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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Window Rock Unified School District,
et al.,

Plaintiffs,

vs.

Ann Reeves, et al.,

Defendants.

No. CV-12-08059-PCT-PGR

ORDER

Pending before the Court are the Navajo Nation Labor Commission Defendants' Motion to Dismiss for Failure to Exhaust Tribal Remedies (Doc. 12), Plaintiffs' Cross-Motion for Summary Judgment (Doc. 27), and the employee defendants' Motion Pursuant to Rule 56(f) [sic] Fed.R.Civ.P. (Doc. #34), all of which relate to the underlying issue of whether the Navajo Nation has the regulatory and adjudicative authority to review personnel decisions made by the plaintiff school districts. Having considered the parties' memoranda, the Court finds that the defendants' motions should be denied and that the plaintiffs are entitled to the entry of summary judgment in their favor as a matter of law pursuant to Fed.R.Civ.P. 56.¹

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While some of the defendants have requested oral argument, the Court concludes that a hearing would not significantly aid the decisional process.

1 Background

2 Plaintiffs Window Rock Unified School District and Pinon Unified School
3 District are both Arizona political subdivisions. See A.R.S. § 15-101(21). Pursuant
4 to their mandates under Arizona constitutional and statutory law to educate all
5 Arizona children², they operate public schools within that portion of the Navajo
6 Reservation located within the State of Arizona on tribal land leased from the Navajo
7 Nation. The defendants are seven current or former employees of the plaintiffs
8 (“employee defendants”), and seven current or former members of the Navajo
9 Nation Labor Commission (“NNLC defendants”).³

10 At the time this action was commenced, the employee defendants had
11 complaints pending before the Navajo Nation Labor Commission (“NNLC”), a tribal
12 administrative tribunal, wherein they alleged that the school districts had violated
13 their employment-related rights under the Navajo Preference in Employment Act
14 (“NPEA”).⁴ The school districts, the defendants in the NNLC cases, filed motions

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The Arizona Constitution requires the state legislature to enact “such laws
17 as shall provide for the establishment and maintenance of a general and uniform
18 public school system[.]” Ariz.Const. Art. XI, § 1.

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The employee defendants are Ann Reeves, Kevin Reeves, Loretta Brutz,
20 Mae Y. John, Clarissa Hale, Michael Coonsis, and Barbra Beall. They are all
21 enrolled members of the Navajo Nation, with the exception of Kevin Reeves, who is
an enrolled member of a different tribe, and Ann Reeves, who is a non-Indian.

22 The NNLC defendants are Richie Nez, Casey Watchman, Ben Smith,
Peterson Yazzie, Woody Lee, Jerry Bodie, and Evelyn Meadows.

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NPEA, a tribal general labor code, in part requires employers operating
24 within the Navajo Reservation to hire, promote and retain qualified Navajo tribal
25 members ahead of non-Navajos, and to fire or discipline employees, whether Navajo
or not, only for “just cause.”

26 The employee defendants’ claims before the NNLC include claims for

1 with the NNLC seeking the dismissal of the complaints for lack of jurisdiction,
2 contending that the NNLC had no regulatory or adjudicatory authority over personnel
3 decisions made by Arizona public school districts located on the Navajo Reservation
4 as a result of this Court's ruling in Red Mesa Unified School District v. Yellowhair,
5 2010 WL 3855183 (D.Ariz. September 28, 2010)⁵. After consolidating the employee
6 defendants' complaints, the NNLC ruled that it could resolve the tribal jurisdiction
7 issue only through an evidentiary hearing held after the parties had engaged in
8 appropriate jurisdiction-related discovery. This action was commenced before the
9 NNLC could hold its evidentiary hearing.

10 In their complaint in this action for declaratory and injunctive relief, the plaintiff
11 school districts, who are indisputably non-Indians, allege that the NNLC and the
12 Navajo tribal courts lack jurisdiction over public school districts' employment

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14 retaliation, for failure to be hired as the most qualified Navajo applicant for a job
15 opening, for workplace harassment, and for termination without just cause. The
16 merits of the employee defendants' NNLC complaints are not at issue here.

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18 The Red Mesa Unified School District case involved essentially the same
19 factual situation as here. The plaintiffs, which were two Arizona public school
20 districts operating schools within the Navajo Reservation on land leased from the
21 tribe, sought to prevent some current and former employees from prosecuting
22 employment termination-related claims before Navajo administrative and judicial
23 bodies and to prevent those bodies from adjudicating the claims. The Court, finding
24 that the Navajo Nation had no regulatory or adjudicatory jurisdiction over the
25 employee defendants' employment claims, enjoined the employees from further
26 prosecuting their claims before the NNLC, the Navajo Supreme Court, or any other
Navajo tribal court or administrative tribunal and enjoined the NNLC defendants from
further adjudication of the employee defendants' claims. Unlike in this case, the
plaintiffs in Red Mesa had sufficiently exhausted their tribal court remedies relating
to the issue of tribal jurisdiction before filing their federal action. That exhaustion
process resulted in the Navajo Nation Supreme Court finding that the school districts
were subject to NPEA and that the NNLC had jurisdiction over the employment-
related claims.

1 decisions and practices conducted on the Navajo Reservation when the districts are
2 fulfilling their state responsibilities to provide a public education for all of Arizona's
3 children. The plaintiffs seek to have the Court prohibit the employee defendants
4 from prosecuting their claims against the plaintiffs in either the NNLC, the Navajo
5 Nation Supreme Court, or any other Navajo forum, and prohibit the NNLC
6 defendants from continuing to adjudicate the claims of the employee defendants, as
7 well as prohibit them from adjudicating any employment claims between the plaintiffs
8 and their employees.

9 Discussion

10 The NNLC defendants, in an unenumerated Fed.R.Civ.P. 12 motion joined in
11 by the employee defendants, seek to have this action dismissed as premature due
12 to the plaintiffs' undisputed failure to exhaust their tribal court remedies before
13 commencing this action; the plaintiffs have cross-moved for summary judgment
14 pursuant to Fed.R.Civ.P. 56 on the ground that tribal jurisdiction over the employee
15 defendants' claims against them is plainly lacking as a matter of law.⁶ Complete
16 exhaustion is mandatory before a non-Indian may bring an action in federal court
17 challenging tribal jurisdiction unless one of four exceptions to the exhaustion rule is
18 applicable. Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842, 846-47 (9th
19 Cir.2009). The plaintiffs invoke what is referred as the fourth exception, which
20 provides that exhaustion of tribal court remedies is not required "when it is plain that
21 tribal court jurisdiction is lacking, so that the exhaustion requirement would serve no
22 purpose other than delay." *Id.* at 847 (internal quotation marks and emphasis

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25 The Court notes that it has intentionally discussed herein only those
26 arguments raised by the parties that the Court considers necessary to the resolution
of the pending motions.

1 omitted) (*citing to Nevada v. Hicks*, 533 U.S. 353, 369 (2001)). In the Ninth Circuit,
2 tribal court jurisdiction is not plainly lacking and exhaustion is required if such
3 jurisdiction is either “plausible” or “colorable.” *Id.* at 848. The Court concludes that
4 the plaintiffs are not required to exhaust tribal administrative or judicial remedies
5 inasmuch as the Court possesses all of the facts necessary to make its jurisdictional
6 determination, which is that tribal jurisdiction is plainly lacking here and that
7 exhaustion would serve no purpose other than delay.

8 The Supreme Court has established that “absent express authorization by
9 federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists
10 only in limited circumstances.” *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).
11 The defendants, who bear the burden of establishing the existence of tribal
12 jurisdiction, see *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554
13 U.S. 316, 330 (2008), do not argue that any federal statute empowers the Navajo
14 Nation with regulatory or adjudicatory over the plaintiffs’ employment decisions
15 underlying this action, and the Court is aware of none. See *MacArthur v. San Juan*
16 *County*, 497 F.3d 1057, 1068 (10th Cir. 2007) (“Congress has passed no law which
17 permits the Navajo Nation to exercise regulatory authority over nonmember entities
18 or individuals who employ members of the tribe within the confines of the
19 reservation; nor has it passed a broader statute which arguably encompasses
20 nonmember employers.”)

21 A. Jurisdiction Based on the Navajo Nation’s Power to Exclude Non-Indians

22 The defendants’ primary argument is that tribal jurisdiction over the employee
23 defendants’ NNLC claims is at least colorable because of the Navajo Nation’s right
24 to exclude non-Indians from its tribally-owned lands, which they contend arises both
25 as a result of the Treaty of 1868 and the tribe’s inherent sovereign powers.

1 (1) Tribal Jurisdiction Under the Treaty of 1868

2 The defendants initially argue that Navajo tribal civil authority over the
3 plaintiffs' employment decisions is recognized by the Treaty of 1868, 15 Stat. 667
4 (1868), wherein the United States agreed in relevant part that non-authorized
5 persons will not be permitted access to reservation lands; the defendants
6 characterize this provision as granting the Navajos a broad right to exclude all
7 outside persons from their reservation except a narrow subset of federal officials.⁷
8 Their contention is that this treaty-based power to exclude non-Indians from the
9 reservation applies to Arizona public school districts and grants the tribe the
10 concomitant authority to impose conditions on the school districts' use of tribal land,
11 which they assert includes requiring the school districts to comply with tribal
12 employment-related laws and procedures. The Court is not persuaded that the treaty
13 provision in and of itself expressly authorizes the specific tribal jurisdiction at issue
14 here.

15 The Court acknowledges that the Supreme Court has interpreted the treaty's
16 exclusion provision as implying "the understanding that the internal affairs of the
17 Indians remained exclusively within the jurisdiction of whatever tribal government
18 existed." Williams v. Lee, 358 U.S. 217, 221-22 (1959). The Supreme Court,
19 however, has also determined that a tribe's right to internal self-government has
20 limitations imposed by Congressional action and by the implicit divestiture of
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23 The portion of Article 2 of the treaty relied upon by the defendants states
24 that "the United States agrees that no persons except those herein so authorized to
25 do, and except such officers, soldiers, agents, and employees of the Government,
26 or of the Indians, as may be authorized to enter upon Indian reservations in
discharge of duties imposed by law, or the orders of the President, shall ever be
permitted to pass over, settle upon, or reside in, the territory described in this article."

1 sovereignty as a result of their dependent status, the latter of which is centered
2 around the relations between an Indian tribe and non-tribal members. See
3 MacArthur v. San Juan County, 497 F.3d at 1067 (*citing to* United States v. Wheeler,
4 435 U.S. 313, 326 (1978)). Whatever the outer scope of the Navajo Nation's treaty-
5 based right of exclusion may be, the Court does not believe it is expansive enough
6 to grant tribal jurisdiction under the specific circumstances present in this case. The
7 Navajo Nation's right to control its internal affairs is not sufficiently implicated here
8 as this case does not involve the state's attempt to assert proprietary interest in tribal
9 lands or broad authority over the tribe's internal affairs. Rather, it involves the
10 plaintiffs' state-imposed duty to operate public schools, which are schools that
11 Congress required Arizona to establish as a condition of statehood, Arizona
12 Enabling Act, 36 Stat. 557, § 20 (1910) (mandating that Arizona provide "for the
13 establishment and maintenance of a system of public schools which shall be open
14 to all children of said state and free from sectarian control"), and which Congress
15 further mandated "shall forever remain under the exclusive control" of the State of
16 Arizona. *Id.* at § 26.

17 (2) Tribal Jurisdiction Under Inherent Sovereign Power to Exclude

18 The NNLC defendants also argue that the Navajo Nation has a federal
19 common law right to exclude non-Indians from its reservation even if it does not have
20 a treaty right to exclude.

21 In its unappealed opinion in Red Mesa Unified School District v. Yellowhair,
22 2010 WL 3855183 (D.Ariz. Sept. 28, 2010), the Court concluded that the Navajo
23 Nation's regulatory and adjudicatory authority over the employment-related decisions
24 of the plaintiff school districts was governed by the limiting principles set forth in
25 Montana v. United States, 450 U.S. 544 (1981), and its progeny, in particular
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1 Nevada v. Hicks, 533 U.S. 353 (2011), notwithstanding that the plaintiffs' schools
2 were located on tribally-owned land. In so ruling, the Court rejected the defendants'
3 contention, which they predicated on Merrion v. Jicarilla Apache Tribe, 455 U.S. 130
4 (1982), that tribal jurisdiction over the plaintiff school districts could be predicated on
5 the Navajo Nation's inherent authority to bar non-Indians from its tribal lands.

6 The NNLC defendants, citing to Water Wheel Camp Recreational Area, Inc.
7 v. LaRance, 642 F.3d 802 (9th Cir. 2011), a decision that was issued subsequent to
8 this Court's Red Mesa decision, argue that the Navajo Nation's jurisdiction over the
9 plaintiffs is plausible because its sovereign right to exclude non-Indians from tribal
10 land exists independently from the limitations on tribal authority over non-Indians
11 recognized in Montana. In Water Wheel, the Ninth Circuit, noting in reliance on
12 Merrion that an Indian tribe's inherent sovereign power to exclude non-Indians from
13 its tribal lands includes the lesser authority to set conditions on their entry through
14 regulations, upheld an Indian tribe's civil authority to prosecute through its tribal court
15 system an unlawful detainer action for trespass and breach of a lease of tribal land
16 against a non-Indian corporation and its non-Indian owner operating a commercial
17 recreational resort on tribally-owned land. After determining that Montana does not
18 generally affect an Indian's tribe fundamental right of exclusion as it relates to
19 regulatory jurisdiction over non-Indians on Indian land, *id.* at 812, the Ninth Circuit
20 concluded that "where the non-Indian activity in question occurred on tribal land, the
21 activity interfered directly with the tribe's inherent power to exclude and manage its
22 own lands, and there are no competing state interests at play, the tribe's status as
23 landowner is enough to support regulatory jurisdiction without considering *Montana*."
24 642 F.3d at 814. The Court concludes that Montana governs here pursuant to the
25 exception noted in Water Wheel.

1 Recognizing that the Supreme Court in Nevada v. Hicks applied the general
2 rule of Montana to non-Indian activity on Indian-owned land, the Ninth Circuit in
3 Water Wheel determined that Hicks' "application of *Montana* to a jurisdictional
4 question arising on tribal land should apply only when the specific concerns at issue
5 in that case exist." *Id.* at 813. Those concerns are sufficiently applicable here
6 because there are significant competing state interests at play.

7 In Hicks, which involved the issue of tribal court jurisdiction over a tribal
8 member's civil rights and tort claims filed against state officers arising from their
9 execution of a search warrant on tribal land, the Supreme Court applied the Montana
10 test to determine that tribal jurisdiction did not exist. In doing so, the Supreme Court
11 determined that it was "[n]ot necessarily" correct that a tribe may make its exercise
12 of regulatory authority over nonmembers a condition of nonmembers' entry onto to
13 tribal land within a reservation. 533 U.S. at 359. The Supreme Court's focus in Hicks
14 was on the nature of the state interest at issue, not the tribally-owned status of the
15 land.⁸ Relevant to the Montana application exception noted in Water Wheel, the

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18 In Hicks, the Supreme Court overturned the underlying Ninth Circuit
19 decision, Nevada v. Hicks, 196 F.3d 1020 (9th Cir.1999), that had rejected the use
20 of the Montana presumption against tribal jurisdiction in favor of determining that
21 tribal jurisdiction existed because the tribe's power to exclude the state officers from
22 Indian-owned, Indian-controlled land implied its authority to regulate the behavior of
23 nonmembers on that land. The Ninth Circuit's view that Montana was applicable
24 only when the nonmembers' activities sought to be regulated occurred on non-tribal
25 lands was rejected by the Supreme Court, which determined that Montana applied
26 notwithstanding the Indian-owned status of the land. The Supreme Court reasoned
that its precedents, including Montana, had not determined that Indian ownership of
the land on which the non-Indians' activities took place suspended the general
proposition that the inherent sovereign powers of the tribe do not extend to the
activities of nonmembers except to the extent necessary to protect tribal self-
government or to control internal relations. Instead, the Supreme Court noted that
the ownership status of land is only one factor to consider in determining the

1 Supreme Court in Hicks, noting that an Indian reservation is considered to be part
2 of the territory of the state, stated that it was clear that “the Indians’ right to make
3 their own laws and be governed by them does not exclude all state regulatory
4 authority on the reservation. State sovereignty does not end at a reservation’s
5 border. ... When ... state interests outside of the reservation are implicated, States
6 may regulate the activities even of tribe members on tribal land[.]” 533 U.S. at 361-
7 62.

8 What distinguishes this case from Water Wheel is that the plaintiffs here are
9 not private actors engaging in a commercial activity on reservation lands for
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11 propriety of tribal regulation of nonmembers. While the Supreme Court further noted
12 that tribal land ownership may sometimes be a dispositive factor, it concluded that
13 “the existence of tribal ownership is not alone enough to support regulatory
14 jurisdiction over nonmembers.” 533 U.S. at 360. This principle was reiterated by the
15 concurring opinions in Hicks, in that one stated that “it is undeniable that a tribe’s
16 remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts
17 committed on a reservation depends on the first instance on the character of the
18 individual over whom jurisdiction is claimed, not on the title to the soil on which he
19 acted. ... It is the membership status of the unconsenting party, not the status of the
20 real property, that counts as the primary jurisdictional fact.” *Id.* at 381-82 (Souter, J.,
21 joined by two other justices, concurring). Another concurrence stated that “the
22 majority is quite right that *Montana* should govern our analysis of a tribe’s civil
23 jurisdiction over nonmembers both on and off tribal land.” *Id.* at 388 (O’Connor, J.,
24 joined by two other justices, concurring in part.) See also, Atkinson Trading Co. v.
25 Shirley, 532 U.S. 645, 559-60 (2001) (“If we are to see coherence in the various
26 manifestations of the general law of tribal jurisdiction over non-Indians, the source
of the doctrine must be *Montana*[.] ... That general principle is ... the first principle,
regardless of whether the land at issue is fee land, or land owned by or held in trust
for an Indian tribe.”) (Souter, J., with two other justices, concurring).

1 economic gain; rather, they are state political entities making employment decisions
2 in the course of their duties mandated by Arizona constitutional and statutory law to
3 provide a public education for all children within the state. Tribal land ownership is
4 not the dispositive factor here; as the plaintiffs correctly note, “[t]his case does not
5 involve encroachment upon tribal land, damage to tribal land, interference with the
6 use of tribal land, or any other effect upon tribal land that might prove dispositive.”
7 The dispositive factor is instead the fact that the state’s considerable interest, arising
8 from outside of the reservation, in providing for a general and uniform public
9 education is very much implicated.

10 B. Jurisdiction Based on Montana

11 The defendants further argue that tribal jurisdiction is plausible even if
12 Montana is the controlling doctrine. The Supreme Court in Hicks reiterated that
13 “Indian tribes’ regulatory authority over nonmembers is governed by the principles
14 set forth in *Montana*[,]” which it described as the “pathmaking case on the subject.”
15 533 U.S. at 358. Montana adopted the general rule that “the inherent sovereign
16 powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”
17 Montana, 450 U.S. at 565. As a result of this general proposition, “efforts by a tribe
18 to regulate nonmembers ... are presumptively invalid.” Plains Commerce Bank v.
19 Long Family Land and Cattle Co., 554 U.S. at 330. In Montana, the Supreme Court
20 recognized two narrowly-construed exceptions to its general rule of no tribal
21 jurisdiction over non-Indians. The Court concludes that neither exception provides
22 the Navajo Nation with civil authority over the employee defendants’ employment-
23 related decisions brought before the NNLC.

1 (1) First Exception

2 The first Montana exception provides that an Indian tribe may exercise some
3 forms of civil jurisdiction over non-Indians on their reservations “through taxation,
4 licensing, or other means ... who enter consensual relationships with the tribe or its
5 members, through commercial dealings, contracts, leases, or other arrangements.”
6 Montana, 450 U.S. at 565. The defendants argue that the leases between the
7 plaintiffs and the Navajo Nation constitute the type of consensual relationship
8 recognized in Montana. The Court concludes that they do not.

9 In the Court’s prior Red Mesa Unified School District v. Yellowhair case, the
10 NNLC defendants and employee defendants raised this same contention, arguing
11 that Montana’s first exception provided the Navajo Nation with civil authority over the
12 plaintiff school districts’ employment-related decisions because the school districts
13 had consented to tribal jurisdiction through their leases allowing them to place their
14 schools on tribal land.⁹ The Court rejected that argument, finding instead that the
15 school districts’ lease-related relationship with the Navajo Nation was not the type
16 of consensual relationship to which the first Montana exception applied. In making
17 that determination, the Court focused on the government/private actor dichotomy,
18 concluding that the first exception could not properly be extended to reach the
19 employment-related actions of the school districts regardless of their status as tribal
20 lessees “since both made the employment decisions at issue while operating in their
21 governmental capacities pursuant to their state constitutionally-imposed mandate to
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25 The Court notes that five of the seven NNLC defendants in this case also
26 were defendants in the Red Mesa case. None of the defendants appealed the
Court’s judgment in Red Mesa.

1 operate a public school systems within the reservation boundaries.”¹⁰ 2010 WL
2 3855183, at *3.

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The Court further noted in its Red Mesa decision that

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7 [t]his governmental/private actor dichotomy was noted in Hicks in
8 reference to the first exception when it observed that the Montana court
9 “obviously did not have in mind States or state officers acting in their
10 governmental capacity; it was referring to private individuals who
11 voluntarily submitted themselves to tribal regulatory jurisdiction by the
12 arrangements that they ... entered into. This is confirmed by the fact
13 that all four of the cases in the immediately following citation involved
14 private commercial actors.” Hicks, 533 U.S. at 372. ... Other courts
15 have also recognized the distinction between private actors and
16 government actors for purposes of Montana’s first exception. See e.g.,
17 MacArthur v. San Juan County, 497 F.3d at 1073-74 (In concluding that
18 the Navajo Nation did not possess regulatory authority over
19 employment-related claims made to the ONLR [Office of Navajo Labor
20 Relations, a tribal administrative body] by terminated Navajo employees
21 of a special health service district, a political subdivision of the state of
22 Utah, the court stated that “[w]e too adhere to the distinction between
23 private individuals or entities who voluntarily submit themselves to tribal
24 jurisdiction and ‘States or state officers acting in their governmental
25 capacity[,]’” and concluded that the employment relationships between
26 the state health district and its Navajo employees “were not ‘*private*
consensual relationships’ in any sense of the term and do not fall within
the first *Montana* exception.”) (emphasis in original); County of Lewis
v. Allen, 163 F.3d 509, 515 (9th Cir.1998) (en banc) (In concluding that
a tribal court had no jurisdiction over a tribal member’s tort claim
against a deputy sheriff for actions taken on reservation land pursuant
to a state-tribal law enforcement agreement, the court determined that
the agreement between the state and the tribe did not qualify as a
consensual relationship of the type giving rise to tribal regulatory
authority over a non-Indian because “Montana’s exception for suits
arising out of consensual relationships has never been extended to
contractual agreements between two government entities[.]”)

2010 WL 3855183, at *4.

1 The Court concludes that its prior ruling remains correct with regard to
2 Montana's first exception and that its reasoning is equally applicable to this action.
3 The Court's determination that the plaintiffs have not consented to tribal jurisdiction
4 in the sense required by Montana is not affected by the defendants' contention that
5 tribal jurisdiction is plausible at least as to plaintiff Window Rock USD because that
6 plaintiff's two leases with the Navajo Nation, unlike the leases of the plaintiff school
7 districts in Red Mesa or the lease of plaintiff Pinon USD here, included an
8 agreement to abide by Navajo laws.¹¹ The Court agrees with the plaintiffs that the
9 Window Rock USD lease does not render tribal jurisdiction plausible over that
10 plaintiff's employment decisions at issue in this action because the NPEA and other
11 tribal statutory provisions on which the employee defendants are basing their claims
12 before the NNLC adversely affect various rights and obligations of public school
13 districts under Arizona law. By way of brief example, Arizona public school districts
14 have the statutory right under Arizona law to have employee grievances resolved

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17 The two Window Rock USD leases, which are part of the record of this
18 action, are essentially identical with regard to the provision at issue. The more
19 recent of the two leases, which was entered into in 1985, provides in relevant part:

20 **16. AGREEMENT TO ABIDE BY NAVAJO LAWS**

21 The Lessee and the Lessee's employees, agents, and sublessees and
22 their employees and agents agree to abide by all laws, regulations, and
23 ordinances of the Navajo Tribal Council now in force and effect or may
24 be hereafter in force and effect as long as those laws, regulations, and
25 ordinances do not conflict with state or federal law. This agreement to
26 abide by Navajo laws shall not forfeit rights which the Lessee and the
Lessee's employees, agents, and sublessees and their employees, and
agents enjoy under the Federal laws of the United States Government,
nor shall it affect the rights and obligations of Lessee as an Arizona
public school district under applicable laws of the State of Arizona.

1 under state, not tribal, mandated procedures, which include a requirement for the
2 exhaustion of state law administrative remedies followed by judicial review
3 exclusively through the state court system using state law-mandated burdens of
4 proof (which, as the plaintiffs correctly note, place the burden of proof on appeal on
5 the employee, not on the employer as does Navajo law), and well as the obligation
6 under both state and federal laws not to base their employment decisions on
7 discriminatory grounds. See e.g., Civil Rights Div. of Arizona Dept. of Law v.
8 Amphitheater Unified School Dist. No. 10, 680 P.2d 517 (Ariz.App.1983) (Court
9 applied the anti-discrimination provisions of the Arizona Civil Rights Act to a public
10 school district's employee hiring procedure); Dawavendewa v. Salt River Project
11 Agricultural Improvement & Power Dist., 154 F.3d 1117 (9th Cir.1998) (Court
12 concluded that differential employment treatment based on tribal affiliation by a non-
13 Indian employer on the Navajo Reservation, which resulted from a Navajo employee
14 preference requirement in a tribal lease, was actionable as national origin
15 discrimination under Title VII).

16 (2) Second Exception

17 The defendants further argue that tribal court jurisdiction also plausibly exists
18 under the second Montana exception, which is an issue that was not raised in the
19 Court's prior Red Mesa case. This exception provides that a tribe may retain
20 inherent power to exercise civil jurisdiction over the conduct of non-Indians on a
21 reservation "when that conduct threatens or has some direct effect on the political
22 integrity, the economic security, or the health or welfare of the tribe." Montana, 450
23 U.S. at 566. The Supreme Court has stated that this exception does not expand
24 tribal jurisdiction "beyond what is necessary to protect tribal self-government or to
25 control internal relations[.]" *id.* at 564, and the Ninth Circuit, noting that "virtually
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1 every act that occurs on the reservation could be argued to have some political,
2 economic, health or welfare ramification to the tribe[,]” has emphasized that this
3 exception must be “narrowly construed” so that the exception does not swallow
4 Montana’s presumption of no tribal jurisdiction over non-Indians. County of Lewis v.
5 Allen, 163 F.3d 509, 515 (9th Cir.1998) (*en banc*). In order for this limited exception
6 to be applicable, the specific conduct the tribe wants to regulate “must do more than
7 injure the tribe, it must imperil the subsistence of the tribal community.” Plains
8 Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. at 341 (internal
9 quotation marks omitted). In an explanatory comment about the narrowness of this
10 exception, the Supreme Court quoted the statement of one commentator who has
11 noted that “the elevated threshold for the application of the second *Montana*
12 exception suggests that tribal power must be necessary to avert catastrophic
13 consequences.” *Id.*

14 The defendants argue that the Court is not in a position to determine if tribal
15 jurisdiction is plainly lacking under Montana’s second exception in the absence of
16 a factual record developed through the tribal court system regarding the impact on
17 the Navajo Nation if tribal law cannot be applied to the employment disputes
18 underlying this action.¹² The NNLC defendants specifically contend that the
19 information that the NNLC ruled it needed before determining its jurisdiction over
20 the employee defendants’ complaints, e.g., information on the demographic makeup

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22 The employee defendants have relatedly filed a motion pursuant to
23 Fed.R.Civ.P. 56(f) [sic-56(d)] to permit them to complete the discovery they were
24 undertaking before the NNLC at the time this action was commenced before the
25 Court resolves the plaintiffs’ summary judgment motion. The Court concludes that
26 the requested discovery, as described by the employee defendants, is not warranted
because its inclusion in the record would not persuade the Court that tribal
jurisdiction exists here.

1 of the school districts' students, employees, and board members, is significant to the
2 issue of whether the tribe's inability to apply its laws to resolve employee complaints
3 imperils its self-government. The Court disagrees.

4 While the Court accepts that the plaintiffs' employees, students, and board
5 members are primarily Navajos and that the plaintiffs' employment-related decisions
6 have an impact on the Navajo Nation, the Court agrees with the plaintiffs that the
7 defendants cannot make any showing, plausible or otherwise, that the inability of the
8 tribe to regulate and adjudicate the plaintiffs' personnel decisions at issue can "fairly
9 be called catastrophic for tribal self-government." Plains Commerce Bank, 554 U.S.
10 at 341 (internal quotation marks omitted). See State of Montana Dept. of
11 Transportation v. King, 191 F.3d 1108, 1114 (9th Cir.1999) (Court concluded in part
12 that Montana's second exception did not provide an Indian tribe with regulatory
13 jurisdiction over a state's employment practices related to a construction project on
14 a reservation highway over which the state had a right of way notwithstanding the
15 court's recognition that the tribe's welfare was harmed by very high levels of
16 unemployment on the reservation.) See *also*, MacArthur v. San Juan County, 497
17 F.3d at 1075 (In determining that the Navajo Nation had no regulatory or adjudicative
18 authority under Montana's second exception over the employment-related decisions
19 of a health services district, which was a political subdivision of the State of Utah
20 operating within the Navajo Reservation on state-owned land, the Tenth Circuit
21 stated that "[w]hile the Navajo Nation undoubtedly has an interest in regulating
22 employment relationships between its members and non-Indian employers on the
23 reservation, that interest is not so substantial in this case as to affect the Nation's
24 right to make its own laws and be governed by them. ... The right at issue in this
25 case is the Navajo Nation's claimed right to make its own laws and have *others* be
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1 governed by them, not the right to self-government.”) (emphasis in original).
2 Furthermore, the lack of tribal jurisdiction over the plaintiffs’ employment-related
3 decisions cannot reasonably be said to menace the tribal community because
4 Arizona law provides due process protections to the plaintiffs’ employees who wish
5 to contest adverse employment actions. See Bugenig v. Hoopa Valley Tribe, 229
6 F.3d 1210, 1221 (9th Cir.2000) (“[O]ur precedents have stressed the inapplicability
7 of the second *Montana* exception in situations where tribal jurisdiction is not
8 necessary to protect Indian tribes or their members who may pursue their causes of
9 action in state or federal court.”) (internal quotation marks omitted). See also, Glacier
10 County School District No. 50 v. Galbreath, 47 F.Supp.2d 1167, 1171-72 (D.Mont.
11 1997) (In determining that an Indian tribe had no authority under the second
12 Montana exception over the operations of a public school district, which was a
13 political subdivision of the State of Montana operating on its fee-owned property
14 located on the Indian reservation, the court reasoned that “[o]nce enrolled in the
15 State of Montana’s public school system, tribal members must comply with the
16 procedures established by state law to resolve any resulting grievance or dispute.
17 Opening the Tribal Court for the optional use of tribal members unhappy with the
18 substance or the pace of the proceedings mandated by Montana law is not ...
19 necessary to protect tribal self government.”)

20 Based on the foregoing, the Court concludes as a matter of law that the
21 Navajo Nation has no regulatory or adjudicative jurisdiction over the plaintiff school
22 district’s employment-related decisions underlying this action. Since tribal
23 jurisdiction is lacking, the Court agrees with the plaintiffs that the employee
24 defendants should be barred from further prosecuting their employment-related
25 claims before the NNLC or any other the Navajo Nation court or forum and that the
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1 NNLC defendants should be barred from any further adjudication of those claims.

2 Therefore,

3 IT IS ORDERED that the Navajo Nation Labor Commission Defendants'
4 Motion to Dismiss for Failure to Exhaust Tribal Remedies (Doc. 12) is denied.

5 IT IS FURTHER ORDERED that defendants Ann Reeves, Kevin Reeves,
6 Loretta Brutz, May Y. John, Clarissa Hale, Michael Coonis and Barbara Beall's
7 Motion Pursuant to Rule 56(f) [sic-56(d)] Fed.R.Civ.P. (Doc. 34) is denied.

8 IT IS FURTHER ORDERED that Plaintiffs' Cross-Motion for Summary
9 Judgment (Doc. 27) is granted.

10 IT IS FURTHER ORDERED that defendants Ann Reeves, Kevin Reeves,
11 Loretta Brutz, May Y. John, Clarissa Hale, Michael Coonis and Barbara Beall
12 are enjoined from any further prosecution of their employment-related claims before
13 the Navajo Nation Labor Commission or the Navajo Nation Supreme Court or any
14 other Navajo Nation tribal court or administrative tribunal, and that Navajo Nation
15 Labor Commission defendants Richie Nez, Casey Watchman, Ben Smith, Peterson
16 Yazzie, Woody Lee, Jerry Bodie, and Evelyn Meadows are enjoined from any further
17 adjudication of the employment-related claims of Ann Reeves, Kevin Reeves,
18 Loretta Brutz, May Y. John, Clarissa Hale, Michael Coonis and Barbara Beall.

19 IT IS FURTHER ORDERED that plaintiffs Window Rock Unified School
20 District and Pinon Unified School District, after consultation with the defendants,
21 shall submit a proposed form of judgment no later than April 30, 2013.¹³ Any
22 objections by the defendants to the proposed form of judgment shall be filed no later

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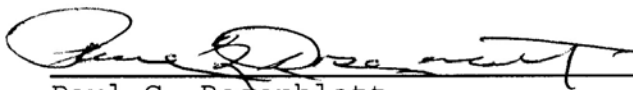
25 The plaintiffs shall state in their proposed form of judgment submission
26 whether or not any defendant will object to the proposed judgment.

1 than May 20, 2013.

2 DATED this 19th day of March, 2013.

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Paul G. Rosenblatt
United States District Judge

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