NORTH DAKOTA SUPREME COURT REVIEW

The North Dakota Supreme Court Review summarizes important decisions rendered by the North Dakota Supreme Court. The purpose of the Review is to indicate cases of first impression, cases of significantly altered earlier interpretations of North Dakota law, and other cases of interest. As a special project, Editors assist in researching and writing the Review.* The following topics are included in the Review:

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INDIANS – PROTECTION OF PERSONS AND PERSONAL RIGHTS; DOMESTIC RELATIONS-INFANTS – DEPENDENT CHILDREN; TERMINATION OF PARENTAL RIGHTS– ACTIONS AND PROCEEDINGS IN GENERAL

Interest of K.B.

In *Interest of K.B.*,[1] the North Dakota Supreme Court analyzed how the requirements of the Indian Child Welfare Act ("ICWA") relates to testimony by an expert witness.[2] The court remanded the decision of the Juvenile Court of Cass County, finding that ICWA requirements can only be satisfied if an expert witness testifies that likely harm will come to the child, but ultimate conclusions are to be made by the juvenile court, and the juvenile court did not make detailed enough findings under ICWA.[3]

This case involves the termination of J.B.'s parental rights after the removal of her two children, K.B. and K.E.B., due to various circumstances, including the mother's use of methamphetamine, an ongoing violent relationship with an individual whose initials are M.N., and the revocation of her probation.[4]

During proceedings, the juvenile court received testimony from an expert witness who was qualified under ICWA.[5] The expert witness testified that the tribe did not support termination, but it would not exercise its jurisdiction over the matter.[6] The expert witness also testified that she did not believe that termination was necessary to prevent physical harm to the child because J.B. would no longer be incarcerated in May of 2021 and J.B. would no longer have contact with M.N.[7] The expert witness stated that she would be concerned about continued domestic violence and drug use if J.B. and M.N. continued their relationship.[8]

Contrary to this opinion, the juvenile court found that J.B. had not terminated her relationship with M.N. upon receiving evidence that the two had been communicating through notes shared through the court's videoconferencing software during recesses.[9] These notes included

1. 2021 N.D. 106, 961 N.W.2d 293.
2. *Id.* ¶ 1.
3. *Id.* ¶¶ 1, 7, 10.
4. *Id.* ¶ 2.
5. *Id.* ¶ 3.
6. *Id.*
7. *Id.*
8. *Id.* ¶ 9.
9. *Id.*

indications that J.B. and M.N. still loved each other, wished to have a son, and an exchange of contact information.[10] The juvenile court also concluded that J.B.'s release from prison was not as imminent as the expert witness suggested. Ignoring the assumptions made by the expert witness based on that evidence, the juvenile court ordered in favor of termination.[11]

To terminate an individual's parental rights under the laws of North Dakota, the juvenile court must find that the party seeking termination proved, by clear and convincing evidence, that the child is deprived, the causes of the deprivation are likely to continue, and the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm.[12] ICWA also contains separate requirements, including a requirement that the decision of the juvenile court be supported beyond a reasonable doubt and by the testimony of an expert witness.[13] The only question considered by the North Dakota Supreme Court was whether the testimony of the expert witness satisfied the requirements of ICWA.[14]

After considering the ruling of the juvenile court and the testimony of the expert witness, the North Dakota Supreme Court remanded the decision for more specific findings under ICWA.[15] The juvenile court made only vague references to ICWA's proof beyond a reasonable doubt requirement instead of specific findings.[16] In remanding for more specific findings, the court noted that an express preference to deny termination by an expert witness "does not preclude the court from making findings sufficient to satisfy ICWA and ordering termination[,]" instead the testimony of the expert witness only needs to support the finding, not be the sole basis for it.[17]

Chief Justice Jensen filed a specific concurrence, noting that the juvenile court's order did not meet the statutory burden of 25 U.S.C. § 1912(f), and the expert witness's testimonial conflict with the juvenile court may be a larger issue.[18] Justice Jensen would require that a reference to 25 U.S.C. § 1912(f) be made, as well as identification of specific expert testimony

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10. *Id.*

11. *Id.* ¶ 1.

12. *In re K.S.D.*, 2017 ND 289, ¶ 7, 904 N.W.2d 479 (citing N.D. CENT. CODE. § 27-20-44(1)(c)(1)) (repealed) (N.D. CENT. CODE § 27-20.3-20 is the current statute governing the standards regarding parental rights termination).

13. 25 U.S.C. § 1912(f) ("No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.").

14. *Interest of K.B.*, 2021 N.D. 106, ¶ 5, 961 N.W.2d 293.

15. *Id.* ¶ 11.

16. *Id.* ¶ 10 ("The court introduced its findings by paraphrasing the ICWA requirement for 'proof beyond a reasonable doubt . . . .'").

17. *Id.*

18. *Id.* ¶¶ 13, 16.

supporting the conclusion that the children will likely suffer serious harm.[19] Justice Jensen also notes that, in deciding that expert witness testimony supports the court's finding, the court should point to the specific evidence that the court relied on in making their decision.[20] In his conclusion, Chief Justice Jensen also noted "[t]his case provides an example of ICWA's unintended adverse consequences on children."[21]

19. *Id.* ¶¶ 17, 19.
20. *Id.* ¶ 23.
21. *Id.* ¶ 28.

INDIANS-ACTIONS-JURISDICTION-STATE COURTS-IN GENERAL

Lavallie v. Jay

In *Lavallie v. Jay*,[22] the North Dakota Supreme Court evaluated the subject matter jurisdiction of the district court over a motor vehicle accident.[23] This was the second time the North Dakota Supreme Court heard this case.[24] The case originated when Lawrence Lavallie ("Plaintiff") rode a snowmobile near Lorne Jay's ("Defendant") home.[25] Plaintiff stopped his snowmobile and was struck by Defendant who was blowing snow with his tractor.[26] After sustaining injuries, Plaintiff sued in the North Dakota District Court.[27] Prior to trial, Defendant moved to dismiss for lack of subject matter jurisdiction; the motion was denied and Plaintiff was awarded $946,421.76 of damages after a bench trial.[28]

Plaintiff appealed to the North Dakota Supreme Court and the case was reversed and remanded "for the district court to make findings on whether the parties to this cause of action were enrolled members of the Tribe and whether the accident occurred on land held in trust for the Tribe."[29] These facts are important in understanding whether the state court system is appropriate for this particular dispute. On remand, the trial court conducted additional fact finding to answer these determinative questions.[30] During this hearing, the court found that "Jay's home site 'is located directly adjacent to the county road upon which the accident occurred' and 'Jay makes a yearly lease payment on his property to the Bureau of Indian Affairs.'"[31] However, the trial court determined that it possessed subject matter jurisdiction because Jay failed to prove the other two parties to the lawsuit were also tribal members, which is one of the two types of claims that would grant tribal courts exclusive civil jurisdiction.[32] After the decision of the trial court, the Defendant once again appealed to the North Dakota Supreme Court.[33]

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22. 2021 ND 140, 963 N.W.2d 287.
23. *Id.* ¶¶ 1-2.
24. *Id.* ¶ 2; *see generally* Lavallie v. Jay, 2020 ND 147, 945 N.W.2d 288.
25. *Lavallie*, 2020 ND 147, ¶ 2, 945 N.W.2d 288.
26. *Id.*
27. *Id.* ¶ 3.
28. *Id.* ¶¶ 3-4.
29. *Id.* ¶ 11.
30. *Lavallie*, 2021 ND 140, ¶ 7, 963 N.W.2d 287.
31. *Id.*
32. *Id.* ¶¶ 7-8.
33. *Id.* ¶ 1.

The North Dakota Supreme Court heard the appeal on evidentiary issues and subject matter jurisdiction.[34] The court declined to consider the evidentiary issues because they were unnecessary in deciding the case.[35] On the issue of subject matter jurisdiction, the court looked to the United States Supreme Court case *Williams v. Lee*[36] as precedent.[37] In *Williams*, the United States Supreme Court determined that a state court is prevented from exercising jurisdiction when it infringes on the rights of the tribes to govern themselves.[38] With the overall rule established, the court went on to consider North Dakota case law interpreting the issue.[39] North Dakota cases, following U.S. Supreme Court precedent, establish that the second type of claim where tribal courts have exclusive civil jurisdiction are those claims where "a non-Indian asserts a claim against an Indian for conduct occurring on that Indian's reservation."[40] Thus, tribal courts have authority when a non-Indian sues an Indian over a claim which arises on the reservation.[41] With the subject matter jurisdiction precedent considered, and because the facts already established that Plaintiff is non-Indian and Defendant is an Indian, the court must now consider if trust land is reservation land in order to decide the subject matter jurisdiction question.[42]

On consideration of the status of trust land as reservation land, the court determined that more than the formal reservation is considered in the term "reservation."[43] This is because additional lands for purposes of jurisdiction are considered by the U.S. Supreme Court to be Indian country.[44] The Court considered that "[u]nless federal law directs otherwise, '[a] state ordinarily may not regulate the property or conduct of tribes or tribal-member Indians in Indian country.'"[45] Because the state lacks jurisdiction when the land in question is in Indian country, the court found it necessary to explain what constitutes Indian country.[46]

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34. *Id.* ¶¶ 9-10.
35. *Id.* ¶ 9.
36. 358 U.S. 217 (1959).
37. *Lavallie*, 2021 ND 140, ¶ 11, 963 N.W.2d 287.
38. *Id.* (citing *Williams*, 358 U.S. at 220).
39. *Id.*
40. *Id.* ¶¶ 11-12 (quoting Winer v. Penny Enter., Inc., 2004 ND 21, ¶ 11, 674 N.W.2d 9).
41. *Id.* ¶ 12.
42. *Id.* ¶¶ 8, 12 ("We must determine whether tribal trust land is considered the same as reservation land for purposes of the infringement test.").
43. *Id.* ¶ 13.
44. *Id.* (citing Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 124-25 (1993)).
45. *Id.* (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.03(1)(a)) (Nell Jessup Newton ed., 2017) [hereinafter Cohen's Handbook].
46. *Id.* ¶ 15.

The court first looked to the United States criminal code for the definition of Indian country.[47] The relevant provision of the code, 18 U.S.C. § 1151,[48] applies in civil and criminal cases.[49] The court went on to examine the case of *Oklahoma Tax Commissioner v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,[50] where the United States Supreme Court found that the distinction of trust land and reservation is not the turning point of the question, but rather, ask if the land was set apart for Indians.[51] In *Lavallie,* the Plaintiff argued that the accident occurred on a county road outside the external boundaries of the reservation.[52] However, the court held the road was set apart for Indians because the land for the road is held in trust for the tribe.[53]

When applying the law to the case at issue, the court found that the district court did not have subject matter jurisdiction.[54] The court reasoned that the land where the accident occurred was trust land; therefore, "[t]he status of the land where the accident occurred being held in trust validly sets it apart for use by the Tribe and its members."[55] Due to the location of the accident on trust land and the tort action being taken "against an Indian . . . for conduct occurring in Indian country," the state court does not have subject matter jurisdiction over the resulting tort action.[56] The court went on to determine that the state does not have concurrent jurisdiction with the tribal court due to the tribal court's exclusive jurisdiction under the infringement test.[57] The case was reversed and remanded with instructions to dismiss due to lack of subject matter jurisdiction.[58]

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47. *Lavallie*, 2021 ND 140, ¶ 15, 963 N.W.2d 287; *see* 18 U.S.C. § 1151.

48. 18 U.S.C. § 1151 ("Except as otherwise provided in sections 1154 and 1156 of this title, the term "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.").

49. *Lavallie*, 2021 ND 140, ¶ 15, 963 N.W.2d 287 ("[T]his definition 'applies in the civil context as well.'") (quoting Cohen's Handbook at § 6.03(1)(a)).

50. 498 U.S. 505, 511 (1991).

51. *Lavallie*, 2021 ND 140, ¶¶ 15-16, 963 N.W.2d 287 (citing Okla. Tax Comm'r v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 511 (1991)).

52. Brief of Plaintiff/Appellee ¶ 20, *Lavallie*, 2021 ND 140, 963 N.W.2d 287 (No. 20190402).

53. *Lavallie*, 2021 ND 140, ¶ 17, 963 N.W.2d 287.

54. *Id.*

55. *Id.* (citing *Patawatomi*, 498 U.S. at 511).

56. *Id.* (citing Winer v. Penny Enter., Inc., 2004 ND 21, ¶ 11, 674 N.W.2d 9).

57. *Id.*

58. *Id.* ¶ 18.

INDIANS– OFFENSES AND PROSECUTIONS-JURISDICITON AND POWER TO ENFORCE CRIMINAL LAWS-NON-INDIAN DEFENDANT-CRIME COMMITTED IN INDIAN COUNTRY OR ON RESERVATION

State v. Suelzle

The North Dakota Supreme Court in *State v. Suelzle*[59] applied the pivotal decision of *United States v. Cooley*[60] to a North Dakota case. Non-Indians cannot avoid the long arm of the law simply by driving onto Native American land. Tribal law enforcement has the authority to detain non-Indians after a lawful stop until law enforcement with proper jurisdiction retrieves the accused per *Suelzle* and *Cooley*. Chief Justice Jon J. Jensen wrote the unanimous opinion.[61]

Benjamin Suelzle ("Mr. Suelzle") was stopped "within the exterior boundaries of the Fort Berthold Indian Reservation."[62] A federal law enforcement officer working for the tribe's drug enforcement agency conducted the traffic stop.[63] Dispatch previously advised the federal law enforcement officer of a possible drunk driver, and the officer spotted a vehicle which matched the description.[64] The officer followed the vehicle and witnessed it swerve multiple times "over the white fog line and the yellow center line."[65] The officer stopped the vehicle and asked Mr. Suelzle if he was an enrolled member of a federally recognized tribe.[66] "The federal law enforcement officer acknowledged she had no authority to arrest Suelzle, a non-Indian, on the reservation."[67] At that point, the officer contacted local police, the McKenzie County Sheriff.[68] The federal officer detained Mr. Suelzle for approximately twenty-seven additional minutes until the county deputy arrived at the initial stop site.[69]

The North Dakota Supreme Court heard two main issues in this case. First, Mr. Suelzle argued that the federal officer did not have reasonable and

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59. 2021 ND 194, 965 N.W.2d 855.
60. 141 S. Ct. 1638 (2021).
61. *Suelzle*, 2021 ND 194, 965 N.W. 855.
62. *Id.* ¶ 2.
63. *Id*.
64. *Id*. ¶¶ 4-5.
65. *Id*. ¶ 5.
66. *Id.* ¶ 6.
67. *Id*.
68. *Id.*
69. Appellee Brief ¶ 14, North Dakota v. Suelzle, 2021 ND 194, 965 N.W.2d 855 (No. 20210028).

articulable suspicion as required by the Fourth Amendment to initiate the stop.[70] The court resolved the first issue because the standard of review for motions to suppress require deference to be given to the trial court's findings of fact unless there is insufficient evidence to support the finding.[71] The court found the officer "had a reasonable and articulable suspicion to" conduct the stop based upon the vehicle crossing the white fog line and the yellow center line.[72]

The second issue was widely discussed at the North Dakota Law Review Indian Law Symposium. Did the federal law enforcement officer "have the authority to seize [Mr. Suelzle] and hold him until the McKenzie County law enforcement officer arrived[?]"[73] In making this determination, the North Dakota Supreme Court considered *United States v. Cooley*,[74] a case decided by the United States Supreme Court on June 1, 2021.[75] In *Cooley*, a tribal officer from the Crow Police Department conducted a vehicle stop and detained the driver who "appeared to be non-native."[76] The tribal officer called for, and received, support from both the federal Bureau of Indian Affairs and the local county police force.[77] The Ninth Circuit required tribal officers to ascertain if the stopped citizen was a registered member of a tribe, and if the citizen was not a member, then a "temporary detention" was allowed if there was an "apparent" violation of law.[78] The Court considered the exceptions it previously outlined regarding when native representatives could enforce laws upon non-natives who were within the boundaries of their reservation.[79] It focused upon the fact that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[80]

Outlining and reiterating the fact that tribes have sovereignty and the right to exclude,[81] the United States Supreme Court concluded that the stop of a vehicle is based upon state and federal law, not tribal law.[82] Further, the

70. *Suelzle*, 2021 ND 194, ¶ 9, 965 N.W.2d 855.
71. *Id.* (citing State v. James, 2016 ND 68, ¶ 5, 876 N.W.2d 720).
72. *Id*. ¶¶ 12-13.
73. *Id*. ¶ 14.
74. 141 S. Ct. 1638 (2021).
75. *Suelzle*, 2021 ND 194, ¶ 14, 965 N.W.2d 855.
76. *Cooley*, 141 S. Ct. at 1642.
77. *Id*.
78. *Id.* at 1645 (citing Unites States v. Cooley, 919 F. 3d 1135, 1142 (9th Cir. 2019)).
79. *Id*. at 1643.
80. *Id*. (quoting Montana v. United States, 450 U.S. 544 (1981)).
81. *Id*. at 1644.
82. *Id*. at 1645.

determination of whether a citizen is or is not a registered member of a tribe brings about "doubts about the workability of the standards that the Ninth Circuit set out."[83] "The Supreme Court held the tribal officer could detain the non-Indian under the tribe's inherent authority."[84]

The North Dakota Supreme Court found Mr. Suelzle's arrest and detention relatively similar to the *Cooley* case.[85] The officer had an articulable reason for stopping Mr. Suelzle, and therefore the officer could detain the suspect while awaiting representatives of the state or county police force.[86] Further, the detainment of Mr. Suelzle was for a reasonable amount of time.[87] Finally, just as in *Cooley*, the federal law enforcement officer asked if Mr. Suelzle was an enrolled member of a federally recognized tribe.[88] The North Dakota Supreme Court affirmed the North Dakota District Court's decision unanimously.[89] Therefore, non-native citizens can be detained for a reasonable time by a tribal officer for a vehicular offense while awaiting the arrival of law enforcement with proper jurisdiction over the suspect.[90]

83. *Id*.
84. State v. Suelzle, 2021 ND 195, ¶ 15, 965 N.W.2d 855 (citing *Cooley*, 141 S. Ct. at 1644).
85. *Id*. ¶ 16.
86. *Id*. ¶ 17.
87. *Id*.
88. *Id*. ¶ 6.
89. *Id*. ¶ 17.
90. *Id*. ¶ 15.

INDIANS – PROCEEDINGS IN TRIBAL COURTS AND AGENCIES – CIVIL ACTIONS AND PROCEEDINGS – JURISDICTION AND VENUE

Trenton Indian Housing Authority v. Poitra

In *Trenton Indian Housing Authority v. Poitra*,[91] the North Dakota Supreme Court analyzed whether Trenton Indian Housing Authority ("TIHA") is a dependent Indian community, because if not, the district court had subject matter jurisdiction and TIHA did not have a contractual obligation to bring the eviction action in tribal court.

The appellant, Lisa Poitra, is an enrolled member of the Turtle Mountain Band of Chippewa Indians ("Turtle Mountain") and lived in a housing unit operated by TIHA.[92] Appellee, TIHA, began an eviction action against Poitra in the North Dakota district court, and Poitra challenged the state court's subject matter jurisdiction, moving to dismiss the eviction action.[93] The district court denied Poitra's motion to dismiss and a subsequent eviction hearing was held.[94] At the eviction hearing, Poitra renewed her motion to dismiss for lack of subject matter jurisdiction and the district court granted the request for additional briefing on the issue.[95]

Poitra argued the district court lacked subject matter jurisdiction because TIHA constitutes a dependent Indian community, and as such, is subject to tribal court jurisdiction rather than state court jurisdiction.[96] Additionally, Poitra argued the contractual provision between TIHA and Turtle Mountain required the eviction to be handled by the Turtle Mountain Tribal Court.[97]

The district court conducted both a four-factor and two-factor analysis under *United States v. South Dakota*[98] and *Alaska v. Native Village of Venetie Tribal Government*,[99] respectively, finding that TIHA did not constitute a dependent Indian community nor qualify as Indian country.[100] The district court did not analyze the contract provision issue because whether TIHA constituted a dependent Indian community determined the outcome of the

91. 2022 ND 87, 973 N.W.2d 419.
92. *Id.* ¶ 2.
93. *Id.* ¶ 3.
94. *Id.* ¶¶ 3-4.
95. *Id.* ¶ 4.
96. *Id.* ¶ 5.
97. *Id.* ¶ 6.
98. 665 F.2d 837, 839 (8th Cir. 1981).
99. 522 U.S. 520, 527 (1998).
100. *Trenton Indian Hous. Auth.*, 2022 ND 87, ¶ 5, 973 N.W.2d 419.

case.[101] Therefore, the district court denied Poitra's motion to dismiss and granted the eviction.[102]

Poitra appealed, arguing the district court erred in its findings.[103] Writing the opinion, Chief Justice Jensen explained that a mixed standard of review applied to this case because Poitra's challenge to subject matter jurisdiction raised a dispute of facts.[104] Poitra's argument contesting subject matter jurisdiction involved factual disputes about the exact status of the land at issue.[105] Presented with a mixed question of law and fact, the court reviewed "the question of law de novo and the district court's findings of fact under the clearly erroneous standard of review."[106] The clearly erroneous standard requires reversal when a finding of fact "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."[107]

After determining the standard of review, the court went on to define "Indian country" because "a determination of whether the land is Indian country subject to tribal court jurisdiction" would determine which court had proper jurisdiction.[108] The definition of Indian country in the federal criminal code applies in both civil and criminal cases.[109] Indian country is defined as:

> (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.[110]

The parties agreed TIHA is not a reservation or allotment, nor held in a trust by the federal government.[111] The dispositive issue became whether TIHA qualified as a dependent Indian community under 18 U.S.C. § 1151(b) and, therefore, was "Indian country."[112]

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101. *Id.* ¶ 5.
102. *Id.* ¶ 4.
103. *Id.* ¶ 6.
104. *Id.* ¶ 7.
105. *Id.*
106. *Id.* ¶ 6 (quoting Gustafson v. Poitra, 2018 ND 202, ¶ 6, 916 N.W.2d 804).
107. *Id.* (quoting *Gustafson*, 2018 ND 202, ¶ 6, 916 N.W.2d 804).
108. *Id.* ¶ 8.
109. *Id.*
110. *Id.* (quoting 18 U.S.C. § 1151).
111. *Id.* ¶ 9.
112. *Id.*

Relying on *Alaska*, the court reiterated a two-part review used to determine what constitutes a dependant Indian community:

> We now hold that [dependent Indian community] 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.[113]

In *State v. Gohl*,[114] the North Dakota Supreme Court considered whether the area around Trenton, North Dakota constituted Indian country.[115] The court concluded in *Gohl* that the record did not present facts from which the court could determine the land where the crime occurred constituted Indian country.[116] In *Lavallie v. Jay*,[117] the court considered whether an accident occurred within Indian country.[118] In *Lavallie*, the court stated that the moving party challenging subject matter jurisdiction holds the burden of proof.[119]

Poitra, as the challenger of the district court's subject matter jurisdiction, had the burden of proving the land in dispute was set aside by the federal government.[120] "Recognition as a dependent Indian community requires the land be set-aside by the federal government."[121] The Tenth Circuit explained "set-aside" as "'some explicit action by Congress . . . to create or to recognize the land in question as part of a federally recognized and dependent Indian community."[122] This set-aside involves active federal government control over the land, similar to a guardianship, with explicit recognition from the federal government that this land is set apart for use by Indian tribes.[123] The Second Circuit agreed with the Tenth Circuit's explanation of the set-aside requirement, noting that Congress determines what land is Indian country.[124] Further explaining the two-part test, the Second Circuit stated that the federal

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113. *Trenton Indian Hous. Auth.*, 2022 ND 87, ¶ 10, 973 N.W.2d 419 (alteration in original) (quoting *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 527 (1998)).

114. 477 N.W.2d 205, 208 (N.D. 1991).

115. *Trenton Indian Hous. Auth.*, 2022 ND 87, ¶ 10, 973 N.W.2d 419 (citing *Gohl*, 477 N.W.2d at 208).

116. *Id.* ¶ 10 (quoting *Gohl*, 477 N.W.2d at 208).

117. 2020 ND 147, 945 N.W.2d 288.

118. *Trenton Indian Hous. Auth.*, 2022 ND 87, ¶ 12, 973 N.W.2d 419 (citing *Lavallie*, 2020 ND 147, ¶¶ 2-3, 945 N.W.2d 288).

119. *Id.* (citing *Lavallie*, 2020 ND 147, ¶ 6, 945 N.W.2d 288).

120. *Id.* ¶¶ 13, 16.

121. *Id.* ¶ 13 (citing *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998)).

122. *Id.* ¶ 14 (quoting Hydro Res., Inc. v. U.S. E.P.A., 608 F.3d 1131, 1148-49 (10th Cir. 2010)).

123. *Id.* (citing *Hydro Res., Inc.*, 608 F.3d at 1148-49).

124. *Id.* ¶ 15 (quoting Citizens Against Casino Gambling in Erie Cty. v. Chaudhuri, 802 F.3d 267, 282 (2nd Cir. 2015)).

government must "designate[] the land to serve the interests of an 'Indian community' . . . while the superintendence requirement ensures that the tribe is 'dependent' on the federal government in the sense of being subject to federal control."[125] Poitra provided no evidence that the federal government set aside the land for Indian community use.[126] The lack of evidence in the record allowed the court to conclude that the district court did not erroneously find that the land was not located within a dependent Indian community.[127] Therefore, the court affirmed the district court's finding.[128]

With respect to the second issue, Poitra argued that the Department of Housing and Urban Development required the contractual agreement between TIHA and Turtle Mountain to include a provision that "Tribal Courts shall have jurisdiction to hear and determine actions for eviction."[129] To further her argument, Poitra also cited Tribal Ordinance 30, which formed TIHA, as requiring TIHA to bring eviction actions in tribal court.[130] Tribal Ordinance 30 states:

> 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 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. The Tribal Government hereby declares that the powers of the Tribal courts shall be vigorously utilized to enforce eviction of a tenant or homebuyer for nonpayment or other contract violations.[131]

The district court found that since Tribal Ordinance 30 discussed enforcing evictions through the appropriate courts, neither contractual provisions nor long-arm statutes required tribal court jurisdiction.[132] Poitra argued that the district court lacked subject matter jurisdiction because the tribal courts had jurisdiction under the contractual provision.[133] Without TIHA as a dependent Indian community within the meaning of Indian

125. *Id.* ¶ 15 (quoting *Chaudhuri,* 802 F.3d at 282).
126. *Id.* ¶ 16.
127. *Id.*
128. *Id.*
129. *Id.* ¶ 17.
130. *Id.*
131. *Id.*
132. *Id.* ¶ 18.
133. *Id.* ¶ 19.

country, the court held the contractual provision alone could not establish subject matter jurisdiction with the tribal court.[134]

Poitra's argument that the state court lacked personal jurisdiction also failed because Poitra did not identify in her brief "how she believe[d] personal jurisdiction may have been deficient," nor did she assert an argument to support her challenge to personal jurisdiction.[135] The court held Poitra abandoned her argument that the court lacked personal jurisdiction because she failed to raise the argument in her brief.[136] "A party abandons an argument by failing to raise it in the party's appellate brief."[137]

The court ultimately affirmed, finding the district court's determination that TIHA did not constitute an Indian community was not clearly erroneous, the district court did not err in determining it had subject matter jurisdiction, and TIHA had no contractual obligation to bring the eviction action in tribal court.[138]

134. *Id.*
135. *Id.* ¶ 20.
136. *Id.*
137. *Id.* (citing Bearce v. Yellowstone Energy Dev., LLC, 2019 ND 89, ¶ 29, 924 N.W.2d 791).
138. *Id.* ¶ 21.