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STATE OF NORTH DAKOTA

# 20210302
# IN THE SUPREME COURT
# STATE OF NORTH DAKOTA

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| Trenton Indian Housing Authority, | ) | |
| | ) | |
| Plaintiff and Appellee, | ) | **Supreme Court No.: 20210302** |
| | ) | |
| vs. | ) | **District Court No.: 2020-CV-00694** |
| | ) | |
| Lisa Poitra, | ) | |
| And All Other Unknown Occupants, | ) | |
| | ) | |
| Defendant and Appellant. | ) | |

APPEAL FROM AN ORDER OF EVICTION DATED OCTOBER 21, 2022

IN DISTRICT COURT

NORTHWEST JUDICIAL DISTRICT

WILLIAMS COUNTY, NORTH DAKOTA

THE HONORABLE JOSHUA B. RUSTAD

## BRIEF OF PLAINTIFF/APPELLEE TRENTON INDIAN HOUSING AUTHORITY

## ORAL ARGUMENT REQUESTED

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## JURISDICTIONAL STATEMENT

¶1. The District Court had jurisdiction to hear the case pursuant to N.D.C.C. §27-05-06(2). Pursuant to N.D. Const. art. VI §§ 2 and 6, and N.D.C.C. §28-27-02, this Court has jurisdiction to consider this appeal.

## REQUEST FOR ORAL ARGUMENT

¶2. Pursuant to N.D.R.App.P. 28(h), Appellee hereby requests oral argument for this appeal as the issues presented to this Court are complex issues of first impression. Because the issues presented are complex issues of first impression, oral argument is needed in order to fully explain and advocate for the claims enumerated herein.

## STATEMENT OF ISSUES

¶3. Whether the District Court erred in determining that the subject property managed by the Trenton Indian Housing Authority (TIHA) is not a dependent Indian community.

¶4. Whether the Trenton Indian Housing Authority (TIHA) validly consented to jurisdiction via contract with Turtle Mountain Band of Chippewa Indians for adjudication of eviction actions.

## STATEMENT OF THE CASE

¶5. On May 14, 2020, the Williams County Sheriff's Department served a Notice of Intent to Evict on Lisa Poitra (hereinafter referred to as "Appellant," "Defendant," or "Ms. Poitra"), as well as all other unknown occupants. On June 3, 2020, the Williams County Sheriff's Department served a copy of the Summons, Complaint, and Notice of Hearing on Ms. Poitra, as well as all other unknown occupants.

¶6. Ms. Poitra resides – and is still currently residing pending appeal – on property that is owned as fee land by the Trenton Indian Housing Authority (hereinafter referred to as "Appellee," "Plaintiff," or "TIHA"). Ms. Poitra's leased residence is the "subject property" for purposes of this appeal.

¶7. The eviction hearing was originally set for June 18, 2020 but was continued after Ms. Poitra's attorney made a motion to dismiss based upon the provisions outlined in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) of 15 U.S.C.A. § 9001, et seq. (2020).

¶8. At the June 18th hearing, the Court was not comfortable moving forward with an eviction proceeding if the CARES Act preempted the Court's jurisdiction.

¶9. Thus, the eviction hearing was continued until June 24, 2020, and each party was directed by the Court to brief the applicability of the CARES Act.

¶10. Plaintiff filed their brief on June 22, 2020.

¶11. On June 24, 2020, Defendant's attorney filed a motion to dismiss for lack of subject matter and personal jurisdiction.

¶12. Given the timing of the motion, Plaintiff's attorney consulted with Defendant's attorney, and both agreed to continue the June 24th eviction hearing in order to allow Plaintiff's attorney to file a response brief. The Court held a status conference to discuss the continuance.

¶13. On July 1, 2020, Plaintiff filed a response to the motion to dismiss for lack of subject matter and personal jurisdiction.

¶14. On July 14, 2020, Defendant filed a reply brief to Plaintiff's response to the motion to dismiss for lack of subject matter and personal jurisdiction. On September 2, 2020, the Court held a hearing to discuss Defendant's motion to dismiss. On November 18, 2020, the District Court denied Defendant's motion to dismiss.

¶15. Two subsequent motions to continue the eviction action was filed in the District Court by Defendant. The Court granted the first motion to continue but denied the second. However, Plaintiff and Defendant executed a stipulation to continue the eviction hearing until on or after July 1, 2021.

¶16. On July 12, 2021, the underlying eviction action of Appellant's appeal came on for hearing before the Honorable Joshua B. Rustad, Judge of the District Court of Williams County, State of North Dakota. Both Plaintiff and Defendant were represented by their respective counsel.

¶17. After the hearing the Court determined Ms. Poitra materially violated the terms and conditions of her written rental agreement with Plaintiff by failing or refusing to complete her annual recertification, and as such there were proper grounds for an eviction.

¶18. Additionally, at the conclusion of the hearing, Appellant's counsel renewed his motion to dismiss for lack of jurisdiction. The District Court previously addressed Defendant's jurisdictional challenge on November 18, 2020. *See* Appellant's App. at pgs. 132-135.

¶19. The District Court requested that Defendant file a brief explaining its position. The District Court also allowed the Plaintiff to respond within fourteen days. Defendant filed its brief on July 16, 2021. Plaintiff filed its brief on July 30, 2021.

¶20. On October 21, 2021, the District Court denied Plaintiff's renewed motion to dismiss for lack of personal jurisdiction and subject matter jurisdiction. *Id*. The District Court also granted the eviction against Ms. Poitra. *Id.*

¶21. On October 26, 2021, Defendant filed a petition with the District Court requesting an order to waive any filing fees, supersedeas bond and for stay pending appeal of the order of eviction. On November 14, 2021, Plaintiff filed its response in opposition to Defendant's petition. On January 5, 2022, the Court granted Defendant's request for stay pending appeal, but ordered that Defendant was obliged to furnish the supersedeas bond.

¶22. On February 9, 2022, Appellant filed its brief in support of its appeal. Appellee hereby submits this brief in opposition to Appellant's position.

## STATEMENT OF THE FACTS

¶23. In February of 1977, the Turtle Mountain Band of Chippewa Indians created Trenton Indian Housing Authority (TIHA) pursuant to Tribal Ordinance. *See* Appellant's App. at pgs. 68-88.

¶24. TIHA operates low-income housing pursuant to the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 et seq.) (NAHASDA). *See* Appellant's App. at pgs. 151-153, 205.

¶25. Under the NAHASDA, the Department of Housing and Urban Development (HUD) provides grants, loan guarantees, and technical assistance to Indian tribes and Alaska Native villages for the development and operation of low-income housing in Indian areas. *See* 25 U.S.C. 4101 et seq. The policies and procedures described in 24 C.F.R. sections 1000, et seq., apply to grants to eligible recipients under the Indian Housing Block Grant (IHBG) program for Indian tribes and Alaska Native villages. 24 C.F.R. § 1000.1. The regulations in 24 C.F.R. sections 1000, et seq., supplement the statutory requirements set forth in NAHASDA as much as practicable, and do not repeat statutory language. *Id*.

¶26. Section 1000.128(a) of Title 24 of the Code of Federal Regulations obligates TIHA to "verify that the family is income eligible based on anticipated annual income. The family is required to provide documentation to verify this determination. The recipient is required to maintain the documentation on which the determination of eligibility is based." *Id*.

¶27. On June 23, 2015, TIHA entered into a lease agreement with the Ms. Poitra to rent a residence located at 4428 147th Ave NW, Unit #307, Trenton, ND 58853. The initial terms required Ms. Poitra to submit monthly payments of $150.00 during the term of the lease. *See* Appellant's App. at pgs. 12-20.

¶28. Plaintiff's complaint alleged the following grounds for eviction based in contract law: (1) non-payment of rent, and (2) failure or refusal to comply with TIHA's recertification process, which was required both by the Lease and the laws and

regulations governing Department of Housing and Urban Development (HUD). Both causes were valid grounds for an eviction. However, the Court only considered the failure to recertify as a grounds for eviction due to the potential applicability of the CARES Act and any federal eviction moratoriums associated with the COIVD-19 pandemic. *See* Appellant's App. at pg. 40.

¶29. The subject property is (TIHA's fee land) is not located in the boundaries of the Turtle Mountain Indian Reservation.

¶30. Turtle Mountain Indian Reservation has not at any time claimed to have an ownership interest in the fee land.

¶31. The property is not held in any form of trust by the United States government for the benefit of the Turtle Mountain Indian Reservation or any individual tribe member.

¶32. The property is fee land owned by TIHA and would otherwise be subject to taxation. For example, in 2001, TIHA and Williams County entered into a cooperation agreement to forego the collection of taxes. This agreement was made because all projects (equally applicable to non-Indian projects) that provides any low-income housing are exempt from taxation by the State, County, and any Municipality. *See* (R:26:7:¶43).

¶33. Since TIHA's inception, it has operated as a separate and distinct organization from the Trenton Indian Service Area (TISA). TIHA and TISA each have their own Board of Directors and governing body, both of which serve separate and distinct purposes. *See* Appellant's App. at pgs. 201, 205.

¶34. Since the inception of TIHA, all TIHA eviction matters have been brought in the Williams County District Court. *See* Appellant's App. at pg. 213.

¶35. Appellant had previously been in front of the Williams County District Court for eviction proceedings. *See* (R:26:3:¶22). In that case, Poitra made a motion to dismiss based upon Trenton Indian Housing Authority's failure to comply with certain notice provisions of the Native American Housing Assistance and Self-Determination Act (NAHASDA), as well as for lack of jurisdiction. ***Id.*** The matter was dismissed without prejudice as this Court found, "This Court has subject matter jurisdiction to hear and rule on the action." *Id.*

¶36. Additionally in 2014, the Northwest Judicial District previously addressed the issue of jurisdiction in an identical action. *See* (R:26:3-4:¶23). TIHA brought an eviction action against Moran. At the eviction hearing, Moran argued the Williams County District Court lacked jurisdiction to hear the matter by specifically asserting TISA is part of "Indian Country" under 18 U.S.C.A. 1151, and thus, TIHA could not bring a case in state court. Northwest Judicial District Court Judge Jacobson allowed each party to submit written briefs regarding whether the district court had jurisdiction on the matter prior to issuing a ruling. The District Court granted TIHA's request for relief and evicted the tenant. *Id.*

¶37. The restraining order referenced in Appellant's Brief was only a temporary order, expired after ten-days of issuance, and was never decided on the merits. Further, the action in which the temporary restraining order was issued pertained to a civil action brought in Tribal court and has since been subsequently resolved. *See* Appellant's App. at pg. 222.

¶38. The District Court found that Ms. Poitra violated the material recertification term of her written lease agreement with TIHA. *See* Appellant's App. at pgs. 154-162. Appellant

is not disputing the facts that gave rise to the eviction action. Rather, Appellant is asserting that the District Court of Williams County did not have personal jurisdiction or subject matter jurisdiction over the eviction of Ms. Poitra.

## SUMMARY OF ARGUMENT

¶39. A State District Court does not have jurisdiction over wrongs committed in Indian Country. *South Dakota v. Bourland*, 508 U.S. 679, 151, 113 S.Ct. 679 (1993). However, Indians outside of Indian Country are subject to all state laws. *Organized Village of Kake v. Egan*, 369 U.S. 60, 75, 82 S.Ct. 562. In order for property to be included in Indian Country, the property must be (a) within the borders of an Indian reservation; (b) a dependent Indian community; (c) or an allotment. *See* 18 U.S.C.A.§ 1151. Appellant and Appellee both that the subject property neither falls within the borders of an Indian reservation nor is an allotment. Thus, in order for the District Court of Williams County to be deprived of jurisdiction over the underlying eviction action, the subject property must be found to be a dependent Indian community. Property is deemed a dependent Indian community when (1) lands have been set aside by the Federal Government for the use of the Indians as Indian land; and (2) the lands must be under federal superintendence. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998). Appellant relies on a four-factor test from *United States v. South Dakota*, 665 F.2d 837, 838 (8th Cir.1981) to illustrate that Appellant's property is a dependent Indian community under the *Alaska* test. As an aside, arguably, when the United States Supreme Court established the two-element *Alaska* test, they overruled or severely limited the *South Dakota* test. However, this Court has never addressed which test is the controlling test. Appellee asserts that the *Alaska* test is controlling.

¶40. The District Court correctly found that the subject property is not a dependent Indian community because the property has not been "set-aside by the federal government for Indians" and is not under "federal superintendence." Because the subject property is not a dependent Indian community, the property is outside of the definition of Indian Country under 18 U.S.C.A. section 1151. Therefore, according to the holding in *Organized Village of Kake v. Egan*, the subject property is subject to all laws under the State of North Dakota, including the jurisdiction of District Courts as stated in section 27-05-06 of the North Dakota Century Code.

¶41. Appellant argues that Tribal Ordinance 30 requires that all eviction actions must be brought in Tribal Court. *See* Appellant's Brief at pg. 35, ¶53. This assertion is a mischaracterization of the plain reading of the ordinance. The ordinance provides that "the Tribe Government hereby declares that the powers of the Tribal Government shall be vigorously utilized to enforce eviction of a tenant or homebuyer for nonpayment or other contractual violations including action through appropriate courts." *See* Appellant's App. at pg. 88 (emphasis added). Tribal Ordinance 30 uses the phrase "appropriate courts" not just "Tribal Court" or appropriate "Tribal Courts." Thus, the plain language of ordinance tends to indicate when appropriate, tribal court, federal court, or state court may all be proper courts to bring an eviction action.

¶42. For the foregoing reasons, highlighted above, the ruling of the District Court must be wholly affirmed.

## STANDARD OF REVIEW

¶43. The issues presented today are questions of law and questions of fact. Appellant has asserted that the "District Court failed to accurately weigh or analyze the factors for a

finding of a Dependent Indian Community." (Appellant's Brief, Pg. 8 ¶13). This argument indicates that the *facts* of the case were not accurately applied to the controlling test, thus creating issues of fact. In *Gustafson v. Poitra*, this Court has previously stated that,

> "If underlying jurisdictional facts are disputed, this Court is presented with a mixed question of law and fact, and we review the question of law de novo and the district court's findings of fact under the clearly erroneous standard of review. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, upon review of the entire record, this Court believes a mistake has been made."

. . .

*Gustafson v. Poitra*, 2018 ND 202, 916 N.W.2d 804.

¶44. Therefore, all questions of law shall be reviewed under a de novo standard and all questions of fact shall be reviewed under a clearly erroneous standard.

## LAW & ARGUMENT

I. **Whether the District Court erred in determining that the subject property managed by the Trenton Indian Housing Authority (TIHA) is not a dependent Indian community.**

### A. DEFINITION OF INDIAN COUNTRY

¶45. Appellant has asserted that the District Court of Williams County lacked jurisdiction to hear the underlying eviction matter because proper jurisdiction lies with the Tribal Court. Appellant also contends that the Tribal Court has jurisdiction to hear the eviction matter because the subject property is a dependent Indian community and thus, is Indian Country. Appellee opposes that assertion for a multitude of reasons.

¶46. As a preliminary matter, Appellant and Appellee both agree that the Federal District Court for the State of North Dakota is not the proper forum to hear the underlying eviction action.

¶47. It is undisputed that the underlying eviction action is not a federal question, and therefore, the proper jurisdiction lies with either the Williams County District Court or Turtle Mountain Reservation. NAHASDA specifically provides federal jurisdiction is not required for the adjudication of eviction actions. *See* Title 25 U.S.C. §§ 4101 - 4243, and specifically § 4137; *See also All Mission Indian Housing Authority v. Magante*, 526 F.Supp.2d 1112, 1115 (S.D. Cal. 2007) (Federal court did not have jurisdiction, pursuant to Native American Housing Assistance and Self-Determination Act (NAHASDA), to hear unlawful detainer action, in which federally-sanctioned and federally-funded Indian housing authority sought to evict tenants from home which it rented to them based on tenants' failure to pay rent; while NAHASDA provided comprehensive framework for governance of use of federal funds, it did not provide a cause of action for a simple eviction proceeding, and while provision of NAHASDA specified certain rules regarding evictions that had to be incorporated into all leases, NAHASDA did not address the issue of where such eviction proceedings should occur). Rather, a complaint for unlawful detainer is a landlord/tenant issue, which is generally a matter of state law. *Round Valley Indian Housing Authority v. Hunter*, 907 F. Supp. 1343, 1348 (N.D. Cal. 1995), citing *Powers v. United States Postal Service*, 671 F.2d 1041, 1045 (7th Cir. 1982) (stating "federal common law" for landlord/tenant issues does not exist).

¶48. Appellant contends that the subject property is situated in Indian Country and is a dependent Indian community because of its purported relationship with the federal government and the Turtle Mountain Band of Chippewa in northern North Dakota.

¶49. However, that assertion lacks merit because TISA's relationship with the federal government and the Turtle Mountain Band of Chippewa does not constitute dependent Indian community.

¶50. In general, tribal jurisdiction is confined to Indian Country. *South Dakota v. Bourland*, 508 U.S. 679, 151, 113 S.Ct. 679 (1993). Indians outside of Indian Country are subject to all state laws. *Organized Village of Kake v. Egan*, 369 U.S. 60, 75, 82 S.Ct. 562. Therefore, the crux of the jurisdictional issues before this Court is whether the subject property is in Indian Country. Federal law defines Indian Country as follows:

> "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

. . .

18 U.S.C.A. § 1151.

¶51. While the definition of "Indian Country" is situated in Title 18 (Crimes and Criminal Procedure) of the U.S. Code, the Supreme Court of the United States has repeatedly stated that the definition provided in section 1151 "applies to questions of both criminal and civil jurisdiction." *Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908, 916 (1st Cir. 1996). Other Courts have defined "Indian country" in civil cases in terms closely paralleling those of Section 1151, while

citing to that statute. *United States v. South Dakota*, 665 F.2d 837, 838 n. 3 (8th Cir.1981) (applying § 1151 in determining whether a housing project was a dependent Indian community), cert. denied, 459 U.S. 823, 103 S.Ct. 52, 74 L.Ed.2d 58 (1982).

¶52. Pursuant to 18 U.S.C. section 1151, in order for the subject property to be deemed Indian Country, one of the following categories must apply: (1) TIHA's property is held for the benefit of the Turtle Mountain Reservation; (2) TIHA's property is an allotment; (3) TIHA's property is a dependent Indian community; or (4) TIHA's property part of the reservation. If none of these categories apply to the subject property then the property is not Indian Country, and the Williams County District Court did in fact possess proper jurisdiction over the eviction action.

¶53. It is undisputed that the subject property is not held by the United States for the benefit of the Turtle Mountain Band of Chippewa Indians as TIHA holds the property in fee simple interest, and it is not held in trust for the benefit of the Turtle Mountain Reservation or any specific member thereof.

¶54. It is undisputed that the subject property is not within the boundaries Turtle Mountain Reservation, and therefore, the property cannot be considered Indian country pursuant to 18 U.S.C.A. § 1151(a).[1]

¶55. It is undisputed that the subject property is not an Indian allotment. As noted above, TIHA holds the subject property in fee simple interest. Therefore, the subject property is not considered Indian country pursuant to 18 U.S.C.A. § 1151(c).

[1] Heitkamp, H. (1994). Letter Opinion. *Trenton Indian Service Area, 94-L–174*, pg. 2.

¶56. The only applicable provision of 18 U.S.C.A. § 1151 that could vest jurisdiction with the Turtle Mountain Reservation is if this Court overruled the District Court and ultimately determined the subject property is a dependent Indian community. *See* 18 U.S.C.A. § 1151(b).

**B. TEST FOR DETERMINING "DEPENDENT INDIAN COMMUNITIES."**

¶57. The inclusion of "dependent Indian communities" in the definition of Indian country dates to Supreme Court cases from the early part of [the twentieth century]. *See United States v. Sandoval*, 231 U.S. 28, 46 (1913). Exactly what constitutes a "dependent Indian community," has been based upon courts conducting a functional inquiry into the nature of the community by weighing a series of factors established by case law. *Narrgannsett*.

¶58. The Supreme Court of the United States has also held that "the test for determining what is a dependent Indian community, for purposes of federal jurisdiction, must be a flexible one, not tied to any single talismanic standard such as percentage of Indian occupants, because needs of Indian people must necessarily change with years, and method of supervision over them by United States must change accordingly. *United States v. Mound,* 477 F. Supp. 156 (D.S.D. 1979).

¶59. In *Alaska v. Native Vill. of Venetie Tribal Gov't*, the United States Supreme Court defined exactly what a constitutes a dependent Indian community. The *Alaska* court held that,

> "Since 18 U.S.C. § 1151 was enacted in 1948, we have not had an occasion to interpret the term "dependent Indian communities." We now hold that it refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the

> Indians as Indian land; second, they must be under federal superintendence. . . . We therefore must conclude that in enacting § 1151(b), Congress indicated that a federal set-aside *and* a federal superintendence requirement must be satisfied for a finding of a "dependent Indian community"—just as those requirements had to be met for a finding of Indian country before 18 U.S.C. § 1151 was enacted. These requirements are reflected in the text of § 1151(b): The federal set-aside requirement ensures that the land in question is occupied by an "Indian community"; the federal superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question."

*Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998) (emphasis added); *See also Alyseka Pipeline Service Co. v. Kluti Kaah Native Village of Copper Center (9th Cir. 1996).*

¶60. Appellant relies on the holding in *South Dakota* to support the assertion that TIHA is a dependent Indian Community. The Eighth Circuit concluded whether a particular geographical area is a dependent Indian community depends on a consideration of the following factors:

> (1) whether the United States has retained title to the lands which it permits the Indians to occupy and authority to enact regulations and protective laws respecting this territory,
>
> (2) the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area,
>
> (3) whether there is an element of cohesiveness manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality, and
>
> (4) whether such lands have been set apart for use, occupancy, and protection of dependent Indian peoples.

. . .

*United States v. State of S. D.*, 665 F.2d 837 (8th Cir. 1981).

¶61. It is important to note that *South Dakota* was decided in 1981 by the Eighth Circuit Court of Appels (certiorari denied) and *Alaska* was decided by the Supreme Court of the United States in 1998. Both *South Dakota* and *Alaska* each discuss a test for determining what constitutes a dependent Indian community. However, the four-factor test in *South Dakota* has arguably been replaced by the two-element test in *Alaska*.

¶62. In *Owen v. Weber*, the Eighth Circuit held that "Federal law defines three classes of Indian country. *See* 18 U.S.C. § 1151. The housing complex's land does not lie within a reservation and is not part of an allotment, so this case centers on whether it is a "dependent Indian community." *Id*. Dependent Indian communities must "satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Owen v. Weber*, 646 F.3d 1105 (8th Cir. 2011); citing *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998).

¶63. In the *Owen* Court's footnote, the Court stated that,

> "[T]he parties also discuss the "dependent Indian community" test from *United States v. South Dakota*, 665 F.2d 837 (8th Cir.1981). We need not decide whether *South Dakota* retains a role in describing the community to which *Native Village of Venetie's* test applies. See *Native Vill. of Venetie*, 522 U.S. at 531 n. 7, 118 S.Ct. 948 (rejecting the Ninth Circuit's similar test). The parties agree that the housing complex's land is the "appropriate subject property." See *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1178 (10th Cir.2010) (en banc) (Ebel, J., dissenting), citing *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951, 970–71 (8th Cir.2009), superseded, 606 F.3d 994 (8th Cir.2010) (applying *Native Village of Venetie* without citing *South Dakota*). In any event, state court decisions are reviewed for compliance with Supreme Court law. See *Christian v. Dingle*, 577 F.3d 907, 912 (8th Cir.2009) (citing 28 U.S.C. § 2254(d)(1)). *Id.* at fn. 3.

¶64. Neither the North Dakota Supreme Court nor the Eighth Circuit Court of Appeals have determined whether the four-factor *South Dakota* test or the two-element *Alaska* test

is controlling in North Dakota. However, due to the recency and supremacy of the *Alaska* decision and the statements made in *Owen*, Appellee asserts that the *Alaska* test is ultimately the controlling test. Thus, Appellee asserts that in order for a geographical area to be designated as a dependent Indian community, the community (1) must have been set aside by the Federal Government for the use of the Indians as Indian land and (2) they must be under federal superintendence.

¶65. However, since Appellant relies on *South Dakota* to support its assertion that TIHA is a dependent Indian community, a full analysis of the *South Dakota* factors will also be conducted. Regardless of whether the *Alaska* or *South Dakota* test applies or whether both can co-exist harmoniously, the determination of whether a dependent Indian community exists entails a factually dependent, multifactored inquiry, whether the land at issue be set aside for use of the Indians as such and that the Indians be under the superintendence of federal government. *Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co*., 89 F.3d 908 (1st Cir. 1996). In fact, the *Narragansett* opinion tends to show that the *South Dakota* test fully encompasses the requirements of the *Alaska* test. The Court opined that "Roughly speaking, the second and third factors [of the *South Dakota* test] weigh whether there is, in fact, an Indian community, and the first and fourth [factors of the *South Dakota* test are] whether it is a dependent one." *Id.* at 917.

¶66. The *Narragansett* Court thoroughly addressed the *South Dakota* factors and ultimately concluded that the housing site was not a dependent Indian community. In *Narragansett*, the State of Rhode Island and the City of Charlestown sought a permanent injunction against the Narragansett Indian Tribe and tribal housing authority to prevent

the construction of a housing complex that was not in compliance with the state and local building and zoning restrictions on property owned by the Tribe. *Id*. at 910-11. The *Narragansett* Court addressed the question of whether the land in question was "Indian country" as defined in 18 U.S.C. § 1151(b). *Id*. at 911. The Narragansett Tribe and housing authority purchased land from a private developer to construct the housing project. *Id*. The property was adjacent to the Tribe's other lands, separated from them by a town road. *Id*. The Tribe's church, Tribal assembly and offices where the tribal government meets were close in proximity to the housing site. *Id*. The housing authority project was open to anyone, but it was contemplated that most, if not all of the units, would be occupied by elderly and low-income members of the Tribe. *Id*. The United States Department of Housing and Urban Development (HUD) recognized the housing authority as an Indian Housing Authority and provided financing for the purchase of the housing site and construction of the buildings. *Id*. HUD also provided money both for managing the project and for subsidizing the occupants' rent. *Id*. After the tribal housing authority purchased the land it was then transferred to the Tribe. *Id*. A deed restriction required the land be placed in trust with the federal government, for the express purpose of providing housing for tribal members. *Id*.

¶67. Based upon these facts, the *Narragansett* Court conducted an analysis to determine whether the land in question was "Indian country" as defined in Section 1151(b). In doing so, the *Narragansett* Court applied the *South Dakota* test and analyzed the factual circumstances in accordance with the factors established in *South Dakota*.

¶68. The *Narragansett* Court concluded that even though that some of these factors weighed in favor of the Tribe (which included nature of the area in question, inhabitants

of the area to Indian Tribes and the federal government, the established practice of government agencies toward the area, and cohesiveness), ultimately the federal role in the housing authority project did not rise to the level to establish the housing site was set aside by the federal government. *Id*. at 921. Therefore, the *Narragansett* Court determined the land did not fall within the definition of Indian country pursuant to Section 1151(b). Id. (emphasis added).

¶69. Based on the facts provided about TIHA, the facts in *Narragansett* are quite similar to the present case. Appellee is requesting this Court to apply the holding in *Narragansett* and determine that the subject property does not fall within the definition of a dependent Indian community.

### C. WHETHER AN INDIAN COMMUNITY EXISTS (FEDERAL SET-ASIDE ELEMENT – ALASKA)

¶70. The second and third factors in the *South Dakota* test applies to this *Alaska* element.

i. *South Dakota* Factor No. 2 – Nature of Area/Relationship of Inhabitants

¶71. The second *South Dakota* factor is "the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area." *South Dakota* 665 F.2d at 839.

¶72. Appellant states that "Trenton Indian Health Services Clinic, funded by U.S. Department of Health & Human Services, which provides a local clinic, medications, dental services, to enrolled Turtle Mountain Tribal members." *See* Appellant's Brief, pg. 33, ¶49. Appellant is attempting to use the presence of these services to illustrate the

federal influence in within the TIHA. However, in *Alaska* "the Tribe contend[ed] that the requisite federal superintendence [was] present because the Federal Government provide[d] "desperately needed health, social, welfare, and economic programs" to the Tribe." *Alaska v. Native Vill. of Venetie Tribal Gov't,* 522 U.S. 520, 534 (1998). The *Alaska* Court held that "Our Indian country precedents, however, do not suggest that the mere provision of 'desperately needed' social programs can support a finding of Indian country. Such health, education, and welfare benefits are merely forms of general federal aid . . . they are not indicia of active federal control over the Tribe's land sufficient to support a finding of federal superintendence." *Id*.

¶73. Furthermore, Appellant is attempting to use the fact that Appellee receives HUD funding is indicative that the land at issue is a dependent Indian community. That assertion is incorrect. In *South Dakota* the Court held that "the fact that the existence of the project is contingent upon continued HUD financing is irrelevant." *South Dakota* 665 F.2d at 842. The *South Dakota* court opened that "[a]s the district court properly noted, all Indian country may ultimately lose that status but that does not mean that while land is within a reservation boundary, or while it is held in trust by the United States, section 1151 does not apply. *Id.* The important consideration is what the land in question is now, not what it may become in the future. *Id.*; *United States v. Pelican*, 232 U.S. 442, 449-50, 34 S.Ct. 396, 399, 58 L.Ed. 676 (1914).

¶74. In February of 1977, the Turtle Mountain Band of Chippewa Indians created Trenton Indian Housing Authority (TIHA) pursuant to Tribal Ordinance. *See* Appellant's App. at pgs. 68-88.

¶75. TIHA operates low-income housing pursuant to the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 et seq.) (NAHASDA). However, the subject property is not solely for Indians. *See* Appellant's Appendix at pg. 71. Under the NAHASDA, the Department of Housing and Urban Development (HUD) provides grants, loan guarantees, and technical assistance to Indian tribes and Alaska Native villages for the development and operation of low-income housing in Indian areas. *See* 25 U.S.C. 4101 et seq.

¶76. The Turtle Mountain Band of Chippewa Indian Reservation is approximately 240 miles away from TIHA. [2] The only Trust lands in Trenton are those lands in which the local casino is located on. *See* Appellant's App. at pg. 222.

¶77. TIHA operates a low-income housing authority for certain individuals living in the Trenton Area. While TIHA does have a preference of enrolled members of the Turtle Mountain Band of Chippewa, in order to live in TIHA housing a person does not have to be an enrolled member of the tribe. *See* Appellant's App. at pg. 208. Thus, Appellant's argument that TIHA is has been set-aside for the sole benefit of Indians, is simply not true.

¶78. Admittedly, there is arguably some relationship between TIHA and the federal government given the fact TIHA operates low-income housing pursuant to the NAHASDA. However, pursuant to the holdings in *South Dakota, Pelican,* and *Alaska*, this interrelationship does not rise to the level of setting apart the land for the use, occupancy, and protection of dependent Indian peoples.

[2] [2] Heitkamp, H. (1994). Letter Opinion. *Trenton Indian Service Area, 94-L–174,* pg. 2.

¶79. Short of the federal funding TIHA receives under NAHASDA, the federal government has little to no governance or authority over TIHA lands.

¶80. Therefore, this factor weighs in favor of Appellee.

ii. *South Dakota* Factor No. 3 – Cohesiveness

¶81. The third *South Dakota* factor is "whether there is an element of cohesiveness manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality." *South Dakota* 665 F.2d at 839.

¶82. In *Narragansett*, the court found that the cohesive factor weighed heavily in favor of the finding of a dependent Indian Community. *Narragansett* 89 F.3d at 918. The community in *Narrgansett* was significantly more cohesive than TIHA. For example, "the proximity of the property in *Narragansett* was adjacent to the Tribe's other property, which included Tribe's church, Tribal assembly and offices where the tribal government met." *Id.* Despite the fact the *Narragansett* court found that the community had a high level of cohesiveness between the inhabitants and the locality, the *Narragansett* Court ultimately concluded that the lands were not a dependent Indian community.

¶83. In the present case, TIHA has operated as a separate and distinct organization from the Trenton Indian Service Area (TISA). TIHA and TISA each have their own Board of Directors and governing body, both of which serve separate and distinct purposes.

¶84. While TIHA offers housing to low-income tribal members and non-tribal members in the Trenton area, its proximity to the Turtle Mountain Band of Chippewa Indian Reservation is significant. As stated-above, TIHA is approximately 240 miles

away from Turtle Mountain Band of Chippewa Indian Reservation. No other trust or tribal lands exist in Trenton other than the Grand Treasure Casino. The circumstances in the present case illustrate a stark difference from *Narragansett* when determining cohesiveness.

¶85. Also, TIHA receives its water services from Trenton Water Department, a non-Indian entity. Turtle Mountain Band of Chippewa Indian Reservation provides no tribal funding to Trenton Water Department.

¶86. TIHA uses and operates roads under the control and jurisdiction of Trenton Township. The Trenton Township receives county, state, and federal funding for maintenance and operation of the roads. Turtle Mountain Band of Chippewa Indian Reservation provides no tribal funding for the roads in Trenton Township and has no authority over the management or supervision of said roads.

¶87. The residents residing in Trenton Township, including residents of TIHA, attend school at the Trenton School, which is a non-Indian school. Trenton School is funded by county, state, and federal funding. The Bureau of Indian Education has no control or authority over Trenton School and provides no funding for the school.

¶88. TISA does not provide any additional financial resources to the community through Bureau of Indian Affairs for roads, water, sewer, or other related services.

¶89. In short, unlike in *Narragansett*, TIHA is not close to the center of the tribal government, culture, and religious life of the Turtle Mountain Band of Chippewa Indian Reservation located in Belcourt, North Dakota.

¶90. Therefore, while TIHA was created for low-income tribal members in Trenton, its lack of proximity to tribal government, culture, and religious life of the Turtle Mountain Band of Chippewa Indian Reservation should cause this Court to conclude this factor weighs in favor of Appellee.

## D. DEPENDENCY OF COMMUNITY ON FEDERAL GOVERNMENT (SUPERINTENDENCE ELEMENT – ALASKA)

¶91. The first and fourth factors in the South Dakota test applies to this Alaska element. The first *South Dakota* factor is "whether the United States has retained title to the lands which it permits the Indians to occupy and authority to enact regulations and protective laws respecting this territory." *South Dakota* 665 F.2d at 839.

iii. *South Dakota* Factor No. 1 – Title to Land

¶92. This factor in *Narragansett*, weighs heavily in favor of the tribe. However, the *Narragansett* court failed to find that the title to the land weighed in favor of finding a dependent Indian community. The *Narragansett* court found that "the federal government does not in fact hold title; rather, the housing site is held by the Tribe, who has leased the land to the [housing authority], in a lease approved by the BIA." *Narragansett* 89 F.3d at 919. The Court went on to state that, "Nonetheless, this must weigh against the Tribe." *Id.* (citing *Blatchford v. Sullivan*, 904 F.2d 542 (10th Cir.1990)) (considering, inter alia, fact that private owner held land in determining that land was not dependent Indian community, although it was surrounded by Navajo allotment land); *Weddell*, 636 F.2d at 213 (noting, inter alia, that although land was within the exterior boundaries of the

original Yankton Sioux Indian Reservation, it was privately held, and finding that the land was not a dependent Indian community for purposes of criminal jurisdiction).

¶93. In other words, the *Narragansett* Court *still* found that lands owned by the tribe did not support the finding of a dependent Indian community. The Court stated that while a relationship exists to the extent that these federal entities are active in the housing site, their actions do not rise the level of setting apart the land for the use, occupancy, and protection of dependent Indian peoples *Narragansett* 89 F.3d at 918. In the present case, the ownership of the land at issue is far more attenuated than the facts in *Narragansett.* The TIHA (a disconnected entity from the tribe) owns the property, not the Turtle Mountain Band of Chippewa.

¶94. The land where TIHA's housing project is located is outside the boundaries of the Turtle Mountain Band of Chippewa Indians Reservation. Neither the Federal Government nor Turtle Mountain Indian Reservation have at any time claimed to have an ownership interest in the land. As stated herein since the inception of TIHA, all TIHA evictions on TIHA lands have been brought in the District Court of Williams County. *See* Appellant's App. at pg. 213. The Tribe has never intervened in *any* of these eviction actions and have also failed to file any sort of amicus brief in support of its purported jurisdiction. It is undisputed that the title to the land is not held in trust by the federal government for the benefit of Turtle Mountain Band of Chippewa Indian Reservation. Nor is title to the lands vested in the name of the Turtle Mountain Band of Chippewa Indian Reservation. Rather, the title is vested in the name of TIHA.

¶95. Admittedly, these facts alone likely do not preclude the land owned by TIHA for the housing authority to be deemed a dependent Indian community, however, Appellee

argues these circumstances undoubtedly do weigh in their favor and against Appellant. See *Narragansett Indian Tibe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908, 918-19 (1st Cir. 1998) (While the Tribe applied for trust status, as the record stands, the status has not been granted. While the fact that the Tribe, not the government, owns the land does not preclude a finding that the housing site is a dependent Indian Community, it nonetheless weighs against the Tribe).

¶96. The second part of this factor focuses on who has the authority to enact regulations and laws. For several decades, the TIHA has been in continuous contract with Williams County to make annual payments in lieu of property taxes and pay annual assessments. Since 1999, TIHA has been in continuous contract with the City of Williston for the same. The District Court concluded that the State of North Dakota has authority over the TIHA property. For this reason, this portion of the factor weighs in favor of the Appellee.

iv. *South Dakota* Factor No. 4 – Set-Apart Requirement

¶97. The fourth *South Dakota* factor is "whether such lands have been set apart for use, occupancy, and protection of dependent Indian peoples." *South Dakota* 665 F.2d at 839.

¶98. This factor is generally the ultimate issue in the factual analysis. *See United States v. Levesque*, 681 F.2d 75, 77 (1st Cir. 1996) (the ultimate issue in the factual analysis for determining whether land is Indian country is whether that land is validly set apart for the use of Indians under the superintendence of the Government). (emphasis added).

¶99. Land is validly set apart for the use of Indians only if the federal government takes some action indicating the land is designated for use by the Indians. *Narragansett*

89 F.3d at 919. In other words, "[s]uperintendence by the federal government, and the consequential political dependence on the part of the tribe, exists for purposes of section 1151(b) where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area." *Id*. at 920.

¶100. Had TIHA's lands been placed in trust by the United States for the tribe, this factor would have been met. Taking Trust land is considered the evaluation and acceptance of responsibility indicative that the federal government has set aside the lands. See *Buzzard v. Okalhoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993), cert. denied sub nom. (trust land is set apart for the use of Indians by the federal government because it can be obtained only by filing a request with the Secretary of the Interior, who must consider, among other things, the Indian's need for the land, and the purposes for which the land will be used. If the request is approved, then the United States holds the land as trustee. . . .).

¶101. The vast majority of cases which analyze what constitutes a dependent Indian community, since Section 1151(b) was enacted, find there is such a community if the land is held in trust. *United States v. Driver*, 945 F.2d 1410, 1415 (8th Cir. 1991), cert. denied; *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986); *South Dakota*, 665 F.2d at 839; *United States v. Mound*, 477 F.Supp. 156, 158 (D.C. S.D. 1979); or as settlement lands, *Youngbear v. Brewer*, 415 F.Supp. 807, 809 (N.D.Iowa 1976), aff'd, 549 F.2d 74 (8th Cir.1977).

¶102. Most cases where land is privately held, even if by a tribe, the courts found there was not a dependent Indian community. See *Narraganset*, 89 F.3d 908 (land purchased

by the tribe were not set apart by the federal government); *Buzzard*, 992 F.2d at 1075 (involving land purchased by tribe); *Blatchford*, 904 F.2d at 548 (addressing privately held land surrounded by Navajo allotment land); *Weddell*, 636 F.2d at 213 (involving independent municipal corporation on former Indian reservation); *United States v. Oceanside Okla., Inc.*, 527 F.Supp. 68, 69 (W.D.Okla.1981) (addressing land held in fee by non-Indians); *Alaska v. Native Vill. of Venetie Tribal Gov't,* 522 U.S. 520 (1998)., at (after settlement act extinguished aboriginal claims, fee held by Native Village of Venetie Tribal Government).

¶103. The finding in *Buzzard* also weighs against finding the housing authority meets the set apart requirement. In *Buzzard*, the Indian tribe unilaterally purchased the lands in dispute, and held title to them in fee simple. *Buzzard* 992 F.2d at 1076. Instead of housing, it set up commercial smoke shops on the land. *Id.* The tribe claimed that the land was Indian country because it had been set apart by the federal government for the use of the Indians. *Id*. The *Buzzard* court rejected the tribe's argument, finding that a restriction on alienation by itself is insufficient to make the land Indian country, and concluded:

> If the restriction against alienation were sufficient to make any land purchased by the [tribe] Indian country, the [tribe] could remove land from state jurisdiction and force the federal government to exert jurisdiction over that land without either sovereign having any voice in the matter. Nothing in *McGowan* or the cases concerning trust land indicates that the Supreme Court intended for Indian tribes to have such unilateral power to create Indian country.

*Id*. at 1077.

¶104. As in *Narragansett* and *Buzzard*, the federal role in the TIHA project is simply not sufficient to establish that the housing site was "set apart" by the federal government or under the "superintendence" of the federal government.

¶105. Based on the foregoing facts, this Court should reject Appellant's arguments as the subject property is owned in fee by TIHA, is not held in trust or as settlement lands, and that the federal government does not exercise some similar level of control over the property. Therefore, these facts should preclude this Court from finding that TIHA is a dependent Indian community.

## II. **Whether the Trenton Indian Housing Authority consented to jurisdiction by contracting with Turtle Mountain Band of Chippewa Indians for adjudication of eviction actions.**

¶106. Appellant contends that, pursuant to Tribal Ordinance 30, the Turtle Mountain Tribal Court possesses exclusive jurisdiction to hear TISA eviction actions. However, Appellant misstates the plain language and the applicability of Tribal Ordinance 30.

¶107. *Article VIII, Cooperation In Connection With Projects*, which contains the only language in Tribal Ordinance 30 that references evictions. That portion states:

> 1. For the purpose of aiding and cooperating in the planning, undertaking, construction or operation of projects, the Tribe and Counsel hereby agrees [sic] that:
>
> (e) The Tribe Government hereby declares that the powers of the Tribal Government shall be vigorously utilized to enforce eviction of a tenant or homebuyer [sic] for nonpayment or other contract violations including action through the appropriate courts.
>
> (f) The Tribal Courts where appropriate and legal shall have jurisdiction to hear and determine an action for eviction of a tenant or homebuyer [sic]. The Tribal Government hereby declares that the powers of the Tribal courts shall be vigorously utilized to enforce eviction of a tenant or homebuyer [sic] for nonpayment or other violations
>
> . . .

Tr. Ord. 30, Art. VIII §§(e)-(f) (*See* Appellant's App. at pg. 88).

¶108. Additionally, Tribal Ordinance 30 also provides that TIHA has broad powers related to: providing housing for Indians and Non-Indians (*See* Appellant's App. at pg. 70); ability for Indians and Non-Indians to serve on TIHA's board (*See* Appellant's. App. at pgs. 73-75); ability to consent to sue, be sued, and enter into any contracts with any local, state, or federal agency or authority (*See* Appellant's. App. at pgs. 76-80); ability to lease, rent, sell, any property owned by TIHA without tribal or federal approval (*See* Appellant's. App. at pgs. 84-85); ability to terminate any lease or rental agreement for a breach of contract terms and the ability to bring an eviction action (venue not specified) (*See* Appellant's. App. at pgs. 84-85).

¶109. Tribal Ordinance 30 gives TIHA broad powers to facilitate and govern how TIHA sees fit. Tribal Ordinance 30 essentially allows TIHA from abiding by any restrictions set forth by the Tribe and the federal government.

¶110. Furthermore, this language is not determinative of jurisdiction. It states the Tribe Government will vigorously enforce evictions, including action in appropriate courts. If, indeed, the Tribal Court was the only "appropriate" court, this statement would not be needed. This language acknowledges the Tribe Government's awareness there would be circumstances, which were not qualified at the time, where one court would be more appropriate than another. In subsection (f), the Tribe Government again acknowledges the Tribal Court may not be the appropriate and legal forum for adjudication of evictions, but this language assures tenants or home buyers that eviction, wherever the jurisdiction may be, is something of which they should be wary.

¶111. The lack of specification cannot simply be attributed to an oversight on the part of the Tribe Government. Appellee's land is approximately 240 miles from Belcourt, ND. Even if the Bureau of Indian Affairs' law enforcement had jurisdiction over the subject property, which it does not, the use of the Tribe Government's resources for service of process alone would be impractical. Furthermore, the Tribe Government specifically designated the jurisdiction for elections in Tribal Ordinance 30 and was therefore cognizant of jurisdiction issues.

¶112. Arguably, the Turtle Mountain Tribal Court does not have jurisdiction over the underlying eviction action due to its own Tribal Constitution.

¶113. This determination is backed by the fact the other parts of the Turtle Mountain Band of Chippewa Indians' Constitution and Tribal Codes limit the Tribe's jurisdiction to certain identified areas, which clearly do not include the subject property.

¶114. The Turtle Mountain Band of Chippewa Indians' Constitution Article XIV – SEPARATION OF POWERS: Judiciary, Section 3(a), describes the powers of the Turtle Mountain Judiciary as follows:

> The Judicial Branch of government of the Turtle Mountain Band of Chippewa Indians shall have jurisdiction, as determined by legislative action pursuant to Chapter 1.05 and Chapter 2.01 of the Turtle Mountain Tribal Code and applicable federal law, to adjudicate actual cases and controversies that arise under the Turtle Mountain Constitution, statutes, resolutions, civil and criminal causes of action and legal decisions, and to ensure due process, equal protection, and protection of rights arising under the Indian Civil Rights Ad. of 1988, as amended, for all persons and entities subject to the criminal and civil Jurisdiction on the Turtle Mountain Tribe. (emphasis added).

(*See* Appellant's Appendix at pgs. 106-111).

¶115. Section 2.01 (jurisdiction of civil procedure) of the Turtle Mountain Tribal Code provides, "The territorial Jurisdiction of the Court extends to all territory within the exterior boundaries of the Turtle Mountain Jurisdiction as defined by Section 1.05 of this Code unless otherwise provided." (*See* Appellant's App. at pg. 91).

¶116. Section 1.0502. Jurisdiction, states as follows:

> For the purpose of enforcement of this Code, the Turtle Mountain Jurisdiction shall be deemed to Include all territory within the boundaries of the Turtle Mountain Indian Reservation, including fee patented lands, roads, water, bridges and lands used for the Bureau of Indian Affairs purposes, and shall also include all Indian trust and restricted lands, specifically located within Townships 181 N, 162N, 163N, and 164N, and Ranges 70W, 71W, 72W, and 73W, except lands located within Incorporated cities, Rolette County. North Dakota.

*See* (R:30:2).

¶117. It is clear the Article XIV of Turtle Mountain Band of Chippewa Indians' Constitution as well as Section 2.01 and 1.0502 of the Turtle Mountain Tribal Code limit the Tribe's civil jurisdiction to only reservation lands or trust lands.

¶118. The Appellee owns the subject property in fee simple, and this land is not subject to restrictions. The subject property is well outside of reservation boundaries and is not held in any form of trust by the U.S. Government for the benefit of the Turtle Mountain Band of Chippewa Indians or an individual tribe member.

¶119. For decades, the Appellee has been in continuous contract with Williams County to make annual payments in lieu of property taxes and pay annual assessments. *See* (R:26:7:¶43). The Turtle Mountain Band of Chippewa Indians do not collect payments for tax or assessment from the Plaintiff because the tribe does not have Jurisdiction. Without entering into arrangements with Williams

County and the City of Williston for payment in lieu of taxes, TIHA would be liable for all county and/or municipal property taxes just as any other property owner.

## CONCLUSION

¶120. A State District Court does not have jurisdiction over wrongs committed in Indian Country. *South Dakota v. Bourland*, 508 U.S. 679, 151, 113 S.Ct. 679 (1993). However, Indians outside of Indian Country are subject to all state laws. *Organized Village of Kake v. Egan*, 369 U.S. 60, 75, 82 S.Ct. 562. In order for property to be included in Indian Country, the property must be (a) within the borders of an Indian reservation; (b) a dependent Indian community; (c) or an allotment. *See* 18 U.S.C.A.§ 1151. Appellant and Appellee agree that the Appellant's property neither falls within the borders of an Indian reservation nor is an allotment. Thus, in order to deprive the Williams County District Court of jurisdiction over the underlying eviction action, the Appellant's property must be found to be a dependent Indian community. Property is deemed a dependent Indian community when (1) lands have been set aside by the Federal Government for the use of the Indians as Indian land; and (2) the lands must be under federal superintendence. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998). Appellant relies on a four-factor test from *United States v. South Dakota,* 665 F.2d 837, 838 (8th Cir.1981) to illustrate that Appellant's property is a dependent Indian community under the *Alaska* test.

¶121. The District Court did not err in finding that the subject property is not situated within a dependent Indian community because the property has not been "set-aside by the federal government for Indians" and the subject property is not under "federal

superintendence." Thus, the subject property fails to meet the two element *Alaska* test to establish a dependent Indian community. Because the subject property is not a dependent Indian community, the property is outside of the definition of Indian Country in 18 U.S.C.A. section 1151. Therefore, according to the holding in *Organized Village of Kake v. Egan*, the subject property is subject all laws under the State of North Dakota, including the jurisdiction of District Courts as stated in section 27-05-06 of the North Dakota Century Code.

¶122. Furthermore, Appellee argues that section (e), article VIII, of Tribal Ordinance 30 requires that all eviction actions must be brought in Tribal Court. This assertion is a mischaracterization of the plain reading of the ordinance. The ordinance provides that "the Tribe Government hereby declares that the powers of the Tribal Government shall be vigorously utilized to enforce eviction of a tenant or homebuyer for nonpayment or other contractual violations including action through appropriate courts." (*See* Appellant's App. at pg. 88). Tribal Ordinance 30 uses the phrase "appropriate courts" not just the Tribal Court. Thus, the plain language of ordinance tends to indicate that tribal court, federal court, or state court may all be proper courts to bring an eviction action. Finally, ever since the beginning of TIHA, which was established in 1977, eviction actions have always been conducted and adjudicated within the State Court situated in Williams County, North Dakota. Thus, Appellee respectfully requests this court the ruling of the District Court must be wholly affirmed.

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## CERTIFICATE OF COMPLIANCE

¶123. Pursuant to N.D.R.App.P. 32(a)(8)(A), undersigned counsel certifies that this brief complies with the page limitation. This excluding this certificate of compliance and certificate of service, this brief contains 37 pages.

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## CERTIFICATE OF SERVICE

¶124. Undersigned counsel hereby certifies that on March 8, 2022, he filed this brief and appendix electronically, using the North Dakota Supreme Court's E-filing Portal. Through this portal, counsel has served Appellant a copy of the brief and appendix, at aturner@legalassit.org.

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**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

Trenton Indian Housing Authority,
Plaintiff and Appellee,

Supreme Court No. 20210302
District Court No. 53-2019-CV-01545

vs.

Lisa Poitra
And All Other Unknown Occupants,
Defendant and Appellant

**AFFIDAVIT OF SERVICE**

STATE OF NORTH DAKOTA )
): ss
COUNTY OF WILLIAMS )

¶1. I, **Mattie Booth**, being first duly sworn, state that on the 14 day of March, 2022, this affiant served the following documents:

**1.** Brief of Plaintiff/ Appellee Trenton Indian Housing Authority

Upon:

Alexander Turner
aturner@legalassist.org

¶2. The above documents were served by electronic mail in an attachment and addressed to the above-named attorney at the e-mail address listed above.

/s/ Mattie Booth

Mattie Booth