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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

NORTHERN ARAPAHO TRIBE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
STAR TRUCKING CORPORATION,	)	
a Wyoming corporation	)	
	)	
Defendant,	)	
	)	
vs.	)	Civil Action No. 11-CV-00364-NDF
	)	
JOHN HUBENKA and	)	
LeCLAIR IRRIGATION DISTRICT,	)	
	)	
Third-Party Defendants.	)	
_____	)	

**NORTHERN ARAPAHO TRIBE'S OBJECTION  
TO REMOVAL AND MOTION FOR REMAND**

COMES NOW Plaintiff Northern Arapaho Tribe ("NAT") and responds to Defendant  
LeClair Irrigation District's Notice of Removal and Motion to Consolidate Cases as follows:

## **BACKGROUND**

LeClair Irrigation District (“LeClair”) attempts to remove a tribal court case to federal district court. Such removal is not proper.

Below is the chronology of this case:

1. NAT filed a Complaint in the Shoshone and Arapaho Tribal Court against Mr. John Hubenka and LeClair on November 13, 2010, for claims arising under tribal law.
2. NAT as Plaintiff-Intervenor filed an Amended Complaint in the District Court of Wyoming on March 14, 2011, naming LeClair as defendant. This is a Clean Water Act case, arising under federal law.
3. NAT filed a Complaint in the Shoshone and Arapaho Tribal Court against Star Trucking Corporation (“Star Trucking”) on August 25, 2011, for claims arising under tribal law.
4. Star Trucking filed a Third-Party Complaint in the Shoshone and Arapaho Tribal Court against Mr. Hubenka and LeClair on October 18, 2011.
5. NAT filed a Motion to Consolidate Cases in the Shoshone and Arapaho Tribal Court against Mr. Hubenka, LeClair and Star Trucking on October 26, 2011, to consolidate adjudication of claims arising under tribal law.

The Shoshone and Arapaho Tribal Court has exclusive jurisdiction over claims arising under tribal law. Those claims are not subject to removal. LeClair has not exhausted its Tribal Court remedies as required by the exhaustion doctrine and this Court lacks subject matter jurisdiction. (Civil Case No. CV-00364-NDF, Doc. #1)

### **STANDARD**

“The removal jurisdiction granted in Sections 1441 and 1443(1) of Title 28 speaks only of actions brought in *State* courts.” Becenti v. Vigil, 309 F.2d 777 (10<sup>th</sup> Cir. 1990). “Until and unless Congress includes tribal courts in the removal statute, federal courts cannot exercise jurisdiction over actions commenced in tribal courts.” Id. at 781. “The state court prerequisite identified in § 1441(a) is applicable to actions purportedly removed under § 1441(b).” Weso v. MISD, 915 F.Supp 73, 76 (1995).

### **ARGUMENT**

#### **1. LeClair’s reliance on § 1441(b) as a basis of removal is misplaced.**

Controlling case law in the 10<sup>th</sup> Circuit says that Section 1441 speaks only of removal of actions first brought in “State” courts. Specifically, the Court ruled that 28 U.S.C. § 1442, which contains a state court limitation for removal like that found in § 1441(b), does not extend to Tribal Courts. Becenti v. Vigil, 309 F.2d 777 (10<sup>th</sup> Cir. 1990). The Shoshone and Arapaho Tribal Court is not a *state* court under the meaning of § 1441(b) and therefore the removal statute does not apply. Congress has amended the removal statutes to permit removal from courts other than *state* courts to include the District of Columbia and Puerto Rico. Id. at 780. Congress has the power to amend the removal statutes to include tribal courts, but to date has not done so; therefore the removal statute cannot be applied to tribal courts.

#### **2. LeClair improperly relies on 28 U.S.C. § 1332 as a basis for removal.**

An Indian Tribe is not a citizen of a state within the meaning of § 1332 and may not be

sued in federal court under the court's diversity jurisdiction. Tenney v. Iowa Tribe of Kansas, 243 F.Supp.2d 1196 (2003). Even if diversity jurisdiction existed, the tribal court exhaustion rule applies. Iowa Mutual v. LaPlante, 480 U.S. 9 (1987). As detailed below, LeClair has not exhausted tribal court remedies.

**3. LeClair has not exhausted its tribal court remedies and cannot proceed to federal court.**

It is a well-established rule that one must first exhaust tribal court remedies before proceeding to federal court. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985). In addition, in Iowa Mutual v. LaPlante, the Court concluded that while the federal court would have jurisdiction to review the tribal court's jurisdiction over the controversy after tribal remedies were exhausted, "proper deference to the tribal court system" precluded relitigation of the substantive issues raised in dispute. 480 U.S. 9, 19 (1987). LeClair has not had a trial on the claims brought against them in Tribal Court and therefore has not even begun the process to exhaust Tribal Court remedies. Any action challenging the Tribal Court's disposition of these claims in Federal District Court is premature.

**4. Exhaustion of tribal remedies is a matter of comity.**

It is well recognized that "as a matter of comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies." Petrogulf Corp., 92 F.Supp.2d at 1113 (quoting Tillet v. Lujan, 931 F.2d 636, 640 (10<sup>th</sup> Cir.

1991).

Three comity concerns are advanced by the tribal exhaustion rule: (1) furthering congressional policy of supporting tribal self-government; (2) promoting the orderly administration of justice by allowing a full record to be developed in the tribal court; and (3) obtaining the benefit of tribal expertise if further review becomes necessary. Petrogulf Corp., 92 F.Supp.2d at 1113 (citing Kerr-McGee Corp. v. Farley, 115 F.3d at 1507). Moreover, the Tenth Circuit has “taken a strict view of the tribal exhaustion rule...based on [these] comity concerns for Indian tribes in maintaining their sovereignty.” Kerr-McGee Corp., 115 F.3d at 1507.

In DHS Drilling Company v. Estate of Jeremy Jorgenson, No. 09-CV-200-J (D. Wyo 2010), the court found that, for reasons of comity, tribal court remedies, including appellate review, must be completed in order to comply with the tribal exhaustion rule. This case involves the same issue of the tribal exhaustion rule and therefore the precedence set in DHS v. Jorgenson should be followed.

LeClair also cites 28 U.S.C. § 1367 as a basis for removal. However, this Court cannot have supplemental jurisdiction if it first does not have original jurisdiction.

LeClair has cited authorities for removal that simply do not apply to NAT’s claims and the Shoshone and Arapaho Tribal Court. LeClair is trying to sidestep and undermine the tribal court system by filing this notice of removal and motion to consolidate cases.

Moreover, the “related matter” that LeClair references, U.S. v. Hubenka et al., U.S.D.C.

Wyo. Civil No. 10-CV-0093-J, is currently set for trial on January 30, 2012. Inserting additional tribal court claims that have not been exhausted would have a chaotic effect on trial logistics. Furthermore, the scope of evidence is not the same and there is no clear way to consolidate case deadlines without interfering with the current case deadlines or violating the parties' right to put forth evidence. NAT is also advised that the United States would oppose such consolidation.

For these reasons, NAT respectfully requests this Court to:

- A. Deny LeClair's Notice of Removal and Motion to Consolidate Cases.
- B. Grant NAT's motion to remand to the Shoshone and Arapaho Tribal Court.
- C. Declare that this Court lacks subject matter jurisdiction.
- D. Award cost and expenses, including attorney fees incurred, allowable under 28 U.S.C. § 1447.

Dated this 28<sup>th</sup> day of December, 2011.

Northern Arapaho Tribe, Plaintiff

By: \_\_\_\_\_/s/  
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ATTORNEYS FOR PLAINTIFF NORTHERN  
ARAPAHO TRIBE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing NORTHERN ARAPAHO TRIBE'S OBJECTION TO REMOVAL AND MOTION FOR REMAND was served upon the following by the methods indicated below on the 28<sup>th</sup> day of December, 2011:

Harriet M. Hageman	<input type="checkbox"/>	By Facsimile
Kara Brighton	<input type="checkbox"/>	By U.S. mail, postage prepaid
Hageman & Brighton, P.C.	<input type="checkbox"/>	By Hand Delivery
222 East 21 <sup>st</sup> Street	<input type="checkbox"/>	By Overnight Courier
Cheyenne, WY 82001	<input checked="" type="checkbox"/>	Electronic Filing

Daniel B. Frank	<input type="checkbox"/>	By Facsimile
Frank Law Office, P.C.	<input type="checkbox"/>	By U.S. mail, postage prepaid
519 East 18 <sup>th</sup> Street	<input type="checkbox"/>	By Hand Delivery
Cheyenne, WY 82001	<input type="checkbox"/>	By Overnight Courier
	<input checked="" type="checkbox"/>	Electronic Filing

Thomas A. Thompson	<input type="checkbox"/>	By Facsimile
Brandon W. Snyder	<input type="checkbox"/>	By U.S. mail, postage prepaid
Matthew E. Riehl	<input type="checkbox"/>	By Hand Delivery
MacPherson, Kelly & Thompson, LLC	<input type="checkbox"/>	By Overnight Courier
P.O. Box 999	<input checked="" type="checkbox"/>	Electronic Filing
Rawlins, WY 82301		

William L. Miller	<input type="checkbox"/>	By Facsimile
Miller & Fasse	<input type="checkbox"/>	By U.S. mail, postage prepaid
710 North 8 <sup>th</sup> West	<input type="checkbox"/>	By Hand Delivery
Riverton, WY 82501	<input type="checkbox"/>	By Overnight Courier
	<input checked="" type="checkbox"/>	Electronic Filing

\_\_\_\_\_/s/  
Terri V. Smith