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' REPLY IN**
	)	**SUPPORT OF MOTION TO DISMISS**
	)	
JAMES PARISIEN, et al.,	)	The Honorable Peter D. Welte, Chief Judge
	)	
	)	
	)	
Defendants.	)	

TRIBAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Defendants Turtle Mountain Band of Chippewa Indians (Tribe), Turtle Mountain Band of Chippewa Indians' Tribal Employment Rights Office (TERO Office), James Parisien, Turtle Mountain Tribal Court, and Turtle Mountain Court of Appeals (collectively, Defendants), hereby submit this Reply in Support of their Motion to Dismiss, ECF No. 3.

ARGUMENT

I. Plaintiffs' Opposition Does Not Address Tribal Defendants' Sovereign Immunity.

Plaintiffs' Opposition is highly evasive on the topic of sovereign immunity. Instead of addressing Defendants' legal argument, or this Court's prior order in *Hanson v. Parisien,* 473 F. Supp. 3d 970 (D.N.D. 2020), Plaintiffs brush aside sovereign immunity, claiming "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 non-Indians." Pls.' Opp'n 4 (cleaned up). While that may be the substantive claim that Plaintiffs allege, they cannot avoid the jurisdictional inquiry this Court must make regarding each Tribal entity that Plaintiffs sued. *See Hagen v. Sisseton-Wahpeton Cmty. Coll*., 205 F.3d 1040, 1043 (8th Cir. 2000) (sovereign immunity is jurisdictional).

Sovereign immunity stems from but is not the same as a tribe's inherent sovereignty. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (internal citations and quotations omitted). Tribes possess "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). Tribes—and their agencies—may not be sued absent an express and unequivocal waiver of immunity or "abrogation of tribal immunity by Congress." *Baker Elec. Coop. v. Chaske*, 58 F.3d 1466, 1471 (8th Cir. 1994);

Hagen, 205 F.3d at 1043 (citing *Dillon v. Yankton Sioux Tribe Housing Auth*., 144 F.3d 581, 583 (8th Cir. 1998)).[1]

Plaintiffs cite three cases to support the assertion that "[t]ribes can be and are sued all the time," Pls.' Opp'n 4, all of which illustrate that this Court lacks jurisdiction over the Tribe and its agencies. First, in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), the Supreme Court did not discuss sovereign immunity because the district court determined that it did not have jurisdiction over the tribe, and only proceeded with claims against the tribal officials: Navajo Tax Commission members. *Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506, 508 (D.N.M. 1994). There, the district court unequivocally stated that it was "beyond debate" that the Navajo Nation was "immune from suit" in federal court. *Id.* The case proceeded through the federal court system with *only* tribal officials as defendants.[2] Second, in the lower court proceedings of *Strate v. A-l Contractors,* 520 U.S. 438 (1997), the tribal defendants initially raised the affirmative defense of sovereign immunity, "but subsequently *consented* to the suit for the limited purpose of defending the federal law claims for injunctive relief." *A-1 Contractors v. Strate*, 76 F.3d 930, 933 (8th Cir. 1996), *aff'd*, 520 U.S. 438 (1997) (emphasis added). Third, *Water Wheel Camp Recreational Area, Inc. v LaRance,* 642 F.3d 802 (9th Cir. 2011) did not involve a tribe or its agencies. Instead, the case was filed against the Chief and Presiding Judge

[1] While a tribal officer's sovereign immunity may be subject to the exception expressed in *Ex parte Young*, 209 U.S. 123 (1908) (discussed in more detail below), this exception does not apply to agencies or the Tribe itself. *See N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty*, 991 F.2d 458, 460 (8th Cir. 1993) ("If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making *him* liable to suit.") (internal citations omitted).

[2] *See Atkinson Trading Co. v. Gorman et al.,* No. 97–1261 BB/LFG (D.N.M. Aug. 21, 1998); *Atkinson Trading Co. v. Shirley*, 210 F.3d 1247, 1250 (10th Cir. 2000), *rev'd sub nom. Atkinson*, 532 U.S. 645.

of tribal court and the Chief Clerk of the tribal court. All three cases cited by Plaintiffs to support the assertion that "Tribes are sued all the time" were either not suits against tribes or their agencies, or the tribe consented to suit; and these cases *did not discuss sovereign immunity*.[3]

Here, the Court lacks jurisdiction over the Tribe and its agencies. The Tribe and its agencies do not consent to this lawsuit. Plaintiffs have had multiple opportunities to plead waiver or Congressional authorization supporting this suit, *see, e.g., Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Oklahoma Tax Comm. v. Citizen Band of Potawatomi Indian Tribe*, 498 US. 505, 509 (1991), and they have failed to do so because no such waiver or authorization exists. As amendment is futile, Defendants request dismissal with prejudice.

II. This Court Lacks Jurisdiction Over James Parisien.

Plaintiffs similarly gloss over Defendants' argument that this Court lacks jurisdiction over James Parisien. Plaintiffs filed this case against "James Parisien, Director of the Turtle Mountain Band of Chippewa Indians Tribal Employment Rights Office." Complaint, ECF No. 1 at p. 1. Plaintiffs now state that Plaintiffs are suing Mr. Parisien "in his individual capacity for actions giving rise to this lawsuit." Pls.' Opp'n 2. Plaintiffs state that Mr. Parisien caused "damage to Plaintiffs," *id.*, and seek to "*make him accountable* for the illegal and damaging action or conduct toward Plaintiffs," *id.* at 8 (emphasis added).

[3] Similarly, Plaintiffs cite *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 845–46 (1985) to support the hollow proposition that "tribes can be sued regardless of their defense of sovereign immunity." Pls.' Opp'n 7. However, *Nat'l Farmers Union Ins. Companies* discussed only whether a tribe has exceeded the lawful limits of its jurisdiction is a federal question under 28 U.S. § 1331 and whether exhaustion of tribal remedies was required. Indeed, the Ninth Circuit decision declined to to reach questions involving sovereign immunity, *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 736 F.2d 1320, 1323 (9th Cir. 1984), rev'd, 471 U.S. 845 (1985), and the Supreme Court did not discuss it at all.

Plaintiffs have not stated a claim against retired TERO employee, Mr. Parisien. This is a suit for injunctive and declaratory relief against the Tribe and its agencies. Plaintiffs seek to enjoin Defendants from enforcing the TERO Ordinance against Plaintiffs or from adjudicating claims against Plaintiffs in Tribal Court.[4] Mr. Parisien no longer has authority to enforce the Tribe's TERO against Plaintiffs or adjudicate TERO-related claims. The Complaint does not contain any other claim for relief against Mr. Parisien. Even if this Court were to grant Plaintiffs all their requested relief, none of it would operate against Mr. Parisien, the individual.

Cases discussing state and federal immunity are instructive. Where a suit is brought against the agent or official of a sovereign, to determine whether sovereign immunity bars the suit, a Court must ask whether the sovereign "is the real, substantial party in interest." *Frazier v. Simmons,* 254 F.3d 1247, 1253 (10th Cir.2001) (quotation marks and citation omitted). This "turns on the relief sought by the plaintiffs." *Id.* (quotation marks and citation omitted). "[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 101 (1984) (quotation marks and citation omitted).

The United States Supreme Court recently clarified the scope of tribal sovereign immunity as applied to tribal officers, employees, and agents in *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017). The *Lewis* Court explained:

> Courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign. *See, e.g., Ex parte New York*, 256 U.S. 490, 500–502 (1921). If, for example, an action is in essence against a State even if the State is not a named party, then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protection. For this reason, an arm or instrumentality of the

[4] Notably, the Tribal Court proceedings have concluded. Complaint ¶ 7. What remains of Plaintiffs' request for relief is a declaration that the Tribal Courts exceeded their jurisdiction and an order vacating the Tribal Courts' rulings.

> State generally enjoys the same immunity as the sovereign itself. *E.g., Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429–430 (1997).

Id. Here, there can be no doubt that Plaintiffs' Complaint is against the TERO Office and the Tribe itself. And because the Tribe and its agencies are immune from suit, this Court lacks jurisdiction against them. Plaintiffs have failed to state a claim—any claim whatsoever—against Mr. Parisien as an individual. Plaintiffs are simply incorrect that they can maintain an individual capacity claim against a retired employee to circumvent the Tribe's sovereign immunity.

III. Plaintiffs Have Failed to Allege an Ongoing Violation of Federal Law.

As Defendants explained in their Motion to Dismiss, pursuant to Rule 25 of the Federal Rules of Civil Procedure, Sherry Baker (the current TERO Director) is automatically substituted as the proper Defendant. Fed. R. Civ. P. 25(d). Notwithstanding Plaintiffs' protestations to the contrary, the only possible Defendant is an official that *currently* has the capacity to enforce. Even so, Plaintiffs must still allege an ongoing violation of federal law. *Verizon Md. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

At all relevant times, the TERO Director was acting within the scope of their authority as defined by the Tribe. Defendants' Memorandum in Support of Motion to Dismiss ("Defs.' Mem."), ECF No. 3-1 at 8-9. Notably, the Complaint alleges that the TERO Director "utilized the full force of his authority through Defendant TERO Office to impose the TERO taxes and fees against or on Plaintiffs." Complaint ¶ 17. By Plaintiffs' own admission, the TERO Director was operating within the authority granted to the TERO Director by the Tribe to enforce the Tribe's Ordinance. Plaintiffs do not allege that the TERO Director did anything—or more importantly, continues to do anything—that is outside the scope of the Director's official duties.

Finally, as discussed in detail in Defendants' Motion to Dismiss and reiterated below, there is nothing controversial—or unlawful—about taxing a contractor for work conducted on

Tribal land. If this Court is to have jurisdiction against a tribal official, Plaintiffs must allege that a tribal official is responsible for an ongoing violation of federal law. Here, there is none.

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

A. Defendants Have the Inherent Authority to Tax Non-Members.

Plaintiffs' Opposition fails to grapple with the extensive federal authority that Defendants cite in their Motion to Dismiss. Instead, Plaintiffs rely almost exclusively on cases construing *Montana v. United States*, 450 U.S. 544 (1981), a case that is not on all fours with Plaintiffs' Complaint because Plaintiffs do not allege that the Project took place on privately-owned fee land. *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). Plaintiffs cannot overcome the extensive body of caselaw Defendants cite by avoiding the legal issue: that the Tribe's inherent power to control economic activity within its jurisdiction provides the authority to tax. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

First, Plaintiffs misconstrue *Merrion* as a case that applies *Montana.* However, *Merrion* did not apply *Montana*, nor did it quote *Montana* as Plaintiffs confusingly imply. Pls.' Opp'n 12 (quoting *Montana* but citing *Merrion* instead). Instead, *Merrion* specifically disavowed that *Montana*'s first exception—consensual relationship—applied at all to the facts of that case. *Merrion*, 455 U.S. at 147 ("Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.").

Merrion is a landmark case that post-dates *Montana*. It is not confined by *Montana* or its exceptions. In *Merrion*, the Supreme Court held that a tribe "has the inherent power to impose the severance tax on petitioners' mining activities as part of its power to govern and to pay for

the costs of self-government." *Merrion*, 455 U.S. at 130. In doing so, the Supreme Court specifically instructed that a tribe's power to tax comes *not only* from its power to exclude, but also from its inherent sovereign powers. *Id.* at 141 ("we conclude that the Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management."). In reaching this conclusion, the *Merrion* Court explained that the views of "the three federal branches of government, as well as general principles of taxation confirm that Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services. Indeed, the conception of Indian sovereignty that this Court has consistently reaffirmed *permits no other conclusion*." *Id.* at 140 (emphasis added). Finally, the Court held that even if a tribe's power to tax derives solely from its power to exclude, it would uphold the tax. *Id.* at 144.

Second, Defendants cited several recent cases that discuss *Merrion* and reiterate tribes' inherent authority to tax, none of which Plaintiffs refute or even attempt to tackle. Defs.' Mem. 10-13. Instead, Plaintiffs rely on the "*Montana-Strate* line of cases" to support their claims. The cases Plaintiffs cite are easily distinguishable. *Strate v. A-1 Contrs*., 520 U.S. 438 (1997) involved a car accident between *two non-tribal members* on a *state highway* that traversed tribal land. 520 U.S. at 444. The Supreme Court held that the tribal court had no jurisdiction over a civil action between two nonmember parties that arose out of an accident on a state highway, because the land was "equivalent, for nonmember governance purposes, to such alienated, non-Indian land." 520 U.S. at 440. The Supreme Court specifically expressed "no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." *Id*. at 439. The Court confirmed that "tribal authority over the activities of non-Indians on

reservation lands is an important part of tribal sovereignty," *id*. at 451, and found *Montana* applicable *only* to the specific facts of that case, *id*. at 459.

Finally, in a misguided effort to create an ambiguity regarding the legality of TERO fee assessment against Plaintiffs, they argue, yet again, that *Belcourt Public School District v. Davis*, 786 F.3d 653 (2015) somehow insulates Plaintiffs from liability. *Belcourt Public School District* does not apply to the facts of this case. There, 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. *Belcourt Pub. Sch. Dist.*, 786 F.3d at 658 ("North Dakota law specifies 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 ... tribal governments located in North Dakota.") (citing N.D. Cent. Code § 54–40.2–08). The ruling is limited to Tribal jurisdiction over a state agency. *Id.* The remainder of the opinion is dicta. *Id.* ("[E]ven assuming arguendo that the School District *could* agree to an expansion of Tribal Court jurisdiction under North Dakota law," then *Montana* precludes jurisdiction.)

Plaintiffs are not a subdivision of the School District. And unlike in *Belcourt Public School District,* the School District is not a party to this case; in fact, not a single state entity is a party to this litigation. *Belcourt School District* simply does not apply here.

B. Plaintiffs Have Not Pleaded Facts that Plausibly Establish that the *Montana* Exceptions Do Not Apply.

Plaintiffs assert that this case should be analyzed under *Montana* instead of under *Merrion* and its progeny. But even under *Montana*, Plaintiffs have failed to state a claim.

1. Plaintiffs Have a Consensual Relationship with Defendants.

The first *Montana* exception applies to "consensual relationships." *Montana* at 565-566 Next, there must be a nexus between the tribe and the nonmember's consensual relationship. *Id*.

at 656. Either direct or implied consent can form the basis for *Montana*'s first exception. *Plains Commerce Bank v. Long Family Land and Cattle Co*., 554 U.S. 316, 337 (2008) (noting that nonmember may consent "either expressly or by his actions").

Plaintiffs have a sufficient consensual relationship with the Tribe to justify the Tribe's regulation of its employment practices. Plaintiffs knowingly chose to work on Tribal land. Complaint ¶ 8. They also knew TERO applied to *this Project. Hanson,* 473 F. Supp. 3d at 973 (TERO Director told contractors at the pre-bid meeting "that despite the omission from the School District's advertisement, TERO would apply to contracts awarded for the project. *Id*.").

The fact that the Project took place on Tribal lands is equally significant. Complaint ¶ 8 (alleging that the Project is "within the exterior boundaries of the reservation"); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1314 (9th Cir. 1990) ("[t]here is also the underlying fact that its plant is within reservation boundaries"); *Atkinson,* 532 U.S. at 653 ("An Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land."); *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 940 (8th Cir. 2010) (land status is of "critical importance" under a *Montana* analysis). Here, the Tribe does not seek to assert jurisdiction over privately-owned fee land. 609 F.3d at 940. It is asserting a landowner's right. "Tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner." *See* 609 F.3d at 940. Application of TERO to nonmembers is within the Tribe's retained power under *Montana.*

2. The Tribe Has Suffered Due to Plaintiffs' Unlawful Actions.

The Tribal Employment Rights Ordinance exists to help Tribal members and Tribal families. "The ordinance's primary purpose is 'to promote employment opportunities for Indians and business opportunities for Indian firms and contractors.'" *Hanson v. Parisien,* 473 F. Supp.

3d 970, 973 (D.N.D. 2020) (citing Doc. No. 16-4, § 32.0102). "Tasked with carrying out that objective, the Turtle Mountain Chippewa Tribal Employment Rights Commission ("Commission") administers a wide-ranging employment rights program for the benefit of tribal members and their families." *Id*. (citing TERO §§ 32.0306, 32.0307). Plaintiffs' attempts to minimize the harm their actions have caused the Tribe are unpersuasive. *See* Pls.' Opp'n 15.

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. 593 U.S. ____ (2021). The Court reasoned that denying tribes this right would make it difficult for tribes to protect themselves against ongoing threats. *Id.* Here, Plaintiffs' non-compliance with TERO—and a ruling that legitimizes such an action—also strips the Tribe of its ability to protect Tribal members against ongoing threats such as continued unemployment, discrimination, and homelessness. TERO ensures that Tribal members have preference in employment and job training. It prevents non-Indian contractors from excluding Tribal members from employment. *Hanson v. Parisien*, 473 F. Supp. 3d at 973 (discussing the "wide-ranging" TERO program administered for the benefit of tribal members). This is precisely what the Supreme Court in both *Montana* and *Plains Commerce* meant when it stated that the conduct "must imperil the subsistence of the tribe." 554 U.S. 316 (2008). Nothing is more catastrophic for a tribe than continued unemployment and poverty.

The TERO is critical to the Tribe's power of self-government. Thus, if this Court determines that *Montana* is the correct jurisdictional framework, this second exception applies.

CONCLUSION

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

December 21, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 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: December 21, 2022

Respectfully submitted,

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