

CHEYENNE RIVER SIOUX TRIBAL COURT) CHEYENNE RIVER SIOUX TRIBE) CHEYENNE RIVER INDIAN RESERVATION)):§	SUPERIOR COURT Eagle Butte, SD
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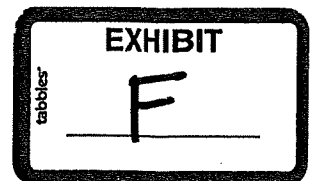
CHEYENNE RIVER SIOUX TRIBE,)) Plaintiff,)) v.)) SARAH SHAFF, CINDY LINDSKOV, and) KEITH FODNESS,)) Defendants.)):	Case No. 23C044 BRIEF IN SUPPORT OF MOTION TO DISMISS AND ALTERNATIVE PETITION FOR HEARING TO RECONSIDER EMERGENCY EXCLUSION ORDER FOR SARAH SHAFF, CINDY LINDSKOV, AND KEITH FODNESS
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COME NOW, Sarah Shaff, Cindy Lindskov, and Keith Fodness, Defendants, and in support of their Motion to Dismiss and Alternative Petition for Hearing to Reconsider Emergency Exclusion Order for Sarah Shaff, Cindy Lindskov, and Keith Fodness, submit the following Brief.

BRIEF IN SUPPORT OF MOTION TO DISMISS

FACTUAL HISTORY AND PROCEDURAL POSTURE

The Dupree School District is a political subdivision of the State of South Dakota. The portion of Dupree on which the Dupree K-12 School is situated is not trust land or allotted land or a dependent Indian Community. Sarah Shaff is an Elementary School Teacher at the Dupree PK-6 School and was acting as such at all times pertaining to this matter. Sarah Shaff is a non-Native American non-Tribal member who resides off the Cheyenne River Sioux Indian Reservation. Cindy Lindskov is the Principal at the Dupree Elementary PK-6 School and was acting as such at all times pertaining to this matter. Cindy Lindskov is a non-Native American non-Tribal member who resides off the Cheyenne River Sioux Indian Reservation. However, Cindy owns land in both Ziebach and Dewey Counties, including land located within the exterior



boundaries of the Cheyenne River Sioux Indian Reservation. Keith Fodness is the Superintendent of the Dupree School District and was acting as such at all times pertaining to this matter. Keith Fodness is a non-Native American non-Tribal member who, as a condition of his employment contract with Dupree School District No. 64-2 in Ziebach County, South Dakota, is “required to live in the House provided by and for the convenience of the School District in order to properly perform the duties as Superintendent of [the] School.” The house is located across the street from the Dupree K-12 School in Dupree, South Dakota, and the portion of Dupree on which the house is situated is not trust land or allotted land or a dependent Indian Community.

The Cheyenne River Sioux Tribe is the Plaintiff in this matter and has brought this action “on behalf of its members, Lance Frazier and Harold Hollow¹, and other unnamed members whose peace, health, safety, morals, and general welfare are harmed by the action actions of Defendants.” *Emergency Petition for Exclusion and Removal of Sarah Shaff, Cindy Lindskov, and Keith Fodness from the Cheyenne River Sioux Indian Reservation*, ¶ 15.

¹ Lance Frazier and Harold Hollow filed a Complaint in Cheyenne River Sioux Tribal Court, Case No. 23C027, on April 28, 2023, which provides a more detailed rendition of their allegations against the Defendants herein than is otherwise stated in Plaintiff’s *Emergency Petition for Exclusion and Removal of Sarah Shaff, Cindy Lindskov, and Keith Fodness from the Cheyenne River Sioux Indian Reservation*. On August 22, 2023, Lance Frazier and Harold Hollow filed a Voluntary Dismissal of said Complaint (23C027).

Additionally, Lance Frazier and Harold Hollow submitted complaints against the Defendants herein to the South Dakota Department of Education wherein they generally made the same allegations as were made in the Complaint filed with this Court (23C027). The complaint against Sarah Shaff is scheduled for hearing in September before the South Dakota Teachers Practice and Standards Commission. As it pertains to Cindy Lindskov and Keith Fodness, after review of the complaint and responses submitted, the South Dakota Professional Administrators Practices and Standards Commission voted to dismiss said complaint, and the parties were informed of the same in a letter dated August 23, 2023.

The Summons, Emergency Exclusion Order for Sarah Shaff, Cindy Lindskov, and Keith Fodness, and Emergency Petition for Exclusion and Removal of Sarah Shaff, Cindy Lindskov, and Keith Fodness from the Cheyenne River Sioux Indian Reservation were served upon the Defendants herein on or about August 21, 2023.

LEGAL ANALYSIS

Rule 1(c) of the Cheyenne River Sioux Tribe Law and Order Code – Rules of Civil Procedure – provides that the Federal Rules of Civil and Appellate Procedure shall act as a gap filler provision whenever “any procedure or matter is not specifically set forth herein.”

Rule 12(b) of the Cheyenne River Sioux Tribe Law and Order Code provides that the defenses of lack of jurisdiction over the subject matter and lack of jurisdiction over the person may be made by motion before pleading and that no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. Rule 12(d) of the Cheyenne River Sioux Tribe Law and Order Code provides that the defenses of lack of subject matter and/or personal jurisdiction shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial. Defendants herein have specifically requested such a hearing on the Motion to Dismiss and Alternative Petition for Hearing to Reconsider Emergency Exclusion Order for Sarah Shaff, Cindy Lindskov, and Keith Fodness occur within two (2) weeks of the Court’s receipt of said Motion and Petition.

I. The Cheyenne River Sioux Tribal Court lacks jurisdiction pursuant to the test set forth in *Montana v. United States*.

An order excluding a nonmember from a reservation is an exercise of civil jurisdiction. *See generally Penn v. U.S.*, 335 F.3d 786 (8th Cir. 2003). The Cheyenne River Sioux Tribal Court lacks jurisdiction over the Dupree School District and any individuals acting in their

official capacity as employees of the Dupree School District, including Defendants herein. The Eighth Circuit has found in two cases with similar alleged conduct as to what is alleged in the matter at hand that a school district and its employees cannot be sued in tribal court under the test set forth in *Montana v. United States*, 450 U.S. 544 (1981), nor its progeny. See *Belcourt Public School Dist. v. Davis*, 786 F.3d 653 (8th Cir. 2015); *Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662 (8th Cir. 2015).

Preliminarily, no federal statute or treaty specifically provides the Tribal Court with jurisdiction over claims relating to state officials operating in their official capacities at a state-run school. Additionally, for jurisdictional purposes, all Defendants herein are non-Indians. Therefore, the Tribal Court's jurisdiction must stem from its "retained and inherent sovereignty." *Murphy*, 786 F.3d at 666 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 649-50 (2001)). The Tribal Court's inherent jurisdiction over nonmembers of the tribe must be analyzed "within the framework and principles set forth in *Montana*, which remains the 'pathmarking case' on the subject." *Murphy*, 786 F.3d at 666 (quoting *Nevada v. Hicks*, 533 U.S. 353, 358 (2001)).

Given the general proposition set forth in *Montana* that an Indian tribe's inherent sovereign powers do not extend to nonmembers of the tribe, efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are "presumptively invalid." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)). Therefore, as a starting point, the Cheyenne River Sioux Tribal Court presumably does not have jurisdiction to enter an order excluding nonmembers from the Cheyenne River Sioux Indian Reservation under the circumstances herein. "The burden rests on the [Cheyenne River Sioux Tribe] to establish that one of the *Montana*

exceptions applies.” *Murphy*, 786 F.3d at 667 (quoting *Plains Commerce Bank*, 554 U.S. at 330).

The *Montana* Court noted two relatively narrow exceptions to the general rule:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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*. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that *conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe*.

Montana v. United States, 450 U.S. 544, 565-66 (1981) (emphasis added).

A. First *Montana* Exception

Regarding the first *Montana* exception, which enables jurisdiction over non-Indians who enter into a consensual relationship with a Tribe, the Court in *Nevada v. Hicks* elaborated that:

The [*Montana*] Court... obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by arrangements that they (or their employers) entered into...

533 U.S. 353, 372 (2001); *see also Murphy*, 786 F.3d at 668 (approving language specifically regarding school districts); *Davis*, 786 F.3d at 658 (approving language specifically regarding school districts). It should be noted that in the *Davis* and *Murphy* cases the school districts had both signed education agreements with the Tribes in question. The Courts in both cases specifically noted that the existence of those agreements did not amount to a consensual agreement allowing tribal jurisdiction. *Davis*, 786 F.3d at 658; *Murphy*, 786 F.3d at 668.

B. Second *Montana* Exception

The only remaining avenue for the Tribal Court to have jurisdiction requires that the claims at issue involve “conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana v. United States*,

450 U.S. 544, 566 (1981). The Court in *Hicks* emphasized the necessarily narrow scope of the second *Montana* exception when it confirmed that, “where nonmembers are concerned, the exercise 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, and so, cannot survive without express congressional delegation.” *Murphy*, 786 F.3d at 669 (quoting *Hicks*, 533 U.S. at 359) (additional quotations omitted). As the Court in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, stated:

The conduct must do more than injure the tribe, it must “*imperil the subsistence*” of the tribal community. [*Montana*, 450 U.S. at 566]. One commentator has noted that “th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be *necessary to avert catastrophic consequences*.” Cohen § 4.02[3][c], at 232, n. 220.

554 U.S. 316, 341 (2008).

The claims and alleged conduct at issue in this case do not “imperil the subsistence” of the Tribe, and Tribal Court jurisdiction is not “necessary to avert catastrophic consequences.” *Id.* In this regard, the Court in *Murphy* noted that other courts have found the second *Montana* exception inapplicable to conduct that was either comparable or more detrimental to the Tribe’s subsistence and well-being than the conduct alleged (which is denied) in this case. *Id.* at 670, n. 7; *County of Lewis v. Allen*, 1633 F.3d 509, 515-16 (9th Cir. 1998) (“Having divested itself of sovereignty over the very activities that gave rise to the civil claim [of false arrest, other torts and a civil rights violation stemming from the arrest], 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.”); *Dolgencorp Inc. v. Mississippi 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 tribal member), *aff'd*. 746 F.3d 167 (5th Cir. 2014). Furthermore, the Court in neither of the Eighth Circuit cases (*Davis* nor *Murphy*) found that the school district or their respective employees' conduct threatened or had some direct effect on the political integrity, economic security, or health or welfare of the Tribes. *Davis*, 786 F.3d at 660 (finding suit against school district and employees relating to claims including excessive force and defamation did not satisfy second exception to *Montana* test); *Murphy*, 786 F.3d at 670 (finding suit against school district over failure to protect children from violence did not satisfy second exception to *Montana* test).

II. Keith Fodness and Cindy Lindskov are not subject to Exclusion or Removal pursuant to Law & Order Code, Section 11-1-2.

Cheyenne River Sioux Tribe Law & Order Code, Section 11-1-2 – Persons Subject to Exclusion and Removal – states:

All persons who are not owners of land located within the exterior boundaries of the Reservation or who are not legally entitled to reside on said Reservation as a result of their having established a permanent domicile or permanent employment on said Reservation, may be excluded or removed from all or any portion of the Reservation as provided herein.

Dupree School District Superintendent Keith Fodness is required, as a condition of his employment, to live in a house provided by and for the convenience of the Dupree School District in order to properly perform the duties as Superintendent. *Affidavit of Keith Fodness*, ¶ 3. The school-owned house is located directly across the street from the Dupree K-12 School, which is located within the exterior boundaries of the Cheyenne River Sioux Indian Reservation. *Id.* at ¶ 4. Therefore, pursuant to Law & Order Code, Section 11-1-2, Keith Fodness is not subject to exclusion or removal.

Dupree Elementary PK-6 School Principal Cindy Lindskov is an owner of land in both Ziebach and Dewey Counties, including land which is located within the exterior boundaries of

the Cheyenne River Sioux Indian Reservation. *Affidavit of Cindy Lindskov*, ¶ 3. Accordingly, pursuant to Law & Order Code, Section 11-1-2, Cindy Lindskov is not subject to exclusion or removal.

CONCLUSION

The Cheyenne River Sioux Tribal Court lacks jurisdiction over the Defendants herein. All Defendants are non-Native Americans non-Tribal members and all of the conduct alleged by Plaintiff (which is generally denied) purportedly took place at a state-run school on state-owned land, during the Defendants' course of employment as state officials. The Cheyenne River Sioux Tribe has the burden of proof to establish that one of the *Montana* exceptions applies, and they have undoubtedly failed to meet that burden. Given the uncontroverted facts establishing a lack of jurisdiction, the Tribe simply cannot meet its burden and this Court must dismiss Plaintiff's Petition and rescind the Emergency Exclusion Order.

In addition to the well-established law as set forth above which requires dismissal, the Cheyenne River Sioux Tribal Exclusion and Removal Code, Section 11-1-2, requires dismissal and rescission as regards Defendants Keith Fodness and Cindy Lindskov given their respective statuses as a resident on the Reservation as a result of permanent employment on the Reservation and an owner of land within the exterior boundaries of the Reservation. Said Defendants are plainly not subject to exclusion or removal.

ALTERNATIVE PETITION FOR HEARING TO RECONSIDER EMERGENCY EXCLUSION ORDER FOR SARAH SHAFF, CINDY LINDSKOV, AND KEITH FODNESS

In the alternative, Defendants hereby Petition this Court to Reconsider the Emergency Exclusion Order for Sarah Shaff, Cindy Lindskov, and Keith Fodness for all of the above-stated reasons and for the reasons set forth below.

In the Emergency Petition for Exclusion and Removal of Sarah Shaff, Cindy Lindskov, and Keith Fodness, Plaintiff conflates procedures for Emergency Exclusion and Removal Without Prior Hearing (Sec. 11-1-5) with procedures for Hearing on Exclusion and Removal in Non-Emergency Situations (Sec. 11-1-6). For example, Plaintiff's prayer for relief requests the Court issue an immediate Notice and Order of Exclusion and Removal of the Defendants from the Cheyenne River Indian Reservation (Sec. 11-1-5), yet Plaintiff also requests the Court schedule a hearing on the Petition for Exclusion and Removal of Defendants pursuant to Section Law & Order Code, Section 11-1-6(1), which is only required in non-emergency situations when an immediate order is not granted.

The nature of the allegations made by Lance Frazier and Harrold Hollow for whom the Cheyenne River Sioux Tribe brought this action certainly fits within the category of non-emergency situations. For example, the Complaint of Plaintiffs Lance Frazier and Harrold Hollow filed in Cheyenne River Sioux Tribal Court, Case No. 23C027, made allegations of conduct which they purport occurred during the 2021-2022 school year and through mid-October of the 2022-2023 school year. Yet, Plaintiffs Frazier and Hollow waited until April 28, 2023, to file their Complaint in Tribal Court as well as with the South Dakota Department of Education. Such a timeline and alleged fact pattern cannot be construed to constitute an emergency by any stretch of the term.

The actions taken by the Cheyenne River Sioux Tribe and the subsequent Emergency Exclusion Order of this Court have had far-reaching consequences beyond disruption of the personal and professional lives of the Defendants herein. Taking away a long-time teacher, principal and superintendent from the Dupree K-12 School negatively impacts the quality of education received by all children who attend the Dupree School District. The lack of due

process afforded to the Defendants has been alarming and discouraging, and the Defendants hereby request this Court apply the law and rescind the Emergency Order of Exclusion immediately.

Dated this 31st day of August, 2023.

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