UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-35003

DAVID M. EVANS, an individual, et al.
Plaintiffs-Appellants,

v.

SHOSHONE-BANNOCK LAND USE POLICY COMMISSION, et al.
Defendants-Respondents.

On Appeal from the United States District Court
for the District of Idaho

Case No. 4:12-cv-00417-BLW
Honorable B. Lynn Winmill, United States District Court Judge

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APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Sage Builders, LP is an Idaho limited partnership. No publicly-held corporation owns 10% or more of Sage Builders, LP.

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The District Court had subject matter jurisdiction over the underlying lawsuit under 28 U.S.C. § 1331 because 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).

C. Jurisdiction of the Court of Appeals.

This Court has jurisdiction over this appeal because the December 20, 2012 Memorandum Decision and Order appealed from (the "Order") is a decision that is final for purposes of 28 U.S.C. § 1291, and because the Order denied injunctive relief , therefore, the Order is immediately appealable under 28 U.S.C. § 1292. The Notice of Appeal was filed on January 2, 2013. This appeal is timely pursuant to Fed.R.App. P. 4(a)(1)(B).

II. STATEMENT OF ISSUES PRESENTED

Issue 1: Did the District Court err by concluding that tribal jurisdiction was "plausible" and requiring Plaintiffs to exhaust Tribal remedies despite the lack of admissible, competent evidence that their activities pose any possibility of harm to Tribal interests?

Issue 2: Did the District Court make clearly erroneous factual findings upon which it based its conclusion that exhaustion was required?

Issue 3: Did the District Court abuse its discretion by declining to strike affidavits that were not timely, were not based on personal knowledge, were not relevant, and were not admissible pursuant to the Federal Rules of Civil Procedure?

Issue 4: Did the District Court abuse its discretion by declining to grant a preliminary injunction halting the Tribal Court proceedings, where it is plain that exhaustion of Tribal remedies serves no purpose other than delay and expense to the non-member defendants?

III. STATEMENT OF FACTS / STATEMENT OF THE CASE

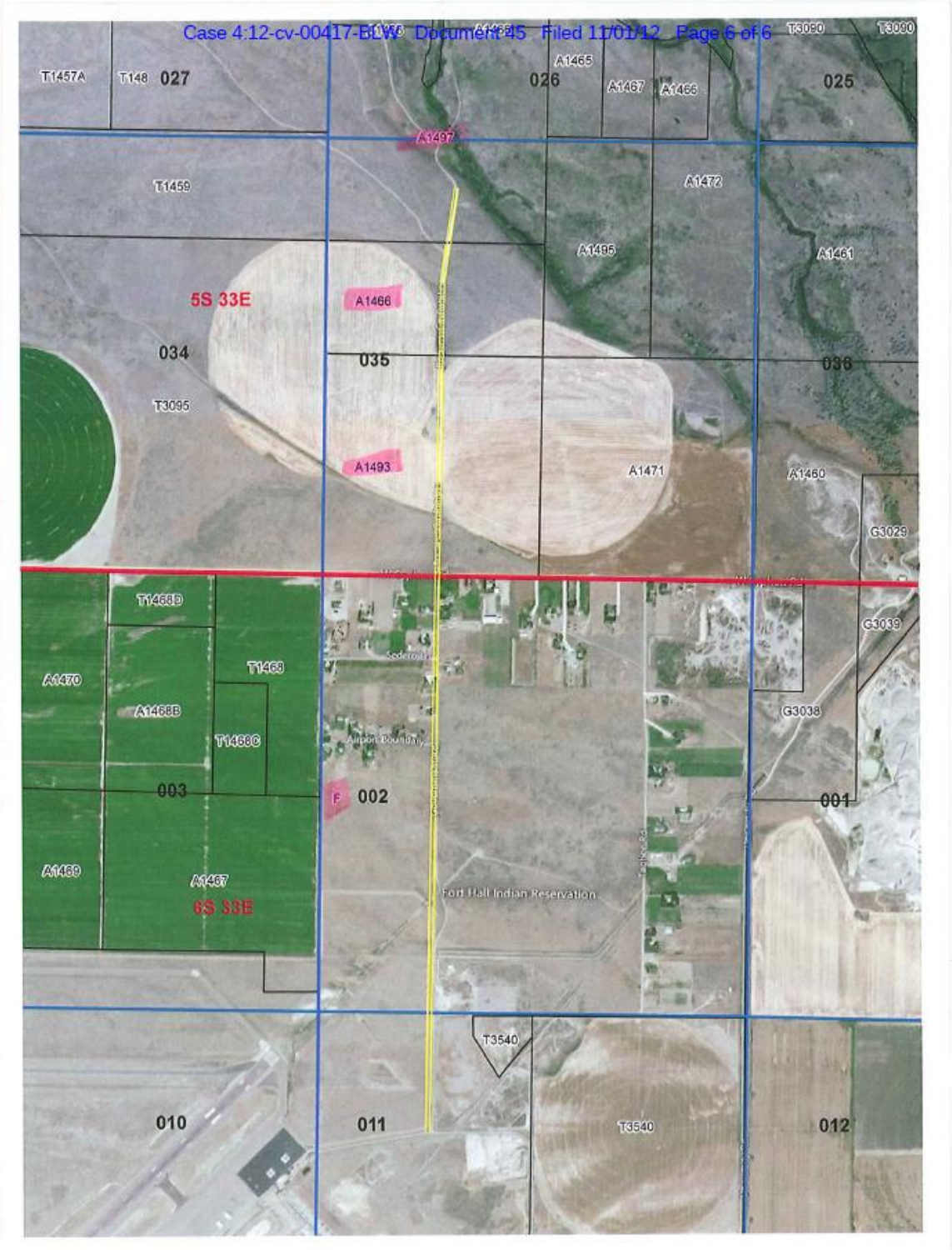
A. Overview of the Parties and Events Involved in this Case.

The Plaintiffs in this tribal jurisdiction lawsuit are: a non-Indian owner of fee land, David M. Evans; his general contractor, Sage Builders, LP ("Sage Builders"); and Ron Pickens, a subcontractor who runs a sole proprietorship known as P&D Construction (referred to jointly herein as "P&D Construction").

In 2010, David M. Evans inherited land located at 1832 Government Road, Pocatello, ID 83204 (the "Property"), which is fee land located within the boundaries of the Fort Hall Reservation. ER0165. Mr. Evans is not a member of the Tribes. Mr. Evans inherited the Property from his late father, Daniel Evans. ER0165. Government Road is open to the public and maintained by the Power County Highway District, an independent governmental agency in Power County, Idaho. ER0022; ER0169.

A County Assessor's map shows over 60 parcels of land owned by non-Indian individuals in the immediate area surrounding the Property. ER0191. An additional 15 parcels are owned by the City of Pocatello. ER0191. These parcels are all located within the boundaries of the Fort Hall Reservation. Aerial

photographs of Government Road (in yellow) show the rural, agricultural, and residential uses of surrounding parcels. ER0149 (below) *see also* ER0023-25.



In the preceding photograph, the Pocatello Regional Airport is visible in the bottom left corner (marked 010). The Evans Property is on the West side of Government Road, two parcels north of cul-de-sac marked as "Airport Boundary" on the preceding photograph. ER0191; ER0149.

In 2012, after obtaining a building permit from Power County, Mr. Evans and his contractors began building a single family residence on the Property. ER0165. Mr. Evans contracted with Plaintiff Sage Builders, to build the house. ER0165. Sage Builders engaged subcontractors, including P&D Construction, to provide materials and services for construction of Mr. Evans' residence on the Property. ER0181-82. P&D Construction's role on the Property was to pour the concrete foundations for the house. ER0186.

The Defendants are all associated with the Shoshone-Bannock Tribes ("Tribes"), which has asserted exclusive zoning authority on the Fort Hall Reservation, regardless of ownership. The Shoshone-Bannock Land Use Policy Commission ("LUPC") is a political subdivision of the Shoshone-Bannock Tribes and is empowered to administer the Tribes' Land Use Policy Ordinance ("LUPO") and implementing regulations, known as the LUPO Guidelines, on behalf of the Tribes. Defendant Tony Galloway, Sr. is the Chairman and a member of the LUPC. Defendants Casper Appenay and John Fred are commissioners of the LUPC. Defendant George Guardipee is an enforcement official for the LUPC.

These individuals are collectively referred to as the LUPC Defendants. Judge John Doe(s) is the nominally-identified judge of the Shoshone-Bannock Tribal Court. ER0296-97.

Defendant Nathan Small is the Chairman and a member of the Fort Hall Business Council, the Tribes' governing body. Defendants Glenn Fisher, Lee Juan Tyler, Devon Boyer, Tino Batt, Blaine Edmo and Darrell Dixey are members of the Fort Hall Business Council. ER0296-97. Defendant Nathan Small, Glenn Fisher, Lee Juan Tyler, Devon Boyer, Tino Batt, Blaine Edmo and Darrell Dixey are collectively referred to as the "Business Council Defendants." Plaintiffs' Complaint alleged that all individual Defendants were being sued in their official capacities as members of the LUPC and Fort Hall Business Council, respectively. ER0297. The Complaint also alleged that the LUPC Defendants' and Business Council Defendants' actions exceeded their authority under federal law and, therefore, those Defendants were not cloaked with any immunity from suit that may apply to the Tribes. The LUPC, the Business Council Defendants, the LUPC Defendants, and Tribal Judge(s) are hereinafter collectively referred to as the Defendants.

B. Mr. Evans Declined the Tribes' Demand that He Obtain a Tribal Building Permit and the LUPC Filed Suit in Tribal Court.

The Tribes' LUPC initiated contact with Mr. Evans on or about April 13, 2012, when Defendant George Guardipee, who described himself as the Building Inspector for the Shoshone-Bannock Tribes, e-mailed to Mr. Evans a copy of the Tribes' building permit application form, requesting that Mr. Evans complete and submit a permit application, pay an invoice for permit fees, and ensure that all contractors and subcontractors obtain business licenses and pay other fees to the Tribes. ER0165. Mr. Evans declined to apply for a Tribal building permit, because he had already obtained a Power County building permit. *Id.* Power County Code requires that non-Indians obtain a building permit prior to construction on lands within the portions of Power County that are also located within the exterior boundaries of the Fort Hall Reservation. ER0211; ER0192. Power County has adopted the International Building Code to provide uniform building standards that apply to all construction projects in Power County. ER0192.

Mr. Evans proceeded with the building of his home on his Property, under the regulated supervision of Power County and its Building Administrator, using the International Building Code. On or about May 16, 2012, Mr. Guardipee and another Tribal official arrived at the Property. ER0187. Mr. Guardipee demanded that Ron Pickens and his crew of workers cease work on the Property. *Id. See also*

ER00183-84; ER194-95 (Affidavits of Cody Clark and Lee Wilson). Mr. Clark and Mr. Wilson are employees of P&D Construction who were attempting to pour concrete when Mr. Guardipee interfered. Mr. Guardipee was verbally hostile and threatened to call the U.S. Marshal to have Mr. Pickens and his crew arrested if they did not comply with his stop work demand. *Id.* He claimed, incorrectly, that he could have them detained in the federal penitentiary for violations of Tribal law. *Id.* Not wanting to cause a confrontation or risk unlawful arrest, Mr. Pickens and his workers left the Property. *Id.* Mr. Pickens and his crew stopped work temporarily in response to the disruption caused by Defendants' actions and this disruption resulted in a loss of one day of work time and approximately $5,000, the value of one day's work. ER0187. Sage Builders also incurred financial losses of $17,000 (based upon seventeen full days of lost work time on the site) due to the Tribes' interference and threats of regulatory enforcement authority. ER0182.

Sometime after business hours on May 17, 2012, the Tribes caused a Stop Work notice to be posted on the Property. ER0165. They also mailed a Tribal Notice of Violation/Cease and Desist Order to Mr. Evans. *Id.* Shortly after receiving a Tribal Notice of Violation, which instructed Mr. Evans to contact the Tribes, Mr. Evans called Tony Galloway, Sr., Chairman of the LUPC. During that call Mr. Galloway informed Mr. Evans that the LUPC would fine him $500 per day for ignoring the stop work order. ER0166. Two members of the Fort Hall

Business Council were also on the phone during this conversation (as well as Mr. Guardipee,). *Id.* They demanded that Mr. Evans consent to Tribal jurisdiction. Mr. Evans declined, and he requested that the Tribal officials refrain from trespassing on his private property. *Id.*

In July 2012, the LUPC mailed to Mr. Evans copies of a Summons and Complaint dated June 14, 2012 that named the following persons and entities as defendants: "Daniel and R. Evans; P&D Construction; David Bott; and Water Master Plumbing" and alleged violations of the Land Use Policy Ordinance ("LUPO"), the LUPO Guidelines, and the Tribes' Business License Act. ER0166. The Complaint had been filed in the Shoshone-Bannock Tribal Court. ER0166.

The LUPC's Complaint did not correctly identify the property owner as Dave Evans. The lawsuit named Mr. Evans' late father and an unknown individual named "R. Evans.[1]" The LUPC's lawsuit also incorrectly identified P&D Construction as an Idaho corporation and did not allege claims against Ron Pickens individually. Even though suit had not been properly filed against Mr. Evans or Mr. Pickens, in July 2012, the LUPC propounded discovery requests by U.S. Mail to Mr. Evans and P&D Construction. ER0166. The discovery requests sought, among other things, copies of all of the recipients' deeds to the Property,

[1] The LUPC had prior e-mail correspondence with Dave Evans, and also spoke with him on the phone, yet continued to pursue this Complaint initially against Dave's late father and an unknown person.

three years of tax returns, all correspondence with County and Tribal governments regarding construction on the Property, and a list of all subcontractors used. The LUPC also served requests for admission seeking admissions that the recipients engaged in a consensual relationship with the Tribes, that their activities had a direct impact on the political integrity, economic security, and health and welfare of the Tribes and Fort Hall Reservation residents, and the construction of a building on the Fort Hall Reservation without a Tribal permit was a violation of Tribal law. *Id.*

C. Plaintiffs Commenced Federal Court Proceedings to Halt the Tribal Court Action and Ensure that Construction Could Be Completed Without Further Delays.

Mr. Evans, P&D Construction, and Sage Builders filed suit in the U.S. District Court, District of Idaho on August 10, 2012. ER0166. They sought declaratory judgment that the Tribal Court lacked jurisdiction and injunctive relief. ER0302. An Amended Complaint was filed on September 14, 2012. ER0294.

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. ER0166. The LUPC's Amended Complaint also dropped David Bott and Water Master Plumbing from the lawsuit.

D. Defendants Moved to Dismiss the Federal Lawsuit; Plaintiffs Sought a Preliminary Injunction.

On September 19, 2012, the LUPC Defendants filed a Motion to Dismiss in the District Court, arguing primarily that the Plaintiffs' federal lawsuit should be dismissed because they had failed to exhaust tribal remedies. ER0258-59. On September 26, 2012, the Business Council Defendants filed a Motion to Dismiss that incorporated by reference the LUPC Defendants' Motion to Dismiss. ER0256. The Defendants filed two declarations in support of their motions, one from George Guardipee and one from Tony Galloway, Sr. ER0284-86; ER0290. The Guardipee declaration stated that the Plaintiffs had engaged in building activities on the Fort Hall Reservation and that the LUPC had attempted to enforce Tribal laws against Plaintiffs, specifically a Tribal building permit for Mr. Evans and a Tribal business license requirement and fee of $150 for the subcontractors. ER0285. Mr. Guardipee denied making threats of any kind. ER0286. The Galloway declaration contained statements regarding the Federal recognition of the Tribes, the high percentage of Tribally-owned and trust land on the Reservation, and the existence and enforcement of Tribal land use laws. ER0288-90. He also denied the use of threats against the Plaintiffs and asserted that no federal right of way existed for a road "encompassing the subject property." ER0290. Neither of these initial declarations contained **any** evidence of potential impact to the Tribes'

political integrity, sovereignty, health or welfare associated with enforcement of the building permit and business license laws against Mr. Evans.

On October 15, 2012, the Plaintiffs filed a Motion for Preliminary Injunction, together with ten supporting affidavits, seeking to halt the proceedings in Tribal Court on the basis that it was "plain" that jurisdiction was lacking. ER0217. The affidavits addressed *inter alia* the fee land status of surrounding parcels, many of which are used for residential use, title history of the Property, the "open" nature of the roads and surrounding properties near the Evans residence, the building code enforcement activities of Power County, and the non-Tribal provision of utilities and governmental services to the Property.

Also on October 15, Plaintiffs responded to the Defendants' Motions to Dismiss, arguing that the Defendants had not met their burden of presenting evidence to show that exhaustion of Tribal remedies was required. ER0238-54. The Defendants had presented no evidence regarding any alleged impact to the Tribes from the construction activity. On October 19, 2012, the District Court set a consolidated hearing for December 10, 2012. ER0160.

On November 1, 2012, in response to Plaintiffs' opposition, the Defendants filed a reply brief that included four new declarations, including second declarations from Mr. Galloway and Mr. Guardipee that alleged a variety of environmental "concerns" associated with construction activities. ER0120-59. The

Defendants filed their opposition to Plaintiffs' Motion for Preliminary Injunction on November 13, 2012. ER0089.

On November 26, 2012, Plaintiffs moved to strike, by formal written motion, certain portions of the Defendants' supporting declarations as untimely, lacking foundation, containing inadmissible evidentiary averments, citing documents that were not included in the record in contravention to local rules, and containing irrelevant statements. ER0073-79.

Plaintiffs' reply brief in support of their Motion for Preliminary Injunction was filed on November 29, 2012. ER0061. The District Court heard argument from the parties on December 10, 2012. After the hearing, the District Court entered a Docket Entry Order denying the Motion to Strike and allowing Plaintiffs to file up to three responsive affidavits and a 3-page brief on the pending motions. ER0060. The due date for the Plaintiffs' supplemental submissions was set for December 17, 2012. Plaintiffs filed two additional affidavits and a 3-page brief. ER0028; ER0021; ER0026. The District Court's decision granting the Defendants' Motions to Dismiss and denying Plaintiffs' Motion for Preliminary Injunction was filed on December 20, 2012. ER0007.

IV. SUMMARY OF ARGUMENT

As a general rule, Indian tribes lack civil authority over the conduct of nonmembers. *Montana v United States*, 450 U.S. 544 (1981). The Shoshone-

Bannock Tribes therefore lack regulatory authority over the construction of a single-family residence on fee land by a non-member and his non-member contractor and subcontractor.

The District Court erred by concluding that it was "plausible" that Plaintiffs' conduct "imperiled" the Tribes' welfare and that exhaustion of Tribal remedies was required. The District Court made clearly erroneous factual findings that it was "plausible" that Plaintiffs had caused groundwater contamination and created a risk of wildfires. Plaintiffs moved to strike Defendants' inadmissible declarations, which contained hearsay and irrelevant assertions regarding unnamed third parties, as well as unsupported statements made without personal knowledge or referenced documents. Yet, the District Court declined to strike inadmissible evidence, and instead, relied upon such inadmissible evidence in its decision to require exhaustion of Tribal remedies.

The District Court misapplied the *Montana* second exception in denying Plaintiffs' Motion for Preliminary Injunction. Plaintiffs were entitled to injunctive relief because they demonstrated a strong likelihood of success on the merits in their challenge to tribal jurisdiction and showed irreparable harm from the unrecoverable expense and other injuries associated with the resources required to exhaust the Tribal Court process. Defendants seek substantial fines and discovery of private, confidential financial information that has no bearing on the building

permit and business license issues. Exhaustion of Tribal remedies will serve no purpose other than delay.

V. STANDARD OF REVIEW

Determinations regarding tribal jurisdiction are reviewed de novo, and factual findings are reviewed for clear error. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1129 (9th Cir. 2006).

Denial of a motion to strike is reviewed for abuse of discretion. *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1038 (9th Cir. 2003).

Denial of a motion for preliminary injunction is reviewed for abuse of discretion. *McCormack v. Hiedeman*, 694 F.3d 1004, 1010 (9th Cir. 2012). A district court abuses its discretion if it bases its decision on an erroneous legal standard or clearly erroneous findings of fact. *Id.* A district court's factual findings that underlie a preliminary injunction are reviewed for clear error, and may be reversed if "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Am. Trucking Assn's, Inc. v. City of Los Angeles*, 660 F.3d 384, 395 (9th Cir.2011) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1251 (2009)(en banc)).

VI. ARGUMENT

A. The District Court Erred in Concluding that Exhaustion of Tribal Remedies Was Required.

The tribal exhaustion doctrine provides for exhaustion of tribal remedies as a matter as a matter of comity, however it is not absolute and the exceptions to the exhaustion rule clearly apply in this case. As explained in the following sections, Plaintiffs demonstrated that the pathmarking case, *Montana v. United States*, 450 U.S. 544 (1981), precludes the Tribes' claim of jurisdiction in this case. Mr. Evans' residential construction project (now completed), located in an "open" area of the Fort Hall Reservation characterized by rural, agricultural, and non-member residential uses, as well as a municipal airport, posed absolutely no conceivable impact to the Tribes' political integrity, economic security, or health and welfare. The District Court erred in granting Defendants' Motion to Dismiss.

1. Exhaustion of Tribal Remedies Not Required When it is Plain That No Jurisdiction Exists.

"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. 353, 369 (2001) (internal quotation marks omitted); *see also Elliott*, *supra*.

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.

"It is the burden of defendants to prove that a *Montana* exception applies …" *Progressive Specialty Ins. Co. v. Burnette*, 489 F.Supp.2d 955, 958 (D.S.D. 2007). Or as recently stated by Chief Justice Roberts in *Plains Commerce Bank*, *supra*,

> … 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 land. *Atkinson*, 532 U.S. at 654, 121 S.Ct. 1825

Plains Commerce Bank, 554 U.S. at 330.

To determine whether a claim of jurisdiction is "colorable" the court must find that, based on the record before it, the assertion of tribal jurisdiction is

"plausible and appears to have a valid or genuine basis." *Stock West Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992). Here, as the facts and legal analysis will show, no "colorable" claim of jurisdiction exists and therefore exhaustion is not required.[2]

2. Defendants Have No "Plausible" Claim of Jurisdiction Against Plaintiffs Under *Montana v. United States.*

As a general rule, Indian tribes lack civil authority over the conduct of non-members on non-Indian fee land within a reservation. *Montana v. United States*, *supra*. *Montana* is the "pathmarking" case on tribal jurisdiction and established two exceptions ("*Montana* exceptions") to this general rule, which 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:

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[2] Evidence also existed of unlawful harassment and bad faith on the part of the LUPC officials who threatened Mr. Pickens and his crew with imprisonment and exclusion from the Reservation, however for the purposes of this appeal, Plaintiffs focus on the fourth exception.

> 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). The rule is "particularly strong" when the nonmember's activity takes place on land owned in fee simple. *Plains Commerce Bank*, 554 U.S. at 328. In *Plains Commerce Bank*, the U.S. Supreme Court applied an "elevated threshold" of the second *Montana* exception "that tribal power must be necessary to avert **catastrophic consequences**." *Plains Commerce Bank*, 554 U.S. at 341 (quoting F. Cohen, Handbook of Federal Indian Law § 4.02[3][c], at 232, n. 220) (emphasis added).

The Defendants entirely ignored their evidentiary burden when filing their Motions to Dismiss. They presented virtually no evidence in support of their Motions to Dismiss, and only came forward with alleged environmental "concerns" (as opposed to actual impacts) associated with house building when they filed their Reply brief. In addition to being untimely, those declarations were largely inadmissible under the Federal Rules of Evidence. Even if their lack of foundation and irrelevance is overlooked, not one of these late and inadmissible offerings could give rise to a "plausible" case for jurisdiction. The valid or

genuine basis for their claim of jurisdiction, which must be proven by Defendants, is entirely lacking.

B. Building a House Does Not Present the Kind of Injury Needed to Overcome *Montana's* Presumption Against Tribal Jurisdiction Over Non-Members on Fee Land.

The Defendants conceded below that there is no plausible "consensual relationship." Thus, the sole inquiry for this Court is whether it is "plausible," based upon the record below, to find jurisdiction over a residential construction project under the second *Montana* exception. As stated above, the second *Montana* 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)). While continuously acknowledging the theoretical possibility that tribal courts might have civil jurisdiction over a non-member, the Supreme Court has yet to hold that a tribal court has civil adjudicatory authority over a nonmember.

In the most recent tribal jurisdiction case to reach the U.S. Supreme Court, Chief Justice Roberts confirmed 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. The District Court misapplied these precedents when it concluded that exhaustion was required despite the absence of evidence of "demonstrably serious" conduct that imperiled "the political integrity, the economic security, or the health and welfare of the Tribe."

Rather than apply the "catastrophic consequences" threshold of *Plains Commerce Bank*, the District Court cited concerns about the "absurdly high standard" used in *Plains Commerce Bank* and expressly declined to follow it because that case "was not about zoning – it was about land sales," opting instead to rely, incorrectly, on *Brendale's* analysis of land ownership as a primary factor. ER0012. This analysis is flawed for at least four reasons. First, the U.S. Supreme Court's interpretation of *Montana* in *Plains Commerce Bank* is the law of the land as applied to disputes about tribal jurisdiction over non-members' conduct on fee land. Second, *Plains Commerce Bank* did not establish two different tests depending upon the type of regulation at issue – it affirmed the high threshold needed to establish jurisdiction. Third, it was error for the District Court to view

the *Brendale* decision as endorsing a lower standard. Fourth, it was error to view the Evans case as a zoning case like *Brendale.* The finding of jurisdiction under the second *Montana* exception in *Brendale* was about incompatible land uses and the consequences of the County allowing what the Yakima Indian Nation did not.

1. Defendants Failed to Show That Mr. Evans' Residential Construction Project Posed Any Threat to the Tribal Community.

Under the standard stated in *Montana, Brendale, Plains Commerce Bank* and other federal decisions, a plausible claim of jurisdiction can only be shown where there is evidence showing a "demonstrably serious" impact to the tribe. None of the evidence presented shows any impact to the Tribes, let alone a demonstrably serious one. Particularly as to Sage Builders and P&D Construction, Defendants made no attempt to connect the business license claim to any health or welfare threat.

a. The Business License Claim Asserted Against Sage Builders and P&D Construction Has No Health or Welfare Connection.

The LUPC sued Sage Builders and P&D Construction for alleged violation of the business license requirement under Tribal law. ER0285. Defendants presented no evidence of any adverse effect upon the Tribes resulting from the failure of Sage Builders and P&D Construction to obtain a business license and pay the $150 fee. Injunctive relief should have been available outright with respect

to these Plaintiffs and claims, yet the District Court determined that there was a "plausible" claim of jurisdiction against them and decided that they too should exhaust Tribal remedies. Where the Defendants offered no evidence of any health or welfare connection associated with the business license requirement – which requires solely payment of a $150 fee – there is no valid or genuine basis for requiring exhaustion of Tribal remedies.

b. Jurisdiction Over Mr. Evans Is Plainly Lacking Under *Montana, Brendale,* and *Plains Commerce Bank*.

As to Mr. Evans, as well as Sage Builders and P&D Construction, dismissal was improper because jurisdiction is plainly lacking. As a result of divestiture from tribal ownership, certain "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*, 492 U.S. at 447. 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)).

The record before the District Court established that the area where Mr. Evans' Property is located is open to the public, regulated and served by local and county agencies, and property ownership is predominantly non-Tribal. These factors are the same ones that the U.S. Supreme Court relied upon in concluding in *Brendale* that Yakima County had exclusive zoning authority in an "open" area of the Yakima Indian Nation Reservation.

Mr. Evans' construction of a single family residence on fee land poses no threat to the right of the Shoshone-Bannock Tribes to make their own laws and be ruled by them. Mr. Evans is not a Tribal member. ER0165. His house is not located on Tribal land. ER0165. David Evans owns the Property in fee simple. ER0165. He inherited it from his father. Power County property records from 1977 reflect the non-Indian, fee simple ownership of the Property since at least that time. ER0170-180.

The area surrounding the Property is predominantly agricultural and residential land with little to no Indian population. ER0189. According to the Power County Tax Assessor, all neighboring parcels in the immediate vicinity are non-member owned. ER0189. All adjacent residences are owned by non-members. *Id.* Also adjacent to the Property is the Pocatello Regional Airport, which is owned in fee by the City of Pocatello. ER0149. The area is open and

freely accessible by anyone along Syphon Road (east-west) or Government Road (north-south). ER0022; ER0027.

The Tribes provide no utility or community services to the Property. ER0167. Those services are received exclusively from state, local, and other entities, such as the Southeastern Health District (septic permits), Idaho Power (electrical hookup), Power County Sheriff (local safety), and others. *Id.* Mr. Evans' house is located on Government Road, which is a County-maintained road. ER0027. Neither the BIA nor the Tribes' Transportation Department provides any maintenance service to Government Road. ER0169.

The area in the immediate vicinity of the Property is "open" as that term is defined in *Brendale*, and thus, is subject to exclusive land use regulation by the local authorities. Consistent with that local authority, Mr. Evans obtained from Power County a building permit for residential construction on the Property. ER0165. Power County reviewed Mr. Evans' building plans, determined that they were in compliance with the International Building Code, and conducted periodic inspections at the Property to ensure that the construction was completed in compliance with the building permit. ER0071-72.

The Defendants attempt to cast the Evans Property as an "unregulated" parcel, yet this assertion is not well-founded. This is not a situation where there is a regulatory gap in Indian Country. In fact, Power County has a significant interest

in possessing exclusive zoning authority over the Property and successfully prosecuted a neighboring property owner, Rodney Sortor, for building a garage without a County permit in 2001. In that lawsuit, the Tribes asserted regulatory authority over the Sortor property and argued that his possession of a Tribal building permit was all that was legally required. ER0205. After reviewing the open nature of the area surrounding the Sortor property, characterized by agricultural, residential, and industrial uses, including the Pocatello Regional Airport, and Interstate 86, which "slices throughout the area west and east and to the south of the airport", and the predominantly non-Tribal ownership of lands in the immediate area, the Magistrate Judge concluded that Power County had the "exclusive power" to regulate use of the non-member's land. ER0210. On appeal, Sixth District for the State of Idaho affirmed the Magistrate's decision, stating that the only "real detriment the tribe will suffer here is the loss of the permit fee" and that such a loss is not "demonstrably serious, nor would it imperil the political integrity, the economic security, or the health and welfare of the tribe." ER0211-15. It should be noted that counsel for the Tribe in this case also represented Mr. Sorter in the Sorter case.

As seen in the Sortor decisions, *Brendale* does not support a finding of Tribal jurisdiction over the Evans property. Power County has a compelling interest in regulating the Property. 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. Despite several inadmissible, conclusory statements of alleged inconsistency with the Tribes' land use laws and plan, the fact is that Mr. Evans' use of the Property for a family home is no different than the numerous other residences immediately adjacent to him. 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.

2. *Brendale* Does Not Stand for for Broad Tribal Zoning Authority Based Solely on Percentage Ownership.

In this case, the District Court misconstrued and misapplied the *Brendale* decision's affirmance of tribal zoning of a non-member parcel in a "closed" area of the Yakama Reservation to find it "plausible" that, based upon the large percentage of Tribal ownership of land on the Fort Hall Reservation, *Brendale* could "confirm the Tribe's jurisdiction in this case." ER0017. The Fort Hall Reservation is predominantly Tribal land, owned by the Tribes or Tribal members. But the area where the Evans residence is located is open, accessible to anyone, and is largely owned in fee simple. It contains many residential parcels owned and occupied by non-Tribal members, including the City of Pocatello, which owns and operates the Pocatello Municipal Airport on fee land on the Reservation immediately south and west of the Evans property. The District Court expressed ambivalence about

whether to focus on the area immediately surrounding the Evans residence or the area beyond the 640 acre section (known as "Section 2") where most non-members owned property. It concluded that it was "plausible" that *Brendale* would support looking more broadly to the Tribal land holdings beyond the area around the Evans Property and over the entire Reservation and therefore it was plausible to assert jurisdiction.

In fact, the U.S. Supreme Court expressly rejected the argument that an Indian tribe enjoys "broad authority over nonmembers wherever the acreage of non-Indian fee land is miniscule in relation to the surrounding tribal land." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 658 (2001). The *Atkinson Trading Co.* decision held:

> But we think it plain that the judgment in *Brendale* turned on both the closed nature of the non-Indian fee land and the fact that its development would place the entire area "in jeopardy." Irrespective of the percentage of non-Indian fee land within a reservation, *Montana's* second exception grants Indian tribes nothing "beyond what is necessary to protect tribal self-government or to control internal relations." Whatever effect petitioner's operation of the Cameron Trading Post might have upon surrounding Navajo land, it does not endanger the Navajo Nation's political integrity.

Atkinson Trading Co., Inc., 532 U.S. at 658-59 (citations omitted).

Thus, the only inquiry that could warrant a decision requiring exhaustion is if it was plausible that the Plaintiffs' conduct endangered the Tribes' political integrity. Plaintiffs demonstrated that the area surrounding the Evans residence has fallen out of Tribal ownership and therefore there is a presumption that with

the transfer of ownership, the Tribes lost the ability to control or define the character of that area. Issuance of a county building permit does not infringe upon the right of "reservation Indians to make their own laws and be ruled by them" because Mr. Evans' actions have no direct or indirect impact on the Tribes or their governance of their members. *Nevada v. Hicks*, 533 U.S. at 361. If there is some threat to public safety from construction of Mr. Evans' house, it can be adequately addressed under applicable county codes and ordinances. State and county courts, and administrative remedies, exist for unlawful construction of a residence. The record in this case amply demonstrated that any health and safety impacts of residential construction are comprehensively regulated to International Building Code standards by the County and Southeast Idaho Health District. Well water is subject to EPA regulation. There is no evidence that requiring Mr. Evans to obtain a Tribal building permit would result in any additional protection that the County's permit requirements do not already address.

Another consideration in the determination of the Tribes' zoning authority is the fact that the Evans construction project in no way changed the character of the land. Both before and after construction, the area can only be described as rural/agricultural/residential. *See* aerial photo at ER0149. Unlike in *Brendale*, where the proposed development of 20 vacation cabins in a wilderness area posed an immediate threat to the character of the surrounding forest and wildlands, here

the Fort Hall Reservation is open, moderately developed, and characterized by neighboring uses that include numerous personal residences, businesses, a municipal airport, farmland, and industrial properties, including a phosphorus processing plant, a bulk petroleum plant, and a gravel pit. ER0204. Constructing a single family residence therefore posed no threat to the character of the surrounding area.

C. The District Court Erred in Concluding that Exhaustion of Tribal Remedies Was Required.

As a general rule, a district court should abstain from asserting federal jurisdiction over claims that are identical to claims pending in tribal court until the tribal court has had a full opportunity to consider the basis for its own jurisdiction. *Strate*, 520 U.S. at 449-450; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) (tribal exhaustion doctrine implicates considerations of comity). Exhaustion of tribal remedies is not required however when tribal court jurisdiction does not exist and remand would only delay a final judgment. *Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059, 1066 (9th Cir. 1999). The Ninth Circuit recently overturned a District Court decision that concluded that there was a "colorable claim" to tribal court jurisdiction in an action brought in tribal court for trademark infringement. *Philip Morris USA, Inc. v. King Mountain Tobacco Company, Inc.*, 569 F.3d 932 (9th Cir. 2009). The Ninth Circuit held in the *King Mountain Tobacco Company* case that exhaustion of tribal remedies would serve no purpose beyond delay in

light of the fact that the tribal court had "no colorable claim" to a dispute between a non-member and a tribal entity. *Id.* at 945. Significantly, the *King Mountain Tobacco Company* case examined the second *Montana* exception after answering "indisputably no" to the question of whether there was a consensual commercial relationship between the defendant Philip Morris USA, a non-member, and the member plaintiff, King Mountain Tobacco Company.

In its analysis of the second *Montana* exception, the Ninth Circuit observed that the district court "imported a general notion of tribal regulatory authority unhinged from *Montana* exceptions" and "predicated its holding on the possibility of general tribal authority to regulate trademarks." *Id. at 944.* The Order at issue in the Evans case similarly appears to be founded upon the possibility of general tribal authority to regulate land use throughout the Reservation and accordingly is in conflict with Ninth Circuit precedent.

In its analysis, the District Court asked the right question, but reached the wrong answer. It posed the question, "When do the Tribes have jurisdiction to apply their zoning regulations to non-members on fee lands within the Reservation?" Dkt. 62-8. It then identified two "fuzzy" factors that appeared to play a "central role": (1) the potential dangers addressed by the zoning; and (2) the character of the Reservation surrounding the land sought to be controlled by the Tribes' zoning. While these two factors do appear to be involved in the

determination of the extent of a tribe's jurisdiction, the District Court's answer to this question departed from the narrow interpretation that federal courts uniformly apply to the second *Montana* exception. This Court observed in *Burlington Northern R. Co. v. Red Wolf* that "*Montana's* second exception 'does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe.'" *Burlington Northern R. Co. v. Red Wolf*, 196 F.3d at 1064-65 (quoting *Brendale, supra*). *Plains Commerce Bank* specifically cautioned against construing the *Montana* exceptions so broadly that they "swallow the rule" *Plains Commerce Bank*, 554 U.S. at 329. But in this case, the District Court did precisely that.

The District Court stated, "Evaluating both the character of surrounding lands, and the potential dangers if no zoning is permitted, the Court finds that under *Montana's* second exception, it is at least plausible – a very low standard – that the construction of the residence may *imperil* the Tribes' welfare." ER0017-18 (emphasis added). The District Court rendered this finding without concluding that the potential adverse effect of the construction would be "demonstrably serious" to the tribe. In fact, there is no "demonstrably serious" impact to the Tribes' from anything that Mr. Evans, P&D Construction or Sage Builders did on the site.

In making this finding, the District Court concluded essentially that the Tribes' zoning authority could be applied to any non-member building a residence on the Reservation due to the "potential dangers" described by the Tribes of unregulated building. Under the District Court's reasoning, residential construction and use, something that occurs throughout the Fort Hall Reservation and nearby communities, was viewed as potentially enough of a threat to Tribal health and welfare that it could justify enforcement of the Tribes' LUPO and Business License Act against non-members. It is difficult to imagine that residential use of the Property could pose any adverse impact to the Tribes' health and welfare. And if residential use and construction *is* deemed sufficient to be a plausible basis for the Tribes to assert jurisdiction, despite the lack of any demonstrated injury to Tribal health or interests, then the *Montana* rule will be eviscerated.

The District Court also made this finding without acknowledging the zoning and regulatory enforcement that Power County applied both generally to non-members and to the Evans residence in particular. Mr. Evans obtained County building permits, septic permits from the local Health District, and was subject to County inspections for compliance with the International Building Code. ER0072. The District Court made the incorrect conclusion that where a non-member constructs a residence on fee land on the Reservation, it is "plausible" that the

construction project may pose a threat to the Tribes that "imperils" Tribal welfare. This case is not about an unregulated building activity inasmuch as the building activity is regulated by Power County—it is about whether without Tribal regulation, there is a potential harm to Tribal interests that is "demonstrably substantial" to imperil the Tribes' welfare and their ability to self-govern. In violation of this principle, the District Court found essentially that any adverse effect, no matter how improbable, could trigger the second *Montana* exception.

1. Erroneous Factual Findings Directly Contributed to the District Court's Misapplication of the Law.

The District Court's errors were not limited to its interpretation of *Montana, Brendale,* and *Plains Commerce Bank*. It also made critical factual errors regarding the alleged environmental harm that formed the basis for requiring exhaustion. These erroneous factual findings were at the core of the Court's flawed conclusion that exhaustion was required.

There were basically three factual premises upon which the District Court based its decision. The first was alleged groundwater contamination. The District Court stated, "With regard to the first factor [the potential dangers addressed by the zoning], the LUPC's affidavits describe a number of potential dangers from the Evans' residence, the principal one being groundwater contamination." ER0014. The second was alleged dumping of construction waste and the third was heightened risk of wildfires. ER0015. The District Court stated, "The Tribes also

raise concerns about the dumping of construction waste and the heightened risk of wildfires. The Ninth Circuit has held that plausible threats of water contamination and wildfire are sufficient to trigger the exhaustion requirement. *Rincon Mushroom Corp. v. Mazzetti*, 2012 WL 2928605 (9th Cir. 2012)."[3] ER0015.

As supposed factual bases for finding a "plausible" assertion of jurisdiction, the District Court made clear factual errors that were not harmless. The affidavits submitted by the Defendants do not support the District Court's findings that these three alleged environmental dangers exist. Plaintiffs' specific objections to the Defendants' evidence are discussed below, however even assuming the objections are not sustained, the District Court's findings cannot stand.

a. It Is Not "Plausible" that Plaintiffs' Conduct Caused Groundwater Contamination.

The District Court correctly stated that there is a groundwater contamination issue on the Reservation posed by ethylene dibromide (EDB). However, the suggestion that the Plaintiffs' conduct "caused groundwater contamination" is absurd.[4] First, the Defendants never even alleged that Plaintiffs "caused" EDB

[3] The District Court noted that the *Rincon Mushroom* decision was unpublished, however it cited to it as "guidance."

[4] The District Court stated, "To trigger the exhaustion requirement, the Tribes do not have to prove here that the conduct of plaintiffs caused groundwater contamination; they need only show that it would be plausible. And given the EPA's findings of well contamination in that area, the Tribes have at least made out a plausible case." ER0016.

contamination. There simply is no "genuine" basis for that statement. In contrast, Plaintiffs submitted to the Court evidence that EDB contamination has been a groundwater concern at the Fort Hall Reservation since at least 1993. ER0030 (citing April 4, 2005 Health Consultation Report, Agency for Toxic Substances and Disease Registry. www.atsdr.cdc.gov/hac/pha/FortHallIndianResv/FortHallReservatonHC.pdf) (last visited 1/26/2013) (hereinafter the "ASTDR Report"). This is almost twenty years before the Evans construction began.

Information about the causes of the Fort Hall Reservation EDB contamination can be found in the ASTDR Report. The Report notes that historically EDB has been used as a pesticide and as an additive in leaded gasoline, however the specific source of EDB in private well water on and off the Fort Hall Reservation is not known. The record does not indicate that Mr. Evans or his contractors utilized any EDB-containing materials or "caused" EDB contamination. According to the ASTDR map, the origin of the plume appears to be in the area of the Fort Hall township, which is substantially (at least several miles) to the north and east of the Evans residence, and groundwater generally flows from the Fort Hall townsite in a southwesterly direction, *towards* the Evans Property. Figure A-1, ASTDR Report. Defendants alleged that "the Tribes' and all Reservation residents' interests in health and welfare are imperiled" if wells are

not dug properly, however such assertions are not the same as establishing a causal connection between the Plaintiffs' conduct and the presence of EDB in groundwater on the Reservation.[5] ER0135. How Defendants could have conceivably "caused" EDB contamination is not explained in the District Court's findings. The District Court also made a finding that there is EDB contamination "in the area of Evans' home," however this finding falls far short of establishing a plausible connection between the EDB plume and Mr. Evans' conduct.

The only mention of causation in the record came in the Second Declaration of Tony Galloway, Sr., which stated at paragraph 17, "The activities on Evans' property affect groundwater which flows into the fishing waters." ER0137. As discussed below, this statement appears to present expert and factual testimony without any foundation or demonstration of personal knowledge. Such statements cannot form a basis for concluding that there is a "plausible" claim of jurisdiction based upon alleged groundwater contamination. It is also too vague and conclusory to make any finding of causation.

[5] Defendants never made any statement that Mr. Evans had dug a well or had done so improperly. In the Second Declaration of Tony Galloway, Sr., Mr. Galloway stated that building activities on the Reservation "regularly include private well construction." ER0135. He also stated that the Tribes "cannot determine the extent of danger or risk or harm to Tribal interests" from Mr. Evans' construction activities. *Id.* From this, the District Court found it was "plausible" that Mr. Evans had dug a well and caused well contamination. ER0014-15.

There is also no competent evidence of EDB contamination in the well from which Mr. Evans obtains his potable water. The Defendants' map that supposedly shows EDB contamination at the Evans Property is a hand-colored, unattributed figure. In contrast, the ATSDR report map showed no observations of EDB contamination at Government Road, where the Evans residence is located. And Mr. Evans testified that his potable water is from a community well that is regulated by EPA to drinking water standards. ER0022. The District Court implied that Mr. Evans drilled his own well and that such well construction could potentially lead to EDB contamination – but these are not reasonable inferences from the record.[6] Even if Mr. Evans had installed a well for the residence, the record does not support the District Court's conclusion that it is "plausible" that these actions "caused" groundwater contamination. ER0016. None of the evidence in the record even remotely establishes that Mr. Evans' activities have a "demonstrably serious" impact on the Tribes' political integrity, economic security, and health or welfare.

[6] The District Court expressed concern that the Affidavit of Mr. Evans referenced the community well as the source of potable water, but did not expressly deny installing that well. This concern was misplaced. It is reasonable to infer from the Evans affidavit that obtaining water from a community well means that no separate well was installed for his house. It is not reasonable to infer from the Defendants' speculation that Mr. Evans in fact did install a new well or that Mr. Evans "plausibly" caused groundwater contamination.

The ATSDR report map demonstrates that the EDB contamination was well documented and widespread on the Reservation many years prior to Mr. Evans' construction. No evidence in the record ties Mr. Evans to any activity that could potentially cause EDB contamination. The finding that it is "plausible" that the Plaintiffs' conduct caused groundwater contamination is clearly erroneous.[7]

b. Alleged Dumping of Construction Debris is a Baseless Accusation.

The District Court alluded to disposal of construction debris as a Tribal concern, however it is not clear the extent to which the District Court relied upon this finding as a basis for requiring exhaustion. The Defendants submitted vague and irrelevant statements that an unidentified "local subcontractor" had illegally disposed of construction debris on the Reservation and was being sued by the Tribes for violations of Tribal ordinances. ER0134. The record contains no evidence of who that was – certainly there is nothing in the record suggesting that Plaintiffs were the source of dumped construction debris. The Defendants submitted a reply declaration in support of their Motion to Dismiss stating that, "The Land Use Policy Commission do not know where David Evans and his

[7] Although the Defendants speculated that Mr. Evans was using an unpermitted septic tank, the District Court appeared to agree, based upon Mr. Evans' affidavit, that there were no unauthorized septic tanks in use on the Evans Property. Furthermore, there is no causal connection between the EDB contamination and septic system installation and use.

subcontractors disposed of their debris." ER0134. Such speculative and baseless statements are vague and irrelevant. And even if considered, disposal of construction debris is not the kind of harm that can satisfy the second *Montana* exception. The potential harm to the tribe must be "demonstrably serious," and the Tribes have not made any claims against Sage Builders or P&D Construction for construction debris disposal. Instead, the sole cause of action against them in Tribal Court is their alleged failure to obtain a business license. Thus, there is plainly no "health and welfare" nexus to the claims made against Sage Builders and P&D Construction.

c. No Mention of Wildfires Appears in the Record.

The third and apparently most serious "concern" cited by the District Court was the risk of wildfires. It stated, "[t]he threat of wildfires is another plausible threat that must be considered." ER0016. The specter of wildfires was a significant threat in the *Rincon Mushroom* decision, where there was evidence presented to the trial court that a wildfire actually spread from the non-member's property to tribal lands "across the street on which the Casino is located." *Rincon Mushroom Corp. of America v. Mazzetti*, 2010 WL 3768347 (S.D. Cal.) (rev'd on other grounds, 2012 WL 2928605 (9th Cir. 2012) (Case No. 10-56521). The Ninth Circuit in that case issued an unpublished decision on July 19, 2012 after granting a rehearing and withdrawing its April 20, 2012 opinion that reversed the trial court.

Although neither the trial court nor the Ninth Circuit's opinions are published, because the District Court relied upon them for "guidance" they are noteworthy and should be discussed. Review of the withdrawn April 20, 2012 opinion shows that the wildfire issue was critical not merely due to the environmental threat to the aquifer, which was the tribe's sole source of drinking water, but because the Casino located on Tribal lands "across the road" provided the tribe's primary source of income. Thus, the environmental and economic ramifications of a wildfire, the threat of which was significant, were enough to trigger the exhaustion requirement. In a dissenting opinion, however, Circuit Judge Rawlinson expressed her viewpoint that the majority had failed to apply the narrow interpretation of the second *Montana* exception that the U.S. Supreme Court endorsed in *Montana* and subsequent decisions.

Although Defendants made numerous unfounded allegations regarding the Evans Property, one that they never made was that the Plaintiffs' conduct posed a risk of wildfire. The District Court here made a clear factual error in basing its legal conclusion on the "threat of wildfires." The record contains no evidence that wildfires are a concern, or that a wildfire could threaten Tribal environmental or economic resources. The Defendants presented vague and irrelevant statements regarding unidentified third parties that had allegedly caused structural fires, but

were silent on potential for wildfires. Specifically, the Second Declaration of Tony Galloway, Sr. stated:

> 6. Fire hazards exist in connection with unregulated conduct on non-Indian fee land. Recently, in July 2012, a fire started on non-Indian owned fee land on Siphon road, close to David Evans' property. The fire started at a non-Indian junk-yard residence that Power County has failed to adequately regulate. *The land owner was using a blow torch when the fire started.* Tribal emergency response services were called and were among the first responders, incurring unreimbursed expenses. In the process of building, contractors' activities can pose fire hazards affecting the Tribes' interests, i.e. use of blow torches to cut metal, use of grinders, heaters, etc.

ER0134-35 (emphasis added). The Second Declaration of Tony Galloway, Sr. also stated:

> 13. Connection to utility services during construction poses risks to Tribal interests. In September, 2012, *a fire started on non-Indian fee owned land in the Fort Hall town site, caused by faulty electrical service connection the non-Indian land owner failed to construct property [sic] or maintain*. Tribal member houses adjacent to the property were burned. Tribal emergency response services were called and were the first to respond, incurring unreimbursed expenses.

ER0136 (emphasis added).

The above identified statements are the only mention of fire hazards in the Defendants' declarations. Of course, none of these statements has any bearing on whether the Evans residence poses any fire risk. They have no relationship to the Evans property or Plaintiffs' conduct. And they are hearsay, conclusory, and without foundation.

Allegations regarding fire hazards posed by use of a blow torch and faulty electrical service connection are not a valid basis for finding that the Plaintiffs' conduct poses a threat of any kind of fire, and there certainly is no basis for concluding that the risk of wildfire was "plausible." In sum, there is no evidence that Tribal health or welfare is imperiled, no evidence that the Evans property is associated with the identified fire hazards, and no evidence that the Plaintiffs' conduct causes wildfires that could potentially be "demonstrably serious." Accordingly, the District Court's factual finding that the threat of wildfires is "another plausible threat" is clearly erroneous.

2. The District Court Inappropriately Relied Upon Evidence that Should Have Been Stricken.

Federal Rule of Evidence 602 prevents a witness from testifying on a matter "unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001). "It is not enough for a witness to tell all she knows; she must know all she tells." *Id.* Similarly, Fed.R.Civ.P. 56(e) requires that affidavits considered on summary judgment be based upon personal knowledge and set forth such facts as would be admissible in evidence. *Payne v. Pauley*, 337 F.3d 767,772 (7th Cir. 2003); *Block v. City of Los Angeles*, 253 F.3d 410, 419 (9th Cir. 2001). It is an abuse of discretion to consider inadmissible evidence contained in litigant declarations. *Id.* The summary judgment affidavit

requirements of Fed.R.Civ.P. 56(e) related to personal knowledge, admissible facts, and affirmative showing of competency apply to affidavits submitted in support of or in opposition to motions to dismiss on jurisdictional grounds. *Federal Deposit Ins. Corp. v. Oaklawn Apartments*, 959 F.2d 170, 175 & n.6 (10th Cir. 1992).

Much of the Defendants' proffered evidence was inadmissible because it was not relevant to the Evans residence, not made based upon personal knowledge, and failed to attach referenced documents as required by Fed.R.Civ.P. 56(e). Before the December 10 hearing, Plaintiffs moved to strike specific portions of Defendants' affidavits on those grounds, as well as on the basis of Local Rule 7.1(b)(2), which requires that a moving party include with its motion copies of all "documentary evidence and other supporting materials upon which the moving party intends to rely." ER0073-79. Defendants supported their Motions to Dismiss with just two bare-bones declarations. It was not until they filed their reply brief on November 1, 2012 that they submitted the Declaration of Casper Appenay, the Second Declaration of Tony Galloway, Sr., the Second Declaration of George Guardipee, and the Declaration of Dean Fox, all of which contained unfounded allegations that of environmental harm that formed the basis of the District Court's Order.

At the December 10, 2012 hearing, Plaintiffs renewed their objections to the inadmissible statements. ER0043 (37:10-23). The District Court indicated that the timeliness issue could be addressed by providing an opportunity to respond. ER0043 (38:7-18). But there was no discussion regarding the inadmissibility of Defendants' evidence. Shortly after the December 10, 2012 hearing, the District Court entered a minute entry denying Plaintiffs' Motion to Strike. ER0060. To cure the lack of opportunity to rebut the Defendants' untimely filings, the District Court allowed Plaintiffs to submit up to three declarations and a three-page rebuttal brief. Plaintiffs were given 4 business days to submit their rebuttal.

Granting Plaintiffs a rebuttal opportunity alleviated to some degree the prejudice that resulted from the tardiness of Defendants' filings, however it was apparent at the December 10, 2012 hearing that the District Court had already reached a conclusion of the case's outcome based upon the inadmissible contents of those declarations. It was an abuse of discretion for the District Court to consider statements that clearly were made without personal knowledge, or in violation of the requirements of Fed.R.Civ.P. 56(e) or Local Rule 7(b)(2).

It was also an abuse of discretion for the District Court to consider statements that were not relevant to the issues before the Court. Federal Rule of Evidence 402 provides that evidence which is not relevant "is not admissible." Relevant evidence "must be probative of a fact of consequence in the matter and

must have tendency to make existence of that fact more or less probable than it would have been without evidence." *Smith v. Pacific Bell Telephone Co., Inc.*, 649 F.Supp.2d 1073, 1086 (E.D. Cal. 2009).

Specific types of evidence that the Plaintiffs objected to included:

- Statements regarding the existence of Tribal laws and their land use ordinance, including what those laws contain (not attached).
- Conclusions on legal matters, not containing statements of facts within personal knowledge.
- Statements regarding the State District Health Departments records, without providing those records.
- Statements regarding alleged use of an unpermitted septic system.
- The entire Second Declaration of Tony Galloway, Sr., apart from the introductory paragraph, which included *inter alia* statements regarding irrelevant construction debris disposal accusations against an unnamed third party; fire hazards caused by a blow torch and faulty electrical service connection that occurred at unnamed and unrelated properties owned by non-members; assertions regarding EDB contamination and issues associated with private well construction on the Reservation; alleged inconsistency with Tribal land use plans,

which are not provided; statements regarding alleged non-compliance with septic regulations and building codes.

ER0073-79.

It is apparent from the District Court's Order that these inadmissible statements formed the express basis of the decision to require exhaustion of Tribal remedies. None of the Defendants' declarants testified regarding any particular scientific expertise to support their statements alleging Plaintiffs' responsibility for environmental harm or the plausibility of groundwater contamination. None of the Defendants' declarants made any demonstration of personal knowledge regarding the Evans' residence, its construction, or the contractors working on the site. Yet, they asserted that Plaintiffs' actions posed a threat so substantial that it "imperiled" the welfare of the Tribes' and Reservation residences.

Reliance on these inadmissible statements constitutes an abuse of discretion. As a result of the District Court's reliance on hearsay and inadmissible statements, Plaintiffs are now faced with the prospect of a lengthy, expensive Tribal Court proceeding. As discussed below, irreparable harm will occur because of the time, expense, invasion of privacy, and lost income that Plaintiffs will endure - none of which will be compensable in money damages because the Tribes can assert sovereign immunity as an absolute defense to recovery of any attorney's fees or damage award.

Plaintiffs' Motion to Strike should have been granted. The evidence in the record regarding potential impacts to the Tribes' political integrity was insufficient, as a matter of law, to trigger exhaustion of tribal remedies. Had the District Court relied solely upon admissible evidence, these deficiencies would have been even more apparent. In considering whether Plaintiffs were entitled to injunctive relief, this Court should consider only admissible evidence, and properly supported statements demonstrating personal knowledge.

D. Plaintiffs' Motion for Preliminary Injunction Should Have Been Granted.

A plaintiff seeking a preliminary injunction must establish (1) likely success on the merits; (2) likely irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the plaintiff's favor; and (4) that an injunction is in the public interest. *Winters v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit follows the "sliding scale" approach, pursuant to which the elements of a preliminary injunction are "balanced, so that a stronger showing of one element may offset a weaker showing of another." *Pimentel v. Dreyfus*, 670 F.3d 1096 (9th Cir. 2012).

Multiple federal courts have granted injunctive relief against a tribal official or agency when a litigant demonstrates a probable likelihood of success on the merits and irreparable harm such as litigating in a forum that has no jurisdiction. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1153 (10th Cir. 2011). *See also*

QEP Field Services Co. v. Ute Indian Tribe of the Uintah and Ouray Reservation, 740 F.Supp.2d 1274 (D. Utah 2010) (granting preliminary injunction to enjoin Tribal Court's order entered without jurisdiction over the non-Indian property owner); *Wells Fargo Bank, N.A. v. Maynahonah*, 2011 WL 3876519 (2011) (Case No. CV-11-648-D, Findings of Fact, Conclusions of Law, and Order dated Sept. 2, 2011) (granting preliminary injunction to prevent Plaintiff from expending resources and effort in litigation, where the Apache Gaming Commission likely lacked jurisdiction); *Otter Tail Power Co. v. Leech Lake Band of Ojibwe*, 2011 WL 2490820 (D. Minn.) (Case No. 11-1070 (DWF/LIB), Memorandum Opinion and Order dated June 22, 2011) (granting immediate preliminary injunction to preclude Tribe from asserting prescriptive and permitting jurisdiction over utility's power line project that did not cross tribally-owned or trust lands); *Koniag, Inc. v. Kanam*, 2012 WL 2576210 (Case No. 3:12–cv–00077–SLG) (Decision and Order Granting Preliminary Injunction dated July 3, 2012) (enjoining tribal court from proceeding with legal action against non-Indian defendants due to tribal court's lack of jurisdiction); *Jones v. Lummi Tribal Court*, C12-1915JLR, 2012 WL 6149666 (W.D. Wash. Dec. 10, 2012) (no "colorable" jurisdiction based on *Montana* exceptions over non-member's tortious conduct against individuals on trust land). Plaintiffs here demonstrated a need for injunctive relief to protect them from the immediate threat of litigating in a Tribal Court that had no jurisdiction over them.

1. Plaintiffs Have Shown a Strong Likelihood of Success on the Merits of Their Objection to Tribal Jurisdiction.

The Defendants' actions exceeded the authority that the Shoshone-Bannock Tribes are capable of exercising under federal law. They have no jurisdiction over Plaintiffs and the Tribal Court action currently pending against them is facially void due to lack of subject matter jurisdiction.

A strong likelihood of success on the merits warrants an exercise of this court's equitable remedies in favor of an injunction because (1) the Defendants can present no set of facts that would justify their assertion of jurisdiction over Plaintiffs in Tribal Court; and (2) exhaustion of tribal remedies is not required because it is "plain" that no jurisdiction over Plaintiffs exists. Exhaustion of tribal remedies is only required when there is a colorable assertion of jurisdiction. This case does not present a situation like in *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir. 2009), which held that there was a "plausible" assertion of jurisdiction over a non-Indian who trespassed on Tribal lands and allegedly intentionally set a forest fire that destroyed millions of dollars worth of the tribe's natural resources. Therefore, the Ninth Circuit held that tribal court jurisdiction was "plausible" and required the tribal court an opportunity to determine their jurisdiction in the first instance.

Instead, this case presents facts more similar to *Crowe & Dunlevy, P.C., supra*, which enjoined a tribal action against a non-member who had not consented to tribal jurisdiction and for whom further tribal proceedings would serve no purpose other than delay. *Crowe & Dunlevy, P.C.*, 640 F.3d at 1153. Neither Mr. Evans nor any of his contractors has consented to Tribal jurisdiction. None of Mr. Evans' actions or those of the other Plaintiffs pose any threat to the economic security or political integrity to the Tribes. The Defendants do not even attempt to show, other than with blanket assertions, any tangible impacts to the Reservation environment that could potentially result from Mr. Evans' construction of a permitted single family residence. Accordingly, there is no plausible claim of Tribal jurisdiction over Mr. Evans or the Property and further proceedings against Plaintiffs should be enjoined in Tribal Court.

2. Granting Injunctive Relief Will Protect Plaintiffs From Irreparable Injury.

Where it is plain that requiring further proceedings in tribal court that has no plausible claim to jurisdiction will result in unnecessary expenditure of litigation resources and time, preliminary injunctive relief is appropriate. *Crowe & Dunlevy, P.C. v. Stidham, supra*. In *Crowe & Dunlevy, P.C.*, the Tenth Circuit upheld issuance of a preliminary injunction where there was a "significant risk that Crowe [the plaintiff] would be forced to expend unnecessary time, money, and effort litigating the issue of their fees in the Muscogee Nation District Court—a court

which likely does not have jurisdiction over it." *Id.* at 1157. Further, in light of the risk that a judgment in favor of the tribe would leave Crowe without recourse to recoup fees improperly paid under a tribal court judgment, there was a "significant risk of financial injury which, given the unique circumstances of this case, creates an irreparable harm sufficient to support a preliminary injunction." *Id.* Money damages that cannot be later recovered for reasons of sovereign immunity are a form of irreparable injury. *Id.* *See also Wells Fargo Bank, N.A. v. Maynahonah*, 2011 WL 3876519 (W.D. Okla. 2011) (unpublished decision) (finding that plaintiff's expenditure of time, money, and resources likely could not be recouped later, even if plaintiff prevails on the merits of this case and that "without injunction Plaintiff stands to suffer both tangible and intangible losses that likely cannot be compensated with money damages").

Plaintiffs David Evans, Ron Pickens d/b/a P&D Construction, and Sage Builders, LP have been sued in Tribal Court and been forced to make a special appearance to prevent entry of default judgment against them. ER0083. They have also been served with discovery requests that seek numerous intrusive and irrelevant documents and information, and there is no guarantee that their confidentiality will be maintained. ER0166.

To defend themselves in Tribal Court, Plaintiffs will be required to incur litigation costs, invest substantial amounts of time and energy, and will undergo

the stress and strain of full-blown litigation in a court that has no jurisdiction. If a judgment is entered against Plaintiffs for their failure to obtain a tribal permit, notwithstanding their valid county building permits, they will bear the stigma of having such a judgment entered. The LUPC has also made clear that it is seeking substantial monetary penalties, at least $500 per day, in any resulting judgment. ER0166. Furthermore, if any payments are made to the Tribes, recovery of those amounts will be virtually impossible to recover back due to the fact that as a sovereign nation, the Tribes possess sovereign immunity from suit.

Due to the irreversible, irreparable, and serious harm to Plaintiffs posed by the pending action against them in Tribal Court, Plaintiffs have no adequate or timely remedy at law for the above-mentioned conduct of the Defendants and injunctive relief is Plaintiffs' only means for securing relief. As discussed above, they have a strong success on the merits of their claim that the Tribes lack jurisdiction over them. Plaintiffs are entitled to injunctive relief enjoining the Defendants from pursuing further any of their claims against Plaintiffs in the Tribal Court in order to prevent the irreversible consequences of further proceedings in Tribal Court. It was an abuse of discretion for the District Court to deny their Motion for Preliminary Injunction.

3. The Threatened Injury to the Defendants from an Injunction is Minimal, and an Injunction is in the Public Interest.

The remaining factors of the test for a preliminary injunction under Fed.R.Civ.P. 65 are whether the threatened injury to the movant will outweigh the potential for harm to the enjoined party and whether an injunction is in the public interest. These factors weigh heavily in favor of the Plaintiffs. There is no colorable argument in favor of tribal jurisdiction over Plaintiffs, and there is minimal (at best) injury that will result from a Federal Court Order halting the proceedings against Plaintiffs in Tribal Court. Tribal sovereignty is "a sovereignty outside the basic structure of the Constitution." *Plains Commerce Bank*, 554 U.S. at 336 (quoting *United States v. Lara*, 541 U.S. 193, 212 (2004)). An injunction in favor of Plaintiffs to halt an unlawful proceeding in Tribal Court is in the public's interest.

VII. CONCLUSION

The District Court erred when it granted Defendants' Motions to Dismiss and required Plaintiffs to exhaust tribal remedies. It abused its discretion in considering inadmissible testimony and making clearly erroneous factual findings in support of its conclusion that there was a "plausible" assertion of tribal jurisdiction. It also abused its discretion in denying Plaintiffs' Motion for Preliminary Injunction. Plaintiffs respectfully requests that this Court reverse the Order and enter injunctive relief halting the Tribal Court proceedings against them.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellants state that there are no related cases.

DATED January 30, 2013.

/s/ Aaron N. Thompson
Aaron N. Thompson
Counsel for Appellants David Evans, Sage Builders, LP, and Ron Pickens d/b/a P&D Construction

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/s/ Aaron N. Thompson
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I HEREBY CERTIFY that on this 30th day of January, 2013, a true and correct copy of the foregoing was served on the following by the manner indicated:

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