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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

DAVID M. EVANS, an individual; RON PICKENS, an individual, d/b/a P & D CONSTRUCTION, an Idaho sole proprietorship; SAGE BUILDERS, an Idaho limited liability partnership;

Plaintiffs,

vs.

SHOSHONE-BANNOCK LAND USE POLICY COMMISSION; NATHAN SMALL, as Chairman of the Fort Hall Business Council; GLENN FISHER, as a member of the Fort Hall Business Council; LEE JUAN TYLER, as a member of the Fort Hall Business Council; DEVON BOYER, as a member of the Fort Hall Business Council; TINO BATT, as a member of the Fort Hall Business Council; BLAINE J. EDMO, as a member of the Fort Hall Business Council; DARRELL DIXEY, as a member of the Fort Hall Business Council; TONY GALLOWAY, SR., as Chairman of The Shoshone-Bannock Land Use Policy Commission; CASPER APPENAY, as a member of the Shoshone-Bannock Land Use Policy Commission; JOHN FRED, as a member of the Shoshone-Bannock Land Use Policy Commission; ARNOLD APPENEY, as the Executive Director of the Shoshone-Bannock Land Use Department; and GEORGE

Case No. 4:12-CV-00417-BLW

RESPONSE TO PLAINTIFFS' MOTION FOR PRELMINARY INJUNCTION

GUARDIPEE, as a enforcement official of the Shoshone-Bannock Land Use Policy Commission; SHOSHONE-BANNOCK TRIBAL COURT JUDGES JOHN DOES, as a Tribal Judicial officer(s),

Defendants.

COME NOW Defendants through counsel Mark A. Echo Hawk of ECHO HAWK LAW and submit the following Response to Plaintiffs' Motion for Preliminary Injunction filed on October 15, 2012.

INTRODUCTION

The landscape of federal Indian law is a scene with several long-lasting landmarks. For over a quarter century the exhaustion doctrine has been one of those notable landmarks. With barely a passing nod to the prominent point of exhaustion, Plaintiffs' Motion for Preliminary Injunction urges this Court to dash ahead and issue injunctive relief impulsively. Plaintiffs push the Court to hastily charge forward while fixating on insignificant factual features. The Shoshone-Bannock Tribal Defendants (Tribes) ask the Court to pause and ponder the setting, to avoid painting an errant brush-stroke across the scene.

Plaintiffs' Motion presents a basic jurisdictional question: whether the Shoshone-Bannock Tribes may lawfully regulate non-Indian activity on fee-land on the Reservation that directly affects the Tribes' federally-protected interests. The Tribes' argue[1] that this Court cannot answer the question until the Shoshone-Bannock Tribal Court has had a full opportunity to consider the question in the first instance.

[1] The Tribes' Motion to Dismiss, Document 20, filed on September 19, 2012, was based on Rules 12(b)(1) and (2) of the Federal Rules of Civil Procedure. However, because the Ninth Circuit has noted that motions for failure to exhaust nonjudicial remedies that are not jurisdictional should be treated as a matter in abatement, subject to unenumerated 12(b) motions, *see Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), the Tribes' motion should also be characterized as an unenumerated 12(b) motion.

To hurry the Court along without noticing landmark laws, Plaintiffs' Motion asks for the extraordinary remedy of injunctive relief. Injunctive relief is not appropriate, however, because the Plaintiffs are not likely to succeed on the merits, they have not and will not suffer irreparable harm, the balance of equities does not tip in their favor, and injunctive relief is not in the public interest.

ARGUMENT

1. EXHAUSTION OF TRIBAL REMEDIES MUST BE ADDRESSED.

Plaintiffs first assert that this Court has jurisdiction, and suggest, therefore, that the Court should quickly assert authority. Plaintiffs' suggestion misses the mark. The real question before the Court is not whether this Court *has* jurisdiction, but whether this Court *should* assert jurisdiction despite the mandate of the long-standing exhaustion doctrine. Whether the Tribal Court ultimately has jurisdiction over the matter is a question that becomes pertinent only after this Court has answered whether the federal court should exercise jurisdiction at this point in the litigation.

Invoking the injunctive relief analysis under Rule 65 is not a way to ignore the exhaustion doctrine. Plaintiffs have not cited authority indicating that a request for injunctive relief obviates the need to address exhaustion of tribal remedies. To the contrary, the propriety of granting injunctive relief cannot be properly determined without considering whether this Court should stay its hand. *See, e.g., Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848 (9th Cir. 2009) (affirming the dismissal of Plaintiffs' request for injunctive and declaratory relief); *Encana Oil & Gas v. John St. Clair*, Case 12CV00027-ABJ (D. Wyo. 2012) (denying motion for preliminary injunction and requiring exhaustion).

A. Exhaustion of Tribal remedies is almost always required.

When a claim arises in Indian country federal courts are generally required to stay their hand until the plaintiffs exhaust tribal court remedies. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *see Auto-Owners Ins. Co. v. Tribal Ct.*, 495 F.3d 1017, 1024 (8th Cir. 2007) (dismissing case for failure to exhaust tribal court remedies, concluding that "Tribal remedies must be exhausted before the district court may properly consider the existence of tribal court jurisdiction" and "the district court erred by not deferring for exhaustion of such remedies.").

In light of Congress' policy "supporting tribal self-government and self-determination," tribal courts should have "the first opportunity to evaluate the factual and legal bases" for challenges to their jurisdiction, and federal courts will benefit from their expertise. *Nat'l Famers Union Ins. Cos.,* 471 U.S. at 856. Indeed, unconditional access to federal courts "impairs the authority of tribal courts over reservation affairs" and "infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *Iowa Mutual Ins. Co.*, 480 U.S. at 16.

In deference to the principles underlying the exhaustion requirement, the Ninth Circuit requires exhaustion in all cases involving tribal affairs, including those arising outside Indian country and off-Reservation, even where no tribal proceeding is pending, so long as there is a colorable or plausible argument that tribal jurisdiction exists. *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920-21 (9th Cir. 2008); *United States v. Plainbull*, 957 F2d 724, 728 (9th Cir. 1992). Likewise, the Tenth Circuit has held that the policies underlying *National Farmers* "almost always" require exhaustion where exhaustion would further the interests of self-government, orderly administration of justice, or utilizing tribal expertise. *Texaco Inc. v. Zah*, 5

F.3d 1374, 1378 (10th Cir. 1993) (dismissing declaratory judgment action, holding that, "*National Farmers* requires that appellants present their jurisdictional challenge to the tribal court before pursuing action in federal district court."); *see also Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir.1992) (stating that bank's challenge to tribal court jurisdiction over banking activity occurring *off* tribal land should be heard first in tribal court).

"Tribal courts have repeatedly been recognized as appropriate forums for the *exclusive* adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978) (emphasis added); *Burrell v. Armijo*, 456 F.3d 1159, 1167-68 (10th Cir. 2006), *citing Enlow v. Moore*, 134 F.3d 993, 996 (10th Cir.1998) (stating that "civil jurisdiction over non-Indians on reservation lands '*presumptively* lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute'") (emphasis added); *Siemion v. Stewert*, 2012 WL 5430977 (Nov. 7, 2012, D. Montana) ("Considerations of comity *require* the exhaustion of tribal remedies before the claim may be addressed by the federal district court.") *citing Wellman v. Chevron,* 815 F.2d 577, 578 (9th Cir. 1987).

Against this backdrop of authority developed and affirmed by many courts over the course of a quarter century, it can be fairly said that, "exhaustion of tribal remedies is 'mandatory.'" *Id.* A corollary observation of the Ninth Circuit notes that, "[a] district court has no discretion to relieve a litigant from the duty to exhaust tribal remedies prior to proceeding in federal court." *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir. 1999), *amended*, 197 F.3d 1031 (9th Cir. 1999).

Despite Plaintiff's urging, this Court should first answer whether exhaustion of tribal remedies is required here. Rule 65 does not alter the exhaustion doctrine or the Court's

obligation to address the issue. Therefore, Plaintiff's suggestion that this Court apply the injunctive relief standard without first addressing exhaustion of Tribal Court remedies should be rejected.

B. This Court has required exhaustion of Tribal remedies for cases arising on the Fort Hall Reservation.

In *United States of America v. FMC Corporation*, CV-98-0406, this Court denied FMC's motion for declaratory relief and made it clear that litigants must exhaust Tribal court remedies before filing suit in federal court. Based on that ruling, no litigant should be surprised by the application of the exhaustion doctrine on the Reservation.

In another case arising on the Fort Hall Reservation, the Ninth Circuit noted the propriety of exhaustion, and reversed the District Court's (Marion J. Callister) jurisdictional determination. In *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990) the Shoshone-Bannock Tribes brought an action against FMC, a non-Indian owned business operating on fee land within the Reservation. The Tribes attempted to apply Tribal regulations to a non-Indian company on non-Indian owned fee land on the Reservation. FMC sought injunctive relief. Judge Callister granted injunctive relief to stay enforcement of Tribal court orders *until the Tribal Court had the opportunity to address the jurisdictional question.* The Tribal Appellate Court found that both *Montana* exceptions were satisfied. FMC appealed to the District Court. When the District Court found that no Tribal jurisdiction existed, the Ninth Circuit reversed the District Court's ruling, finding that the Tribes indeed had jurisdiction to enforce legislative regulation on the non-Indian owned company operating on fee land. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990).

Neither exhaustion of Tribal remedies nor Tribal jurisdiction over non-Indians on the Fort Hall Reservation is a new concept in this Court or the Ninth Circuit. *Big Horn County Electric*

Cooperative, Inc., v. Adams, 219 F.3d 944 (9th Cir. 2000) (Ninth Circuit did not address the merits of the case until after an electrical cooperative operating on non-Indian fee land on a reservation first exhausted tribal court remedies). The Court's decision in this case should follow the same consistent pattern.

C. None of the exceptions to the exhaustion doctrine apply.

The Ninth Circuit recognizes four exceptions to the exhaustion requirement:

> "(1) when an assertion of tribal court jurisdiction is 'motivated by a desire to harass or is conducted in bad faith'; (2) when the tribal court action is 'patently violative of express jurisdictional prohibitions'; (3) when 'exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; and (4) when it is 'plain' that tribal court jurisdiction is lacking, so that the exhaustion requirement 'would serve no purpose other than delay."

Elliot v. White Mountain Apache Tribal Court, 566 F.3d 842, 844 (9th Cir. 2009), *cert denied*, 130 S.Ct. 624 (2009). None of these exceptions apply.

Plaintiffs' Motion for Preliminary Injunction contains multiple allegations about the first exception—harassment or bad faith.[2] Underlying Plaintiffs' entire jurisdictional argument is a generalized accusation of harassment—that despite the 'plain' lack of jurisdiction the Tribal Court and the Tribes keep pressing. Federal courts have already affirmed that allegations of local bias or tribal court incompetence are not exceptions to the exhaustion requirement. *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006). Plaintiffs' argument begs the question: If the lack of tribal court jurisdiction is so clear-cut and the tribal court is competent, then would the plainness of the law not be similarly evident to the Shoshone-Bannock Tribal Court? At any rate, neither the sensational allegations of bad faith nor a generalized accusation of harassment satisfy the first exception.

[2] As explained in the Reply Memorandum in Support of Motion to Dismiss, Doc. 47, 10-11, and supported by several declarations and video evidence, the allegations about prison time and arrest are false, and irrelevant. *Grand Canyon Skywalk Development v. 'Sa'Nyu Wa*, 2012 WL 1207149.

The second exception to the exhaustion requirement does not fit either. It only applies when there is specific and express federal statutory authority preempting and proscribing tribal court jurisdiction. A sister District Court in the Ninth Circuit analyzed the second exception earlier this month in *Dish Network Corp., et al. v. Eric Tewa, et al.*, Case 3:12-CV-08077-JAT. The court observed that the Communications Act of 1934 and regulations of the Federal Communications Commission were insufficient to satisfy the second exception.

> "The Dish Plaintiffs appear to read a broader rule into the 'patently violative of express jurisdictional prohibitions' exception than has been applied by the United State Supreme Court or the Ninth Circuit Court of Appeals. Rather, it appears that *this exception only applies when the legislation at issue speaks directly to a court's adjudicatory jurisdiction over a dispute*." *Id.* (emphasis added).

Not only does there have to be federal legislation on point, but the Supreme Court has also required the legislation to have an "unusual preemption provision" making it clear that tribal court jurisdiction would be inappropriate. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484 (1999). Here, there is no federal legislation or regulation at issue providing basis for argument about preemption or express jurisdictional prohibitions. Accordingly, this exception to the exhaustion requirement cannot apply.

The third exception to exhaustion cannot apply because Plaintiffs have an opportunity to challenge the tribal court's jurisdiction. The Plaintiffs have deliberately ignored the opportunity based on their conscientious objection to the concept of Tribal court jurisdiction. Significantly, the Tribal Court, upon the Land Use Policy Commission's motion, stayed all Tribal Court proceedings until this Court rules and the Tribal Court Defendants have an opportunity to challenge jurisdiction in Tribal Court. Even when the Tribal Court, *sua sponte*, noticed a hearing regarding default judgment in light of Plaintiffs' inaction, the Commission filed an objection to default judgment and requested that Defendants have the opportunity to challenge the Court's

jurisdiction and address the merits of the case in Tribal Court. *Declaration of Mark Echo Hawk*, 2.

The Plaintiffs also argue that the fourth exception to the exhaustion requirement applies. The fourth exception to the exhaustion requirement enunciated in *Strate*, 520 U.S. at 459, n. 14—when "it is plain that no federal grant provides for tribal governance or nonmembers' conduct on land covered by *Montana's* main rule, so the exhaustion would serve no purpose other than delay"—does not fit this case either.

Like the Supreme Court found in *Nevada v. Hicks*, the fourth exception 'is technically inapplicable' because the Plaintiffs have failed to make a plain showing that no federal grant provides for tribal governance so that exhaustion would serve no purpose other than delay. 533 U.S. 353, 369 (2001). The Tribes offered numerous arguments demonstrating the grounds for finding such a grant, including the Congressionally approved Fort Bridger Treaty of 1868, the Tribes' federally approved Land Use Policy Ordinance and accompanying implementation regulations, the Tribes' federal Treatment as a State (TAS) for purposes of federal Clean Water Act enforcement, federal case law granting authority to regulate in particular circumstances, etc. Notwithstanding, the Plaintiffs argue for the application of a broadly interpreted exception, based on the reasoning of *Strate's* fourth exception.

As a preliminary matter, it has not been conclusively determined that the *Hicks* Court intended to expand the fourth, or carve out a fifth exception to the exhaustion requirement. *Dish Network Corp., et al. v. Eric Tewa, et al.*, Case 3:12-CV-08077-JAT. Plaintiffs rely almost entirely on the expanded fourth exception (or *Hicks'* fifth exception)—where it is 'clear that the tribal court lacks jurisdiction' and 'tribal court exhaustion would serve no purpose other than

delay.'[3] However, even if it was the intention of the *Hicks* Court to officially expand the fourth exception or to create a fifth exception, the Plaintiffs' proposed application of the exception would eviscerate the comity doctrine altogether.

Just weeks ago, a sister District Court in *Dish Network Corp.* recognized the same thing:

> "Even if it was the intention of the *Hicks* Court, if this Court were to find that tribal court exhaustion were not required in this case because this Court is capable of first conducting a merits analysis of the tribal court's jurisdiction [] **such a holding would essentially eviscerate the comity doctrine and the reasoning behind it.** "Accordingly, because, unlike in *Hicks*, it is not clear that the tribal court lacks jurisdiction in this case, this 'exception' to the exhaustion requirement is likewise inapplicable."

Id. (emphasis added) (finding that "comity requires the Hopi Tribal Court be afforded the opportunity to evaluate the factual and legal bases for the challenges to its jurisdiction in the first instance and, thus, exhaustion of tribal court remedies is required.").

Strate's footnote exception and the reasoning behind it did not overrule *National Farmers* and *Iowa Mutual sub silentio*. The footnote did not do away with exhaustion in all cases involving non-Indians or non-Indian fee land on reservations. A better interpretation of *Strate* is that exhaustion is not required in cases "such as this one," involving highway accidents between non-Indians on fee land. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n. 14 (1997). The only way it is 'plain' or evident that a tribal court lacks jurisdiction is if that determination is made under applicable federal law, but that issue is precisely what the exhaustion doctrine intended to leave, in the first instance, for tribal courts to decide.

In addition, the Supreme Court's limitation of its own holding in *Hicks* weighs in favor of narrowly interpreting the 'fifth' exception. The Supreme Court was very specific in limiting *Hicks'* holding. *Hicks*, 533 U.S. at 358 n. 2. "Our holding in this case is limited to the question

[3] Plaintiffs' Motion for Preliminary Injunction, Page 20 ("exhaustion is not required because it is 'plain' that no jurisdiction over Plaintiffs exists.")

of tribal-court jurisdiction over state officers enforcing state law. *We leave open the question of tribal-court jurisdiction over nonmember defendants in general*." *Id.* (emphasis added).

Rather than being plain, the question of Tribal Court jurisdiction in this case is complex. The Tribes' Motion to Dismiss advances multiple legal and factual grounds upon which jurisdiction is firmly based. Ninth Circuit cases confirm this conclusion.

Where non-Indians voluntarily engage in commercial activities in Indian country, it is plausible that tribal court jurisdiction is proper. *Lanphere v. Wright*, 387 Fed. Appx. 766 (9th Cir. 2010) ("For those reasons, tribal court jurisdiction is plausible, and exhaustion of tribal court remedies is required. (At this state of the proceedings, we need not, and do not decide definitively whether the tribal courts have jurisdiction.)").

"[B]oth the Supreme Court and this circuit have held that non-Indian defendants must exhaust tribal court remedies before seeking relief in federal court, even where defendants allege that proceedings in tribal court exceed tribal sovereign jurisdiction." *Burlington N.R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1244 (9th Cir. 1991) (court rejected claim by railroad that exhaustion was not required where it alleged that tribal ordinance exceeded the Tribe's sovereign powers); *Landmark Golf Ltd. P'ship v. Las Vegas Paiute Tribe*, 49 F. Supp. 2d 1169, 1174 (D. Nev. 1999).

Exhaustion of tribal remedies is a threshold issue and must be addressed. Because none of the exceptions to the requirement apply, questions of injunctive relief in this Court must take a back seat. Plaintiffs have similar rules of civil procedure in Tribal Court to pursue an injunction.

2. INJUNCTIVE RELIEF IS NOT APPROPRIATE.

All plaintiffs seeking a preliminary injunction must establish that: (1) they are likely to succeed on the merits; (2) that they are likely to suffer irreparable harm in the absence of

preliminary relief; (3) that the balance of equities tips in their favor; and, (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Id.* at 376; *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

Plaintiffs' sensational blustering about the 'plainness' of the law, prison threats, or costs of Tribal Court litigation are insufficient to meet this exacting standard. Certainly, no litigant is entitled to a preliminary injunction against tribal court proceedings by virtue of his status as a non-Indian or fee landowner. *Stare decisis* demands more. Every Plaintiff has to make a showing on each requirement of the standard.

A. Plaintiffs do not have a likelihood of success on the merits.

Plaintiffs have foisted the idea upon the Court that the law is 'plain' that tribal court jurisdiction over non-Indians on non-Indian fee land has been virtually foreclosed by precedent. They argue, therefore, that they are likely to succeed on the merits.

To the contrary, whether a tribal court has the power to exercise civil-subject matter jurisdiction over non-Indians is not automatically foreclosed. *Nevada v. Hicks,* 533 U.S. 353, 358, n. 2 (2001). The existence and scope of the Shoshone-Bannock Tribal Court's jurisdiction in this case requires an in-depth examination of tribal sovereignty, the Fort Bridger Treaty of 1868, the extent to which that sovereignty has been altered, divested, or diminished, Tribal laws, in addition to a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative and judicial decisions pertaining to the Reservation. *National Farmers Union,* 471 U.S. at 855–56.

In this case the Plaintiffs sued the Tribes to stop them from exercising jurisdiction, arguing that the assertion of tribal jurisdiction violates federal law. Plaintiffs' likelihood of

success on the merits is thus, the likelihood that this Court will find that the assertion of tribal jurisdiction violates federal law.

The assertion of tribal jurisdiction does not violate federal law because federal law contemplates, and even requires initial tribal court jurisdiction in cases like this. The law actually requires federal courts to stay their hand while tribal courts address the jurisdictional inquiry in the first instance. To find a likelihood of success on the merits, this Court has to be able to say with certainty that the Tribal Court is plainly violating federal law by considering whether it has jurisdiction. In the face of federal laws supporting the assertion of Tribal jurisdiction it is difficult to say the assertion of Tribal jurisdiction is a plain violation of federal law.

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. *See Montana*, 450 U.S. at 565–566; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 133, 152–153 (1980); *Fisher v. District Court*, 424 U.S. 382, 387–389 (1976). Concluding at this point that the Plaintiffs have a likelihood of success on the merits, despite the contested factual and legal arguments surrounding this case, ignores the importance of sovereignty.

Since there are no cases addressing this particular scenario—whether a tribal building permit is required for residential construction on land within an EDB contaminated zone, where wells may contaminate the groundwater resource, where an existing unpermitted septic system exists for a trailer house on the same lot, where no right of way exists for the access road, where the parcel cannot support two septic systems, where the groundwater resource may be contaminated by the nearby superfund site or sewage biolsolid dissemination, where the site is close to prime Tribal hunting ground and next to Tribal agricultural zone land, etc.—and the law

requires a fact sensitive inquiry, likelihood of success on the merits can hardly be determined. To shoot from the hip and conclude that the Tribes likely do not have jurisdiction ignores the exhaustion mandate and infringes on the Tribes' right to first adjudicate matters involving its treaty, federally-approved legislation, natural resources, and health and welfare.

Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008) does not foreclose tribal jurisdiction in this case. Rather, it supports the exhaustion mandate. In that case the plaintiffs sued in tribal court and the bank contested the tribal court's jurisdiction. *Id.* at 320. After trial in tribal court, the bank appealed to the Cheyenne River Sioux Tribal Court of Appeals. *Id.* at 322. After exhausting tribal court remedies, the bank filed an action in federal court contesting tribal jurisdiction. *Id.*

Withholding facts regarding consensual relationship or direct impacts on Tribal interests, and then arguing that no evidence support the *Montana* exceptions exists is unfair. To properly evaluate Tribal jurisdiction in this case the Tribal Court should develop a full factual record and decisional matrix for this Court to review later. Do Evans' contracts with his contractor or subcontractors require permits? Have the contractors obtained tribal business licenses previously? Was the house built to code? Did Evans obtain a license for the first septic system on his land? How does the second septic system burden the particular soil type on Evans' lot? Was the well properly dug, fitted, and sealed to protect the groundwater resource and users? Was construction debris properly disposed? Did the house plans and construction conform to applicable code? Does the building size, type, and use conform to applicable zoning for the area? Does a right of way and appropriate ingress and egress exist? Have the Plaintiffs entered previous agreements with the Tribes? Have the Plaintiffs received Tribal government services? Have the Plaintiffs availed themselves of rights, protections, or services from the Tribal

government? Have the Plaintiffs drained tribal resources to a degree that Tribal interests are at risk? Was Congress' promise that the Reservation would be 'set apart for the absolute and undisturbed use and occupation of the Tribes' inclusive of the power to define the character of the Reservation through zoning and permitting? Each of these and many other questions should be asked and answered by the development of a full record before this Court can rightly determine likelihood of success on the merits, which is the purpose of the exhaustion doctrine in the first place.

The first and second Declaration of Tony Galloway, Sr., and the Declaration of George Guardipee demonstrate direct impacts the Plaintiffs' activities have on Tribal interests, including threats to Tribal water resources. Threats to tribal water resources invoke inherent tribal authority over non-Indians. *State of Montana v. U.S. E.P.A.*, 137 F.3d 1135, 1141 (9th Cir. 1998) ("We have previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians. A tribe retains the 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 health and welfare of the tribe. This includes conduct that involves the tribe's water rights.") *citing Colville Confederated Tribes v. Walton,* 647 F.2d 42, 52 (1981)). Similarly, actions of a non-Indian business that have some direct effect on health and welfare of a tribe give rise to tribal court jurisdiction. *Cheromiah v. United States*, 55 F. Supp. 2d 1295, 1305, 1999 WL 454912 (D.N.M. 1999) (concluding that the second *Montana* exception was met because the conduct of the non-Indian had a "direct effect" on the health and welfare of the tribe).

Inability to regulate business activity and permitting on the Reservation directly affects the Tribes' inherent sovereignty, political integrity, economic security, and health and welfare.

(Reply Memorandum in Support of Motion to Dismiss, 5-6). In addition to those interests previously identified, the Court should consider the impact of 'unacceptable incremental shifts' caused by discrete land use decisions referenced in *Brendale*, on the Tribes' political integrity. Also, the building permitting process produces information about rights of way to a construction site. Unlawful access where no right of way exists undermines the Tribes' trespass laws and thus affects a Tribes' political integrity. Contamination of the Tribes' groundwater resource by unpermitted and overburdened septic systems negatively impacts the value of surrounding Tribal land and leads to expensive costs of restoration and monitoring. Continuing to drill wells in the EDB contaminated area where Evans' property is located 'could affect funding for future waterline projects,' according to the U.S. Department of Health and Human Services. *Second Declaration of Tony Galloway, Sr.*, Exhibit B. Thus, the Tribes' interest in economic security is directly affected. Unauthorized dumping of construction debris, fire hazards, utility connection hazards, substandard construction practices, etc., also impact the Tribes' interests.

Cases like *Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997) do not dictate the result here. A vehicle accident on a federal highway within a Reservation, like in *Wilson*, has discrete impacts on a particular tribal member. *Id.* at 807. Such accidents do not affect tribal natural resources, a tribes' ability to define the character of the reservation through permitting and zoning, or tribal hunting grounds. Significantly, exhaustion of tribal remedies occurred in *Wilson*. *Id.* The Court weighed in mainly on whether tribal court judgments are entitled to full faith and credit, it did not deal with preliminary injunctive relief, similar Reservation land, or similar tribal interests as in this case. *Id.* at 809.

I. The Fort Hall Reservation is 'Closed.'

Plaintiffs spend a lot of time arguing that they are likely to succeed because they view the Fort Hall Reservation as 'open' under the *Brendale* analysis. *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). As a preliminary matter, whether the Fort Hall Reservation is 'open' or 'closed' under the *Brendale* analysis is a matter for the Shoshone-Bannock Tribal Court to determine in the first instance.

The Fort Hall is not an 'open' Reservation. It is completely unlike the reservation of the Yakima Indian Nation analyzed in *Brendale*. Approximately ninety-eight percent (98%) of the Fort Hall Indian Reservation lands are Tribal lands or lands held in trust by the United States for the benefit of the Tribes or individual Indians. *Declaration of Tony Galloway, Sr., 2; FMC v. Shoshone-Bannock Tribe*, 905 F.2d 1311, 1312 (9th Cir.), *cert. denied*, 499 U.S. 493 (1991). Over twenty percent (20%) of the Yakima Indian Nation is non-Indian fee land. That means non-Indians owned more than 260,000 acres of the Yakima Reservation. In stark contrast, only two percent (2%) of the Fort Hall Reservation is owned by non-Indians in fee simple. Only 10,800 acres of the Fort Hall Reservation is owned by non-Indians. In addition, the Yakima Reservation had three (3) entire towns open to non-Indian residences, businesses, and development. There are no similar independent towns on the Fort Hall Reservation. Finally, the Yakima Indian Nation deliberately classified parts of the Reservation as 'open.' In contrast, the Shoshone-Bannock Tribes have designated the entire Fort Hall Reservation as 'closed' in the federally-approved Land Use Policy Ordinance, giving notice to all residents of the nature of the Reservation.[4] It cannot be argued with a straight face that the Fort Hall Reservation is like the

[4] "The Fort Hall Reservation has been set aside as the permanent homeland for the Shoshone-Bannock Tribes. No person may use land or natural resources on the Reservation in a manner inconsistent with this purpose. The Fort Hall Reservation is a 'closed' Reservation, as that term has been defined by the United States Supreme Court in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). The Fort Hall

Reservation in *Brendale*. The *Brendale* case holding was based on the particular facts presented in that case, and would have been different based the facts and features of the Fort Hall Reservation.

The Tribes and tribal members own land on six of the eight Sections surrounding Evans' property. *Second Declaration of Tony Galloway, Sr.*, Exhibit A. The absence of tribal member housing in the area does not demonstrate lack of Tribal interest as Plaintiffs suggest. Rather, it is the result of a deliberate decision of the Shoshone-Bannock Tribes to protect prime agricultural ground for economic development purposes and preserve hunting grounds nearby. Evans does not have a legitimate recorded right of way to access his property on Government Road and Power County lacks a maintenance agreement for Government Road. *Declaration of Dean Fox*, 2-5.

Showing a line of ownership from several past owners, Plaintiffs attempt to demonstrate that the Fort Hall Reservation has been diminished or 'opened' through allotment. Attempting to apply the General Allotment Act of 1887 to the Fort Hall Reservation is improper, and advances the objectives of that ill-conceived legislation. "The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *County of Yakima*, 504 U.S. at 254. Fortunately, "the policy of allotment came to an abrupt end in 1934 with the passage of the Indian Reorganization Act." *Id.* at 255. Unfortunately, some individuals are stuck in the ideological past. It is clear that Congress passed distinct allotment legislation for the Fort Hall Reservation by the Act of Congress, 25 Stat. 688. Accordingly, the General Allotment Act, along with its outdated and disgraced objectives, should not be the backdrop for considering the

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Reservation is closed to the general public, except as described herein. [] No portion of the Fort Hall Reservation is 'open' as that term has been defined by [Brendale]." Land Use Policy Ordinance, Chapter 6(A)(1).

present state of the Fort Hall Reservation. Other allotments on the Fort Hall Reservation originate from 'land-book' treaty allotments. The Fort Hall Reservation has not been diminished or opened as Plaintiffs suggest.

In a final grasping attempt to show that Tribal Court jurisdiction violates federal law, Plaintiffs latch onto a State district court criminal case, *State v. Sortor*. *Sortor* does not apply, however, because it dealt with whether Power County could enforce a State criminal code provision over a non-Indian on the Reservation. The extent of State criminal jurisdiction over the defendant in that case involves a distinct legal analysis. *Sortor* simply has no bearing on whether the Tribes are violating federal law by asserting jurisdiction in this case.

In sum, the Plaintiffs cannot show a likelihood of success on the merits because there is no law or set of facts upon which the Court can clearly base a ruling that the Tribes are violating established federal law by insisting on exhaustion of Tribal court remedies. Accordingly, they cannot meet the standard for issuance of a preliminary injunction.

B. Plaintiffs will not suffer irreparable harm if injunction is not granted.

Under *Winter*, Evans and his contractors must each establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Under any formulation of the test, the moving party must demonstrate a significant threat of irreparable injury. *Arcamuzi v. Cont'l Air Lines, Inc.,* 819 F.2d 935, 937 (9th Cir. 1987); *Oakland Tribune,* 762 F.2d at 1376.

Plaintiffs argue that they will incur costs of simultaneous litigation in Tribal Court. First, all Tribal Court proceedings have been stayed at the Tribes' request and upon the Plaintiffs stipulation. *Declaration of Mark Echo Hawk,* 2. Second, economic loss usually does not, in and of itself, constitute irreparable harm because such losses are generally compensable by monetary

damages. *See Port City Properties v. Union Pac. R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008); *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). Third, the prospect of being forced to spend money and time in Tribal court cannot constitute irreparable harm where a tribal court has stayed proceedings. *Encana Oil & Gas v. John St. Clair*, Case 12CV00027-ABJ (D. Wyo. 2012) ("Once Judge St. Clair issued his Order of Court Staying Proceedings (Doc. 30-1) on February 17, 2012, this potential for harm was effectively abated.").

Stress of litigation in Tribal court is not irreparable harm. Plaintiffs cited no authority for this proposition or evidence of stress related to Tribal Court litigation. Indeed, since they have not participated in Tribal Court litigation at all it is hard to fathom how stress from such (stayed) litigation is harm at all.

Invasion of privacy by standard discovery requests (that have been stayed) is not irreparable harm either. Plaintiffs can seek relief from intrusive discovery under either Tribal Court Civil Rules of Procedure of Federal Rules of Civil Procedure applicable thereunder.

There is no risk of accruing fines or fees. The Tribes are aware that Plaintiffs have objected to Tribal jurisdiction through this proceeding, and are not attempting to apply additional fines while the jurisdictional issue is unresolved. The real risk of fines can be assessed by looking at what happened to one of Evans' actual subcontractors. When the plumbing subcontractor talked to the Tribes and obtained a Tribal Business License, he paid the license fee of $100, paid no fine, and was dismissed from the enforcement action altogether.

Significantly, the Plaintiffs have paid no fees whatsoever. Moreover, the Tribes cannot recover a fee until a final court order is obtained. By the time a final order is issued, Plaintiffs can appeal to this Court and seek a stay of execution before actually paying any fine. Risk of

losing money by payment to an entity protected by sovereign immunity is, therefore, non-existent.

Here, there is no danger of losing something irretrievable. 11A Charles Alan Wright, Arthur P. Miller & Mary Kay Kane, Federal Practice and Procedures, Section 2948.1 p. 139 (2d ed. 1995). The Plaintiffs finished building the house and nothing is threatening the *status quo*. No contractor has been stopped on other jobs. None of Evans' activities at his house have been impeded. Plaintiffs have not been excluded from the house or property, and have not paid any money out of pocket to the Tribes. They have not been required to undertake any burden from which they need relief. They just don't like the prospect of Tribal court jurisdiction. If they prevail in Tribal Court or federal court, procedures are available for Plaintiffs to recover litigation fees and costs.

Finally, the attempt to articulate irreparable harm by arguing that Plaintiffs have a federal right to be protected from tribal court jurisdiction fails. Since tribal jurisdiction cases involving non-Indians are especially fact sensitive, and there are no cases matching this particular set of facts, there is no defined or established federal right to protect. The exercise of tribal jurisdiction is not unlawful, but required at this stage by the long-standing tribal exhaustion requirement. Abstract arguments about a violation of a broad right to be protected from tribal court in any circumstance by virtue of non-Indian status or the involvement of non-Indian land on a Reservation do not meet the definition of irreparable harm.

The *Crowe & Dunlevy, P.C. v. Stidham*, 609 F. Supp. 2d 1211, 1226 (N.D. Okla. 2009) aff'd, 640 F.3d 1140 (10th Cir. 2011) case does not support a finding of irreparable harm in this case. Temporary injunctive relief was issued in that case pending a final order adjudicating the merits of the case in tribal court. *Id.* The injunctive relieve balancing analysis in that case

involved the execution of a tribal court order in the midst of an ongoing internal tribal governance dispute. Unlike that case, no order has been issued by the Tribal Court that threatens the *status quo* or Plaintiffs rights.

Fear about what might happen in Tribal Court is not a recognized irreparable harm. Plaintiffs' argument that it is 'highly unlikely' that they will get a fair shake in Tribal Court should not be countenanced.

C. The balance of equities tips in the Tribes' favor

Requiring exhaustion would not result in substantial hardship to Plaintiffs outweighing the Tribes' interests. Plaintiffs have already presented their case regarding lack of jurisdiction, and could present the same case to the Tribal Court. Preventing the Tribal Court from addressing the jurisdictional question in the first instance strikes at the heart of sovereignty and undermines the exhaustion doctrine. Inability to evaluate the merits of the jurisdictional question at the Tribal Court level or in federal court before a full record can be developed harms the Tribes' ability to protect its interests in this case and others to follow. Where the Tribes have presented a colorable and plausible claim to jurisdiction, injunctive relief that prevents the normal course of discovery and litigation will cripple the Tribes' ability to enforce land use regulations on the Reservation. Regardless of the activity, a non-Indian will be able to disregard Tribal interests and authority, knowing they can run to federal court and get injunctive relief before the matter is fully evaluated.

D. Injunctive Relief is not in the public interest

The only public interest argument raised by Plaintiffs was 'to halt an unlawful proceeding in Tribal Court. This is insufficient to meet the standard. The public interest element weights heavily in the Tribes' favor.

First, if exhaustion is not required, "the legitimacy and independence of the tribal court system come into serious question. Allowing litigants to bypass tribal institutions simply by filing an action in federal court would undercut the tribal court system." *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1537 (10th Cir. 1995). Public interest weighs in favor of supporting the Tribal Court system.

Second, the exhaustion requirement is consistent with federal legislative and executive branch policy. "Congress is committed to a policy of supporting tribal self-government and self-determination," *National Farmers*, 471 U.S. at 856, and "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mutual*, 480 U.S. at 18. Indeed, "unconditional access to the federal forum would place [federal courts] in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Id.* at 16. Deciding that exhaustion applies is consistent with long-standing federal policy.

Third, deciding that exhaustion applies will require the Tribes, counties, and landowners to have reasonable discussions about informal resolution, rather than ignoring each other and resorting to federal litigation on every case. In this case, the Tribes dismissed claims against one of the subcontractors as soon as he obtained his Tribal Business License. Reasonable resolutions like this are more likely if everyone knows that they are required to acknowledge and deal with each other. Public interest weighs in favor of informal cooperative resolutions.

Fourth, exhaustion encourages more efficient procedures. Indeed, it "simply makes good policy sense to allow tribal administrative agencies and courts to develop the decisional matrix prior to federal court consideration." *Pittsburgh & Midway Coal Mining Co. v. Watchman*, supra,

52 F.3d at 1538. Allowing the Tribal court to develop a full record will make this Court's analysis more efficient.

Because all the *Winters* factors weigh against the issuance of injunctive relief, the Court should deny the motion for preliminary injunction.

CONCLUSION

Before painting a lasting brush-stroke on the landscape of federal Indian law, the Court should examine the long-standing landmarks. Issuing a preliminary injunction here is a rushed, wild brush-stroke on the canvas.

No harm has occurred. No irreparable harm is eminent. This is simply a case of conscientious objection to Tribal jurisdiction. The Court should reject Plaintiffs' urging to jump in prematurely. Long established laws lay out a path for the Court to follow. Following the prescribed path will lead to respectful resolution of this and other cases.

Based on the foregoing points and authorities, the Defendants' Motion to Dismiss should be GRANTED. Defendants hereby request payment of their costs and fees associated with defending against this action.

DATED this 13th day of November, 2012.

By: /s/ Mark A. Echo Hawk
Mark A. Echo Hawk
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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/s/ Mark A. Echo Hawk
For ECHO HAWK LAW