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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 **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO EXHAUST TRIBAL COURT JURISDICTION**

COME NOW the herein captioned Plaintiffs who respond to Defendants' Motion to Dismiss for Failure to Exhaust Tribal Court Jurisdiction.

INTRODUCTION

Plaintiffs (St. Isidore) filed a Complaint for declaratory and injunctive relief, seeking to enjoin Defendants (Tribe) from exercising regulatory and adjudicative jurisdiction over non-

Indian conduct on non-Indian fee land because the Tribe lacks jurisdiction. The Tribe seeks to dismiss the Complaint pursuant to FRCP 12(b)(un-enumerated), for failure to exhaust Tribal court remedies.

St. Isidore asserts that the Tribe lacks civil jurisdiction over its conduct under the general rule of Montana v. United States, 450 U.S. 544, 565 (1981) – "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." The Tribe contends that Tribal jurisdiction is proper under the second Montana exception, which allows the Tribe 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" (health and welfare exception). Id.

In the present motion, the Tribe argues that the Complaint should be dismissed because "exhaustion is a pre-requisite to a federal court's exercise of jurisdiction for determination of whether or not [the] tribal court has jurisdiction over a dispute." Dkt. 21, p.6. The Tribe is wrong. Exhaustion is not required because the fourth exhaustion exception applies. Specifically, "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).

The motion to dismiss for failure to exhaust Tribal court jurisdiction must be denied because the Tribe has not established that Tribal jurisdiction is proper, nor has the Tribe shown any plausible basis for Tribal jurisdiction.

FACTS

The relevant facts of this case are presented in St. Isidore's Verified Complaint for Declaratory Judgment and Injunctive Relief (Dkt. 1) as well as the supporting Declarations of

Thomas Hess, Ph.D., John Monks, P.G., and Jerry Boyd. They are expressly incorporated herein by reference. To summarize: Plaintiffs are non-Indian business entities conducting their business on non-Indian fee land. Dkt. 1, ¶¶ 2-3, 22-25,43-50. St. Isidore injects septage beneath the land surface as a fertilizer. Dkt. 1, ¶ 23; *see also* Declaration of Thomas Hess, Ph.D., Ex. 3, p.4. The site is bordered by Tribal land only on the northern forested boundary, which is up-gradient from the portion of the property where septage is applied. Dkt. 1, ¶ 27. There are no nearby bodies of surface water. Dkt. 1, ¶ 28. The Coeur d'Alene reservation is predominantly non-Tribal land in the area surrounding the St. Isidore site. *See* Declaration of Jerry Boyd, Ex. A. The Tribe seeks to prohibit St. Isidore's conduct under Chapter 57 of the Tribal Code and filed a complaint in Tribal Court. Dkt. 1, ¶¶ 1, 7-12. The Idaho Department of Environmental Quality regulates the application of septage to land and already granted permit authority to St. Isidore. Dkt. 1, ¶¶ 13-21, 29-38. St. Isidore's conduct poses neither threat nor harm to the health and welfare of the Tribe or its members. Decl. Hess, p.3. St. Isidore's conduct does not pose a significant risk to human or environmental health from ground water exposure pathways. Declaration of John Monks, p.3.

ARGUMENT

Exhaustion of Tribal remedies is not necessary in this case because "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule," and as such, exhaustion "would serve no purpose other than delay." Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997). "Since it is clear … that tribal courts lack jurisdiction … adherence to the tribal exhaustion requirement … 'would serve no purpose other than delay' and is therefore unnecessary." Nevada v. Hicks, 533 U.S. 353, 369 (2001).

A. Exhaustion Is Not Required Where an Exception Applies.

Under the general rule, exhaustion of Tribal remedies is a prerequisite to a federal court's exercise of jurisdiction to determine whether a Tribal court has jurisdiction over a dispute. *See, e.g.*, Red Wolf, 196 F.3d at 1065. The Tribe suggests that St. Isidore pays no respect to the exhaustion requirement, which is not accurate. St. Isidore recognizes the exhaustion doctrine and the purposes behind it, as developed from Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985) and Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15–16 (1987).

However, the Ninth Circuit recognizes four enumerated exceptions where exhaustion is not required:

> [E]xhaustion is not required where (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule.

Red Wolf 196 F.3d at 1065 (internal citations omitted); *see also* Grand Canyon Skywalk Dev., LLC v. Sa'Nyu Wa, Inc., 715 F.3d 1196, 1200 (9th Cir. 2013). Nevada v. Hicks expanded the fourth exhaustion exception to include all situations where Tribal jurisdiction is plainly lacking. 533 U.S. at 369. Hicks explicitly recognized that the fourth exhaustion exception was "technically inapplicable" because the land at issue in Hicks was Tribal land, yet the Court found that the reasoning behind the fourth exhaustion exception relieved the non-Indian petitioners from the exhaustion requirement. Id. "Since it is clear … that tribal courts lack jurisdiction … adherence to the tribal exhaustion requirement … 'would serve no purpose other than delay' and is therefore unnecessary." Id.

The present matter falls within the fourth exhaustion exception because "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule." Strate, 520 U.S. at 459 n.14.

B. To Avoid Application of the Fourth Exhaustion Exception (Where it is Plain that Tribal Jurisdiction Does Not Exist), the Tribe Must Show that Jurisdiction Is Plausible.

To determine whether exhaustion may be avoided under the fourth exhaustion exception, the Court must determine whether jurisdiction is colorable or plausible. Elliot v. White Mountain Apache Tribal Court, 566 F.3d 842, 848 (9th Cir. 2009). If jurisdiction is colorable or plausible then exhaustion of Tribal remedies is required. Id.

The Tribe contends that Tribal jurisdiction is plausible pursuant to Montana's health and welfare (second) exception. As the Tribe acknowledges, "The Tribe has the burden of proving the second exception to Montana v. United States." Dkt. 21, p.7 (citing Plains Commerce 554 U.S. at 330). Therefore, the Tribe has the burden to show a plausible basis for jurisdiction before exhaustion of Tribal remedies is required.

1. Showing "Plausible" Jurisdiction Requires Facts, Rather than Mere Conclusions, Creating a Reasonable Inference that Jurisdiction Exists.

The application of the "plausible" standard is controlled by Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009).[1]

> The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of `entitlement to relief.'"

[1] While Twombly and Iqbal considered "plausibility" in the context of FRCP 12(b)(6) motions to dismiss, the Tribe's citation for the definition of "plausible" to Latif v. Obama, 677 F.3d 1175, 1190 (D.C. Cir. 2011) and Zamanov v. Holder, 649 F.3d 969, 974 (9th Cir. 2011) instead considered the meaning of "credibility" and made the cited statements in the context of distinguishing "plausibility" from "credibility."

Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556-557) (internal citations omitted). Factual allegations must be enough to raise a right to relief above the speculative level. Twombly, 550 U.S. at 555. Determining the credibility aspect inherent to a plausibility analysis is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679. Iqbal expressly rejected the argument that Twombly's application should be narrowly limited to antitrust disputes. Iqbal, 556 U.S. at 684.

The plausibility standard requires the Tribe's submissions to create a reasonable inference that the Tribe has jurisdiction to regulate St. Isidore's conduct under Montana's health and welfare exception. Iqbal, 556 U.S. at 678. The Tribe must rely upon facts rather than labels and conclusions, which suffice to carry the allegations over the line between mere possibility and true plausibility. Id. The Tribe has offered no admissible evidence for the Court to consider in determining whether it is plausible and credible that there is a sufficient threat to Tribal health and welfare. *See generally* Memorandum of Authorities in Support of Motion to Disqualify Cameron Heusser as an Expert Witness; Memorandum of Authorities in Support of Motion to Disqualify Cameron Heusser as an Expert Witness; Memorandum In Support of Motion to Exclude Declaration Testimony of Tom Briggs; Memorandum In Support of Motion to Exclude Declaration Testimony of Callie Ridolfi.

The Tribe has neglected to explain how any alleged prospective harm will "imperil the subsistence of the tribal community" such that Tribal power is "necessary to avert catastrophic consequences" in order to satisfy Montana's health and welfare exception. Plains Commerce, 554 U.S. at 341. Rather, the Tribe merely asserts that the alleged harm will threaten or affect Tribal health, safety, and welfare. This is the type of conclusory allegation which Twombly and Iqbal, found insufficient to show a "plausible" claim for relief.

2. To Create a Plausible Basis for Tribal Jurisdiction Under Montana's Health and Welfare Exception, the Tribe Must Show that St. Isidore's Conduct Imperils the Subsistence of the Tribe such that Tribal Power is Necessary to Avert Catastrophic Consequences.

"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.'" Red Wolf, 196 F.3d at 1064-65 (quoting Brendale v. Confederated Yakima Indian Nation, 492 U.S. 408, 431 (1989)).

> 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,'" Atkinson [Trading Co. v. Shirley, 532 U.S. 645], *supra,* at 651 [2001] (quoting Montana, *supra,* at 565, 101 S.Ct. 1245), efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are "presumptively invalid," Atkinson, *supra,* at 659, 121 S.Ct. 1825. 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. Atkinson, 532 U.S., at 654, 121 S.Ct. 1825. These exceptions are "limited" ones, id., at 647, 121 S.Ct. 1825, and cannot be construed in a manner that would "swallow the rule," id., at 655, 121 S.Ct. 1825, or "severely shrink" it, Strate, 520 U.S., at 458, 117 S.Ct. 1404.

Plains Commerce, 554 U.S. at 330 (internal citations included). Tribal sovereign interests are confined to managing Tribal land, protecting Tribal self-government, and controlling internal relations. Id. at 332. "Tellingly, with only 'one minor exception, we have never upheld under Montana the extension of tribal civil authority over non-members on non-Indian land.'" Id. at 333 (quoting Hicks, 533 U.S. at 360). The exception is Brendale, in which "a six-Justice majority held that Montana did *not* authorize the Yakima Nation to impose zoning regulations on non-Indian fee land located in an area of the reservation where nearly half the acreage was owned by non-members," yet "five Justices concluded that Montana did permit the Tribe to impose different zoning restrictions on non-member fee land isolated in 'the heart of [a] closed portion of the reservation,' though the Court could not agree on a rationale." Plains Commerce, 554 U.S. at 333 (citing Brendale, 492 U.S. 408) (alterations by Plains Commerce).

As Plains Commerce explained:

> The logic of Montana is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated. ... While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations.

Id. at 334-35 (internal citations omitted).

Thus, to establish plausible Tribal jurisdiction under Montana's health and welfare exception and require exhaustion, the disputed activity must plausibly "imperil the subsistence of the tribal community" such that Tribal power is "necessary to avert catastrophic consequences." Plains Commerce, 554 U.S. at 341.

3. The Plains Commerce Standard For Application of Montana's Health and Welfare Exception Applies to All Non-Indian Conduct on Non-Indian Fee Land.

Judge Winmill's opinion in Evans v. Shoshone Bannock Land Use Policy Commission, D.Idaho, Cause No. CV-417-BLW, 212 WL6651194 (December 20, 2012) Unpublished, which has been cited by the Court as persuasive authority, concluded that Plains Commerce recognized a different test for conduct on the land vs. sale of the land. However, Plains Commerce was merely attempting to provide guidance for the application of Montana's exceptions, rather than establish a different test for land sales. The Court was actually explaining why Montana's "consensual relationships" exception did not apply.[2]

While Plains Commerce noted that "conduct taking place on the land and the sale of the land are two very different things," the Court still required that, to qualify under Montana's

[2] *See* Plains Commerce, 554 U.S. at 341 ("The District Court is correct, for the same reasons we explained above. The second Montana exception stems from the same sovereign interests that give rise to the first ....").

health and welfare exception, the non-Indian conduct on non-Indian fee land "must 'imperil the subsistence' of the tribal community" such that Tribal power is "necessary to avert catastrophic consequences." *See* Plains Commerce, 554 U.S. at 340-341.

In fact, the portion of the Plains Commerce opinion which directly addresses the applicability of Montana's health and welfare exception clearly requires that "[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community .... The sale of formerly Indian-owned fee land to a third party is quite possibly disappointing to the tribe, but cannot fairly be called 'catastrophic' for tribal self-government." Id. at 341.

C. The Factors Evaluated in Evans Bearing on Tribal Jurisdiction Suggest in this Case that Tribal Jurisdiction Is Not Plausible.

The Court has indicated that Judge Winmill's summary of the law in Evans is persuasive as to the analysis the Court should undertake. Dkt. 31, p.4. Although Evans is distinguishable from the present case on factual bases, the analysis undertaken in Evans does not support a finding of plausible jurisdiction in the present case.

In Evans, the underlying dispute concerned whether the Tribe had zoning authority over non-Indian fee land within the reservation. As such, the court naturally turned to Brendale, 492 US. 408 as the Supreme Court case determining the extent of Tribal jurisdiction zone non-Indian fee land within the reservation.

In Brendale, Eighty percent (80%) of the Yakima reservation was Tribal land, with the remaining 20% owned in fee by both Indians and non-Indians. *See* Id. at 415. The majority of the fee land was located in three incorporated towns within the reservation and the rest was dispersed throughout the reservation in a checkerboard pattern. Id. The reservation was further divided into "closed" and "open" areas. Id. The "closed area" was largely forest land and "[o]f the approximately 807,000 acres of land in the closed area, 740,000 acres were located in

Yakima County." Id. The area was "closed" because it had been "closed to the general public at least since 1972 when the Bureau of Indian Affairs restricted the use of federally maintained roads in the area to members of the Yakima Nation and to its permittees," who had to be record landowners or associated with the Tribe. Id. at 415. In contrast, the "open area" was land used for residential and commercial development, or used as rangeland and agricultural land. Id. at 416. The "open area" did not restrict access to the general public and almost half the land in the "open area" was held in fee. Id. at 415-16. In a divided plurality opinion, the Court recognized Tribal zoning jurisdiction in the "closed" portion, but found that the Tribe lacked zoning jurisdiction in the "open" portion. *See* Id. at 444-46. In characterizing Brendale, Atkinson stated, "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." 532 U.S. at 658-59 (internal citations omitted).

After noting the "fuzzy" contours of the Brendale holding, Judge Winmill found that "two factors appear to play a central role in determining whether the Tribes have jurisdiction to apply their zoning regulations to nonmembers on fee lands: (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." Evans, 212 WL6651194 at p.8.

The present case does not involve zoning. Evans is distinguishable on that basis alone, and the Court need not look specifically to Brendale for guidance. However, an evaluation of the Brendale factors noted by Evans reveals that Tribal jurisdiction is implausible under Montana's health and welfare exception.

First, regarding the potential dangers factor, in Evans there was a scarcity of water and the *known* risks of adverse impact on water supply and water quality due to admitted evidence of

EPA-documented EDB contamination. *See* id. at p.8-10. The court specifically noted the EPA's findings in evaluating whether the potential dangers plausibly supported Tribal jurisdiction. Id. at p.10.

The alleged threats in the present case are more akin to those in Strate and Red Wolf. Like the automobile accident in Strate and the railroad/automobile accident in Red Wolf, the Tribe's interest in the health of Tribal members is too attenuated and the alleged threats do not "imperil the subsistence of the tribal community." Plains Commerce, 554 U.S. at 341. In this case, the Tribe's claim of adverse affect on the health, safety, and welfare of the Tribe and its members requires that (1) animals graze upon the St. Isidore property, (2) the grazing animals somehow become infected with human pathogens, (3) such infected animals are harvested by Tribal members, and (4) such harvested animals somehow infect Tribal members with human pathogens. *See* Dkt. 21, p.7. In Strate and Red Wolf, the Supreme Court and Ninth Circuit, respectively, found that while the non-Indian conduct "surely jeopardize[d] the safety of tribal members," it was not a sufficient threat to justify Tribal jurisdiction under Montana's health and welfare exception. Strate 520 U.S. at 458; *see also* Red Wolf, 196 F.3d at 1065. "[I]f Montana's second exception requires no more, the exception would severely shrink the rule." Strate, 520 U.S. at 458. Dr. Hess has concluded that St. Isidore's conduct poses no threat to Tribal health and welfare in this case. Decl. Hess, p.3-4. "Concerns of public contact with pathogens or toxic compounds, vector attraction, and emanating odors are scientifically unfounded as the septage is injected in the soil subsurface and not available for direct contact." Decl. Hess, Ex. 3, p.10.

Second, regarding the character of the land factor, the facts in the present case suggest that Tribal jurisdiction is implausible. In Evans, the court found that the land in the areas surrounding the property consisted of both Tribal lands and nonmember fee lands, while the

Reservation as a whole is only 2% owned by nonmembers in fee. Evans, 212 WL6651194 at p.10-11. As such, the situation at least plausibly resembled the "closed" portion of the reservation in Brendale, where the Supreme Court held the Tribe possessed zoning jurisdiction over nonmember fee lands. The Coeur d'Alene reservation is predominantly non-Tribal land in the area surrounding the St. Isidore site. *See* Declaration of Jerry Boyd, Ex. A. An evaluation of the character of the surrounding lands weighs against finding Tribal jurisdiction.

Therefore, while Evans is distinguishable, application of the Evans reasoning reveals that Tribal jurisdiction is not plausible in this case.

D. The Tribe Has Not Established a Plausible Basis for Jurisdiction Under Montana's Health and Welfare Exception.

While the Court recognizes that the Tribe's declarations indicate "there may be some risk or threat to the welfare of the Tribe due to Plaintiffs' actions," (Dkt. 31, p.7) some undefined degree of potential risk is not sufficient to justify plausible jurisdiction under Montana's health and welfare exception. The Tribe must demonstrate that any alleged risk to Tribal health and welfare plausibly allows jurisdiction under Montana's health and welfare exception. The declarations in support of the Tribe's motion provide no plausible basis that any potential threat is sufficiently grave as to justify Tribal jurisdiction under Montana's health and welfare exception.

The Tribe's declarations have not shown that any alleged threats "imperil the subsistence of the tribal community," nor have they shown "tribal power must be necessary to avert catastrophic consequences." Plains Commerce 554 U.S. at 341. It is not enough that the Tribe alleges St. Isidore's conduct poses some potential threat to Tribal health and welfare; rather, the Tribe must establish a plausible basis for its implied assertion that such threats actually imperil the subsistence of the Tribal community such that Tribal power is necessary to avert catastrophic

consequences. The Tribe does not, and cannot, establish any plausible basis for Tribal jurisdiction.

St. Isidore has moved under FRE 702 and FRE 104 to strike testimony of Tribe's experts, who have submitted declarations which purportedly establishes that St. Isidore's conduct poses a threat to Tribal health, safety, and welfare. In short, the Tribe's experts lack the necessary qualifications, facts, and scientific methodology to reach the conclusions to which they testify. The Tribe brought forth expert testimony, and therefore, the Tribe has the burden of establishing its admissibility. Bourjaily v. United States, 483 U.S. 171, 175-76 (1987); *see also*, Lust v. Merrell Dow Pharms., Inc., 89 F.3d 594, 598 (9th Cir. 1996). The Tribe has offered no admissible evidence that St. Isidore's conduct threatens Tribal health and welfare, let alone to the degree that such threats imperil the subsistence of the Tribal community such that Tribal power is necessary to avert catastrophic consequences.

Yet even if the Court accepts the declarations submitted by the Tribe, the declarations still fail to establish any threat to Tribal health or welfare which imperils the subsistence of the Tribal community such that Tribal power is necessary to avert catastrophic consequences. Furthermore, Dr. Hess concludes that St. Isidore's conduct poses no threat to the Tribe's health and welfare. Decl. Hess, p.3-4.

The report submitted as exhibit 2 to the Declaration of Callie Ridolfi (Ridolfi Report) states in its opening paragraph, "it should be noted that Ridolfi personnel have not visited the Site and are not aware of existing site conditions." Dkt. 22, p.12. The Ridolfi Report further acknowledges that "the actual physical and chemical nature of the septage being farmed at the Gobers Site is unknown." Dkt. 22, p.15.

The report submitted as exhibit 2 to the Declaration of Tom Briggs (Briggs Report) acknowledges that the risks associated with St. Isidore's conduct depend upon the toxicity of the constituents present in the waste, yet "[i]nformation on the characteristics of septage applied to the Site was not available in DEQ files or in engineering reports reviewed for this assessment." Dkt. 25, p.15.

The Declaration of Cameron Heusser provides no foundation for his conclusions that Tribal members will be at risk for illness and that Tribal wildlife will by threatened by grazing on the St. Isidore property. *See* Dkt. 23. Likewise, the Declaration of Scott Fields contains nothing more than the bare conclusory statement that the septage is untreated and contains contaminants, so it is a threat to water quality and to the health, safety, and welfare of the Tribe. *See* Dkt. 24.

Wholly absent from the Tribe's experts' declarations is any showing that the alleged harm to Tribal health, safety, and welfare will imperil the subsistence of the Tribal community such that Tribal power is necessary to avert catastrophic consequences. "[A] tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,' but instead depends on the circumstances."

On the other hand, St. Isidore submits the Declaration of Thomas Hess, Ph.D., with attachments, establishing that St. Isidore's method of applying septage poses neither threat nor harm to the health and welfare of the Tribe or its members. Decl. Hess, p.3-4. Dr. Hess finds that there is no appreciable threat because (1) St. Isidore complies with regulation by IDEQ, (2) concerns of contact with pathogens and toxic compounds, vector attraction, and emanating odors are scientifically unfounded as the septage is injected beneath the surface, (3) transport to surface

waters is unlikely due to setback buffer strips and injection application, (4) transport of pathogens, chemicals, and metals to groundwater is unlikely due to the nature and depth of soils on the site, (5) transport of nutrients to groundwater is unlikely due to plant uptake, (6) atmospheric transport of contaminants is unlikely due to injection application, and (7) public site access is limited by fencing. Decl. Hess, p.3-4. John Monks likewise concludes that St. Isidore's conduct "does not pose a significant risk to human or environmental health from ground water exposure pathways." Decl. Monks, p.3.

Moreover, the Tribe allows the City of Plummer to engage in similar but comparatively more threatening conduct. *See* Decl. Hess, Ex. 3, p.8. The Tribe has exempted municipalities from the prohibitions under the Tribal Waste Management Act (TWMA). *See* Coeur d'Alene Tribal Code 57-9.01(g). The City of Plummer applies biosolids (sewage sludge resulting from treatment of wastewater) to the land surface. Decl. Hess, Ex. 3, p.8; *see also* Exs. R5, R6. The substances applied by Plummer lie on top of the soil. Decl. Hess, Ex. 3, p.8; *see also* Exs. R5, R6. St. Isidore injects septage six to eight inches beneath the surface. Decl. Hess, Ex. 3, p.4. There is no visible effort to mitigate vector attraction or potential pathogen exposure at the Plummer site. Decl. Hess, Ex. 3, p.8; *see also* Exs. R5, R6.

The Tribe cannot simultaneously allow the City of Plummer to engage in comparatively more harmful application of human waste to reservation land and also plausibly claim that their inability to regulate St. Isidore's conduct on fee land imperils the subsistence of the Tribal community such that Tribal power is necessary to avert catastrophic consequences.

Chapter 57 of the Tribal Code does not provide any application or compliance process whereby St. Isidore may seek approval of its practices by showing adequate safeguards against perceived threats; it simply prohibits all such conduct. A blanket prohibition cannot be justified

as necessary to avert catastrophic consequences when the Tribe allows the City of Plummer to engage in similar, yet comparatively more harmful, land application of human waste.

Furthermore, St. Isidore's conduct will not go unregulated in the absence of Tribal jurisdiction. The Idaho Department of Environmental Quality regulates the application of septage to land and already granted permit authority to St. Isidore. Dkt. 1, ¶¶ 13-21, 29-38. John Monks concludes that the IDEQ permitting process adequately addresses the environmental issues associated with St. Isidore's septage application. Decl. Monks, p.3.

The Tribe has not shown it is plausible that St. Isidore's conduct imperils the subsistence of the Tribal community such that Tribal power is necessary to avert catastrophic consequences. Therefore, Tribal jurisdiction is not plausible, and exhaustion of Tribal remedies is not required, for it would serve no purpose other than delay.

1. The Tribe's Existing Regulatory Authority Does Not Extend to Non-Indian Conduct on Non-Indian Fee land.

The Tribe's theory of health and welfare risks arising from the harvesting of animals is misplaced. *See* Dkt. 23, p. 8, 16. Mr. Heusser is not qualified to provide an opinion regarding the statistical probability of an animal being harvested by a Tribal member after grazing on the St. Isidore lands from which it became contaminated with human pathogens acquired thereon. *See generally* Memorandum of Authorities in Support of Motion to Disqualify Cameron Heusser as an Expert Witness. Game animals are not owned by the Tribe or any regulatory authority. *See* Hughes v. Oklahoma, 441 U.S. 322, 334 (1979). A game animal only becomes the property of the Tribal member when it is captured. Id. The regulatory jurisdiction of any governing body, such as the State of Idaho or the Coeur d'Alene Tribe, does not equate to ownership of the game animals. Id. Moreover, Montana foreclosed the argument that Tribal jurisdiction automatically extends to the regulation of wildlife on non-Indian fee land by holding that the Tribe did not

retain the power to regulate fishing and hunting on non-Indian fee land. Montana, 450 U.S. at 566.

2. Montana's Exceptions are Not a Federal Grant of Authority.

The Tribe contends that a "federal grant of authority clearly exists" under Montana and Plains Commerce. Dkt. 21, p.13. While Montana, and subsequently Plains Commerce, recognized that Tribes have civil authority to regulate non-Indian conduct which sufficiently threatens Tribal health, safety, and welfare (Montana's heath and welfare exception), that recognition did not constitute a federal grant of authority. Rather, Montana's exceptions are simply recognitions of inherent Tribal sovereign powers which are *retained* after their original incorporation into the United States. *See* Montana, 450 U.S. at 563-566 (emphasis added). The Tribe has not cited any other federal grant of authority to regulate non-Indian conduct on non-Indian fee land. Thus, it is plain that no federal grant of authority exists.

This case concerns conduct on land covered by Montana's main rule. Therefore, as recognized by Hicks and Strate, Tribal jurisdiction is not plausible. This case fits squarely within the fourth exhaustion exception where "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule." Strate, 520 U.S. at 459 n.14.

3. The Cases Cited by the Tribe Are Distinguishable and Inapplicable.

The Tribe cites Grand Canyon Skywalk Dev., LLC v. SA-NYU Wa, Inc., 715 F.3d 1196 (9th Cir. 2013). 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 exhaustion 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. 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 shown that non-Indian conduct on fee land plausibly threatens Tribal health and welfare to the necessary degree so as to actually imperil the subsistence of the Tribe.

The Tribe further cites two additional unpublished cases which have required exhaustion in Tribal Court: 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 Rincon Mushroom is unpublished. Both of these cases are unpublished and carry no precedential value. The Rincon Mushroom court did not include enough discussion of the facts and the purported threats to Tribal welfare in order to make any meaningful comparison to the facts presented in this case. 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.

CONCLUSION

While any mention of human waste inevitably produces a visceral reaction linking to sanitation concerns, the Tribe has failed to allege any facts which indicate that any speculative health risks actually imperil the subsistence of the Tribal community. The Tribe merely submits

unsupported conclusory statements that St. Isidore's conduct poses a threat to Tribal health, safety, and welfare whereas St. Isidore has submitted evidence that the conduct at issue does not pose any appreciable threat to Tribal health and welfare, let alone to the degree that Tribal power is necessary to avert catastrophic consequences.

Therefore, the Tribe's Motion to Dismiss must be denied. Exhaustion of Tribal remedies is not necessary because it is plain that no federal grant provides for Tribal governance of St. Isidore's conduct on land covered by Montana's main rule.

RESPECTFULLY SUBMITTED this 23rd day of July, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd 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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For Ausey H. Robnett

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