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

Jason Hanson, & Dakota Metal Fabrication, 312 3rd Street, PO Box 66, Manvel, North Dakota 58256, Plaintiffs, v. James Parisien, Director of the Turtle Mountain Band of Chippewa Indians Tribal Employment Rights Ordinance (TERO), The TERO Office, the Turtle Mountain Band of Chippewa Indians (Tribe), Turtle Mountain Tribal Court, And the Tribal Appellate Court, Defendants.	)	Civ. Action No. 3:22-cv-174 **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

Plaintiffs are not members of the Tribe. Plaintiff Hanson is the owner of Plaintiff Dakota Metal Fabrication, and had a construction contract with the Belcourt Public School District # 7, (hereinafter School District), which is a non-Indian sub-division of the State of North Dakota. The contract required Plaintiffs to perform metal work, i.e. installing heating and air-conditioning with duct work in the Pre-K and Wrestling Facility Project (hereinafter Project), which is located on trust property within the exterior boundaries of the Turtle Mountain Indian Reservation (hereinafter Reservation). The Project is owned and occupied by the School District under a memorandum of agreement with Defendant Tribe. Defendants enforced the Tribal Employment Rights Ordinance, TERO, Tribal Code, Title 32, §§ 32.0101-32.1801 against Plaintiffs. The TERO requires **all** vendors providing services on the Reservation over $10,000.00, to pay a 3%

tax, which includes **all** contractors performing all types of service contracts within the Reservation.

Plaintiffs filed this action to prevent Defendants from enforcing its TERO. Plaintiffs have exhausted all tribal remedies. A similar action was filed in 2019, in this Court, *Hanson v. Parisien,* 473 F. Supp. 3d at 975 (2020), and the Court dismissed the case without prejudice, because Plaintiffs had failed to exhaust tribal remedies. Plaintiffs state a viable case for adjudication regardless of Defendants meritless defenses alleging otherwise.

With regards to Defendant James Parisien, he is being sued in his individual capacity for his actions giving rise to this lawsuit. Defendant James Parisien may be retired, and Sherry Baker may now be the TERO director, but it was Defendant James Parisien's acts which caused damage to Plaintiffs, and not Sherry Baker. Defendants allege failure to substitute Sherry Baker as a defendant in place of Defendant James Parisien, precipitates Plaintiffs' failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 25(d) provides in part:

> Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded.

The court in *Sexton v. Hutton*, No. 3:06CV00163 BSM, 2008 WL 2328327, at *5 (E.D. Ark. June 4, 2008), cited by Defendants, said

> Therefore, the court denies Hutton's motion for summary judgment as to Plaintiffs' claims against him in his official capacity.

In this action, Defendant James Parisien is sued in his individual capacity therefore, Fed. R. Civ. P. 25(d) and *Sexton* do not apply. In *Hanson*, (2020) the court said,

> Like their federal and state counterparts, though, tribal officials remain subject to suit under the longstanding sovereign immunity exception articulated in *Ex parte Young*, 209 U.S. 123 (1908).

BACKGROUND

Defendants argue this is a simple case of the Turtle Mountain Band of Chippewa Indians (Tribe) enforcing its TERO law against Plaintiffs. Defendants go on describing how the TERO laws' various sections function, which is immaterial. TERO section § 32.0501 requires a non-Indian contractor to pay a 3% tax on the non-Indian contractor's total awarded contract that is to be performed within the exterior boundaries of the Turtle Mountain Indian Reservation. This is not the main reason Plaintiffs filed this action, but for the reason that Defendants are attempting regulate Plaintiffs at all.

Procedural History

In response to Defendants' procedural history, Defendants argue that the TERO Commission conducted a hearing and ruled Defendants have authority to regulate Plaintiffs through its TERO. Defendants then argue the TERO decision was affirmed or upheld by the Tribal Court of Appeals.

In the appeal to the Tribal Court of Appeal, it was pointed out that Plaintiffs filed a grievance with the TERO Commission on October 1, 2020, and hearing was held on April 14, 2021. In a post hearing brief to the TERO Commission, Plaintiffs submitted the following facts.

> The Post Hearing Brief named two IHS contractors that the Commission's Findings of Fact omitted. Appellant attached the Post Hearing Brief as an Exhibit- Appellant's -A. According to Ms. Shelly Harris, Chief Executive Officer (CEO) for the Belcourt Hospital, two business are Trinity Health, Minot, ND, paid over $150,000.00 per year for medical transports from the hospital ER to surrounding hospitals. Ms. Harris also stated the Belcourt Hospital pays Northland Imaging-Mobile MRI well over $150,000.00 per year to provide magnetic resonance imaging. The mobile clinic parks on the south parking lot of the Belcourt Hospital, where the land is similar to wrestling project Appellant worked on for the School Board # 7. The Northland Imaging Mobile Clinic comes to Belcourt three (3) times per month.

The TERO Commission held on April 14, 2021, and issued its decision on July 21, 2021. In their appeal to the Tribal Court of Appeals, Plaintiffs pointed out the following.

> The Tribal Code, Title 32, Tribal Employment Rights Ordinance, Chapter 32.07, Complaints and Hearings, 32.0705 (8) Hearing procedure, provides as follows: "The Commission or Director **shall** notify all parties **within 30 days** after its decision in the matter." Emphasis added. The undersigned telephone called Jesse Trottier on or about June 15, 2021, to ask if a decision had been reached. In the call Ms. Trottier indicated that the TERO Commission had denied Appellants' complaint filed with the Commission. The undersigned has phone records to evidence the call.

On appeal, these facts were also presented to the Tribal Court of Appeals. Both the TERO Commission and the Tribal Court of Appeals ignored these facts in their decision discussions. So much for Defendants following their own laws.

LEGAL STANDARDS

The issue is not sovereign immunity, but whether the tribe can regulate non-Indians when the tribe is not a party to the activity between the nonIndians. However, Plaintiffs will address the issue of sovereign immunity.

Tribes can be and are sued all the time, and there are several U.S. Supreme Court decisions ruling in favor of aggrieved parties suing Tribes all the time. For example, "Petitioner's challenge under *Montana* to the Navajo Nation's authority to impose the hotel occupancy tax was rejected by both the Navajo Tax Commission and the Navajo Supreme Court. Petitioner then sought relief in the United States District Court for the District of New Mexico, which also upheld the tax. A divided panel of the Court of Appeals for the Tenth Circuit affirmed. "We granted certiorari, 531 U.S. 1009 (2000), and now reverse." See *Atkinson Trading Co., Inc. v. Shirley*, 210 F.3d 1247 (2000). *Atkinson Trading Co., Inc. v. Shirley*, 531 U.S. 645, 649–50 (2001).

Citing *Montana v. United States*, 450 U.S. 544 (1981) in *Atkinson*, the Court said, "we noted that 'through their original incorporation into the United States as well as through specific treaties and statutes, Indian tribes have lost many of the attributes of sovereignty.'" 450 U.S., at 563.1. The Court went on to say, "We concluded that the inherent sovereignty of Indian tribes was limited to 'their members and their territory': "[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes." *Montana*.

In another case, (this one from North Dakota, and which the full title is) *Strate, Associate Tribal Judge, Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, et al. v. A-l Contractors et al*, 520 U.S. 438, 453 (1997), is another example of a tribe[s] being sued. The Court in *Strate* said,

> The Tribal Court ruled that it had jurisdiction over Fredericks' claim and therefore denied respondents' motion to dismiss, and the Northern Plains Intertribal Court of Appeals affirmed. Respondents [A-l Contractors] then commenced this action in the Federal District Court against Fredericks, her adult children, the Tribal Court, and Tribal Judge Strate, seeking a **declaratory judgment** that, as a matter of federal law, the Tribal Court lacked jurisdiction to adjudicate Fredericks' claims; respondents also sought an **injunction** against further Tribal Court proceedings. Relying particularly on *National Farmers Union Ins. Coso v. Crow Tribe*, 471 U. S. 845, and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U. S. 9, the District Court dismissed the action, determining that the Tribal Court had civil jurisdiction over Fredericks' complaint against respondents. The en banc Eighth Circuit reversed, concluding that the controlling precedent was *Montana v. United States*, 450 U. S. 544, and that, under *Montana*, the Tribal Court lacked subject-matter jurisdiction over the dispute.

Emphasis added. *Strate*, at 439.

The Court in *Strate* went on to say, "The Court of Appeals concluded that our decision in *Montana* v. *United States*, 450 U.S. 544 (1981), was the controlling precedent, and that, under Montana, the Tribal Court lacked subject matter jurisdiction over the dispute." We granted

certiorari, and now affirm." *Strate, id.*

In a case cited by Defendants, *Water Wheel Camp Recreational Area, Inc. v LaRance*, 642 F.3d 802, 809 (9th Cir. 2011), the Ninth Cir. Court said, "While the case was pending before the tribal court, Water Wheel and Johnson filed a complaint in the District of Arizona seeking **declaratory and injunctive** relief against the tribal court's exercise of jurisdiction." Johnson was the other plaintiff in *Water Wheel*. The District Court in Water Wheel dismissed the case based on the first exception in Montana, as Water Wheel was a non-Indian who fit the description of "non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."

Water Wheel can be distinguished from the instant case before the Court, in that Plaintiffs here did not fit the description of "non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."

In all three of the cases cited, *Atkinson Trading Co.*; *Strate,*; and *Water Wheel*, the plaintiffs brought actions in federal courts seeking **declaratory and injunctive** relief the same as Plaintiffs in this action.

Added to this list, is *Farmers Union Insurance Cos. v. Crow Tribe of Indians*, where the Supreme Court said, "We reversed the Court of Appeals' judgment and held that **federal courts have authority to determine, as a matter 'arising under' federal law, see 28 U.S.C. § 1331** whether a tribal court has exceeded the limits of its jurisdiction." 471 U.S. 845 (1985). Emphasis added.

ARGUMENT

In response to Defendants' Argument section, Plaintiffs present the following arguments

and legal authorities. In the sub- title of their "ARGUMENT," Defendants boldly state the Court lacks jurisdiction over Defendants because of sovereign immunity and that the Tribe, TERO Commission, and Tribal Courts are immune from suit. This couldn't be further from the truth. Plaintiffs have already demonstrated this by citing three cases where aggrieved parties have sued tribes, in response to Defendants' Legal Standards section of their Memorandum. The cases are *Atkinson Trading Co.*; *Strate,*; and *Water Wheel*. This list is not meant to be inclusive, but is merely a short list to demonstrate that tribes can be sued regardless of their defense of sovereign immunity.

In addition, Plaintiffs cite *Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), where *Farmers Union Insurance* cites 28 U.S.C. § 1331, as the federal courts' authority to hear cases to determine "whether a tribal court has exceeded the limits of its jurisdiction." Based on *Farmers Union* and 28 U.S.C. § 1331, this Court has authority and jurisdiction over Defendants to determine "whether a tribal court [here defendants] has exceeded the limits of its jurisdiction."

In response to the section labeled the "Defendant TERO director is immune from Suit," Plaintiffs state that Defendant James Parisien is sued in his individual capacity for illegal actions or conduct that is outside the scope of his official duties. Defendant cite *Ex parte Young*, 209 U.S. 123 (1908) for their authority that Defendants enjoy the defense of sovereign immunity.

In *Young*, the United States Supreme Court allowed a suit against officials acting on behalf of the States Minnesota, to proceed despite the State's defense of sovereign immunity, when the State acted contrary to any federal law or contrary to the [U.S.] Constitution.

[T]he general doctrine that the Circuit Courts of the United States will restrain a state

> officer from executing an unconstitutional statute of the State when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution and would work irreparable damage and injury to him, has never been departed from.

Osborn v. United States Bank, 9 Wheat. 738, 22 U. S. 846, 22 U. S. 857 (1824).

> The courts having jurisdiction, Federal or State, [or tribal] should at all times be opened to them [complainants], as well as to others, for the purpose of protecting their property and their legal rights.

Ex Parte Young.

Ex Parte Young applies to Defendant James Parisien, to make him accountable for his illegal and damaging action or conduct toward Plaintiffs.

Defendants cited *McDonald v. Means* to support their argument Defendants are immune from suit. All the *Means* case stands for is that if a tribe has not alienated its right to control tribal land, then the tribe can still exclude people and regulate people. The tribe in Means did not alienated its right to control the roadway, where an auto accident occurred, through a right-of-way agreement.

Strate v. A—1 Contractors, 520 U.S. 438, 453 (1997).

Strate resolved the issue of an accident that occurred on a 6.59 mile stretch of a public highway maintained by the State under a federally granted right-of-way over Indian reservation land. The *Strate* Court decided tribal court could not hear a civil action against an allegedly negligent driver and the driver's employer, neither of whom is a member of the tribe?

In *Strate*, the Court said the following:

> On the particular matter before us, however, we agree with respondents [A-1

> Contractors]: The right of way North Dakota acquired for the State's highway renders the 6.59 mile stretch equivalent, for nonmember governance purposes, to alienated, non Indian land.

The Court in *Strate* went on to say,

> Apart from this specification, the Three Affiliated Tribes expressly reserved no right to exercise dominion or control over the right of way. ... Forming part of the State's highway, the right of way is open to the public, and traffic on it is subject to the State's control. ... So long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude.
>
> Petitioners and the United States refer to no treaty or statute authorizing the Three Affiliated Tribes to entertain highway accident tort suits of the kind Fredericks commenced against A-1 Contractors and Stockert. Rather, petitioners and the United States ground their defense of tribal court jurisdiction exclusively on the concept of retained or inherent sovereignty. *Montana*, we have explained, is the controlling decision for this case. To prevail here, petitioners must show that Fredericks' tribal court action against nonmembers qualifies under one of *Montana's* two exceptions.
>
> In this action, the agreement or Plans of Operation between the Tribe and School Board is

analogous to the to a right-of-way agreement the State of North Dakota has with the Three Affiliated Tribes in *Strate*. As in *Strate*, the Tribe here is in the same situation as the Three Affiliated Tribes when the *Strate* Court said, "Apart from this specification, the Three Affiliated Tribes expressly reserved no right to exercise dominion or control over the right of way." The Plans of Operations provide:

> The Tribe and School District have agreed to mutually share the responsibility for educating students, both Indian and non-Indian, residing on the Reservation. Accordingly, the Tribe and School District entered into agreements ("Plans of Operations") in both 2006 and 2009 that provided the School District with exclusive authority to administer the "day-to-day operations" of the Turtle Mountain Community High School ("Grant High School"), subject to applicable laws. **This arrangement vested the School District with exclusive administrative authority** over, among other things, the supervision and employment of staff at Grant High School.

Emphasis added. *Davis*.

Under the Plan of Operations, the Tribe retained no authority control or exclude anyone from the School or Project. Additionally, like in *Strate* where the State maintaining the highway. the School District maintains the grounds where the Project is located. The tribe cannot control or exclude anyone because of the agreement to educate all children according to the North Dakota Constitution. N.D. Const. art. VIII, § 1 ("[P]ublic schools [ ] shall be open to all children of the state of North Dakota . . . ."). *Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653 (8th Cir. 2015).

Defendants have made the statement that the land where the Project is located is tribal land under the exclusive jurisdiction of the Tribe. Defendants position is at odds with the Eight Circuit Court's description of the land in *Davis*, footnote # 1, where the Court said:

> Although both the School District and Grant High School operate within the boundaries of the Reservation, it is unclear in the record what, if any, of their facilities or the land on which the facilities are located belong to the Tribe. Per the Plans of Operations, however, it is clear that some but not all of the property used by Grant High School [and Project] is "federally owned."

The Court in *Davis*, footnote # 5, touched on the ownership of the land again where the School Board and Project is located, when it said,

> Of course, the transaction at issue in *Plains Commerce Bank* involved land that non-Indians owned in fee simple both before and after the transaction, and this court is aware that "[t]he ownership status of land" is "one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" *Hicks*, 533 U.S. at 360. As noted above, however, there is scant evidence in the record what, if any, land and facilities relevant to this case were owned by the Tribe. **Nevertheless, even if the Tribe owned all of the land and facilities relevant to this case**—which is not supported by the record—***Montana* would still apply**, *see Attorney's Process*, 609 F.3d at 935–41, and our analysis would not change for the reasons stated herein.

Emphasis added.

There is 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. 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. *Nevada v. Hicks*, 533 U.S. 353, (2001). School District has a competing interest to educated students under the State Constitution, when in its operations the School District awards construction contracts to Plaintiffs. The agreement, Plans of Operation between School Board and Tribe allows the board to manage with out interference from the Tribe imposing the TERO on the Project amounts to interference by the Tribe in regulating non-Indians.

The Supreme Court said, "[W]e likened the public right-of-way to non-Indian fee land because the Tribes lacked the power to 'assert a landowner's right to occupy and exclude'". *Strate*, 520 U.S. 438, 453 (1997).

In regards to Defendants' argument that Plaintiffs' Complaint Fails to State a Claim Upon Which Relief Can Be Granted, Plaintiffs respond as follows.

The federal rules of civil procedure Rule 8. General Rules of Pleading provides:

> Claim for Relief. A pleading that states a claim for relief must contain:
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Plaintiffs' Complaint provides a statement that includes the requirements found in Rule 8 of the Federal Rules of civil Procedure. The complaint is seeking declaratory and injunctive relief, the same relief sought in *Atkinson Trading Co.*; *Strate,*; and *Water Wheel*. In addition,

Plaintiffs' Civil Sheet cites 28 U.S.C. § 1331 as the Courts authority and jurisdiction, and *Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), cites 28 U.S.C. § 1331 as the federal courts' authority to determine "whether a tribal court has exceeded the limits of its jurisdiction."

Plaintiffs respond to Defendant's Memorandum section where they allege, "The Tribe Has the Power to Manage its Own Lands Under the Exclusion Doctrine." Plaintiffs argue Defendant Tribe contracted away its right or power to mange the land where the Project sits in the Plans of Operation with the School Board. The Court in *Davis*, found the School Board has exclusive management control over the Project under the Plans of Operation.

Defendants cite *Merrion v. Jicarilla Apache Tribe*, as authority for the Tribe to regulate Plaintiffs. 455 U.S. 130 (1982). *Merrion* is distinguished from this case, in that Merrion was subject to the tribe's regulatory schemes because it fit into the first exception of *Montana*, which provides, "A tribe may regulate, through taxation, licensing, or other means, *the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements*." *Merrion*. Merrion had entered into "*consensual relationships*", oil lease agreements with Jicarilla Apache tribal members for land within the Jicarilla Apache Indian Reservation.

Here, Plaintiffs do not have any *"consensual relationships*" in the form of agreements or leases with any tribal members, or with the Tribe.

Plaintiffs responds to Defendants argument "The Tribe's Right to Exclude Provides the Tribe with the Right to Tax Plaintiffs for Work They Conducted on Tribal Land." This issue has been addressed earlier, but additional rationalization will be provided.

Merrion involved a tax that only applied to activity occurring on the reservation, and its holding is therefore is easily reconcilable with the Montana-Strate line of authority, which we [Supreme Court] deem to be controlling. In *Merrion*, the Court said,

> We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe. However, we do not believe that this territorial component to Indian taxing power, which is discussed in these early cases, means that the tribal authority to tax derives solely from the tribe's power to exclude nonmembers from tribal lands.

In *Merrion*, the Court said, "This result confirms that the Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government." In the case before the Court, Plaintiffs entered land within the Reservation where tribal authority has been alienated according to *Davis*, because of the Plans of Operation, and because of Footnote # 5 in *Davis*. The Court in Merrion said "[A] tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe." An Indian tribe's sovereign power to tax–whatever its derivation–reaches no further than tribal land under its control. *Merrion*, at 142.

In this case, the Tribe alienated its right to control, to exclude, and to tax pursuant to and analogous to the highway right-of-way in *Strat*e.

The Navajo Nation attempted to impose a tax on guests staying at a resort hotel located on fee land within the exterior boundaries of the Navajo Indian Reservation. *Atkinson Trading Co. v. Shirley*, (00-454) 532 U.S. 645 (2001). The Court in *Atkinson* said,

> The Navajo Nation's imposition of a tax upon nonmembers on non-Indian fee land within the reservation is, therefore, presumptively invalid. Because respondents have failed to establish that the hotel occupancy tax is commensurately related to any consensual relationship with petitioner or is necessary to vindicate the Navajo Nation's political

> integrity, the presumption ripens into a holding. The judgment of the Court of Appeals for the Tenth Circuit is accordingly Reversed.

The Court in *Atkinson* reasoned, "Because Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute, and because the incidence of the tax falls upon nonmembers on non-Indian fee land, it is incumbent upon the Navajo Nation to establish the existence of one of Montana's exceptions." The *Atkinson* Court went on to say,

> In Strate, for example, even though respondent A-1 Contractors was on the reservation to perform landscaping work for the Three Affiliated Tribes at the time of the accident, we nonetheless held that the Tribes lacked adjudicatory authority because the other nonmember "was not a party to the subcontract, and the [T]ribes were strangers to the accident." 520 U.S., at 457.

In regards to the 2d *Montana* exception discussed in *Atkinson*, the Court said,

> [W]e fail to see how petitioner's operation of a hotel on non-Indian fee land "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." citing *Montana*, 450 U.S., at 566.

The Court in *Atkinson* stated the "*Montana's* second exception grants Indian tribes nothing "'beyond what is necessary to protect tribal self-government or to control internal relations.'" citing *Strate*, 520 U.S., at 459 (quoting *Montana*, supra, at 564). "Whatever effect petitioner's operation of the Cameron Trading Post might have upon surrounding Navajo land, it does not endanger the Navajo Nation's political integrity." The *Atkinson* Court concluded,

> The Navajo Nation's imposition of a tax upon nonmembers on non-Indian fee land within the reservation is, therefore, presumptively invalid. Because respondents have failed to establish that the hotel occupancy tax is commensurately related to any consensual relationship with petitioner or is necessary to vindicate the Navajo Nation's political integrity, the presumption ripens into a holding. The judgment of the Court of Appeals for the Tenth Circuit is accordingly Reversed.

Atkinson, at 658.

Defendants cited *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.

S. 408, 440 (1989) to support their argument that tribes can regulate non-Indian owned fee land located within an Indian reservation because of the 2d Montana exception. The *Atkinson* Court said,

> We find unpersuasive respondents' attempt to augment this claim by reference to *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 440 (1989). In this portion of Brendale, per the reasoning of two Justices, we held that the Yakima Nation had the authority to zone a small, non-Indian parcel located "in the heart" of over 800,000 acres of closed and largely uninhabited tribal land. Ibid. Respondents extrapolate from this holding that Indian tribes enjoy broad authority over nonmembers wherever the acreage of non-Indian fee land is minuscule in relation to the surrounding tribal land. But we think it plain that the judgment in Brendale turned on both the closed nature of the non-Indian fee land 13 and the fact that its development would place the entire area "in jeopardy." Id., at 443 (internal quotation marks and citation omitted).14 Irrespective of the percentage of non-Indian fee land within a reservation, Montana's second exception grants Indian tribes nothing "'beyond what is necessary to permit the exercise of civil authority wherever it might be considered "necessary" to self-government. Thus, unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually "imperil[s]" the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands. Montana, 450 U. S., at 566. Petitioner's hotel has no such adverse effect upon the Navajo Nation.

Atkinson, at 658.

Installing fabricated metal certainly does not *threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.* In fact Plaintiffs' activity had a positive effect on the *economic security, or the health or welfare of the tribe*, as school children now have a safe, warm or cool place to participate in extra-curricular activities. The Project will also allow additional tribal members a place for employment.

The Davis Court provided a list of non-Indian activities in Footnote # 6 that failed to satisfy the 2d exception in Montana.

> *See Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1305 (9th Cir. 2013) (holding that the second *Montana* exception did not apply to non-Indian conduct that allegedly caused, among other things, "groundwater contamination" and "improper

> disposal of construction debris"); *MacArthur,* 497 F.3d at 1075 (holding that "[w]hile the Navajo Nation undoubtedly has an interest in regulating employment relationships between its members and non-Indian employers on the reservation, that interest is not so substantial in this case as to affect the Nation's right to make its own laws and be governed by them"); *Allen*, 163 F.3d at 515–16 (9th Cir. 1998) (en banc) ("Having divested itself of sovereignty over the very activities that gave rise to the civil claim, nothing in this case can be seen as threatening self-government or the political integrity, economic security or health and welfare of the tribe. . . . Indian tribes or their members . . . may pursue their causes of action in state or federal court."); *Otter Tail Power Co. v. Leech Lake Band of Ojibwe*, No. 11-1070 DWF/LIB, 2011 WL 2490820, at *5 (D. Minn. June 22, 2011) (holding that the second *Montana* exception did not apply to nonmember conduct that would interfere with the tribe's "hunting, fishing, and gathering rights"); *Dolgencorp Inc. v. Miss. Band of Choctaw Indians*, 846 F. Supp. 2d 646, 650 (S.D. Miss. 2011) (holding that the second *Montana* exception did not apply to a case in which a nonmember of the tribe allegedly molested a minor tribe member), *aff'd*, 746 F.3d 167 (5th Cir. 2014).

The activity of Plaintiffs here, pales in comparison to the plaintiffs' activities in all of the cases listed in *Davis*, Footnote # 6.

CONCLUSION

For the reasons argued *supra*, Plaintiffs respectfully request that the Court deny Defendants Motion to Dismiss.

December 7, 2022.

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PROOF OF SERVICE

Defendants' attorney will be served through the electronic system when this document is filed with the Court.