

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

Belcourt Public School District and Angel
Poitra,)

Plaintiffs,)

vs.)

Ella Davis and Turtle Mountain Tribal
Court,)

Defendants.)

DEFENDANTS' MEMORANDUM IN
SUPPORT OF RESPONSE IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

Case No. 4:12-cv-00114

Belcourt Public School District,)

Plaintiffs,)

vs.)

Erica Malaterre and Turtle Mountain Tribal
Court,)

Defendants.)

Case No. 4:12-cv-00115

Belcourt Public School District, Roman
Marcellais and School Board members for
the Belcourt Public School District,)

Plaintiffs,)

vs.)

Bruce Allard, Martin Desjarlais, Jeff
Laducer, Chad Marcellais, Robert St.
Germain, and Turtle Mountain Tribal
Court,)

Case No. 4:12-cv-00117

	Defendants.)	
_____)	
)	
Belcourt Public School District, Roman)	
Marcellais and School Board members for)	
the Belcourt Public School District,)	
)	
	Plaintiffs,)	
)	
vs.)	
)	Case No. 4:12-cv-00118
Steve Herman and Turtle Mountain Tribal)	
Court,)	
)	
	Defendants.)	

COMES NOW Defendants and submit their Memorandum in Support of Defendants’ Response in Oppose to Plaintiffs’ Motion for Summary Judgment, along with previous filings or submissions, and all exhibits filed by all parties in these actions.

STATEMENT OF FACTS

Defendants in these cases filed law suits in the Turtle Mountain Tribal Court (Tribal Court) alleging wrong doing by the Plaintiff School District and staff. In Defendant Davis’ case, the Tribal Court dismissed the action based on its misinterpretation of *Nevada v. Hicks*, 533 U.S. 353 (2001). See Plaintiffs’ Exhibit # 3. The Turtle Mountain Tribal Court of Appeals (Tribal Court of Appeals) reversed the Tribal Court and held the Tribal Court had jurisdiction. See Plaintiffs’ Exhibit # 6. Plaintiff School District then filed these actions. The Court issued an Order of Consolidation, dated October 31, 2012, signed by Charles S. Miller, Jr., Magistrate

Judge, United States District Court.

LEGAL ARGUMENT

ELEVENTH AMENDMENT IMMUNITY

Plaintiff School District argues it enjoys Eleventh Amendment immunity as a political subdivision of the state. Defendants argue Plaintiff School District is a political subdivision of the State and has entered into a contractual agreement with the Turtle Mountain Band of Chippewa Indians, hereafter Tribe. Defendants offer the North Dakota Attorney General Opinion 68-305, as Exhibit # 1, and *Baldwin v. Board of Educ. of City of Fargo*, 33 N.W.2d 473, 481 (N.D. 1948), to support the fact that Plaintiff School District is a political subdivision of the State; and not an arm of the State.

In reversing the Tribal Court, the Tribal Court of Appeals cited *Mt. Health City School District Board of Education v. Doyle*, 429 U.S. 274, 280-81 (1977), where the U.S. Supreme Court ruled a political subdivision is not an arm of the State and does not enjoy Eleventh Amendment immunity.

Assuming arguendo Plaintiff School District enjoyed the defense of Eleventh Amendment immunity, Plaintiff School District waived what ever Plaintiff School District it may have had in the agreement with the Tribe; titled "Plan of Operations Contract for Services." Plaintiffs' Exhibits # 1 and 2. In paragraph # 2 of both Plaintiffs' exhibits, tribal law is included as the "Applicable Laws" that Plaintiff School District must comply with under the agreement.

Defendants incorporate the Tribal Court of Appeals decision (Plaintiffs' Exhibit 6) in its entirety in this part of Defendants' memorandum. In addition Defendants incorporate the

Memorandum Opinion in *Ted Siers et al v. Mandaree Public School District, Mandaree Public School District # 36*, Civ. No. CV20050242 (Three Affiliated Tribal Court 11-30-2007) in its entirety this part of Defendants' memorandum, as Exhibit # 2.

NORTH DAKOTA CENTURY CODE

Plaintiff School District is governed by N.D.C.C., §15.1-07-01, which provides:

1. Each school district in this state is a public school district governed by the provisions of this title. Each school district is a body corporate. Each school district may sue and be sued, contract, and convey any real and personal property that comes into its possession.
2. The board of education of the city of Fargo is a body corporate. It has the power to sue and be sued and to contract with others. It possesses all the powers usual and incidental to a body corporate.

According to paragraph 2, Plaintiff School District can be sued. The statute does not specify in which jurisdiction an action can be brought against Plaintiff School District.

Plaintiff School District argues in its Memorandum in Support of Plaintiffs' Motion for Summary Judgment, p. 13, 1st full paragraph, "North Dakota law provides that a school district cannot '[a]uthorize an agreement that enlarges or diminishes the jurisdiction over civil or criminal matters that may be exercised by either North Dakota or tribal governments located in North Dakota.'" Citing N.D.C.C., §54-40.2-08. Plaintiff School District argues that since the "Plan of Operations Contract for Services" (Plaintiffs' Exhibits # 1 and 2) "enlarges or diminishes the jurisdiction over civil or criminal matters that may be exercised by either North Dakota," that the "Plan of Operations Contract for Services" (Plaintiffs' Exhibits # 1 and 2) violates N.D.C.C., §54-40.2-08. "The general rule of law is that a contract made in violation of a

statute is void, and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover.” *Miller v. Ammon*, 145 U.S. 421 (1892). If indeed Plaintiff School District is correct in its argument, then Plaintiff School District is operating within the exterior boundaries of the Turtle Mountain Indian Reservation (Reservation) under an illegal and void contract/agreement. Plaintiff School District has no legal basis to operate the school system for the Tribe. Plaintiff School District’s argument may reap unintended consequences.

DATAPHASE

In determining whether a temporary restraining order should be granted, Rule 65(b) of the Federal Rules of Civil Procedure directs the court to look to the specific facts to determine whether immediate and irreparable injury, loss, or damage will result to the petitioner.

In determining whether preliminary injunction should be granted, the court is required to consider the factors set forth in *Dataphase Sys., Inc. v. C.L. Sys. Inc.*, 640 F2d. 109, 114 (8th Cir. 1981).

The standards set forth by *Dataphase*, apply to Plaintiffs’ Petition. In *Dataphase*, the court, sitting *en banc*, clarified the factors district courts should consider when determining whether to grant a motion for preliminary injunctive relief:

- (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. *Id.* at 114.

“No single factor in itself is dispositive; rather, each factor must be considered to determine whether the balance of equities weighs toward granting the injunction.” *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998). “At base, the question is whether the balance of equities so favors the movant [Plaintiffs] that justice requires the court to intervene to preserve the status quo until the merits are determined. . . .” *Dataphase*, 640 F.2d at 113.

(1) IRREPARABLE HARM

A plaintiff must establish there is a threat of irreparable harm if injunctive relief is not granted and that such harm is not compensable by money damages. *Doe v. LaDue*, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007).

Plaintiffs, in this action, will not suffer irreparable harm if the Court does not issue a declaratory judgment and an injunction against the Tribal Court from going forward with the cases on file there. Plaintiff School District has already signed an agreement that Plaintiff School District will abide by tribal laws. The Tribal Court is part of the tribal laws.

(2) BALANCE OF HARM

Plaintiffs must establish there will be no threat of harm inflicted upon Defendants if the Court issues a temporary restraining order or a preliminary injunction to Plaintiffs against Defendants.

Here, Defendants will suffer harm as Plaintiff School District has been operating for years under a Plan of Operation agreeing to abide by tribal laws. In the process of carrying out the Plan of Operation, Plaintiffs have harmed or injured Defendants. State laws cannot be imposed or enforced within the boundaries of the Reservation without eroding the tribal sovereignty. If Plaintiff School Board is not compelled to answer for its wrongdoing in Tribal Court, then

Plaintiff School Board is afforded a lawless operation within the Reservation.

(3) PROBABILITY OF SUCCESS ON THE MERITS

Plaintiffs must establish a “likelihood of success on the merits” of the case when the Court weighs the case’s particular circumstances in favor of Plaintiffs. *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987).

This case fits perfectly into the exceptions outlined *Montana v. United States*, 450 U.S. 544 (1981). Plaintiff School Districts’ agreement with the Tribe in the Plan of Operations affects the “political integrity, economic security, health, or welfare of not only the Tribe, but of every individual tribal member on the Reservation in one way or another.

(4) THE PUBLIC INTEREST

Plaintiffs must establish the public has an interest in the courts not acting arbitrary and capricious when deciding cases which have similar issues. Plaintiffs must establish the public has an interest in the courts applying precedents and or prior decisions to current cases, and that the court afford litigants due process and equal protection. *Dataphase*.

The North Dakota public has an interest that Courts protect Tribal members from harm when a State entity operates as a political subdivision of the state within the boundaries of the Reservation. Plaintiff School District admits in its Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, p. 3, 1st sentence in the “Statement of Facts,” that it is a political subdivision of the State.

In Plaintiff School Districts’ *Montana* argument, Plaintiff School District attempts to distinguish itself as a public non-tribal member as opposed to a private non-tribal member of the Tribe. The North Dakota Supreme Court ruled the Tribal Court has exclusive jurisdiction over

activities between nonmembers and members when the activity occurs within the boundaries of the Reservation. *Gustafson v. Poitra*, 800 N.W.2d 842 (2011).

MONTANA

“Absent express congressional delegation, a tribe’s exercise of its sovereign powers is limited to what is necessary to protect tribal self-government or control internal relations, because tribes are domestic-dependent nations.” *Gustafson*, Paragraph # 11. Citing *Montana v. United States*, 450 U.S. 544, 564 (1981). One exception allows a tribe to regulate “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Gustafson*, Paragraph # 11. Citing *Williams v. Lee*, 358 U.S. 217, 223 (1959). The United States Supreme Court “assume[s] that ‘where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts’” *Gustafson*, Paragraph # 11, Citing *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001).

The North Dakota Supreme Court ruled “We cannot conclude, as Gustafson argued, the tribal court did not have jurisdiction under Montana, because Gustafson entered into a consensual relationship with the Poitras through the lease.” 450 U.S. at 565. There is an available forum for this matter in the tribal courts. *Gustafson*, Paragraph # 10, Citing *Kelly v. Kelly*, 2009 ND 20, ¶ 11, 759 N.W.2d 721

JURISDICTION

“Relative to the issue of state court jurisdiction, if there is an available forum in the tribal courts,

considerations of tribal sovereignty and the federal interest in promoting Indian self-governance and autonomy arise.” *Gustafson*, Paragraph # 10, Citing *Kelly*, 2009 ND 20, ¶ 11, 759 N.W.2d (quoting *Rolette Cnty. Soc. Serv. Bd.*, 2005 ND 101, ¶ 6, 697 N.W.2d 333).

This Court lacks subject matter jurisdiction to issue an injunction against the Tribal Court from hearing Defendants case in Tribal Court. *Albrecht v. Metro Area Ambulance*, 580 N.W.2d 583 (1998). A judgment is void if the court entering the judgment did not have subject matter jurisdiction. *Rolette Cnty. Soc. Serv. Bd. v. B.E.*, 697 N.W.2d 333 (2005). Citing *McKenzie Cnty. Soc. Serv. Bd. v. C.G.*, 633 N.W.2d 157 (2001). "Subject-matter jurisdiction is the court's power to hear and determine the general subject involved in the action" *Investors Title Ins. Co. v. Herzig*, 785 N.W.2d 863 (2010). Quoting *Albrecht*, 580 N.W.2d 583 (1998). Subject matter jurisdiction is derived from the constitution and laws and cannot be conferred by agreement, consent, or waiver. Citing *Albrecht*, at 10.

“A state court does not have jurisdiction over a civil action if state court jurisdiction undermines tribal authority. *Gustafson*, Paragraph # 10, Citing *Luger v. Luger*, 2009 ND 84, ¶ 8, 765 N.W.2d 523 (citing *Winer v. Penny Enters., Inc.*, 2004 ND 21, ¶ 11, 674 N.W.2d 9). “Under the infringement test set forth by the United States Supreme Court in *Williams v. Lee*, 358 U.S. 217, 223 (1959), state court jurisdiction over certain claims is prohibited if it would ‘undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.’” *Gustafson*, Paragraph # 10, Citing *Kelly*, at ¶ 11 (quoting *Williams*, at 223); see also *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng’g, P.C.*, 467 U.S. 138, 147-48 (1984).

The issue of jurisdiction can be raised at any time during the pre-trial period, during trial,

and post trial on appeal. *Gustafson*.

CONCLUSION

For these reasons, the Court must deny Plaintiff School Districts' motion for summary judgment and dismiss this action.

DATED November 3, 2013.

FOR DEFENDANTS:

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