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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ST. ISIDORE FARM LLC, an Idaho limited liability company; and GOBERS, LLC, a Washington limited liability company, Plaintiffs, vs. COEUR D'ALENE TRIBE OF INDIANS, a federally-recognized Indian Tribe, Defendant.	Case No. CV-13-00274-EJL **REPLY TO DEFENDANTS' RESPONSE RE: TEMPORARY RESTRAINING ORDER**

COME NOW the herein captioned Plaintiffs who reply to the Response Re: Temporary Restraining Order filed by the Defendants, Dkt. 17. Plaintiffs (hereinafter St. Isidore) include within this Reply the previously filed Verified Complaint, Memorandum of Authorities in Support of Motion for Temporary Restraining Order and Preliminary Injunction and the entire court file.

NOTICE OF MOTION SEEKING TEMPORARY RESTRAINING ORDER

The Defendants (hereinafter the Tribe) assert that the Temporary Restraining Order was issued without notice, which is not correct. St. Isidore gave notice of the pending Motion seeking a Temporary Restraining Order to the counsel for the Defendants on June 21, 2013, the date on which the instant case was filed. Dec. G. Smith ¶ 5, see also, Dec. E. Coulter, Dkt # 19, pgs 7-8. On June 25, 2013 the Tribe refused to enter into a negotiated Temporary Restraining Order on the basis that it would "tacitly admit the case is properly in Federal Court." Id.

In the present case, there was no attempt on the part of the St. Isidore to have a Temporary Restraining Order entered without notice to the Defendants. Written notice was given in the form of those e-mail communications that are attached to the Declaration of the Tribe's attorney and which are also referenced in the Declaration of Gregg Smith. St. Isidore complied with the obligations imposed by FRCP 65(1), *et seq.*

The Tribe's reliance on Reno Air Racing Ass'n., Inc. v. McCord, 452 F.3d 1126, (9th Cir. 2006), is misplaced. In Reno Air the district court issued a temporary restraining order on the same day in which the case was filed, when the whereabouts of the Defendant was known to the Plaintiff. Id. at 1131. There was no attempt to notify the Defendant prior to the issuance of the temporary restraining order. Id. In the present case, the Tribe made a conscience decision to not file an appearance, including a limited appearance, until after the temporary restraining order was entered. Dec. G. Smith, ¶5, pg. 3. The time period in which the Tribe was aware of the pending Motion seeking a Temporary Restraining Order was at least three days, up to a maximum of seven days. Dec. G. Smith; Dec. E. Coulter, Dkt. 19 and Exhibit 1. St. Isidore agrees with the obligations imposed by Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423,

438-439 (1974). However, in that case there also was no notice given to the defendants, unlike this case at bar.

The timing of the filing of the present matter and the filing of the Answer in Tribal court was a function of the deadlines contained in the Coeur d'Alene Tribal Court Summons. Dec. G. Smith ¶ 2. Said Tribal Court Summons required an answer 20 days from the date of service, on June 4, 2013. *Id.* at ¶ 3. Because of the risks of ongoing fines of $5,000 per day, liens, and the imposition of criminal sanctions as set forth within Chapter 57 of the Coeur d'Alene Tribal Code, St. Isidore was faced with irreparable harm if it did not proceed immediately with its Motion for a Temporary Restraining Order. While there is no dispute that the Tribe's and St. Isidore's attorneys met on June 5, 2013, there is also no dispute that at the time of the meeting no agreements were reached. Dec. G. Smith, ¶ 4, pg. 2.

PRESENT STATUS OF THE PROCEEDINGS IN THIS CASE

The Court is being asked to consider the issuance of a Preliminary Injunction that will remain in effect until the entry of a Declaratory Judgment and Permanent Injunction. Once a temporary restraining order has been issued and the Defendant has been notified, the proceedings shift to the preliminary injunction phase. FRCP 65(a)(1); FRCP 65(b)(3); Kansas Hospital Ass'n v. Whiteman, 835 F.Supp. 1548, 1551, (D.C.Kan.1993), see also, 11A Federal Practice and Procedure § 2053.

PLAINTIFFS SHOULD BE GRANTED A PRELIMINARY INJUNCTION

A. St. Isidore Has a Strong Likelihood of Success on the Merits. St. Isidore Is Not Required to Exhaust Tribal Remedies Because the Tribe Has Not Established a Plausible Basis for Jurisdiction Pursuant to the Health and Welfare Exception Set Forth in Montana v. United States, 450 U.S. 544, 566 (1981).

St. Isidore asserts that tribal jurisdiction is improper under Montana's main rule establishing the general presumption that tribes lack civil jurisdiction over non-Indians on fee

land. Montana, 450 U.S. at 565. The Tribe takes the position that tribal jurisdiction is proper under Montana's exception for conduct which threatens the health and welfare of the Tribe. Id. at 566 ("health and welfare exception"). The Tribe further asserts that exhaustion of tribal remedies is required prior to challenging jurisdiction in federal court.

The Tribe is mistaken. Exhaustion of tribal remedies is not required in this case because "exhaustion is not required where ... (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule." Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1065 (9th Cir. 2000) (internal citations omitted).

Pursuant to Ninth Circuit case law regarding the fourth exhaustion exception stated above, exhaustion is only required if jurisdiction is "colorable" or "plausible." Elliot v. White Mountain Apache Tribal Court, 566 F.3d 842, 848 (9th Cir. 2009).

The general rule delineated within Montana v. United States prohibiting civil tribal court jurisdiction over non-Indians on fee lands cannot be "limited" or "construed in a manner that would 'swallow the rule'" by merely stating that an activity may come within a recognized exception. Plains Commerce Bank v. Long Family Land and Cattle, Co., 554 U.S. 316, 330 (2008).

Plausible or colorable jurisdiction by a tribal court over non-Indians engaged in activities on fee lands requires sufficient facts to prevent an erosion of Montana's general rule. Tribal court jurisdiction over non-Indians does not extend beyond what is necessary to protect the self governance of the tribe. Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997). Furthermore, where the conduct of the non-Indian acting on fee land does not burden the tribe to such a degree that it "actually 'imperils' the political integrity of the Indian tribe, there can be no assertion of

civil authority beyond tribal lands." (Internal citations omitted). Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 657-658 (2001).

The Tribe makes the naked assertion that the non-Indian Plaintiffs' lawful business activities being carried out on fee lands, as approved by the State of Idaho Department of Environmental Quality, are a danger to the health and welfare of the Coeur d'Alene Tribe and therefore that tribal court jurisdiction is proper under the health and welfare Montana exception. See generally Dkt. 17, pg 2, lns 19-24. No affidavits, declarations, or evidence of any kind have been put before this Court by the Tribe to support its Response. The Tribe merely makes an unsupported assertion that St. Isidore's conduct affects the Tribe's health and welfare.

Even under the standard that exhaustion is required when tribal jurisdiction is plausible or colorable, the Tribe has the burden to at least show a plausible or colorable claim of jurisdiction. Efforts by a tribe to regulate nonmembers, especially on non-Indian fee land are "presumptively invalid" and "the burden rests on the tribe to establish one of the exceptions to Montana's general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land." Plains Commerce Bank, 554 U.S. at 330. "Once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it. . . ." Id. at 328. "This necessarily entails the loss of regulatory jurisdiction over the use of the land by others. . . ." Id. at 329 (citation and internal quotation marks omitted).

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, 520 U.S. at 457 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)). In order for the limited health and welfare exception to be applicable, the specific conduct the tribe seeks to regulate "must do more

than injure the tribe, it must imperil the subsistence of the tribal community." Plains Commerce Bank, 554 U.S. at 341 (internal quotation marks omitted).

The Tribe has not carried its burden. The Tribe has merely stated that it asserts jurisdiction under the health and welfare Montana exception, allowing regulation of "the noxious conduct of non-Indians on fee land when the conduct threatens, menaces, imperils or has a direct impact upon the health or welfare of the Tribe." Dkt. 17, p.5. Yet the Tribe has not produced any evidence, nor any further briefing, showing or explaining how St. Isidore's conduct has any impact whatsoever upon the health or welfare of the Tribe.

The Tribe cites Grand Canyon Skywalk Dev., LLC v. SA-NYU Wa, Inc., 715 F.3d 1196 (9th Cir. 2013) to support their claim that exhaustion is a prerequisite to the exercise of federal jurisdiction. Skywalk is inapplicable because that case originated out of a revenue sharing contract between a non-Indian corporation and a tribal corporation, implicating Montana's "consensual relationships" exception rather than Montana's health and welfare exception. Id. at 1199. Yet the Skywalk case still proceeded to evaluate whether any exceptions to the exhaustion requirement were applicable. In relation to the fourth exception for land covered by Montana's main rule, the court specifically stated that "this case is not Montana" because the land in question was tribal land rather than non-Indian fee land. Id. at 1205.

The Tribe also cites Elliot v. White Mountain Apache Tribal Court, 566 F.3d at 848, in support of its exhaustion argument. However, that case involved massive actual, rather than speculative, damages to the environment from a forest fire set on tribal land by a non-Indian, plausibly supporting tribal jurisdiction. In contrast, here, the Tribe has not supported its claim that non-Indian conduct on fee land threatens to harm the health and welfare of the Tribe to the necessary degree that such threat actually imperils the political integrity of the Tribe.

The Tribe further cites three unpublished cases which have required exhaustion in Tribal Court: Evans v. Shoshone Bannock Land Use Policy Commission, D.Idaho, Cause No. CV-417-BLW, 212 WL6651194 (December 20, 2012) Unpublished; Rincon Mushroom Corp. v. Mazzetti, 490 F. App'x. 11, WL2928605 (9th Cir. 2012) Unpublished; and Dish Network Corp. v. Tewa, D.Ariz. Cause No. CV-12-8077-PCT-JAT (November 12, 2002) Unpublished. The Tribe notes only that the Rincon Mushroom case is unpublished. Each of these cases is unpublished, and they carry no precedential value. Moreover, each of these cases is factually distinguishable from the present case. In Rincon Mushroom, the Tribe filed four affidavits that specifically enumerated the hazards that were the basis for the lawsuit. In Evans, the defendants also presented the court with evidence illustrating the potential injury to tribal health and welfare, and the case evaluated the character of traditional tribal lands in determining the Tribe's zoning authority. Finally, Dish Network was resolved because Montana's first exception – "consensual relationships" – was plausibly applicable. Dish Network, at footnote 9, further determined that the defendants had not made any plausible showing that jurisdiction existed under Montana's health and welfare exception.

The cases relied upon by the Supreme Court to formulate Montana's health and welfare exception illustrate the intention to only apply the exception when the "State's (or Territory's) exercise of authority would trench unduly on tribal self-government." Strate, 520 U.S. at 458. Montana's exceptions apply only in the absence of a federal statute. Congress enacted 25 U.S.C. § 231, which grants states the power to inspect and enforce health and sanitation regulations on Indian tribal lands. In light of state power over health enforcement on Indian lands, it would make little sense to allow tribes health enforcement over non-Indians on fee lands.

Therefore, St. Isidore demonstrates a strong likelihood of success on the merits because Montana's main rule applies and the Tribe has not established any plausible basis for tribal jurisdiction. As such, St. Isidore is not required to exhaust Tribal remedies because the Tribe has not established a plausible basis for tribal jurisdiction under Montana's health and welfare exception.

B. The Balance of Equities Supports Granting Preliminary Injunctive Relief.

1. Plaintiffs Will Suffer Irreparable Harm Without Injunctive Relief.

As previously noted, St. Isidore will suffer irreparable harm in the absence of injunctive relief. The ongoing fines of $5,000 per day, liens, criminal sanctions, and Constitutional violations imposed under the mandatory language of Chapter 57 of the Coeur d'Alene Tribal Code will irreparably harm the Plaintiffs.

Further, the Tenth Circuit affirmed an Oklahoma District Court which found a significant risk of irreparable harm in the "significant risk that [plaintiff] will be forced to expend unnecessary time, money, and effort litigating the issue of their fees in the [Tribal] Court - a Court which likely does not have jurisdiction over it." Crowe & Dunlevy, P. C. v. Stidham, 609 F.Supp.2d 1211, 1222 (N.D. Okla. 2009), *aff'd* 640 F.3d 1140 (10th Cir. 2011). That factor, in combination with the recognition that any fees paid to the Tribe would not be recoverable due to tribal sovereign immunity, was sufficient to establish a significant risk of irreparable harm. Crowe & Dunlevy, P. C. v. Stidham, 640 F.3d 1140, 1157 (10th Cir. 2011). Both factors are present in this case. In addition, the mandatory language of Ch. 57 indicates that irreparable harm is not merely possible, but likely to occur absent injunctive relief.

2. Public Interest Favors Granting Injunctive Relief.

St. Isidore does not deny that the exhaustion doctrine grew out of comity and respect for tribal sovereignty, public policy factors that can be argued to support exhaustion, but no such public policy is served by allowing the Tribal Court to exercise powers it does not possess and where exhaustion would serve no purpose other than delay. While "public policy encourages tribal courts as part of the self-determination of Indian tribes," and "also encourages exhaustion of tribal remedies," "these policies would not be furthered if an Indian community ... exercises powers that it clearly does not possess." State of Alaska v. Native Village of Venetie, 856 F.2d 1384, 1390 (9th Cir. 1988).

The Tribe argues that "the legitimacy and independence of a tribal court system comes into serious question and will undercut the tribal court system in contravention of the [policy] requiring exhaustion in Tribal Court." Dkt. 17, p.9. This argument ceases to apply when the tribal court exercises powers that it does not possess. Moreover, the legitimacy of the tribal court system would suffer comparatively more harm if the tribal court is allowed to actually exercise powers which it does not possess, only to later be overturned upon federal court review.

3. The Balance of Equities Tips Strongly in Favor of Injunctive Relief.

The Tribe will suffer only minimal harm in the nature of delay by the issuance of injunctive relief while jurisdiction is determined, while St. Isidore faces a significant risk of irreparable harm. The Tribe is not injured by an injunction prohibiting the Tribe from exercising powers it doesn't possess. Moreover, public policy and judicial economy support granting injunctive relief while the federal court has an opportunity to assess jurisdiction. As such, the overall balance of the equities tips strongly in favor of granting a preliminary injunction.

CONCLUSION

Plaintiffs have established that they are likely to succeed on the merits, that they will likely suffer irreparable harm in the absence of injunctive relief, that the balance of equities tips in their favor, and that the injunction is in the public interest. The Defendants have not satisfied their burden of showing a plausible basis for jurisdiction under Montana. Therefore, exhaustion of tribal remedies is not required prior to challenging jurisdiction in federal court. As such, Plaintiffs submit that a preliminary injunction should be granted.

RESPECTFULLY SUBMITTED this 11th day of July, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of July, 2013, I electronically filed the *Memorandum of Authorities in Support of Motion for Temporary Restraining Order and Preliminary Injunction*, using the CM/ECF system which served a copy of the foregoing, on CM/ECF Registered Participants as reflected on the Notice of Electronic Filing.

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By: _____
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