERO tax is assessed by Defendants against Plaintiffs).

[3] To the extent that Plaintiffs argue in their Complaint that tribal regulatory authority here "may be out of step" with *Belcourt Public School District, et al. v. Davis, et al.,* No. 14-1541 (8th Cir. 2015), *see* Complaint ¶ 21, *Belcourt School District* does not apply to the facts of this case. There, School District employees attempted to sue the School District in Tribal Court for employment-related injuries. *Id.* The Eighth Circuit held that a state agency, such as the School District, cannot consent to Tribal court jurisdiction because North Dakota law expressly prohibits state agencies from doing so. *Id.* (citing *Montana,* 450 U.S. at 544). The ruling is limited to

The allegations in the Complaint, at their most basic, are that the Tribe—a sovereign—sought to enforce a tax on a private business venture—Plaintiffs—within their sovereign territory. *Merrion* recognized that tribes have this exact power. And even *Hicks*, the outlier case, recognized *Merrion*'s assertion of tribal taxing authority. *Hicks* at 360 (citing *Merrion* at 137, 142 ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government," at least as to "tribal lands" on which the tribe "has ... authority over a nonmember"). The Tribe has the power to exclude Plaintiffs for their failure to pay a perfectly reasonable tax as the price of doing business on tribal land. The Tribe has the power to require Plaintiffs to pay TERO fees in exchange for permission to work on tribal land.

Plaintiffs are the master of their pleadings, and they have not set forth the necessary allegations that entitle them to recovery. In other words, the Complaint utterly fails to allege facts that would plausibly state a claim that this extensive federal precedent and the Tribe's power to exclude and inherent regulatory authority does not apply to this case. Thus, Plaintiffs have failed to state a claim, and this Court should dismiss this case.

CONCLUSION

For the foregoing reasons, the Tribal Defendants respectfully request that this Court dismiss this action.

November 21, 2022

Respectfully submitted,

/s/ *Paige M. Tomaselli*
Paige M. Tomaselli (Bar ID CA 237737)
GRIME LAW, LLP
730 Arizona Avenue
Santa Monica, CA 90401
ptomaselli@grimelaw.com

Tribal jurisdiction over a state agency for employment-related disputes, *id.*, and has nothing to do with the Tribe's power to tax as part of its inherent right to exclude.

Telephone: (310) 747-5095

LEVITANLAW
P.O. Box 5475
Sonora, CA 95370
Email: paige@levitanlaw.net
Phone: (619) 339-3180

Alysia E. LaCounte
WI Bar No. 1019507
P.O. Box 900
Belcourt, N.D. 58316
Alysia.lacounte@gmail.com
(701) 477-2600

Attorneys for Tribal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2022, I electronically filed the foregoing document using the Court's CM/ECF system, which will send notification of the filing of this document to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Service List.

Dated: November 21, 2022

Respectfully submitted,

/s/ *Paige M. Tomaselli*
Paige M. Tomaselli (Bar ID CA 237737)
GRIME LAW, LLP
730 Arizona Avenue
Santa Monica, CA 90401
ptomaselli@grimelaw.com
Telephone: (310) 747-5095

LEVITANLAW
P.O. Box 5475
Sonora, CA 95370
Email: paige@levitanlaw.net
Phone: (619) 339-3180

Attorney for Tribal Defendants