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SUPREME COURT OF THE NAVAJO NATION
NO. SC-CV-06-10

John Doe BF,

Plaintiff/Appellant,

v.

Diocese of Gallup, et al.,

Defendants/Appellees.

APPELLEE BRIEF BY CHUCK CICHANOWICZ

Appeal from the District Court
for the District of Shiprock
Case No. SR-CV-369-07

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Oral Argument Requested

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STATEMENT OF THE CASE

Pursuant to Rule 11 of the Navajo Rules of Civil Appellant Procedure, Defendant/Appellee Chuck Cichanowicz files this Brief. Consistent with Rule 11(f), Cichanowicz respectfully adopts by reference and joins the arguments and authorities set forth by other Appellees in their respective briefs.

The District Court properly found that Plaintiff's claim is barred by the statute of limitations because Plaintiff has always been aware of the alleged sexual contact and his alleged injury. Order to Dismiss ¶¶ 4, 9 (Exhibit 6 to Appellant's Brief). Plaintiff contended only that he was unable to connect the two for 20 plus years. The Court correctly found that such contentions do not survive the statute of limitations. *Id.* ¶¶ 10-12, 16. In the alternative, Plaintiff's claim is barred by the doctrines of laches, due process and Fundamental Law, issues presented to the District Court but not ruled upon. Cichanowicz' Motion to Dismiss Second Amended Complaint at 6-8 (Exhibit 7 to Appellant's Brief).

Additionally, Cichanowicz contends that the District Court erred in finding that it has jurisdiction over this action and him, an issue which may be raised at any point in the proceedings and was raised to the District Court, respectively. Cichanowicz' Motion to Dismiss Second Amended Complaint at 1-5; Order to Dismiss at 1.

STATEMENT OF FACTS

This is an appeal by a plaintiff who does not establish that he is, or was, a member of the Navajo Nation or the status of land where a tort allegedly occurred over 20 years ago. His claim is time-barred and the Nation's courts lack jurisdiction.

Plaintiff misstates a fact critical to this appeal. He contends that he "was a member of the Navajo Nation" and relies on paragraph 2 of the Second Amended Complaint for this assertion. Appellant's Brief at 3. That is unsupported. Plaintiff has **never** alleged or testified about his membership in the Nation, despite filing three complaints and an affidavit. All that Plaintiff has alleged is that he resided on the Nation. Second Amended Complaint ¶ 2 (Exhibit 1 to Appellant's Brief). In his affidavit, Plaintiff did not address the issue. Plaintiff's Affidavit (Exhibit 2 to Appellant's Brief). Plainly, it is important for jurisdiction that Plaintiff has failed to allege, or offer evidence regarding, his membership in the Nation.

In addition, Plaintiff has never pled the status of the land where the alleged sexual acts took place. In his brief, Plaintiff states that the acts took place "on the Navajo Nation Reservation." Appellant's Brief at 3; *see also* Second Amended Complaint ¶ 14. But, at paragraph 9 of the Second Amended Complaint, Plaintiff alleges that the alleged acts took place "on the premises owned by Defendant Diocese." Plaintiff never pleaded where the alleged acts took place and the Second Amended Complaint (and prior complaints) indicate that it was on non-Indian fee land.

A few undisputed facts set forth by the District Court in its Order to Dismiss bear emphasizing. Plaintiff's claim is premised on his failure, for over 20 years, to realize that his injuries were connected to the alleged gay sexual contact with a priest. Order ¶ 9. In other words, Plaintiff was always aware of the alleged sex, Cichanowicz' identity and his injuries. *Id.* at ¶¶ 4,

9. Plaintiff's counsel essentially admitted this was the import of the Affidavit, stating that the injury "technically" occurred at the time of the alleged sex and implying that it began to manifest through depression. Plaintiff just did not connect the two for twenty years. Exhibit A, Page 40 from the transcript of the September 22, 2009 Hearing.

As the District Court stated, this theory has not been recognized by any jurisdiction to evade the statute of limitation. *Id.* ¶ 5. The District Court properly framed the issue as: what evidence must Plaintiff marshal to support that theory. Plaintiff offered only his own "mental assertion," which is legally insufficient to meet his burden. *Id.* ¶¶ 13, 16. Thus, there are a few critical, undisputed, facts to the time-bar issue: Plaintiff was aware of the alleged sex (he was 15 and he found it pleasurable), he was aware of his alleged injuries, he failed to connect the two for over 20 years, and the only evidence why he failed to do so, or that it was reasonable for him to fail to do so, was his own state of mind.[1] The Court did not weigh evidence; rather, Plaintiff failed to meet his burden.

[1] As Plaintiff admits, Defendants' motions to dismiss were converted to motions for summary judgment by Plaintiff's submission of his affidavit. Appellant's Brief at 14. As both he and the Court note, he was on notice to present evidence sufficient to meet his burden on September 22, 2009. Appellant's Brief at 15, Notice of Hearing (Exhibit 11 to Appellant's Brief); Order to Dismiss ¶ 6.

Plaintiff has indicated that he was not aware, or prepared for, a motions hearing. Appellant's Brief at 15-16. But, when asked by the Court Plaintiff stated he was "prepared to argue" the motion at the September 22, 2009 Hearing. Exhibit A, Page 4 of transcript. He was aware that the motion would be argued and was "prepared" to do so.

STATEMENT OF ISSUES

By mischaracterizing the Court's order, Plaintiff misstates one of the issues on appeal. Cichanowicz agrees that one issue is whether the Court erred in granting summary judgment to Defendants. However, the second issue not whether Plaintiff's affidavit created a disputed issue of fact. It is clear that Plaintiff's affidavit is undisputed for purposes of this appeal. But the issue is whether Plaintiff's "mental assertion" is sufficient to meet his burden of proof: that for over 20 years Plaintiff could not reasonably realize that the alleged injuries and sexual contact were connected. Also at issue is whether the courts have jurisdiction over this matter and Cichanowicz.

ARGUMENT

This Court should affirm the District Court in its ruling that Plaintiff's claim is barred by the statute of limitations. Alternatively, the District Court should be affirmed because Plaintiff's claim is barred by laches. This Court may affirm on alternate grounds which were presented to the trial court. *Green Tree Servicing LLC v. Duncan*, No. SC-CV-46-05, Slip op. at 6 (Nav. Sup. Crt. Aug. 18, 2008) ("This Court may, but is not required to, uphold district court decisions on alternative grounds."); *Salt v. Martinez*, No. SC-CV-12-08, Slip op. at 1 (Nav. Sup. Crt. March 5, 2009) (stating the preservation rule). Also, in the alternative, the District Court erred in ruling that it has jurisdiction over this matter, an issue which may be raised at any time. *Ford Motor Company v. Kayenta District Court*, No. SC-CV-33-07, Slip op. at 6 (Nav. Sup. Crt. Dec. 18, 2008).[2]

I. THE COURT'S IMPLICIT EVIDENTIARY RULINGS WERE CORRECT

In its Order, the District Court did not reference certain psychological articles proffered by Plaintiff and took judicial notice of one fact. The District Court was correct in doing so. The District Court's implicit evidentiary rulings are reviewed for an abuse of discretion: "Evidentiary rulings are reviewed under the abuse of discretion standard, and absent a clear abuse of discretion, this Court will not disagree with a district judge's decision." *Rough Rock Community School v. Navajo Nation*, Nav. R. 313, 316 (Nav. Sup. Crt. 1998) (punctuation and citation omitted).

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[2] In *Ford Motor Company*, the Court made clear that its jurisdictional rule survived the United States Supreme Court's decision in *Plains Commerce Bank* and that the Treaty of 1868 controls jurisdiction on trust land. However, as the *Ford* case demonstrates, there is a prudential rule that issues of jurisdiction usually must be presented to tribal nations before consideration in federal court. As the Nation's jurisdictional test has not been considered in federal court, Cichanowicz respectfully presents his jurisdictional argument, including matters which are settled Navajo law, to preserve the issues.

The District Court did not reference the psychological articles presented by Plaintiff, which are Exhibits 3-5 to Appellant's Brief. These documents are hearsay, lack a foundation, lack any reference to, analysis of, or connection to Plaintiff, lack a basis to be relied upon as expertise, and are both too general and too equivocal to be reliable or relevant. *See* Navajo Rules of Evidence 7 (irrelevant evidence is to be excluded); 23 (the requirements for expert testimony); 25 (hearsay is to be excluded) and 30 (documents must have a foundation). As such, the District Court correctly declined to reference the articles in its Order. This Court should also disregard the articles.

By contrast, the District Court properly took judicial notice that society considers sex between a priest and a young man abusive, and at least some portions of society believe the same of sex between men and men of different ages. Order to Dismiss ¶ 4. The District Court is empowered to take judicial notice of facts. Navajo Rule of Evidence 5; *Fort Defiance Housing Corp. v. Lowe*, Nav. R. 463, 473 (Nav. Sup. Crt. 2004) ("Judicial notice is appropriate in matters of custom and tradition . . . and may be taken of facts every damn fool knows.") (punctuation and authority omitted).

The District Court did not abuse its discretion in declining to reference Plaintiff's psychological articles and taking judicial notice of one well known fact.

II. PLAINTIFF'S CLAIM IS TIME-BARRED

Plaintiff's claim is time-barred by the applicable statute of limitation, the doctrine of laches, the due process rights of Defendants and Dine Fundamental Law.

A. Plaintiff's Claim is Barred by the Statute of Limitation

By statute, Plaintiff had two years to file his action. 7 N.N.C. § 602(A)(2). Although the Council has extended that deadline for cases involving toxic torts or other "latent" methods of

causing an injury, Section 602(A)(5), there is no similar provision for the style of claims here. Plaintiff is alleged to have been 14 or 15 years old when the alleged tort occurred. He was aware of alleged sexual acts and Cichanowicz' identity. His injury, by his counsel's admission, occurred then. Exhibit A, Page 40 from the transcript of the September 22, 2009 Hearing. But, it took him over 20 years prior to determine that alleged gay sex with a priest could be a cause of his depression or other mental issues. Exhibit A, Page 40 from the transcript of the September 22, 2009 Hearing.

Plaintiff contends that he was not able to "make the connection" between his injury and the alleged sex over 20 years, until May of 2007. But, under the Navajo statute of limitations, the period of limitation begins to run when a person, using reasonable diligence, "should have discovered" the connection. 7 N.N.C. § 602(A)(4). The District Court properly found that Plaintiff has offered no evidence that he could not discover the connection. Thus, Plaintiff's claim is barred by the two year statute of limitation.

B. Plaintiff's Claim is Barred by Laches

The case law regarding laches, due process and Fundamental Law is in accord. A claim must be filed in "a reasonable period of time" or the principle of laches bars the claim. *Estate of Goldtooth Begay No. 2,* 6 Nav. R. 405 (Nav. Sup. Crt. 1991). If a person "sits on his rights," he loses the aid of the Court. *Haskie v. Nav. Bd. of Elec. Supervisors,* 6 Nav. R. 336 (Nav. Sup. Crt. 1991).

C. Plaintiff's Claim is Barred by Defendants' Due Process Rights

All persons enjoy due process and equal protection in the Navajo judiciary. 1 N.N.C. § 3; *see, e.g., Staff Relief, Inc. v. Polacca,* 8 Nav. R. 49 (Nav. Sup. Ct. 2000) (applying the "just cause" requirement of the NPEA to all persons within the Nation). It is a hallmark of due process

to be aware of the claims against one and be able to prepare a defense. *See Hood v. Navajo Nation Dep't of Headstart*, No. SC-CV-11-05, Slip op. at 5 (Nav. Sup. Crt. Jan. 5, 2006) (as a matter of due process, only claims raised in the ONLR may be raised in a complaint to the Labor Commission).

Here, Cichanowicz is unable to prepare an adequate defense due to the passage of time. He left the Nation over twenty years ago. He began a new career in Indiana soon thereafter. Documents are lost. Witnesses, both in the Franciscan orders and members of the Nation, cannot be located. Memories fade. Plaintiff's delay has prejudiced the defense, justifying dismissal under due process.

D. Plaintiff's Claim is Barred by Dine Fundamental Law

At the core of Diné Fundamental law is a balance between finality and opportunity to be heard. These concepts are related to *házhó'ógo* and an opportunity to be heard or "talking things out." In sum, parties must have an opportunity to be heard. But, if a party has an opportunity to be heard, and had meaningful notice of the opportunity, then the right to be heard may be waived, resulting in dismissal. *See Yazzi v. Smith*, 8 Nav. R. 191, 194-95 (Nav. Sup. Crt. 2001) (a party "waived his opportunity to be heard" when he had adequate notice but failed to request a hearing); *Eriacho v. Ramah District Court*, 8 Nav. R. 617, 624-25 (Nav. Sup. Crt. 2005) (a party may waive a "fundamental right" through failure to act if meaningful notice was provided).

Plaintiff has missed the substantive deadline – the statute of limitation – and failed to bring this action within reasonable time. In so failing, he has lost the opportunity to be heard, particularly as the due process of right of Mr. Cichanowicz to a defense has been prejudiced.

> The Navajo legal concept relevant to this case is that once parties have had an opportunity to have their say, a decision on the matter is final, and should not be disturbed. . . While res judicata prevents filing a new case after a previous final decision, the concept of finality applies within a single case as well. Litigants

> have certain responsibilities within the court system. Among these is the responsibility to submit whatever evidence supports his or her case when given the opportunity. If a party fails to do so at the first opportunity, there must be a limit to the number of opportunities given to present that evidence, as for Navajo society to function there must be a limit on how long disputes continue.

In re Kindle, No. SC-CV-40-05, Slip op. at 5-6 (Nav. Sup. Crt. May 18, 2006) (quotation marks and citations omitted, emphasis added). Plaintiff failed to file his action and has lost the opportunity to be heard. As such, the Complaint should be dismissed as time barred under the statute of limitation, the doctrine of laches and Defendants' due process and Dine Fundamental Law.

III. THE COURT LACKS JURISDICTION

A. Plaintiff Failed to Meet His *Dale Nicholson* Burden

As set forth in more detail above, Plaintiff has not alleged that he is, or was, a member of the Navajo Nation. In addition, he alleged only that the tort occurred on the Navajo Nation. To the extent he alleged the status of the land, he appears to allege that the land is non-Indian fee land. Under this Court's jurisdictional test, Plaintiff has not met his burden to allege facts sufficient to establish the Court's jurisdiction. *Dale Nicholson Trust v. Chavez*, 8 Nav. R. 417, 424-25 (Nav. Sup. Crt. 2004) (Plaintiff must allege "specific facts" establishing jurisdiction). For this reason alone, the Court lacks jurisdiction.

B. The Court Lacks Subject Matter Jurisdiction

Plaintiff alleges that a tort occurred on the Nation in 1984 or 1985. The Supreme Court has held that if a claim arises on trust land, then the Treaty of 1868 provides the Nation with subject matter jurisdiction. *Dale Nicholson*, 8 Nav. R. at 424-25. Although the record does not support a finding that an injury or act occurred on trust land, Cichanowicz addresses the Court's jurisdictional test. Respectfully, *Dale Nicholson* mis-reads the Treaty of 1868, ignores the Treaty

of 1849 and the Supreme Court's jurisdictional test conflicts with federal law, *Montana v. United States*, 450 U.S. 544 (1980) and its progeny.

1. The Nation's Treaties with the United States Limits the Nation's Jurisdiction Over non-Indians

For its jurisdictional test, this Court relies on Article II of the Treaty of 1868, which provides that persons will not be allowed within the Nation unless the Nation authorizes entrance. In other words, the Nation has the power to exclude. The 1868 Treaty contains no express statement that the Nation may condition entry, which is the basis of the *Dale Nicholson* holding. There is also no statement in Article II of the Treaty regarding jurisdiction.

Article I, by contrast, expressly addresses jurisdiction. It states in relevant part:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong **upon the person** or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender **to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.**[3]

15 Stat. 667, 667-68; Article I, Treaty of 1868 (emphasis added). There follows a parallel provision for wrongs committed by a Native American. These provisions, agreed to by the sovereigns, expressly state that a person who commits a wrong "upon the person . . . of the Indians" will be arrested, punished and the injured person will be reimbursed "according to the laws of the United States." *Id.*

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[3] The United States Court of Claims has held that the "bad man" clause in the 1868 Treaty with the Navajo Nation, and similar clauses with the Sioux and Shoshone/Bannuck Nations, create a claim by tribal members against the United States for injuries caused by non-Indians. *See, e.g., In re Begay*, 219 Ct. Cl. 599 (1979) (Navajo Nation members alleging sexual abuse by teachers at a boarding school); *Hebah v. U.S.*, 428 F.2d 1334 (Ct. Cl. 1970); *Elk v. U.S.*, 70 Fed. Cl. 405 (2006).

As such, Article I either creates exclusive jurisdiction in the Court of Federal Claims for claims by tribal members for injuries caused by non-Indians against individual Navajos, or, it is a remedy which supplements the jurisdictional provisions of the Treaty of 1849.

This provision is consistent with general principles of federal Indian law. Beginning in 1790 and through today, certain interactions between Native Americans and other citizens of the United States are prohibited. Non-natives who violate the prohibitions are subject to punishment in accord with federal law. *See generally,* Paul Francis Prucha, American Indian Policy in the Formative Years at 1-4, 41-50 (1962) (discussing the development of, and provisions of, the "Trade and Intercourse Acts.").

In its latest pronouncement on the subject, the United States Supreme Court set forth general principles consistent with this reading of Articles I and II.

> [Tribal Nations] may also exclude outsiders from entering tribal land. But tribes do not, as a general matter, possess authority over non-Indians who come within their borders: The inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.

Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2718 (2008) (punctuation and authority omitted).[4] The Court expressly stated that the two narrow exceptions to the general rule are "limited," and "cannot be construed in a manner that would swallow the rule." *Id.* at 2720 (punctuation and authority omitted). Only conduct that "implicates the tribe's sovereign interests" overcomes the general rule. *Id.* at 2721; *see also id.* at 2726 (stating that circumstances meeting the second *Montana* exception must "imperil the subsistence of the tribal community" or "be necessary to avert catastrophic circumstances."

[4] Notably, the tribal nation which was a party in *Plains Commerce*, the Cheyenne River Sioux, was also a party in *South Dakota v. Bourland*, 508 U.S. 679 (1993). That Nation entered a Treaty with the United States in 1868 which includes the same Articles I and II as the Treaty with the Navajo Nation. 15 Stat. 635, 635-636. That Treaty was not discussed in *Plains Commerce*. It is also notable that the tribal nation which was a party to the *Montana* case, the Crow, have a treaty with the United States which also includes the same Articles I and II. 15 Stat. 649, 649-650. Thus, treaties with the same wording as the 1868 Treaty with the Navajo Nation have been related to the establishment and development of the *Montana* test.

In addition, the Treaty of 1849[5] provides a clear allocation of jurisdiction. Article II of that Treaty provides:

> All cases of aggression against said Navajoes by citizens or others of the United States, or by other persons or powers in amity with the said States, **shall be referred** to the Government of said States for adjustment and settlement.

9 Stat. 974, 974 (emphasis added). Article VI provides:

> Should any citizen of the United States . . . murder, rob or otherwise maltreat any Navajo Indian or Indians, he or they shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the said States.

Id. at 975. Notably, the United States Supreme Court has considered both treaties, determining that "both of the treaties" allocated criminal jurisdiction over non-Indians to the United States. *United States v. Wheeler*, 435 U.S. 313, 324 (1978) (holding also that neither treaty surrendered the Nation's power to criminally sanction members of the Nation). The same year the United States Supreme Court determined that all tribal nations lack criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). When considering civil

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[5] Treaties are part of the "supreme law" of the land. Treaties remain binding absent circumstances not relevant here, such as Congressional abrogation or mutual amendment or abolishment. Felix S. Cohen, Handbook of Federal Indian Law 33-36 (Univ. of New Mexico Press, 1970 reprint of original 1942 edition); Cohen's Handbook of Federal Indian Law § 5.01[2] (2005 ed., 2009 Supp.).

One scholar states that the Treaty of 1849 remains binding. David E. Wilkins, The Navajo Political Experience 75 (2003 Rev. ed.) ("this treaty has never been abrogated and many of its provisions have legal merit today.").

The Navajo Nation has relied on the Treaty of 1849 as creating federal jurisdiction. *Rockbridge v. Lincoln*, 449 F.2d 567, 569 (9th Cir. 1971). Recently, the Nation argued that the Treaty created a trust relationship between the Nation and the United States for purposes of the coal royalties, and the Federal Circuit Court of Appeals found that Articles I and XI created a general trust relationship. *Navajo Nation v. United States*, 501 F.3d 1327, 1336 (Fed. Cir. 2007) reversed on other grounds in *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009). In the past, the Nation argued that the Treaty provided equitable title to lands within the "checkerboard" of northwest New Mexico. *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1464 n.17 (10th Cir. 1987).

jurisdiction three years later, the United States Supreme Court endorsed the principles of *Oliphant*

> the principles on which [*Oliphant*] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.

Id. at 565. Both Treaties and general principles of tribal nation powers, particularly read together, provide that the Navajo Nation does not have civil, or criminal, jurisdiction over non-Indians except under the narrow circumstances set forth in *Montana* and progeny.

2. The *Montana* Test Applies to Trust Land

Even if the act here occurred on trust land, the United States Supreme Court has ruled that the status of land alone is not dispositive. In *Nevada v. Hicks*, 533 U.S. 353 (2001), the United States Supreme Court applied the *Montana* test to trust land. While that case involved state officials, that Court's holding is not limited to circumstances involving such officials. In *Hicks*, the United States Supreme Court expressly stated that *Montana* "clearly implied that the general rule [that tribal nations lack jurisdiction over non-Indians] of *Montana* applies to both Indian and non-Indian land." *Id.* at 360. The status of land is "only one factor" in determining whether a tribal nation has jurisdiction over non-Indian conduct. *Id.* That holding was restated in *Plains Commerce*:

> This general rule restricts tribal authority over nonmember activities taking place on the reservation and is particularly strong when the nonmembers activity occurs on land owned in fee simple by non-Indians – what we have called "non-Indian fee land."

128 S.Ct. at 2719. While the Court limited its factual holding, *Hicks*, 533 U.S. at 358 n.2, it did not limit its guidance on the application of the *Montana* test. This Court's rulings are contrary by making the status of land always dispositive of jurisdiction when the land is trust land. *Nelson v. Pfizer*, 8 Nav. R. 369, 375-77 (Nav. Sup. Crt. 2003) (discussing *Hicks* and limiting its application

to cases involving state officials); *Dale Nicholson Trust*, 8 Nav. R. at 425 (holding that the Nation has jurisdiction over nonmembers' conduct on trust land).

3. The General Rule of *Montana* Applies Here

Under the Treaties of 1849 and 1868 and federal law regarding jurisdiction, even if tortious conduct occurred on trust land, the Nation lacks subject matter jurisdiction because the *Montana* exceptions are not met, as the following reasoning sets forth.

Plaintiff must meet the test for civil jurisdiction set forth in federal law, *Montana* 450 U.S. at 564-65, and its progeny. *See generally Dale Nicholson*, 8 Nav. R. at 425. Plaintiff must allege that there is a "consensual relationship" between Mr. Cichanowicz and the Nation or its members, or that his conduct had a "direct effect on the political integrity, economic security, or health or welfare of the Navajo Nation." *Id.*

In *Dale Nicholson*, this Supreme Court quoted and relied on *Nelson v. Pfizer, Inc.*, 8 Nav. R. 369, 375-76 (Nav. Sup. Crt. 2003). There, the Supreme Court noted that "tribes generally lack jurisdiction over non-Indians on non-Indian owned fee land within a reservation." *Id.* at 375 (citing *Montana*, 450 U.S. at 565). Consequently, the Nation's courts have jurisdiction only if there are facts pled to support one of the two exceptions.

Plaintiff did not allege that a consensual relationship existed between Mr. Cichanowicz and the Navajo Nation or its members. To the contrary, Plaintiff alleges that Mr. Cichanowicz was "under the direct supervision, employ and control" of the Diocese or the Orders. SAC ¶ 7. Plaintiff has not alleged facts to meet the first *Montana* exception.

The facts pled do not meet the second *Montana* exception. This Court's direction is useful in understanding the narrow scope of this exception:

> Though the language of the exception suggests broad authority over non-Indian activity that harms the tribe, jurisdiction is proper only where "necessary to protect

> tribal self-government or to control internal relations." *Atkinson*, 532 U.S. at 658. Even then, the "direct effect" exception does not permit jurisdiction "whenever it might be considered necessary," but only where the conduct is severe enough to actually imperil the Navajo Nation. *Id.* at 657 n.12.

Pfizer, 8 Nav. R. at 375 (the full citation to the United States Supreme Court case cited by the Navajo Nation Supreme Court is *Atkinson Trading Company v. Shirley*, 532 U.S. 645 (2001)). While Mr. Cichanowicz denies the alleged conduct ascribed to him, the allegations nevertheless do not meet the second *Montana* exception. The alleged conduct does not "actually imperil the Navajo Nation," its self-governance or internal relations. Plaintiff's allegations do not meet the second *Montana* exception. As in *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997), the Nation's "adjudicatory authority" over tort actions is not "needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" Sovereign Indian authority, particularly on non-trust land, is presumed invalid:

> efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid. The burden rests on the tribe to establish one of the exceptions to *Montana's* general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land.

Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2720 (2008) (punctuation and authority omitted). Because Plaintiff has failed to allege facts, or establish facts, establishing one of the narrow *Montana* exceptions, and particularly because he failed to allege membership in the Nation or the status of land where acts allegedly occurred, the *Montana* presumption controls this case.

C. By Statute, the Court Lacks Personal Jurisdiction Over Cichanowicz

Plaintiff alleges a tort occurring on the reservation in 1984 or 1985. SAC ¶ 14. Cichanowicz left the Navajo Nation in 1986 and has not returned since. He resides in Indiana. The Supreme Court held that residency of a defendant is determined at the time an action is filed.

Yazzie v. Yazzie, 5 Nav. R. 66 (Nav. Sup. Crt. 1985). As such, the Court must determine whether the Nation had personal jurisdiction over Cichanowicz when the case was filed.

Separate from subject matter jurisdiction, the Nation's Courts must have personal jurisdiction over the defendant. *Pfizer*, 8 Nav. R. at 377. The Nation's Court's have personal jurisdiction over those persons "causing tortious injury by any act or omission within the Navajo Nation" or by an act outside the Nation if the person regularly conducts business inside the Nation at the time the lawsuit is filed. 7 N.N.C. § 253a; *Yazzie*, 5 Nav. R. 66. Cichanowicz has not resided on the Nation for over twenty years. He has not conducted business on the Nation since the 1980s. He certainly did not reside there when Plaintiff filed his action. The Nation lacks personal jurisdiction over him as a matter of statute, and as a matter of due process as above.

IV. CONCLUSION

The Supreme Court should affirm the District Court's order dismissing this case because 1) the District Court properly determined that Plaintiff had not met his burden to justify the 20 years he waited to file this action; thus, 2) Plaintiff's action is time-barred by the statute of limitation, the doctrine of laches, to preserve the due process rights of Defendants and under Fundamental Law. Finally, 3) the Nation lacks jurisdiction over this matter and the person of Mr. Cichanowicz.

Respectfully Submitted,

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NAVAJO NATION DISTRICT COURT

JUDICIAL DISTRICT OF SHIPROCK, NEW MEXICO

John Doe BF,

Plaintiff,

vs. Case No. SR-CV-369-07-CV

DIOCESE OF GALLUP, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

On the 22nd day of September 2009, at approximately 9:12 a.m., this matter came on for hearing on a Status Conference before the HONORABLE GENEVIEVE WOODY, Judge of the Navajo Nation Court, Shiprock District.

JUSTINE HANNAWEEKE, CCR
Official Court Reporter

had scheduled this week for a trial, but then when I looked at the Scheduling Order we had different dates, as far as discovery is concerned and other matters that needed to be addressed, and I wasn't too sure if the parties were ready.

Furthermore, the Court had received motions to dismiss and I guess I just need information from all Counsels as to where we're at, what we need to do, so that we can either go towards scheduling a trial, or whether the parties are ready today to argue the motion to dismiss. Okay. Plaintiff?

MR. KEELER: Your Honor, we had filed our response to the motion to dismiss, and this morning we did receive the reply. We are prepared to argue, if that's what this Court would have us do. We'll just leave it to the pleasure of the Court, Your Honor.

THE COURT: Okay.

MR. NICHOLS: Your Honor, I was waiting for the affidavit from the Plaintiff in this case to file a reply, and it was not forthcoming, so I filed a reply this morning and provided a courtesy copy to Your Honor, I'd be happy to give you another one. We're ready to argue the motion, the motion to dismiss, and would ask that we do so so we can have a ruling on the jurisdictional issues.

THE COURT: Okay. Counsel?

MR. ISAACSON: Your Honor, On behalf of the

Counsel.

MR. NOAKER: Yes.

THE COURT: So is your argument that the harm was not -- that Plaintiff realized that he was harmed until May of 2007, or that the harm occurred prior to that? I guess I'm still confused about the argument. When did the Plaintiff realize he was harmed until May of 2007, or was it prior to May of 2007?

MR. NOAKER: Excellent question, because I obviously didn't make that very clear.

Your Honor, in this case, the sex abuse occurred back in '84, '85. So the sexual acts occurred over time. Technically, Plaintiff was injured at that time.

The Navajo statute though requires the defendant to know -- I'm sorry -- the Plaintiff to know that he's been injured. And let's use -- I think you heard a back injury analogy by one of the counsel here, and that may be helpful.

In sexual abuse when ten years later, 15 years later, and in this case, 20 years later, you're experiencing depression. How would you possibly know that that depression had anything to do with being injured as a child? And that is like to go with the back injury or physical injury. That is like having an accident when you're a kid. Heal up and everything and then when you're 40, you know, your right knee starts giving you trouble.