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**Honorable Edward J. Lodge**

8 Attorneys for Defendants the Coeur d'Alene Tribe of Indians, et al.

9  
10 **UNITED STATES DISTRICT COURT**  
11 **FOR THE DISTRICT OF IDAHO**

12 ST. ISIDORE FARM, LLC, an Idaho  
13 limited liability company; and  
14 GOBERS, LLC, a Washington limited  
15 liability company,

16 Plaintiffs,

17 vs.

18  
19 COEUR D'ALENE TRIBE OF  
20 INDIANS, a federally-recognized  
21 Indian tribe, JOHN DOES 1-10, each  
22 of which are Members of the Coeur  
23 d'Alene Tribe of Indians,

24 Defendants.

No. CV-13-00274-EJL

**DEFENDANTS'**  
**MEMORANDUM OF LAW**  
**IN SUPPORT OF MOTION**  
**TO DISMISS FOR FAILURE**  
**TO EXHAUST TRIBAL**  
**COURT JURISDICTION**

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26 COMES NOW the Coeur d'Alene Tribe of Indians, a federally recognized  
27 Indian tribe (hereinafter "the Tribe"), Defendant above-named, and herewith  
28 submits the following Memorandum of Law in support of the Tribe's Motion to  
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MEMORANDUM OF LAW – 1

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1 Dismiss Plaintiffs' collateral attack upon the Tribe's jurisdiction to regulate and  
2 adjudicate Plaintiffs' conduct on non-Indian fee land.

### 3 4 INTRODUCTION

5 The Court has before it a Complaint for declaratory relief as well as  
6 injunctive relief brought by Plaintiffs seeking to prohibit the federally recognized  
7 Tribe from exercising regulatory and adjudicatory jurisdiction over Plaintiffs'  
8 conduct on non-Indian fee land. The Plaintiffs' action is a direct challenge to the  
9 Tribe's regulatory and adjudicatory jurisdiction contending that exhaustion of  
10 tribal court remedies, and specifically jurisdiction, is not required. Also before  
11 the Court is the Tribe's Motion to Dismiss Plaintiffs' Complaint pursuant to  
12 FRCP 12(b) for failure to exhaust tribal court jurisdiction.

13  
14 The Tribe has regulatory and adjudicatory jurisdiction over Plaintiffs'  
15 conduct on non-Indian fee land within the Coeur d'Alene Tribe of Indians'  
16 reservation based upon the second exception in Montana v. United States, 450  
17 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). Specifically the Tribe has  
18 alleged Plaintiffs' conduct in spreading and injecting human waste on  
19 agricultural fields constitutes conduct which threatens the health and welfare of  
20 the Coeur d'Alene Tribe and as such, the second exception to Montana 450 U.S.  
21 565-66 is applicable to permit regulatory and adjudicatory jurisdiction in the  
22 Coeur d'Alene Tribal Court.

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30 MEMORANDUM OF LAW – 2

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## FACTUAL BACKGROUND

The Tribe is a federally recognized Indian tribe with a reservation located in Kootenai and Benewah Counties, Idaho. St. Isidore Farm, LLC, is an Idaho limited liability company and the owner of non-Indian fee land within the boundaries of the Coeur d'Alene Tribe of Indians' reservation. Gobers, LLC, is a Washington limited liability corporation engaged in pumping septic tanks and collecting human waste from portable toilets. Gobers transports the septic tank waste and portable toilet human waste from Washington to the non-Indian fee land owned by St. Isidore Farm, LLC. St. Isidore Farm then receives the human waste, frequently referred to as "septage," on site and then spreads or injects the human waste into the land. It should also be noted the contents from these septic tanks and portable toilets consists of more than just human waste in that they also contain unknown chemicals, pathogens, and heavy metals, which is acknowledged by the Idaho Department of Environmental Quality (DEQ).

Gobers or St. Isidore Farm obtained approval for human waste application on the non-Indian fee land from the DEQ.

The Tribe is governed by the Coeur d'Alene Tribal Council, and the Tribal Council by duly adopted resolution dated March 6, 2013, enacted Chapter 57 of the Coeur d'Alene Tribal Code entitled "Tribal Waste Management Act." The

1 Tribal Waste Management Act ("TWMA") provides authority for the Tribe to  
2 regulate the conduct of St. Isidore and Gobers.

3  
4 The Tribe gave notice by letter to Plaintiffs demanding the Plaintiffs' cease  
5 and desist from the spreading and injection of human waste and other unknown  
6 substances on the non-Indian fee land. Plaintiffs' failed to stop the conduct, and  
7 as a result the Tribe filed suit in the Coeur d'Alene Tribal Court on June 3, 2013,  
8 under case number CV-SC-2013-0115. St. Isidore Farm and Gobers appeared  
9 and answered the Complaint by filing Answers in tribal court contesting tribal  
10 jurisdiction on or about June 20, 2013. In addition to responding in tribal court,  
11 St. Isidore Farm and Gobers filed the present action in the United States District  
12 Court for the District of Idaho on June 21, 2013.

13  
14 St. Isidore Farm and Gobers' action before this Court seeks to challenge  
15 the jurisdiction of tribal court in federal court rather than following the Ninth  
16 Circuit Court of Appeals and United States Supreme Court's mandate of  
17 exhaustion of tribal remedies in tribal court prior to seeking review in federal  
18 court regarding tribal court jurisdiction.

## 19 LEGAL ANALYSIS

### 20 **1) Summary of Argument**

21 The Coeur d'Alene Tribe has regulatory and adjudicatory jurisdiction  
22 pursuant to what has been referred to as the second exception set forth in  
23 MEMORANDUM OF LAW – 4

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1 Montana v. United States 450 U.S. 544 (1981). The second exception under  
 2 Montana, supra, permits an Indian tribe to regulate the noxious conduct of non-  
 3 Indians on fee land when the conduct threatens, menaces, or has a direct impact  
 4 upon the health or welfare of the tribe. See Plains Commerce Bank v. Long  
 5 Family Land and Cattle Co., 554, U.S., 316, 341, 128, S.Ct. 2709, 171 L.Ed.2d  
 6 457 (2008), citing Montana 450 U.S. at 566.

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 10 Contrary to Plaintiffs' assertions, the Tribe has not sought to assert  
 11 criminal jurisdiction over the conduct of Plaintiffs spreading human sewage and  
 12 waste. The Tribe's criminal jurisdiction may exist based upon the Indian status  
 13 of Ben Johnson the principal/member of Gobers and St. Isidore Farm. Johnson,  
 14 not a party here, represented to the Tribe's Chief of Police that he was an Indian  
 15 ( See Declaration of Cody SiJohn filed in response to TRO) Indian Tribes do  
 16 have inherent sovereign authority to assert criminal jurisdiction over non-  
 17 member Indians pursuant to 25 U.S.C. 1301(2) and the holding in US v. Lara  
 18 541 U.S. 193 (2004). The Tribe does not currently have sufficient information to  
 19 establish criminal jurisdiction of Johnson; but does not waive its rights to assert  
 20 criminal jurisdiction. Moreover, even if the Tribe were to pursue criminal action  
 21 against the plaintiffs, the exhaustion rule applies to criminal actions. See  
 22 Jeffredo v. Macarro 599 F.3d 913 (9th cir. 2010; Valenzuela v. Silversmith 699  
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1 F.3d 1199 (10th Cir. 2012) for discussion of Federal Court challenges of criminal  
2 actions in Tribal Court.

3  
4 The United States Supreme Court and the 9th Circuit Court of Appeals  
5 have held that tribal court exhaustion is a pre-requisite to a federal court's  
6 exercise of its jurisdiction for determination of whether or not tribal court has  
7 jurisdiction over a dispute. See Grand Canyon Skywalk Development, LLC, v.  
8 Sa'Nyu Wa, Inc., 715 F.3d 1196, 2013 WL 1777060, (9th Cir. 2013) citing Nat'l  
9 Farmers Union Ins. Co., v. Crow Tribe of Indians, 471 U.S. 845; Iowa Mut. Ins.  
10 Co. v. LaPlante, 480 U.S. 9, (1987); Burlington N.R.R. Co., v. Red Wolfe, 196  
11 F.3d 1059 (9th Cir. 1999).  
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16 There are four (4) recognized exceptions to the exhaustion requirement of  
17 tribal court remedies, which include: (1) bad faith; (2) express prohibition; (3)  
18 futility; and (4) jurisdiction plainly does not exist. See Grand Canyon Skywalk  
19 Development, LLC., v. Sa'Nyu Wa, supra. None of the four (4) exceptions to the  
20 tribal court exhaustion rule apply in this case, and as such Plaintiffs' action  
21 should be dismissed permitting the Coeur d'Alene Tribal Court to examine the  
22 jurisdictional challenge.  
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## 26 **2) Tribal Court Jurisdiction**

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28 The general rule established by Montana v. United States, 450 U.S. 544  
29 (1981); Strate v. A-1 Contractors, 520 U.S. 438, 469 (1997); Nevada v. Hicks,

1 533 U.S. 353 (2001); and finally Plains Commerce Bank v. Long Family Land  
2 and Cattle Co., 554 U.S. 316 (2008), is that Indian tribes do not have regulatory  
3 or adjudicatory jurisdiction over conduct on non-Indian fee lands except when  
4 the noxious conduct poses a threat to the health, safety, and welfare of the tribal  
5 community. Plains Commerce Bank v. Long Family Land and Cattle Co., 554  
6 U.S. 316, 341 citing Montana 450 U.S. at 566.  
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10 The Tribe has alleged in its tribal court Complaint that the Plaintiffs'  
11 conduct in processing human waste and other substances on land within the  
12 reservation boundaries is noxious conduct that threatens the health, welfare, and  
13 safety of the Coeur d'Alene Tribe of Indians' community. The Plaintiff's conduct  
14 threatens the Tribe's community for the stated reason that the conduct involves  
15 spreading or injecting untested and untreated human waste upon unfenced land  
16 where deer, elk and other wildlife graze and tribal members harvest said game  
17 for their subsistence and cultural practices all year long.  
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22 The Tribe has the burden of proving the second exception to Montana v.  
23 United States. See Plains Commerce, 554 U.S. at 330. Proof of the second  
24 Montana exception should properly occur in front of the tribal court pursuant to  
25 the exhaustion rule enumerated above.  
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### 3) Current Tribal Regulation

The Tribe currently regulates the water quality for a portion of Lake Coeur d'Alene. (See Declaration of Scott Fields) Further, the Tribe has direct input to water quality standards on tributaries to Lake Coeur d'Alene, although the Tribe has not been designated as a state (TAS) for regulating tributaries. (See Declaration of Scott Fields) The Tribe also regulates air quality standards for the Coeur d'Alene Tribal Reservation. (See Declaration of Scott Fields).

Simultaneous with environmental regulation, the Tribe also regulates hunting within the exterior boundaries of its reservation as it relates to deer, elk, bear, moose, and other wildlife. (See Declaration of Cameron Heusser)

### 4) Exhaustion

Plaintiffs clearly do not want to follow the established rule requiring Plaintiffs (Defendants in tribal court) to challenge the tribal jurisdiction in tribal court. Rather, Plaintiffs' lengthy Complaint for Declaratory and Injunctive Relief seeks to circumvent the exhaustion requirement.

The Ninth Circuit Court of Appeals in Grand Canyon Skywalk Development, LLC., v. Sa'Nyu Wa, Supra, recently reaffirmed that exhaustion is based upon comity and deference to tribal court to permit tribal court to determine its jurisdiction citing Nat'l Farmers Union Ins. Co., v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S.

9, 15-16 (1987); and Burlington N.R.R. Co., v. Crow Tribal Council, 940 F.2d 1239, 1244-47 (9th Cir. 1991).

The reasoning behind the deference to tribal court's initial determination of jurisdiction is based upon: "(1) Congress' commitment to 'a policy of supporting tribal self-government and self-determination;' and (2) a policy that allows 'the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge;' and (3) judicial economy, which will best be served 'by allowing a full record to be developed in the tribal court.'" Grand Canyon Skywalk Development, LLC., v. Sa'Nyu Wa, Inc., at page 8 citing Nat'l Farmers, 471 U.S. at 856.

Plaintiffs' arguments suggest exhaustion is optional. Exhaustion is not optional as held by the court in Grand Canyon Skywalk Development, LLC., v. Sa'Nyu Wa, Inc., as follows:

"We have interpreted *National Farmers* as determining that tribal court exhaustion is not a jurisdictional bar, but rather a prerequisite to a federal court's exercise of its jurisdiction. *Crow Tribal Council*, 940 F.2d at 1245 n.3. 'Therefore, under *National Farmers*, the federal courts should not even make a ruling on tribal court jurisdiction . . . until tribal court remedies are exhausted.' *Stock West, Inc., v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989). However, there are four recognized exceptions to the requirement for exhaustion of tribal court remedies where:

- (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the

1 action is patently violative of express jurisdictional  
 2 prohibitions; (3) exhaustion would be futile because of  
 3 the lack of adequate opportunity to challenge the court's  
 4 jurisdiction; or (4) it is plain that no federal grant  
 5 provides for tribal governance of nonmembers' conduct  
 on land covered by *Montana's* main rule."

6 *Burlington N.R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999).

7  
 8 The Ninth Circuit Court of Appeals in *Burlington N.R.R. Co., v. Crow*  
 9 *Tribal Council*, 940 F.2d 1239 (9th Cir. 1991) relying upon *National Farmers*  
 10 held "The requirement of exhaustion of tribal remedies is not discretionary; it is  
 11 mandatory." *Burlington N.R.R. Co.* at 1245. The holding in *National Farmers*,  
 12 *supra*, establishes the requirement, in the context of required exhaustion, that  
 13 tribal courts (1) should be afforded a "full opportunity" to analyze and determine  
 14 the tribal court's jurisdiction, (2) are capable of "rectifying errors," (3) will create  
 15 a more complete record for eventual federal court review, and (4) **will provide**  
 16 **federal courts with the benefit of tribal court "expertise."** (Emphasis added)  
 17 As the court noted in *Burlington N. R.R. Co.*, at page 940 the "tribe must itself  
 18 first interpret its own ordinance and define its own jurisdiction."  
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## 24 **5) Exceptions to Required Exhaustion**

25  
 26 The legal standard for determining whether or not one of the four  
 27 exceptions to the exhaustion requirement exists is whether tribal court  
 28 jurisdiction is colorable or plausible. *See Elliott v. White Mountain Apache*  
 29  
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1 Tribal Court, 566 F.3d 842, 848 (9th Cir. 2009). "If jurisdiction is 'colorable' or  
 2 'plausible' then the exception does not apply and exhaustion of tribal court  
 3 remedies is required." Elliott v. White Mountain Apache Tribal Court, 566 F.3d  
 4 848 citing Atwood v. Fort Pack Tribal Court Assiniboine, 513 F.3d 943, 948 (9th  
 5 Cir. 2008).

6  
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 8 Plaintiffs in this action seemingly only assert that exception 4 is a basis for  
 9 a lack of exhaustion. The Tribe sets forth all four (4) exceptions and discusses  
 10 each.  
 11

#### 12 **6) Bad Faith**

13  
 14 The first exception to the tribal court exhaustion requirement is when the  
 15 tribal court jurisdiction is based upon a bad intent or bad faith. Bad faith as an  
 16 exception to exhaustion can only exist when it is shown that tribal court as an  
 17 entity is acting in bad faith. See Grand Canyon Skywalk Development, LLC., v.  
 18 Sa'Nyu Wa, Inc., supra (9th Cir. 2013). Nothing within the record can create a  
 19 basis to assert the Coeur d'Alene Tribal Court is motivated by bad faith.  
 20  
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#### 22 **7) Express Jurisdictional Prohibition**

23  
 24 The seminal case on the second exhaustion requirement is El Paso Natural  
 25 Gas Co., v. Neztsosie, 526 U.S. 473 (1999). The Supreme Court held that  
 26 exhaustion was not required when there was a federal pre-emption dealing with  
 27 uranium and radioactive issues. Jurisdiction over such an issue is in federal  
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1 court, and tribal court does not have jurisdiction. In the present case, there is no  
 2 pre-emption or express prohibition in respect to tribal court jurisdiction.

### 3 4 **8) Futility Exception**

5 The third exception to the required exhaustion of remedies in tribal court  
 6 relates to futility of challenging jurisdiction in tribal court due to an adequate  
 7 opportunity to challenge the tribal court jurisdiction. See Elliott v. White  
 8 Mountain Apache Tribal Court, 566 F.3d 842, 847, citing Nevada v. Hicks 533  
 9 U.S. 353, 369. Plaintiffs have provided no basis to assert that challenging  
 10 jurisdiction in tribal court would be futile. The Coeur d'Alene Tribe maintains  
 11 an active, well staffed, tribal court system with attorney judges handling a variety  
 12 of claims. Moreover, the Coeur d'Alene Tribe likewise maintains a tribal court  
 13 of appeals, and as such exhaustion would not be futile. Plaintiffs will have more  
 14 than an adequate opportunity to challenge tribal court's jurisdiction.

### 15 16 **9) Tribal Court Jurisdiction is Plainly Lacking**

17 The fourth exception to the exhaustion requirement was originally set  
 18 forth in Strate v. A-1 Contractors, 520 U.S. 438 (1997). This exception  
 19 (Jurisdiction is Plainly Lacking) was recognized by the Ninth Circuit Court of  
 20 Appeals in Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842, 844  
 21 (9th Cir. 2009). The court in Nevada v. Hicks, 533 U.S. 353, 369 (2001), pointed  
 22 out that National Farmers created only three (3) exceptions (bad faith, express  
 23 MEMORANDUM OF LAW – 12

1 jurisdictional prohibitions, and futility), whereas the court found that Strate v. A-  
2 1 Constructors added the fourth exception: "(w)hen . . . it is plain that no federal  
3 grant provides for tribal governance of non-members' conduct on land covered  
4 by Montana's main rule," such that the exhaustion requirement "would serve no  
5 purpose other than delay." Nevada v. Hicks, 533 U.S. 353, 369.  
6

7  
8 The federal grant of authority clearly exists and is not lacking. Montana  
9 and Plains Commerce create the federal grant of authority to regulate the conduct  
10 in this case. Montana and subsequently Plains Commerce held that when  
11 conduct on non-Indian fee land is a threat to the health, safety, and welfare of an  
12 Indian nation, a tribe, such as the Coeur d'Alene Tribe of Indians, has the  
13 regulatory as well as the adjudicatory jurisdiction to regulate the noxious  
14 conduct.  
15

16  
17 The legal standard for the plainly lacking jurisdiction exception was  
18 established in Atwood v. Fort Pack Tribal Court Assiniboine, 513 F.3d 943, 948  
19 (9th Cir. 2008), as whether the claimed jurisdictional basis was plausible or  
20 colorable. A plausible statement is a statement seeming reasonable, but not  
21 necessarily compelling credence. See Latif v. Obama, 677 F.3d 1175, 1190  
22 (D.C. Cir. 2011) citing Zamano v. Holder, 649 F.3d 969, 974 (9th cir. 2011).  
23

24  
25 Tribal court jurisdiction over the subject dispute is far more than colorable  
26 or plausible. Rather it is probable for the following reasons:  
27

1                   **1) Montana Second Exception** – The court in *Montana* stated:

2                   "To be sure, Indian tribes retain inherent sovereign power  
3                   to exercise some forms of civil jurisdiction over non-  
4                   Indians on their reservations, even on non-Indian fee  
5                   lands. . . A tribe may also retain inherent power to  
6                   exercise civil authority over the conduct of non-Indians on  
7                   fee land within its reservation **when that conduct**  
8                   **threatens or has some direct effect on the political**  
9                   **integrity, economic security, or the health or welfare of**  
10                  **the tribe."** *Montana*, 450 U.S. at 544, 565-66. (emphasis  
11                  added)

12                  Chief Justice Roberts in *Plains Commerce*, 554 U.S. 316 (2008), when  
13                  reviewing the *Montana* exceptions went into great depth to review and  
14                  distinguish regulation of conduct on non-Indian fee land and the sale of non-  
15                  Indian fee land.

16                  "As our cases bare out, (citation reference omitted) the tribe may  
17                  quite legitimately seek to protect its members from noxious uses  
18                  that threaten tribal welfare or security, or from non-member  
19                  conduct on the land that does the same. That the key point is that  
20                  any threat to the tribe's sovereign interests flows from changed  
21                  uses or non-member activities, rather from the mere fact of resale.  
22                  The tribe is able fully to vindicate its sovereign interest in  
23                  protecting its members and preserving tribal self-government by  
24                  regulating non-member *activity* on the land within the limits set  
25                  forth in our cases." *Plains Commerce*, 554 U.S. at 336. (Emphasis  
26                  in original)

27                  Justice Roberts went further when reviewing the second exception under  
28                  *Montana*.

1 "The second exception authorizes the tribe to exercise civil  
2 jurisdiction when non-Indians 'conduct' menaces that the 'political  
3 integrity, the economic security, or the health or welfare of the  
4 tribe.' *Montana*, 450 U.S. at 566. The conduct must do more than  
5 injure the tribe, it must 'imperil the subsistence, of the tribal  
6 community. One commentator has noted that 'the elevated  
7 threshold for application of the second *Montana* exception suggests  
8 that the tribal power must be necessary to revert catastrophic  
9 consequences.'" (citations omitted) *Plains Commerce*, 554, U.S.  
10 at 341.

11 It should be noted the court in *Montana* held that a tribe could assert civil  
12 authority over conduct when the conduct threatens **or** has some directed effect  
13 on the health or welfare, political integrity or economic security of the tribe.  
14 The court in *Plains Commerce* did not modify the *Montana* holding; rather the  
15 court reaffirmed the second exception of *Montana*, stating: "The tribe may quite  
16 legitimately seek to protect its members from noxious uses that threaten tribal  
17 welfare." *Plains Commerce*, 554 U.S. 336.

18 The Tribe has submitted supporting declarations addressing the Plaintiffs'  
19 spreading or injecting of untested, untreated human waste within the exterior  
20 boundaries of the reservation. (See declarations of Ridolfi, Briggs, Fields,  
21 Heusser regarding risk and threat to Tribe)  
22

23 The threat or risk to the Tribe and its members is the Plaintiffs'  
24 application of human waste in an area where wildlife, such as deer and elk, graze  
25 in close proximity to where tribal members subsistence hunt to feed themselves  
26

1 as well as for cultural purposes. It is this conduct on the part of the Plaintiffs the  
 2 Tribe seeks to regulate and adjudicate to protect the health, safety, and welfare  
 3 of its tribal members from Plaintiffs' dumping of human waste and expecting  
 4 mother earth to somehow process the residual metals, minerals, pathogens, virus  
 5 and bacteria.  
 6  
 7

8       It is quite likely the human waste being applied by Plaintiffs will fertilize  
 9 the ground and crops will grow prolifically. It is just as likely the wild animals  
 10 upon which the tribal members depend upon for subsistence and cultural  
 11 heritage will graze at will as if the fields are a feed lot. The threat and direct  
 12 impact upon the Coeur d'Alene Tribe and its members is real and substantial.  
 13 The Tribal Community is at risk when harvesting deer, elk, bear or moose for  
 14 their primary consumption. The Tribe has full and complete regulatory  
 15 jurisdiction over these free range animals inhabiting the Tribe's reservation,  
 16 including the animals that pasture the plaintiff's property. The Tribe has  
 17 jurisdiction over plaintiffs' conduct that imperils the health and welfare of tribal  
 18 members.  
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## 25       **10) Review of Recent Exhaustion Cases**

26       Review of Ninth Circuit District Court and appellate court decisions may  
 27 be of benefit to the court in analyzing the exhaustion issue presented.  
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1 In Evans v. Shoshone-Bannock Landuse Policy Commission, U.S. District  
2 Court for the District of Idaho, Cause No. CV-417-BLW, 2012 WL 6651194,  
3  
4 District Court Decision December 20, 2012, Judge Winmill was faced with a  
5 similar collateral attack on the requirement of exhaustion. The Shoshone-  
6 Bannock Tribe sought to regulate zoning of non-Indian fee land owned by Evans  
7 for failure to obtain a tribal building permit. The tribe filed suit in tribal court,  
8  
9 and in response Evans brought an action in federal court before Judge Winmill  
10 to enjoin the tribe. The court reviewed the exhaustion doctrine and applied the  
11 case law from the ninth circuit dealing with whether or not the jurisdiction in  
12 tribal court was plausible or colorable. The court found exhaustion in tribal  
13 court was required and dismissed the collateral challenge. (Case is currently on  
14  
15 appeal to Ninth Circuit Court of Appeals)  
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19 In Dish Network Corporation v. Tewa, United States District Court for the  
20 District of Arizona, Cause No. CV-12-8077-PCT-JAT, 2012 WL 5381437,  
21  
22 November 12, 2012, involved the Hopi Tribe of Indians seeking to regulate for  
23 revenue purposes Dish Network Corporation, the satellite television provider.  
24  
25 The tribe filed suit in the Hopi Tribal Court against Dish Network seeking  
26 injunctive relief as well as damages. Dish Network then subsequently filed suit  
27  
28 in the federal district court of Arizona seeking declaratory relief and arguing pre-  
29  
30 emption of Hopi Tribal Court jurisdiction. Dish Network argued the federal

1 communications commission's provisions pre-empted tribal regulation, which is  
2 the second exception to the exhaustion rule. Dish Network argued the fourth  
3 (4th) exception to the exhaustion rule that jurisdiction is plainly lacking. The  
4 court went through the plausibility or colorable jurisdiction analysis and found  
5 that jurisdiction in tribal court was colorable and plausible, and therefore Dish  
6 Network was obligated to exhaust tribal court remedies.  
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10 In Rincon Mushroom Corporation v. Mazzetti, 490 F. App'x 11, 2012, WL  
11 2928605 (Ct. App. 9th Cir. (unpublished opinion and cited to the court pursuant  
12 to Circuit Rule 36-3) Rincon brought suit in federal court against tribal officials  
13 seeking to enjoin the tribe from environmental regulation on non-Indian fee  
14 property. Suit was brought in the United States District Court for the Southern  
15 District of California wherein the District Court Judge William Q. Hayes  
16 dismissed the action for failure to exhaust tribal court remedies. The Court of  
17 Appeals affirmed the trial court's holding that the tribe has the first opportunity  
18 to determine its jurisdiction under the exhaustion doctrine and the tribal  
19 assertions created colorable or plausible jurisdiction in favor of tribal court. The  
20 dismissal was upheld on appeal.  
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26 In the recent case of Grand Canyon Skywalk Development, LLC v Sa'Nyu  
27 Wa, Inc., supra the case involved a long standing dispute regarding a sightseeing  
28 facility at the Grand Canyon. The Grand Canyon Skywalk Development  
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1 brought suit in district court seeking declaratory judgment that the Hualapai  
 2 Tribe lacked authority to condemn the corporation's property, and further sought  
 3 injunctive relief. The trial court denied the request for injunctive relief and held  
 4 that the corporation was obligated under the exhaustion rule to exhaust tribal  
 5 court remedies challenging tribal court jurisdiction. On appeal, the ninth circuit  
 6 upheld the dismissal and held that exhaustion was a pre-requisite challenging  
 7 tribal court jurisdiction in federal court. Although the jurisdictional issues  
 8 discussed by the court did not directly deal with the second exception to  
 9 Montana, the exhaustion requirement analysis by the court clearly supports the  
 10 Coeur d'Alene Tribe's position that exhaustion in this case is mandated.

### 16 CONCLUSION

17 Plaintiffs' end-run efforts to challenge the jurisdiction of the tribal court  
 18 and the Coeur d'Alene Tribe is inappropriate. The Tribe has regulatory and  
 19 adjudicatory jurisdiction over the Plaintiffs' conduct on non-Indian fee land  
 20 pursuant to the second exception of Montana. The Plaintiffs are required to  
 21 exhaust the jurisdictional challenges in tribal court rather than proceeding to  
 22 federal court seeking interlocutory relief.

26 / / / / / /

27 / / / / / /

1 RESPECTFULLY SUBMITTED this 11th day of July, 2013.

2 EVANS, CRAVEN & LACKIE, P.S.

3  
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13 CERTIFICATE OF SERVICE

14 I hereby certify that on the 11th day of July, 2013, I electronically filed the  
15 foregoing with the Clerk of the Court using CM/ECF System, which will send  
16 notification of such filing to the following:

17 Ausey H. Robnett, III via [ausey.robnett@painehamblen.com](mailto:ausey.robnett@painehamblen.com)  
18 Gregg R. Smith via [Gregg.smith@painehamblen.com](mailto:Gregg.smith@painehamblen.com)  
19 Jerry K. Boyd via [jerry.boyd@painehamblen.com](mailto:jerry.boyd@painehamblen.com)  
Trevor B. Frank via [trevor.frank@ecl-law.com](mailto:trevor.frank@ecl-law.com)

20 I hereby further certify that I have caused to be served a true and correct copy of  
21 the foregoing document(s) on the non-CM/ECF participants as indicated:

22  
23 *No manual recipients* \_\_\_\_\_ Hand Delivered  
24 \_\_\_\_\_ U.S. Mail  
25 \_\_\_\_\_ Overnight Mail  
26 \_\_\_\_\_ Facsimile

27 /s/ Everett B. Coulter, Jr.  
28  
29  
30