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UNITED STATE 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 CONSTRUCTION, LP, an Idaho limited 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 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 APPENAY, as a member of the Shoshone-Bannock Land Use

CASE NO. 12-CV-417-BLW

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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

Defendants.

INTRODUCTION

Plaintiffs David Evans, Ron Pickens d/b/a P&D Construction, and Sage Builders, LP, respectfully request that the Court deny Defendants' Motion to Dismiss. There is no colorable argument that the Shoshone-Bannock Tribes ("Tribes") have jurisdiction over Plaintiffs, who are all non-Tribal members, have no consensual commercial relationship with the Tribes, and pose no threat to the economic security, political integrity, or health and welfare of Tribal members. Plaintiffs have done nothing more than construct a single family home on fee land located in an "open" area of the Fort Hall Reservation, and under state and federal precedent, Power County has the exclusive zoning and regulatory authority for that construction activity. Pursuant to *Strate v. A-1 Contractors,* 520 U.S. 438 (1997) and *Nevada v. Hicks*, 533 U.S. 353, 369 (2001), exhaustion of tribal remedies is not required when there is no "colorable" or "plausible" claim to jurisdiction. Plaintiffs have concurrently filed a Motion for Preliminary Injunction to halt legal proceedings currently pending against them in the Shoshone-Bannock Tribal Court. This Court should grant Plaintiffs' request for injunctive relief and deny Defendants' motions to dismiss this case.[1]

[1] Defendants filed two motions to dismiss. The first, Docket No. 20 filed on Sept. 19, 2012, seeks dismissal of the claims filed against the LUPC and the individual defendants associated with the LUPC (i.e. the Commissioners and staff). The second motion to dismiss, Docket No. 23 filed on Sept. 24, 2012, seeks dismissal of the claims filed against the remaining defendants. The second motion to dismiss relies on the substantive content of the first brief filed under Docket No. 20. For efficiency, Plaintiffs are filing a single response to both motions.

FACTUAL BACKGROUND

The relevant facts of this case are presented in Plaintiffs' Motion for Preliminary Injunction and are expressly incorporated herein by reference. To summarize for purposes of this Response, Plaintiff David Evans, a non-Tribal member, owns fee land at 1832 Government Road, Pocatello, Idaho (the "Property") that he inherited from his father, Daniel Evans. Affidavit of Dave Evans, ¶2 (hereinafter "Evans Affidavit").[2] He obtained a Power County building permit in the spring of 2012 for the construction of a single family residence where he intended to reside with his family. Evans Affidavit, ¶4. After commencing construction, representatives of the Tribes' Land Use Policy Commission ("LUPC") and Land Use Department asserted jurisdiction over the project and demanded, both verbally and in writing, that Mr. Evans obtain a Tribal building permit and that his contractor and subcontractors obtain Tribal business licenses. Evans Affidavit, ¶¶6-9.

After Mr. Evans informed the LUPC and other officials, including members of the Fort Hall Business Council, that the Tribes had no jurisdiction over his fee land, the LUPC commenced litigation against Mr. Evans and his contractors and subcontractors in Shoshone-Bannock Tribal Court. Evans Affidavit, ¶11. In July 2012, the LUPC mailed to Mr. Evans copies of a Summons and Complaint dated June 14, 2012. *Id.* The Complaint was filed in the Shoshone-Bannock Tribal Court, and alleged violations of the Land Use Policy Ordinance ("LUPO"), the LUPO Guidelines, and the Tribes' Business License Act.

On August 14, 2012, after Mr. Evans had filed his Complaint in Federal Court, the LUPC filed an amended Summons and Complaint that substituted "David Evans" for "Daniel and R. Evans" and alleged claims against Ron Pickens d/b/a P&D Construction. Evans Affidavit, ¶13.

[2] Plaintiffs filed Affidavits in support of their Motion for Preliminary Injunction. Due to the overlapping issues and relevant facts of the Plaintiffs' Motion for Preliminary Injunction and the Defendants' Motions to Dismiss, this Memorandum cites to and relies upon those Affidavits.

The Tribes served the Amended Complaint on Mr. Evans, Mr. Pickens, and a newly-added defendant, Sage Builders, LP. The LUPC's Amended Complaint also dropped David Bott and Water Master Plumbing from the lawsuit. *Id.* Thus, the Plaintiffs are now all facing suit in the Shoshone-Bannock Tribal Court.

According to the Defendants' Motion to Dismiss, the Tribal Court held a status conference on August 14, 2012, the same day that the Amended Complaint and Summons were filed.

ARGUMENT

A. Exhaustion of Tribal Remedies Is Not Required Because it is Plain the Tribes Lack Jurisdiction.

At the heart of this lawsuit is the Tribes' legal authority to assert civil regulatory and adjudicatory jurisdiction over non-members on fee land within the Fort Hall Reservation. Defendants' motion to dismiss this lawsuit should be denied because it is "plain" that the Tribes have no regulatory authority over Mr. Evans' fee land located in an "open" area of the Fort Hall Reservation. As discussed in Plaintiffs' Motion for Preliminary Injunction, exhaustion of tribal remedies is not required and, rather than dismiss this lawsuit, this Court should grant Plaintiffs' request for injunctive relief.

"As a matter of comity ... federal courts generally decline to entertain challenges to a tribal court's jurisdiction until the tribal court has had a full opportunity to rule on its own jurisdiction." *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 844 (9th Cir.2009). There are four exceptions to the exhaustion rule: (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." *Nevada v. Hicks*, 533 U.S. at 369. (internal quotation marks omitted); *see also Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir. 2009).

Under the fourth exception, the exhaustion requirement does not apply when it is "plain" that the tribal court lacks jurisdiction and requiring exhaustion would serve no purpose other than delay. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997). When determining whether it is "plain" that the tribal court lacks jurisdiction, the court should consider whether "jurisdiction is colorable or plausible." *Elliot*, 566 F.3d at 848.

The issue of an Indian tribe's jurisdiction over a non-member is a federal question. *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985) ("The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under §1331.") Accordingly, it is proper for this Court to determine, in the first instance, whether the Tribes have any civil regulatory jurisdiction over Plaintiffs.

B. Under Montana, the Tribes Have No Jurisdiction Over Plaintiffs.

As a general rule, Indian tribes lack civil authority over the conduct of non-members on non-Indian fee land within a reservation, and, unless the Tribes can demonstrate that one of two limited exceptions apply, Plaintiffs are not subject to civil tribal authority pursuant to *Montana v. United States*, 450 U.S. 544 (1981) ("*Montana* exceptions").

Montana is the "pathmarking" case on tribal jurisdiction. The *Montana* exceptions are:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationship with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. 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.

Montana, 450 U.S. at 565-66. On recent occasions the U.S. Supreme Court has interpreted the *Montana* exceptions ***narrowly***, stating:

> Given *Montana*'s "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," 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. These exceptions are "limited" ones, and cannot be construed in a manner that would "swallow the rule," or "severely shrink" it.

Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., 554 U.S. 316, 330 (2008) (citations omitted).

Neither of the two *Montana* exceptions is present here. Under applicable federal law, unless one of the *Montana* exceptions is present, the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe. The rule is "particularly strong" when the nonmember's activity takes place on land owned in fee simple. *Plains Commerce Bank, 554 U.S.* 328. The U.S. Supreme Court's general rule against tribal authority over non-Indian owned fee land applies to the Property within the boundaries of the Fort Hall Reservation. Plaintiffs are non-Tribal members who either own or do business on fee land located within the Fort Hall Reservation boundaries. This is not a dispute between Tribal members. This is not a case involving use of Tribally-owned or controlled lands. Under the circumstances presented here, the presumption that there is no jurisdiction over Plaintiffs is "particularly strong."

a. There is No Consensual Relationship

Defendants do not allege that there is a consensual relationship between any of the Plaintiffs and the Tribes, or any Tribal member. The Tribal Defendants claim that the Tribes

possess jurisdiction over Plaintiffs based solely upon the second *Montana* exception. Accordingly, there is no plausible or colorable claim that the Tribes have jurisdiction over Plaintiffs based upon the first *Montana* exception.

b. The Defendants Present No Evidence that Would Justify Jurisdiction under the "Health and Welfare" Exception

The second *Montana* exception applies only when the Indian tribe shows that it must assert regulatory authority over non-member conduct in order to avoid a "***catastrophic***" impact to Tribal health and/or welfare. *Plains Commerce Bank*, 554 U.S. at 341. Courts have repeatedly held that the "possibility of injuring multiple tribal members does not satisfy the second Montana exception." *Wilson v. Marchington*, 127 F.2d 805, 815 (9th Cir. 1997); *Strate*, 520 U.S. 457 – 58 (stating that the mere possibility of injury caused by those who drive recklessly on public highways running through reservation did not meet the second Montana exception). To permit any broader reading of that exception would mean that "the exception would swallow the rule[,] because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe. The exception was not meant to be read so broadly." *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998). *See also Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1221 (9th Cir. 2000) (while recognizing cultural, social, and religious importance of White Deerskin Dance, non-member's proposed logging activity within a half mile buffer zone of site of dance was not the type of activity triggering the second Montana exception).

The only relevant inquiry is whether the Defendants have proven that jurisdiction over Plaintiffs is plausible or colorable under the second *Montana* exception. Efforts by a tribe to regulate nonmembers, especially on non-Indian fee land are "presumptively invalid" and "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*, 554 U.S. at 330.

In support of their Motion to Dismiss, Defendants present numerous irrelevant and unsupported assertions regarding the Tribal land use regulatory system. For instance, they state that the LUPO and LUPO Guidelines apply to all lands within the Fort Hall Reservation. Pursuant to *Montana*, that is plainly not true. They also assert that the Solicitor of the Department of the Interior issued "a lengthy legal opinion upholding both the existence and exclusivity, vis-a-via counties, of the Tribes' power to regulate the use of all Reservation lands." Neither a copy of the cited legal opinion nor a supporting declaration is presented. They assert that in this case, "the absence of Tribal regulation has a major impact." No supporting evidence or testimony is presented on this point, either. The Defendants' failure to introduce competent testimony is inexcusable. These unsupported factual claims should be stricken and not considered by the Court.

More significantly, and ultimately fatal to their claims of jurisdiction, the Defendants present no evidence of any impact to Tribal economic security or political integrity from the Evans home construction, let alone any impact that would be sufficiently serious to justify tribal jurisdiction. They present two affidavits. The affidavit of Tony Galloway does not contain any information regarding the Evans home construction. It simply asserts (without supporting documentation) the existence and approval of a Tribal land use code, the contents of which are not disclosed. The affidavit of George Guardipee describes his efforts to enforce the claimed Tribal land use code against Mr. Evans and his contractors. It also denies making threats. Mr. Guardipee's declaration contains no statements regarding any potential impact to tribal health or welfare.

Quite simply, the Defendants' declarations are not relevant to the inquiry that must be made to determine whether jurisdiction exists under the second *Montana* exception, which is whether tribal regulation of the non-member conduct is necessary to secure the tribe's political and economic well-being. *Cf. Elliott*, 566 F.3d at 850 (holding that exhaustion was required when the tribe alleged that the non-member's conduct had resulted in the destruction of millions of dollars of the tribe's nature resources). Defendants have presented no evidence of any impact to the Tribes' economic security or political integrity. At most, they are claiming fees and fines for failure to obtain a building permit. Non-payment of a building permit fee is not a basis for finding jurisdiction under federal law. The Defendants' request for Plaintiffs to exhaust tribal remedies must be denied because Defendants, whose burden it is to present evidence of their claimed jurisdiction, have wholly failed do so.

Even if they had presented any such evidence that was relevant to the second *Montana* exception, no conceivable impact from Mr. Evans' construction project would pose such a threat of "catastrophic" harm that would justify the Tribes' claim of jurisdiction. Mere construction of a single family home on fee land poses no threat to the Tribes' economic security or political integrity, let alone one that would be sufficiently serious to overcome the presumption against jurisdiction. Under the circumstances presented here, exhaustion of tribal remedies is not required and this Court should deny Defendants' Motion to Dismiss.

c. The Defendants Present No Evidence that Would Justify Jurisdiction under the "Health and Welfare" Exception; It is Their Evidentiary Burden to Overcome the Presumption Against Jurisdiction.

The Defendants argue that the second *Montana* exception applies whenever any use of fee land has *some* adverse effect on the tribe. But the law does not contemplate such a broad

reading of *Montana*. Indeed, such an interpretation would make the exception swallow the rule. Any impact, no matter how insignificant, could justify imposition of tribal jurisdiction.

Contrary to Defendants' claim, the second exception only applies when the nonmember's impact is "demonstrably serious." *Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059, 1064 (9th Cir. 1999). A tribe's "bare interest in the safety of its members cannot satisfy the second exception." *Id. citing County of Lewis v. Allen,* 163 F.3d 509, 515 (9th Cir. 1998). "To invoke the second *Montana* exception, the impact must be 'demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the Tribe.'" *Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir.1997) (quoting *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 431, (1989)).

More recently, the U.S. Supreme Court has said that the second exception is not triggered for conduct that merely "injure[s]" the tribe—the second exception authorizes civil jurisdiction only if the non-Indians' conduct "imperil[s] the subsistence of the tribal community." *Plains Commerce Bank, supra,* at 339 (2008).

Construction of a single family residence poses no threat to the economic security and political integrity of the Tribes and certainly cannot be considered the kind of activity that, if not regulated, could cause harm that would be considered "catastrophic" to Tribal self-government. *Plains Commerce Bank*, 554 U.S. at 341. If mere construction of a house were sufficient to warrant tribal jurisdiction, then the exception would "swallow the rule," and any potential impact to the Reservation landscape, no matter how minute, would form a basis for tribal jurisdiction. The presumption *against* tribal jurisdiction would be turned on its head in favor of finding jurisdiction in every instance where human activity could potentially impact the Reservation environment.

There can be no plausible claim of jurisdiction when the Defendants openly acknowledge in their brief that issuance of a Tribal building permit is a "relatively minor regulatory matter." Memo in Support of Motion to Dismiss, at 13. Over time, they argue, inability to regulate residential construction may result in "incremental shifts" in the character of the Reservation, which may have "cumulative impacts." These vague and speculative claims come nowhere close to showing the "demonstrably serious" impact that the Tribes must show to justify their claim of jurisdiction. It is not enough to show the mere threat of harm, there must be a showing that tribal regulation is necessary to avoid catastrophic consequences.

If mere construction of a house were sufficient to warrant tribal jurisdiction, then the exception would "swallow the rule," and any potential impact to the Reservation landscape, no matter how minute, would form a basis for tribal jurisdiction. The presumption *against* tribal jurisdiction would be turned on its head in favor of finding jurisdiction in every instance where human activity could potentially impact the Reservation environment.

d. Although the Lack of Jurisdiction is Dispositive, There is Evidence that Defendants Have an Intent to Harass Plaintiffs.

Under *Nevada v. Hicks*, the first exhaustion exception is triggered when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith." *Nevada v. Hicks*, 533 U.S. at 369. Evidence of bad faith and a desire to harass exists in this case.

A Tribal official, George Guardipee, personally visited the Property on May 16, 2012 and was verbally abusive and hostile. Affidavit of Ron Pickens, ¶4; Affidavit of Lee Wilson, ¶4; Affidavit of Cody Clark, ¶4. He made specific, unlawful threats to have Ron Pickens and his crew arrested by the U.S. Marshal and imprisoned in the federal penitentiary for their alleged violation of a Tribal administrative requirement. *Id.* No government official should ever make such threats when it is plain that the law does not authorize such a drastic remedy.

Well-established U.S. Supreme Court precedent establishes that Tribal governments have no criminal jurisdiction over non-members. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). Violation of a tribal ordinance by a non-member can *never* result in imprisonment, and certainly not based upon nothing more than an alleged failure to obtain a business license or building permit. Defendants may deny making such threats, however where disputed facts are at issue, it is not appropriate for this court to resolve those disputed facts and render a decision that would force Plaintiffs into the Tribal Court system. A formal fact-finding hearing would be necessary before this Court could determine as a matter of law that the tribal exhaustion principle applies under such circumstances.

C. Power County is the Exclusive Land Use Regulatory Authority for Non-Members on the Fort Hall Reservation.

The U.S. Supreme Court has held that "open" areas of Indian reservations that are predominantly owned and populated by nonmembers have lost their character as an exclusive tribal resource, and have become, as a practical matter, an integrated portion of the county. *See Brendale v. Confederated Tribes and Bands of Yakima Indian Nation,* 492 U.S. 408, 447 (1989). In those areas, there is no longer any substantial tribal interest in governing land use and the power to zone has become "outmoded." *Id.* The crucial inquiry is whether the tribal assertion of jurisdiction is essential to preserve "the right of reservation Indians to make their own laws and be ruled by them." *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). In *Brendale*, the U.S. Supreme Court concluded by a plurality opinion that zoning authority for a non-Indian owned parcel of fee land in an "open" area of Yakima County was subject to county, not Tribal zoning authority.

The area in the immediate vicinity of the Property is "open" as that term is defined in *Brendale, supra,* and thus, is subject to exclusive land use regulation by the local governing authorities. Consistent with that local authority, Plaintiff David Evans obtained, from Power County a building permit for his residential construction project on the Property. Evans Affidavit, ¶2. There is no compelling reason for the Tribes to assert jurisdiction over Mr. Evans and the Property in light of the extant civil regulatory authority of Power County and its subdivisions. Mr. Evans pays taxes to Power County and obtains health and safety services from the County. Evans Affidavit, ¶3. The Southeastern Health District is responsible for permitting and inspection the septic system and well. Evans Affidavit, ¶14. Idaho Power provides electrical hookups. The Power County Highway District maintains the portion of Government Road inside Reservation boundaries where Mr. Evans' house is located. Affidavit of Donald R. Haskin, ¶3. Power County also maintains a public record of deeds and recorded instruments relating to the Property's title history, which show that the Property has not been Tribally-owned for at least several decades. Affidavit of Christine Steinlicht, ¶¶2-3. In sum, Power County has a significant interest in possessing exclusive zoning authority over the Property, and conversely, the Tribes have little to no interest in regulating the Property. The Tribes' attempts to regulate activities on the Property are therefore presumptively invalid.

In a recent state lawsuit related to an adjacent property, Power County successfully prosecuted a non-Indian land owner who proceeded to build a single family residence without obtaining a county building permit. The Sixth Judicial District Court's decision in *State of Idaho v. Rodney Sortor*, State of Idaho Sixth Judicial District Court, Cause No. CR-00-00716 (2001), relied upon *Brendale* in ruling against the Tribes' assertion of jurisdiction over areas of the Fort Hall Reservation that in actuality are "open" and not primarily Tribal in character. Affidavit of

Aaron Thompson, Exhibits A and B. The state court expressly held that Mr. Sortor could not avoid prosecution under Power County's ordinance by "opting in" to the Tribes' land use regulatory program. The Defendants attempt to argue that "voluntary" compliance with Tribal laws by non-members is proof of their legal jurisdictional authority. In fact, such "voluntary" compliance does not satisfy the county-imposed laws, which remain applicable to non-members on the Reservation.

This Court should be aware that in the *Sortor* case, which was defended by Defendants' attorney, the Tribes participated as an *amicus curae* and made the same arguments as here. They went so far as to send a letter to Power County indicating that as Mr. Sortor had a Tribal building permit, there was no need for him to get a Power County Building Permit. Affidavit of Aaron Thompson, Exhibit C. The Tribes, as an *amicus curae*, participated in the argument on behalf of Mr. Sortor. In addition to holding that the County had the exclusive zoning authority to require building permits on fee land on the Reservation, the state court also found that the only harm the Tribes complained of, under the second *Montana* exception, was their loss of a permit fee. As Judge Woodland held, that did not meet the test for finding jurisdiction under *Montana*.

Thus, the Defendants' contention that Power County lacks authority to regulate land use by non-Indians on the Fort Hall Reservation is baseless and was specifically rejected in the *Sortor* case. The Defendants' attorneys filed, but ultimately dismissed an appeal of the Sixth District's decision.

D. Idaho and U.S. Supreme Court Have Expressly Rejected Claims that the Organic Act and the Idaho Constitution Carve Out Indian Reservations from State Territory.

Binding legal precedent rejects the Defendants' theories under the Organic Act and the Idaho Constitution that the State and local governments have no authority to regulate non-

members within the Fort Hall Reservation. There is no limit on Power County's authority to issue building permits and enforce its building and zoning codes within the Fort Hall Reservation when the property at issue is owned in fee by non-Tribal members.

As early as 1885, the question of the State of Idaho's regulatory authority over non-Indians on the Fort Hall Reservation reached the U.S. Supreme Court in *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28 (1885). The plaintiff, a railroad company, argued that the portion of the railroad that crossed the Fort Hall Reservation was excepted from the State's territory, relying on the same Organic Act of Idaho cited by the Defendants in this case. The U.S. Supreme Court rejected the railroad's claim and concluded that upon lawful construction of the railroad it became subject to state laws and could be taxed as any other property located in the State, notwithstanding its location inside the boundaries of the Fort Hall Reservation. *Id.* at 32-33. *See also Nevada v. Hicks,* 533 U.S. at 361-62 ("Though tribes are often referred to as 'sovereign' entities, it was 'long ago' that 'the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. 'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State.'" (citations omitted))

The Idaho Supreme Court recently discussed the *Utah & N. Ry. Co.* decision favorably in a challenge to the State's authority to regulate gambling activity within the boundaries of the Fort Hall Reservation. In *Knox v. State ex rel Otter*, 148 Idaho 324, 223 P.3d 266 (2009), the plaintiffs sought a declaration that Idaho statutes authorizing video gaming on Indian reservations were unconstitutional due to the Idaho Constitution's requirement that Indian reservations remain under the "absolute jurisdiction and control of the Congress." *Id.* 148 Idaho at 329. Citing another U.S. Supreme Court decision, *Draper v. United States*, 164 U.S. 240 (1896), the Idaho Supreme Court concluded that "absolute" jurisdiction does not mean

"exclusive" jurisdiction and it upheld the constitutionality of the Idaho statutes. Under *Williams v. Lee*, 358 U.S. 217, 220, 223 (1959), the test for determining whether a state law applies within Indian reservations is whether application of that law would interfere with tribal self-government. State regulation of gambling, within the parameters of federal gambling laws, is not an infringement on the Tribes' self-government, nor does it violate the Idaho Constitution.

Similarly, Power County's application of its zoning and building codes does not interfere with the Tribes' self-government. Tribal self-government inherently focuses on Tribal land and Tribal members. The Evans Property is not Tribal land, nor are Tribal members involved. But this issue ultimately is irrelevant because the question here is no whether state law is preempted, but rather what is the scope of tribal inherent sovereignty. *Montana* and its progeny control that issue and under any view of the facts presented in this case, there is no basis for the Tribes' assertion of jurisdiction over the Evans Property.

E. The Defendants Are Not Immune from Suit.

The Defendants claim that they are immune from suit based on sovereign immunity but provide no discussion or analysis of this assertion. They cite *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), however that case involved a lawsuit against an Indian tribe for violations of the Indian Civil Rights Act. Here, there are no allegations or claims made under the Indian Civil Rights Act, and the Shoshone-Bannock Tribes, as a sovereign entity, are not a party to this lawsuit.

Plaintiffs brought this suit against the individual Tribal members and officials involved in this permitting dispute. Also named is the LUPC, which is a Tribal agency and the named plaintiff in the lawsuit filed against Mr. Evans, Mr. Pickens, and Sage Building, LP in Tribal Court.

"Under the doctrine of *Ex Parte Young*, immunity does not extend to [tribal] officials acting pursuant to an allegedly unconstitutional statute." *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir.2007) (citing *Ex Parte Young*, 209 U.S. 123, 155-56 (1908)). "In determining whether *Ex Parte Young* is applicable to overcome the tribal officials' claim of immunity, the relevant inquiry is only whether [plaintiff] has alleged an ongoing violation of federal law and seeks prospective relief." *Id.*

Plaintiffs in this action are entitled to prospective relief, in the form of an injunction, against the Defendants for their unlawful assertion of Tribal authority against them. They are entitled to a federal court order stating that the Tribal Court action will not proceed and that it is not necessary for Plaintiffs to defend themselves in that action because it is plain that there is no Tribal jurisdiction over Plaintiffs' conduct. Further Tribal Court proceedings will result only in delay and needless expenditure of time and money. Under *Ex Parte Young*, no sovereign immunity protects the individual Tribal defendants.

CONCLUSION

Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss and grant their request for a preliminary injunction. The Tribal Court has no colorable or plausible jurisdiction over Plaintiffs and exhaustion of tribal remedies is not required. Defendants should be enjoined from continuing to prosecute their claims against Plaintiffs.

DATED this 15th day of October, 2012.

MAY, RAMMELL & THOMPSON, CHTD.

By /s/
Aaron N. Thompson, ISB No. 6235
Attorney for Plaintiffs