The Honorable James L. Robart

UNITED STATES DISTRIC COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GEORGE JONES Plaintiff, v. LUMMI TRIBAL COURT, et al. Defendant.	**No: C12-01915-JLR** Defendants' Memorandum in Opposition to the Plaintiff's Motion Tribal Court Orders, Restore the Status Quo Ante, and to Award Attorney's Fee

I. INTRODUCTION

The Plaintiff, Mr. Jones, filed another Motion to Vacate Tribal Court Orders.[1] Although it is not denoted as such and devoid any reference to Fed. R. Civ. P. 56, the Defendants[2] understand the Motion to seek summary judgment under Fed. R. Civ. P. 56. The Defendants respond in opposition to the Motion to Vacate.

II. PROCEDURAL/FACTUAL BACKGROUND

The factual and procedural background of the proceedings before this Court[3] and the proceedings before the LTC [4] are detailed by this Court in the Order,[5] and by the Lummi

[1] *Motion to Tribal Court Orders, Restore the Status Quo Ante, and to Award Attorney's Fee,* ECF No. 48.
[2] The Lummi Tribal Court (LTC) and Honorable Judge Cardoza.
[3] Jones v. Lummi Tribal Court C12-1761. and Jones v. Lummi Tribal Court C12-01915
[4] Jones v. Lummi Tribal Court 2012-CVPD-3167[4] and Wolfblack v. Jones2012-CVNP-3172.

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Nation Court of Appeal (LNCOA)'s Opinion.[6] Supplemental background on all proceedings has been detailed in the Defendants' previous responsive pleadings.[7] Since the Defendants' last responsive briefing,[8] this court heard oral argument on the Plaintiff's Motions for Preliminary Injunction[9] on May 23, 2013.[10]

At that hearing, this Court: 1) directed Mr. Jones to file a motion for child custody within 10 days of the May 23 in the Jones v. Jones[11]; 2) directed that the LTC hold a hearing on that motion within ten days of filing and 3) directed that any appeal of the LTC decision be filed within 10 days of the LTC decision.[12] A minute entry of that hearing was entered on May 28, 2013 and stated, in part, that: "The court directs counsel for plaintiff to file a motion regarding jurisdiction for custody in the Lummi Tribal Court within 10 days."[13]

Eleven days after this Court ruling of May 23, the Mr. Jones' filed a Motion for Finding of Fact and Conclusions of Law (Motion for Findings)[14] with the LTC seeking "[w]ritten findings of fact and conclusions of law determining that this court [LTC] lacks jurisdiction to determine custody of the child."[15] The LTC held a hearing the Motion for Findings on June 12, 2013.[16]

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[5] *Order Denying Motion for Preliminary Injunction,* ECF No. 23, at 2-7.
[6] Declaration of Mary M. Neil Supplementing Tribal Court Record, Exhibit B, ECF No. 29-2, at 1-15.
[7] Defendants Memorandum in Opposition to the Plaintiff's Motion to Vacate Tribal Court Order and Immediate Transfer of Custody of Child, ECF No. 38; Defendants' Motion in Opposition to the Plaintiff's Motion for Preliminary Injunction, ECF No. 43.
[8] Defendants' Motion in Opposition, ECF No. 43.
[9] Motion to Vacate Tribal Court Order and Immediately Transfer Physical Custody of Child to Father, ECF No. 30; Motion for Preliminary Injunction/Immediate Transfer of Physical Custody of Child From Wherever She May Be to Father, ECF No. 33.
[10] Declaration of Sharon R. DeGrave in Support of Defendants' Memorandum in Opposition to Plaintiff's Motion to Vacate, Ex. A2, ECF No. 54 at 23-47; ECF No. 47.
[11] 12-CVPD-3167
[12] Decl. DeGrave, Ex. A2, ECF No.54-2 at 44-47.
[13] *Minute Entry*, ECF No. 46.
[14] Decl. of DeGrave, Ex. A1, ECF No. 54-1 at 2-10.
[15] *Id.*
[16] Decl.of DeGrave, Ex. A4, ECF No.54-4 at 11-44, ECF No. 54-4 at 2.

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At that June 12th hearing, the Mr. Jones sought a ruling on whether the LTC had jurisdiction to determine the custody of the child, "basically means a parenting plan."[17] Mr. Jones also reaffirmed his previous stipulation that the LTC has jurisdiction to issue the domestic violence protection order.[18] The LTC granted the maternal aunt's Motion to Dismiss the Third-Party Custody Petition.[19]

The LTC issued Findings of Fact and Conclusions of Law (Findings) the very next day on June 13, 2013.[20] The LTC Court Clerk mailed a copy of the Finding to Mr. Lewis' Office on June 13, 2013.[21] In the Finding, the LTC "retains jurisdiction of the matter under the Order For Protection Domestic Violence," and ordered that "[c]ustody is to remain with the mother for the duration of the Protection Order or **until further action is taken with regard to the permanent child custody order and the Protection Order is modified with regard to that plan or it expires."[22]**

The LTC reasoned that it had already determined jurisdiction to issue the Order for Protection based upon Mr. Jones' agreement to submit to jurisdiction and that ruling had been

[17] Decl.of DeGrave, Ex. A4, ECF No.54-4 at 13.
[18] *Id.* ("The issue of whether or not this court has jurisdiction to exclude my client from, you know, the mother's house on the reservation we stipulated that the first time and we were here. The issue…is the custody of the child – and that basically means a parenting plan.") ECF No. 54-4 at 14 ("We want a determination about…the jurisdiction to determine the custody of the child…") ECF No. 54-4 at 20 ("I have heard… probably two separate things from the mother. One is that state court has jurisdiction in her parenting plan. I would – that is exactly what I want. I want a tribal court order that says the state court has jurisdiction to enter a parenting plan.") ECF No. 54-4 at 21 (So what we need is a decision about not whether your honor has the authority to enter a protection order, whether or not your honor – this court has the authority to enter a parenting plan to determine the custody of the child…"). See also, ECF No. 12-3 at 6 (We'll stipulate to the court's jurisdiction over dad, dad has significant contact with the reservation…"); ECF No. 13-1 at 27 ("I told, You Honor, last time I was here that father wasn't that concerned about the domestic violence protection order from the Tribal Court. I mean he stipulates to it…we'll stipulate that the –that the court has jurisdiction over my client solely for purpose of entering a domestic violence protection order against him.").
[19] Decl.of DeGrave, Ex. A4, ECF No.54-4 at 23.
[20] *Id.*, Ex. A4, ECF No.54-4 at 2-4.
[21] Declaration of Sharmaine McIntyre In Support of Defendants' Opposition to Plaintiff's Motion to Vacate Tribal Court Orders, ECF No. 53.
[22] Decl.of DeGrave, Ex. A4, ECF No. 54-4 at 10.

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affirmed by the LNCOA.[23] Judge Cardoza further explains that the Domestic Violence Protection Proceeding is not a child custody action.[24] Therefore, the question of the LTC jurisdiction in a child custody action is not before the LTC until a child custody action is filed with the LTC.

On June 27, Mr. Jones appealed to the LNCOA seeking direct review of "whether the Lummi Nation has jurisdiction over the child custody dispute…whether Lummi has jurisdiction to enter a parenting plan and order of child support for this child."[25] The Clerk of the Court forwarded the Notice and record to the Chief Justice that same day.[26] The LNCOA requested supplemental briefing due on August 12, 2013 on two questions:

> a) Is an action for child custody, separate from the existing protective order, active and pending in the tribal court?
> b) If an action is pending, does the tribal court have personal and subject matter jurisdiction over it?[27]

Because Mr. Jones did not request oral argument, the LNCOA has not scheduled oral argument and reserved argument.[28]

On July 11, 2013, Mr. Jones filed a Motion to Vacate[29] with this Court. The Defendants file this Memorandum in Opposition to the Motion to Vacate. All facts are as determined by the LTC and the LNCOA.[30] All other facts are disputed.

IV. STANDARD

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[23] *Id.* at 9-10.
[24] *Id.*
[25] Decl. of DeGrave, Ex. B, ECF No. 54-5 at 2.
[26] Decl. of McIntyre, ECF No. 54 at 2.
[27] Decl. of DeGrave, Ex. B, ECF No. 54-5 at 5.
[28] *Id.*
[29] ECF No. 48
[30] Declaration of Mary Neil, Ex. 1, Order for Protection Domestic Violence, ECF No. 14-1 at 3-7.; Ex. 4,ECF No. 12-1, 12-2, 12-3, 12-4 13-1, 13-2; Decl. Neil, Exhibit B, ECF No. 29-2, at 1-15; Decl. of DeGrave, Ex.A4 ECF No. 54-4 at 8-25.

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1. SUMMARY JUDGMENT

The standards for summary judgment are well-known:

> Rule 56 of the Federal Rules of Civil Procedure governs summary judgment motions, and provides in relevant part, that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir.1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. Anderson, 477 U.S. at 248, 106 S.Ct. 2505. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52, 106 S.Ct. 2505. The moving party bears the burden of showing that there is no evidence which supports an element essential to the nonmovant's claim. Celotex Corp. v. Catrett, 477 U.S.317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant has met this burden, the nonmoving party then must show that there is in fact a genuine issue for trial. Anderson, 477 U.S. at 250, 106 S.Ct. 2505.[31]

2. EXHAUSTION OF TRIBAL COURT REMEDIES

It is well established in the Ninth Circuit that exhaustion of tribal court remedies is required before a plaintiff can seek relief in the federal court.[32] There are four exceptions to exhaustion:

> (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 nonmember's conduct on land covered by Montana's main rule. [33]

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[31] Prime Start Ltd. V. Maher Forest Products Ltd., 442 F.Supp 2d 1113, 1117 (W.D.Wa. 2006).

[32] *National Farmers Union Insurance Companies v. Crow Tribe of Indians,* 471 U.S. 845; *Grand Canyon Skywalk Development, LLC v. "Sa' Nyu Wa Inc.,* 715 F.3d 1196, 1200 (9th Cir 2013); *Water Wheel Camp Recreational Area, Inc. v. LaRance,* 642 F.3d 802, 809 (9th Cir 2011); *Boozer v. Wilder,* 381 F.931 (9th Cir 2004).

[33] Grand Canyon, at 1200.

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3. TRIBAL COURT JURISDICTION

A tribe's adjudicative authority may not exceed its regulatory authority.[34] "To exercise its inherent civil authority over a defendant, a tribal court must have both subject matter jurisdiction—consisting of regulatory and adjudicative jurisdiction – and personal jurisdiction."[35]

It is a "long-standing rule that Indian tribes possess inherent sovereign power, including the authority to exclude, unless Congress clearly and unambiguously says otherwise.[36] "From a tribe's inherent sovereign powers flow lesser power, including the power to regulate non-Indians on tribal land."[37] Unless Congress has said otherwise or the Supreme Court has recognized that such a power conflict with federal interests promoting tribal self government, the Ninth Circuit case law mandates that the court shall conclude that tribal right to exclude non-Indians from tribal lands includes the power to regulate them.[38]

When there are no sufficient competing state interests at play, a tribe has regulatory jurisdiction through its inherent authority to exclude independent of the power recognized in *Montana v. United States*[39].[40]

> In *Montana,* the Supreme Court has stated that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and so cannot survive without express congressional delegation."[41]

There are two exceptions, known as the *Montana* Exceptions, to the limit on tribal powers:

1) "A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationship with the tribe or its members, through

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[34] *Water Wheel,* 642 F.3d at 808-9.
[35] *Id.*
[36] *Id.* at 808 (citation omitted).
[37] *Id.* at 808-809 (citing *South Dakota v. Bourland,* 508 U.S. 679, 689, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993).
[38] *Id.* at 812.
[39] 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)
[40] *Water Wheel,* 642 F.3d at 805.
[41] *Id.* at 809.

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commercial dealing, contracts, leases or other arrangements."[42]

2) "A tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on feed 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.[43]

The Supreme Court has applied the *Montana* Exceptions "almost exclusively to question of jurisdiction arising on non-Indian land or its equivalent," except in *Nevada v. Hicks*[44].[45] In *Hicks,* the Supreme Court noted that "land ownership may sometime be a 'dispositive factor' in determining whether a tribe has jurisdiction over a non-Indian, it was not dispositive when weighed against the state's considerable interest in executing a search warrant for an off-reservation crime."[46] The Ninth Circuit has recognized the general rule that *Montana* does not apply to a tribe's jurisdiction over non-Indians on tribal lands unless *Hick* factor is involved: there must be a sufficient competing state interests that is then weighed against the tribal interest.[47]

V. ARGUMENT

The Motion should be denied because Mr. Jones has not and cannot demonstrate that there are no genuine issues as to any material fact and that he is entitled to judgment as a matter of law. Mr. Jones asserts that the facts do not support tribal court jurisdiction, and to that extent the facts are disputed and he is wrong. Mr. Jones is not entitled to judgment as a matter of law. First, the jurisdictional prerequisites to Federal court jurisdiction have not been

[42] *Montana,* 450 U.S. at 565.
[43] *Id.* at 566.
[44] 533 U.S. 353 (2001).
[45] *Water Wheel,* at 809.
[46] *Id.* at 809.
[47] E.g. *Water Wheel*, 642 F.3d 802; *Grand Canyon,* 715 F.3d 1196

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met: a ripe case or controversy after Mr. Jones has exhausted tribal court remedies. This Court has already determined that the Order for Protection is not at issue because Mr. Jones has stipulated to the LTC's jurisdiction[48] and Mr. Jones is currently prosecuting an appeal to the LNCOA.[49] Second, if the Court disagrees and determines the Order for Protection is at issue here (and Exhaustion of tribal court remedies has occurred or excepted), the LTC has jurisdiction under inherent tribal authority, both exceptions to the *Montana* rule and by way of positive grant of authority. Third and finally, Tribal Sovereign Immunity and Judicial immunity bar an award of attorney's fees, even if Mr. Jones was entitled to an award of attorney's fee (which he is not entitled to). The Motion should be denied.

1. <u>The jurisdictional prerequisites to Federal court jurisdiction have not been met</u>
    a. This Court has already determined that the Order for Protection is not at issue in this case. There is no reason to revisit that determination.

This Court has already determined that Mr. Jones stipulated to the jurisdiction of the LTC to issue the Order for Protection.[50] Mr. Jones has not asserted any basis for this Court to revisit that issue. The only matter at issue is the LTC jurisdiction to determine child custody. The LTC has determined that is not exercising jurisdiction to determine child custody in the Order for Protection.[51] Rather the LTC has exercised jurisdiction to temporarily enjoin Mr. Jones from further acts of or threats of acts of Domestic Violence, including temporary

[48] *Order,* ECF No. 23 at 6, ("It is the order awarding temporary custody of M.J. to her maternal aunt that is at issue in this lawsuit, and not the original order of protection. Indeed, Mr. Jones stipulated to the jurisdiction of the LTC with respect to the order of protection."); at 11 ("More importantly, however, the LTC proceeding involving the order of protection entered against Mr. Lewis is not the LTC proceeding at issue here. Mr. Jones consented to the LTC jurisdiction with respect to the protection order against him and those proceedings are not before this court.").
[49] Decl. of DeGrave, Ex. B, ECF No. 54-5.
[50] See Supra note 48.
[51] Decl. of DeGrave, Ex. A4 ECF No. 54-4 at 2-25.

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provisions to protect the child.[52] That case is on appeal to the LNCOA and it has not been definitively answered whether the LTC has exercised jurisdiction to determine child custody. This Court is without jurisdiction unless there is a ripe case or controversy.[53] Additionally, the Doctrine of Exhaustion of Tribal Court Remedies is a prerequisite to this Court's exercise of jurisdiction.[54]

b. Mr. Jones has not exhausted tribal court remedies.

Mr. Jones has not exhausted tribal court remedies: is currently prosecuting an appeal of the Findings and Conclusion.[55] The jurisdictional prerequisite has not been met because none of the exceptions to the Doctrine of Exhaustion apply. The Motion should be denied.

It is well established in the Ninth Circuit that exhaustion of tribal court remedies is required before a plaintiff can seek relief in the federal court.[56] The Ninth Circuit has recently explained that:

> Federal law has long recognized a respect for comity and deference to the tribal court as the appropriate court of first impression to determine its jurisdiction. As support for this premise, the Supreme Court cites: (1) Congress's commitment to "a policy of supporting tribal self-government and self-determination;" (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."[57]

Exhaustion is a prerequisite to federal court's exercise of jurisdiction such that a federal court should not make a ruling on tribal court jurisdiction until exhaustion has occurred

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[52] *Id.*
[53] *Lujan v. Defenders of Wildlife,* 504 U.S. 555; *Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990); See also, *Walker v. Munro,* 879 P.2d 920 (Recognizing the "long-standing rule that this court is not authorized under the declaratory judgments act to render advisory opinions or pronouncements upon abstract or speculative questions.")
[54] *Grand Canyon*, 715 F.3d at 1200.
[55] Decl. of DeGrave, Ex. A4 ECF No. 54-4 at 2-25.
[56] See Supra note 32.
[57] *Grand Canyon*, 715 F.3d at 1200.

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or in the case of four exceptions:

> (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 nonmember's conduct on land covered by Montana's main rule.[58]

Mr. Jones asserts that Exceptions 1, 3 and 4 to Exhaustion Doctrine apply. He makes unsubstantiated statements that the LTC and the LNCOA have acted in bad faith (when they have not), that exhaustion would be futile (when it clearly would not be) and that LTC jurisdiction is plainly lacking (when LTC's jurisdiction is clear). Mr. Jones is wrong. None of the Exceptions to the Exhaustion Doctrine apply and requiring exhaustion will serve all four purposes of the Exhaustion Doctrine. The motion should be denied.

i. Mr. Jones has not demonstrated that the LTC or the LNCOA has acted in bad faith.

Mr. Jones has not and cannot demonstrate that the LTC or the LNCOA has acted in bad faith, because they have not. The Ninth Circuit has recently clarified that Exception 1 to Doctrine of Exhaustion of Tribal Court Remedies, bad faith, requires a showing that the tribal court asserting jurisdiction is acting in bad faith.[59] "Bad faith by a litigant instituting the tribal court action will not suffice."[60] For the bad faith exception of exhaustion of tribal court remedies to apply, Mr. Jones must show that the LTC has acted in "dishonesty of belief or purpose."[61] In support of his assertion Mr. Jones offers nothing more than a delay in receipt of

[58] *Id.*
[59] *Id.*, at 1201
[60] *Id.*
[61] *Id.*

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the Finding of Fact and Conclusions of Law (that cannot be attributed to the LTC or LNCOA)[62] and that as of July 11, 2013 the LNCOA had not issued a briefing schedule. None of these assertions establish bad faith.

None of the LNCOA actions have been in bad faith. The LNCOA has acted promptly. The Clerk of the Court promptly forwarded the Notice of Appeal and Record to the Chief Justice *the same day it was filed*.[63] The LNCOA has issued a briefing schedule. Mr. Jones cannot point to any substantiated factual basis to claim that the LTC or the LNCOA acted in bad faith.

Mr. Jones asserts that the LTC and Ms. Hull have been in collusion alleging that collusion is evidenced by the similarity between the LTC ruling and the relief requested. Mr. Jones fails to cite to any particular portion of the transcript to support his assertion, because there is no support in the transcripts. A review of the transcripts will not demonstrate collusion because there is no collusion. It is not unusual in any court, tribal, state or federal, to grant the relief requested by a plaintiff,[64] or to direct one party's attorney to put language to the court's oral ruling. Mr. Jones again complains that the LTC adopted the order Ms. Hull submitted without his client's review or countersign. The Court has already dismissed this unfounded allegation because the record did not establish that the LTC's proceedings were conducted in bad faith.[65]

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[62] Decl. of McIntyre, ECF No. 53 at 1("I mailed the Findings of Fact and Conclusions of Law to Mr. Lewis at his regular business address on June 13, 2013.").
[63] Decl. of McIntyre, ECF No. 53 at 2.
[64] See E.g. See e.g. United States v. Washington, C70-9213, Subproceeding 01-1, ECF No. 20383 ("The Court shall accordingly GRANT the Tribes' motion for a Permanent Injunction (Dkt. # 660) and adopt the proposed Order presented by the Tribes.")
[65] *Order,* ECF No. 23 at 11. To the extent this court may revisit this issue; the Defendants incorporate the argument in Supplemental Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, ECF No. 19.

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Exception One to the Exhaustion Doctrine does not satisfy this court's jurisdictional prerequisite any more than Exception 3, futility, under these facts.

ii. Mr. Jones has not and cannot establish that exhaustion of tribal court remedies would be futile.

Mr. Jones asserts that exhaustion would be futile because he claims that the LNCOA "may feel required to rule the same way." Mr. Jones' unsubstantiated statement does not satisfy the Ninth Circuit's requirement that the plaintiff demonstrate that exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction. The futility exception is to be applied "narrowly to the only most extreme cases."[66] Under *Grand Canyon*, Mr. Jones must show that the Lummi Tribal Court does not offer an adequate and impartial opportunity to challenge jurisdiction.[67] Mr. Jones has not and cannot show that exhaustion of tribal court remedies is futile.

The Ninth Circuit has pointed to examples such as a two year delay or no functioning tribal court.[68] This case does not mirror those examples. First, there are adequate opportunities for Mr. Jones' to challenge the Finding of Fact and Conclusion of Law and he is pursuing that opportunity with the LNCOA. Furthermore, the LNCOA offers an adequate remedy evidenced by the question the LNCOA framed. The LNCOA is proceeding with its review. Its determination will impact this matter before this Court.

If the LNCOA rules that the LTC does not have a child custody action pending it cannot have exercised jurisdiction and there is nothing for this Court to review. If the LNCOA determines that the LTC has a child custody is action pending in the LTC, the LNCOA will

[66] *Grand Canyon,* at 1203.
[67] *Id.*
[68] *Id.*

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likely clarify the jurisdictional basis for that action. Thereby, the LNCOA will provide something for this Court to review.

Thus, like Mr. Jones' failure to demonstrate that the LTC has acted in bad faith, he has failed to demonstrate that it would be futile exhaust tribal court remedies. Consistent with Mr. Jones' failure to demonstrate bad faith or futility, he failed to demonstrate Exception 4, plainly lacking jurisdiction.

iii. Mr. Jones has not and cannot establish that the LTC plainly lacked jurisdiction to issue the Order for Protection Domestic Violence.

Mr. Jones asserts that under *Montana* the LTC lacks jurisdiction over the child because the child is not a member and that this court should vacate the entire Order for Protection and Findings and Conclusions. Mr. Jones is wrong. The Ninth Circuit has recently explained that exception (4) to exhaustion of tribal court remedies requires a showing that "it is plain that no federal grant provides for tribal governance of nonmember's conduct on land covered by Montana's main rule." Mr. Jones has not demonstrated that *Montana's* main rule applies to the tribal lands where Mr. Jones engaged in acts of domestic violence or to the tribal lands that Mrs. Jones has resided upon for approximately the last two years.[69] He, therefore, cannot establish that Exception 4 applies.

As discussed in section 2A, the Lummi Nation has the regulatory authority to prohibit acts of domestic violence on tribal land. The Order for Protection is directly connected to his domestic violence acts on tribal lands. Therefore LTC has adjudicative jurisdiction to enjoin

[69] ECF No. 13-1, at 56 (Mrs. Jones testified that she lived on the reservation for approximately 2 years); ECF No. 13-1 at 47-48 (Chum Circle and Uncle Ray's House where DV acts occurred are on the Lummi Reservation in the Lummi Projects.) See Cohen v. U.S., 297 F.2d 760 ("One does not change his residence to the prison by virtue of being incarcerated there.")

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Mr. Jones' from engaging in further acts or threats of acts of domestic violence on the tribal lands or from engaging in acts that interfere with the parental rights of Mrs. Jones, a resident on tribal lands.

Even if the Court disagrees and applies *Montana*, both exceptions are satisfied, as discussed in section 2B and 2C, because 1) Mr. Jones stipulated that he had entered into a consensual relationship such that exception one to the Montana was satisfied and 2) Mr. Jones acts of domestic violence threaten and has a direct effect on the political integrity, economic security or the health or welfare of the tribe. Finally, as discussed in section 2D it is plain that the VAWA provides congressional recognition of inherent tribal authority, or alternatively is a congressional grant of authority that applies because the actions were pending in the tribal court.

Mr. Jones has not demonstrated any of the Exceptions to the Exhaustion Doctrine and the purposes of the doctrine are furthered by exhaustion of tribal court remedies.

iv. Adherence to the Doctrine of Exhaustion of Tribal Court Remedies here furthers the underlying purposes of the doctrine.

This Court's continued exercise of judicial restraint furthers the purposes of the Doctrine of Exhaustion of Tribal Court Remedies recognized by the Ninth Circuit. Judicial economy will be served by reviewing a fully developed record, instead of the pieced-meal approach resulting from Mr. Jones' multiple motions. The policy of allowing the forum whose jurisdiction is challenged is also served by allowing the tribal court to evaluate the factual and legal basis for the jurisdictional challenge.

The LNCOA ruling will narrow the focus of this case, be in the interest of judicial economy and might alleviate the need for any federal court action. Therefore, as a

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prerequisite to federal court jurisdiction, the court should continue to adhere to the Doctrine of Exhaustion of Tribal Court Remedies.

This court does not have jurisdiction to grant Mr. Jones' Motion and it should be denied. Even if the Court disagrees and believes that Mr. Jones has exhausted tribal court remedies or that one of Exception to Exhaustion of Tribal Court Remedies applies, Mr. Jones is not entitled to relief because the LTC has jurisdiction to issue the Order for Protection.

2. THE LUMMI TRIBAL COURT HAS JURISDICTION OVER MR. JONES IN THE DOMESTIC VIOLENCE PROCEEDING.

Mr. Jones asserts that the LTC does not have jurisdiction to issue the Order for Protection. The Defendants strongly disagree because 1) the Order for Protection is not before this court and 2) the LTC has jurisdiction to issue the Order for Protection. The Lummi Nation has inherent authority to regulate non-Indian acts of domestic violence on tribal lands, unlimited by a clearly and unambiguously congressional statement. Conversely, congress has recognized inherent tribal authority in the Violence Against Women Act (VAWA)[70]. The Supreme Court has not recognized that enjoining acts or threats of domestic violence on tribal lands conflicts with federal interest in promoting tribal self government. In the event this Court disagrees and concludes that the LTC does not have inherent tribal authority, the LTC has jurisdiction under both *Montana* Exceptions. Alternatively, the VAWA provides a positive grant of authority that applies to authorize the tribal court to issue the Order for Protection. Therefore, Mr. Jones' motion should be denied.

a. The Lummi Nation has inherent authority to regulate Mr. Jones' conduct

[70] Violence Against Women Act of 1994, P.L. 103-322 (September 13, 1994); Violence against Women Reauthorization Act of 2013, P.L. 113-4, 127 Stat. 54 (March 7, 2013).

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> on tribal lands. Therefore the LTC has adjudicative authority to issue the Order for Protection.

Mr. Jones asserts that under *Montana*, the LTC does not have jurisdiction to issue the Order for Protection because his daughter is not currently enrolled Lummi. Mr. Jones is wrong, *Montana* does not apply here. Rather the status of the land Mr. Jones was on when he committed acts of domestic violence as tribal lands is dispositive in favor of tribal court jurisdiction because there is no competing state interest, no clear and unambiguous congressional limitation and no Supreme Court recognition that tribal court jurisdiction over acts of domestic violence on tribal lands is inconsistent with federal policy of prompting tribal self government.[71]

It is undisputed that Mr. Jones entered onto tribal lands and committed acts of domestic violence.[72] The Lummi Nation has plenary jurisdiction over tribal lands.[73] The Lummi Nation has the authority to exclude and manage tribal lands, including the power to condition entry and exclude acts thereon or uses thereof. Among those acts Lummi can prohibit are tortuous acts on tribal lands. While a tort against an individual is generally not sufficient to support tribal court jurisdiction on non-tribal lands, a tort is sufficient on tribal land.[74] Moreover, acts of domestic violence are both a tort against an individual and a tort against the public.[75]

> The pervasive, continuing damage to Indian children in tribal communities is what distinguishes domestic violence cases like this one from cases holding that tribal courts do not have jurisdiction over non-members based solely on the fact of a

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[71] *Grand Canyon, 715 F.3d 1196; Water wheel, 642 F.3d 802.*
[72] See Supra FN 69, FN6, FN 30.
[73] *Water Wheel Camp Recreational Area., Inc. v. LaRance,* 642 F.3d 802 (9th Cir 2011)(per curiam).
[74] *Phillip Morris USA., Inc. v. King Mountain Tobacco Co. Inc,* 569 F.3d 932 (9th Cir. 2009)(distinguished by Water Wheel, 642 F.3d 802).
[75] *Black's Law Dictionary* defines public nuisance as "An unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of property. Such nuisance may lead to a civil injunction…") 1095 (7th ed. 1999).

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tort.[76]

The Lummi Nation is not alone in declaring the public interest in preventing domestic violence. [77] It is well recognition that public interest in preventing domestic violence because of the long-lasting consequences and cost to society.[78]

Thus, Lummi can prohibit Mr. Jones from engaging in acts of domestic violence on tribal lands. Because the Lummi Nation can regulate Mr. Jones' conduct on tribal lands to prohibit acts of domestic violence, the LTC has adjudicative jurisdiction to enjoin him from further acts or threats of acts as a direct result of his act on tribal lands. Protection Order is defined to include child custody provisions and to authorize protection of all victims.[79] The Court can consider domestic violence that occurred outside tribal lands, and prior acts but it is enough that the victim is on tribal lands and in need of protection.

Montana does not apply because there is no competing state interest as in *Hicks.* Thus, land status is dispositive. Mr. Jones has not and cannot point to any clear and unambiguous statement of Congress. Conversely, the Violence Against Women Act and its legislative history clearly provide Congressional recognition of inherent tribal authority, including provision for temporary protective custody.[80]

Just as there is no unambiguous statement of congress limiting tribal inherent

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[76] *Amicus Brief of Lummi Nation,* ECF No. 29-3 at 75.

[77] *See E.g. State v. Karas*, 32 p.3d 1016, 1020 (Wash. Ct. App. 2001)(Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic violence has long been recognized as being at the core of other major social problems: Child abuse, other crimes of violence against person or property, juvenile delinquency, alcohol and drug abuse. Domestic violence cost millions of dollar each year in the state of Washington for health care, absence from work, services to children and more.)(quoting State *v. Dejarlais,* 969 P.2d 90, 92 (Wash 1998) (enbanc)).

[78] See infra FN 89. See also, Lummi Code of Law Title 5A http://narf.org/nill/Codes/lummi/5A_Domestic_Violence.pdf (downloaded 7/29/2013).

[79] 18 U.S.C. § 2266 (2006).

[80] See Supra FN 70, FN 79.

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jurisdiction, there is also no Supreme Court ruling that an Indian Tribe's exercise of jurisdiction over a non-Indian to enjoin him from future acts of domestic violence when the non-Indian committed acts of domestic violence on tribal lands is inconsistent with the federal interest protecting tribal self government. Thus, under the Ninth Circuit mandate, this Court must find that the land status is dispositive. The LTC had and has jurisdiction to issue the Order for Protection. Alternatively, if this Court disagrees and determines no inherent tribal authority, independent of *Montana,* both exceptions of *Montana* are satisfied.

b. Mr. Jones stipulated that his consensual relationship satisfied *Montana* Exception 1. Therefore, the LTC has jurisdiction to issue the Order for Protection.

Mr. Jones has stipulated that his consensual relationship is sufficient to satisfy *Montana* Exception 1.[81] As discussed in A.1, supra, Mr. Jones has stipulated that the Lummi Tribal Court has jurisdiction to issue the Protection Order and has repeatedly reaffirmed that stipulation.[82] This stipulation effectually satisfies Exception One of the *Montana* rule. Under *Montana* exception one, a tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationship with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.[83] Mr. Jones asserted that the temporary provision should not cover M.J. Mr. Jones. This is not a situation like *Atkinson* where the court explained consent in one area does not trigger tribal civil jurisdiction. [84] This is consent to the same area, domestic violence protection orders. Consent to a

[81] See Supra FN 79.
[82] See Supra FN 18.
[83] See Supra FN 42.
[84] *Atkinson Trading Company, Inc. v. Shirley,* 532 U.S. 645 (2001)

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domestic violence protection order is "in for a penny, in for a pound."[85]

His repeated stipulation, however, has not (and might not) be determined by the LTC to formed the basis for the LTC to make a child custody determination in a dissolution or child custody action. Furthermore, his stipulation was a strategic decision that he is bound by. He admits to attempting to leverage the federal court[86] and he should not be allowed to limit the development of a full record and then seek to challenge that record as lacking facts in this Court. To allow him to do so not only undermines the policy of judicial economy, but also the policy of allowing the tribal court to determine jurisdiction first.

Mr. Jones should be held to his stipulation and this court should conclude that the LTC had jurisdiction to issue the Order for Protection through stipulated facts that satisfy Exception One of *Montana.* The general rule that subject matter jurisdiction cannot be waived is not violated by such determination because Mr. Jones is not waiving.[87] Rather he has stipulated that the facts and nature of his relationship is consensual and sufficient to allow the Lummi Nation to issue the protection order. And absent Mr. Jones' stipulation, the LTC has jurisdiction because domestic violence threatens and directly affects "the political integrity, the economic security or the health or welfare of the tribe."[88]

c. Domestic violence, including Mr. Jones' acts on tribal lands are actions that threaten and directly affect the Lummi Nation's political integrity, economic security and health or welfare.

The second exception to *Montana* is also satisfied as acts of domestic violence or

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[85] *Id.* at 656.
[86] Declaration of Attorney's Fee, ECF No. 51, at 3 ("Our Strategy was always to use federal court as leverage…").
[87] *Stock West Inc. v. Confederated Tribes of the Colville Reservation,* 873 F.2d 1221 (9th Cir 1989) ("On the other hand, a party cannot waive by consent or contract a court's lack of *subject matter* jurisdiction.")(citing *Securities & Exchange Comm'n v. Blazon Corp.*, 609 F.2d 960, 965 (9th Cir.1979)).
[88] See Surpa FN 43.

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threats of acts of domestic violence threaten and directly affect the Lummi Nation's political integrity, economic security and health and welfare. The evidence that domestic violence is a significant threat to political integrity, economic security and health and welfare of the tribes is not only overwhelming, but also undisputed by Mr. Jones.[89] Instead, Mr. Jones asserts that there is no interest because he, M.J. and Mrs. Jones are not members of the tribe. Mr. Jones ignores the fact that M.J. is eligible for enrollment, that Mrs. Jones resides on tribal lands, and that D.J., an enrolled Lummi member is also protected by the Order for Protection. Moreover, he ignores the direct affect any act of domestic violence on tribal lands has to the political integrity, economic security and health and welfare.

That the perpetrator is non-Indian does not change the direct affect any act of domestic violence on tribal lands to the political integrity, economic security and health and welfare. The LTC has jurisdiction under Exception 2 to *Montana.*

d. Alternatively, the LTC's exercise of jurisdiction over Mr. Jones to issue the Order for Protection is authorized by both versions of the Violence Against Women Act.

Lummi can assert jurisdiction under Violence Against Women Act.[90] The U.S. Supreme Court has recognized that tribal court jurisdiction can be upheld when federal statutes recognize or grant tribal jurisdiction.[91] Here, VAWA, and its reauthorization recognize

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[89] Bea Hanson, *"Protecting Native American and Alaska Native Women from Violence: November Is Native American Heritage Month" (*11/29/2012), http://blogs.justice.gov/ovw/archives/2213 (downloaded 7/28/2013.) See also, Janice A. Drye, *The Silent Victims of Domestic Violence: Children Forgotten by the Judicial System,* 34 Gonz. L. Rev. 229 (1999); Matthew L.M. Fletcher, *"Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty,"* American Constitutional Society for Law & Policy (March 2009). A. Radon, *Tribal Jurisdiction and Domestic Violence: the Need for Non-Indian Accountability on the Reservation,* 37 U.Mich. J.L. Reform 1275 (Summer 2004);

[90] See Supra FN 70

[91] *United State v. Lara,* 541 U.S. 193, 196 (2004)(Concluding that Congress possessed "the constitutional power to lift restrictions on the tribes' criminal jurisdiction over nonmember Indians by enacting legislation that "recognized and affirmed" tribal power to exercise criminal jurisdiction over all Indians.")

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tribal jurisdiction. In the alternative, its reauthorization provides sufficient basis for the LTC to issue the Order for Protection as affirmed by both the LNCOA and the LTC post enactment.

There is no United States Supreme Court case that recognizes a restriction on tribal court jurisdiction to issue a domestic violence protection order against a non-Indian on tribal lands. The only case that discusses a tribal court jurisdiction over a domestic violence protection order involved non-members on fee land. Here, the domestic violence protection order involved members, non-member Indians, a non-Indian and tribal lands. As such the prior version of the VAWA recognizes tribal court jurisdiction:

> (a) Full Faith and Credit. Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian Tribe or territory) shall be accorded full faith and credit by the court of another State, Indian tribe or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe.
> (b) Protection Order. A protection order issued by a State, tribal, or territorial court is consistent with this subsection if
> (1) Such court has jurisdiction over the parties and matter under the law of the State, Indian tribe or territory; and
> ***
> (e) Tribal Court Jurisdiction. For purposes of this section, a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any order through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.[92]

Under VAWA, a protection order is defined to include child custody provision in an injunction restraining order or other order issued by a civil court.[93] It recognized (and went further to require enforcement of) protection orders in matters arising within tribal authority. Since, Mr. Jones' acts of domestic violence took place on tribal lands; the Protection Order was

[92] 18 U.S.C.A § 2265 (2006).
[93] See Supra FN 79.

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indisputable arising within the authority of the tribe.

VAWA expired after the Order for Protection was issued. Prior to VAWA's expiration, legislation was proposed in Congress to extend tribes' criminal jurisdiction over non-members to domestic violence cases, and to clarify that the tribes' civil jurisdiction extends to domestic violence committed by non-members.[94] At the time of the proposed legislation, the only judicial restriction recognized was that over non-members on non-tribal lands.[95] Conversely, there was no recognized restriction on tribal lands.

VAWA's reauthorization states:

> (e) Tribal Court Jurisdiction. For purposes of this section, a tribal court shall have full civil jurisdiction to issue and enforce protection orders involving any person, including authority to enforce any order through civil contempt proceedings, to exclusion violators from Indian lands, and other appropriate mechanisms, in matters arising anywhere in the Indian Country of the Indian Tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.[96]

This language very clearly provides tribal jurisdiction over Mr. Jones to issue and enforce the Order for Protection. The definition of protection order is the same as before reauthorization. Under that definition it is clear that an Order for Protection can make child custody provisions.

Mr. Jones as asserted that reauthorization does not apply retro-actively. He is incorrect. A court of appeal applies the law when the matter is decided unless it determines that application will result in manifest injustice.[97] Mr. Jones has not made such a showing of manifest injustice. Nor can he as he has no right to commit acts of domestic violence and the temporary restriction on his parenting rights is just that temporary. That he has not obtained

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[94] ECF No. 29-3 at 75 N 5.
[95] Martinez v. Martinez, 2008 WL 5262793 (W.D.Wash 2008).
[96] 18 U.S.C.A § 2265 (2013).
[97] *Henderson v. U.S.,* 133 S.Ct. 1121, 1126 (2013); *Delta Computer Corp v. Samsung Semiconductor,* 879 F.2d 662 (9th Cir 1989).

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temporary child custody orders in the State Court proceeding is beyond the LTC control. That delay is attributable only to Mr. Jones.

3. MR. JONES IS NOT ENTITLED TO ATTORNEY FEES.

Mr. Jones is also not entitled to any award of attorney fees because the Defendants possess tribal sovereign immunity, and that immunity has not been waived. Moreover, the Defendants possess judicial immunity that bars any monetary award.

It is well-established that Indian tribes possess common-law immunity from suit absent a clear unequivocal waiver.[98] The courts have repeatedly stressed the important policy concerns underlying tribal immunity: protection of tribal assets, preservation of tribal cultural autonomy, and promotion of self-government.[99]

The Ninth Circuit has repeatedly described the sovereign immunity of Indian tribes as more analogous to that of the federal government rather than to the various states under the Eleventh Amendment.[100] Likewise, tribal immunity has repeatedly been extended to tribal officials and employees acting in their official capacity and within the scope of their duties.[101] The test for immunity is whether the position "encompasses public duties, official in character."[102] Tribal immunity has also been held to protect tribal employees acting in the course of their employment.[103]

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[98] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52 (1978); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *E.E.O.C v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (2001); *California v. Quechan Tribe of Indians,* 595 F.2d 1153 (9th Cir)*; see also Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012).

[99] *See generally Potawatomi Indian Tribe*, 498 U.S. at 510 (1991).

[100] *See e.g.*, *Quechan,* 595 F.2d 1153; *Sekaquaptewa v. MacDonald*, 591 F.2d 1289, 1291 (9th Cir. 1979).

[101] *Sekaquaptewa,* 591 F.2d at 1291; *Davis v. Littell*, 398 F.2d 83, (9th Cir 1968); *See also Fletcher v. U.S.*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Hardin v. White Mt. Apache Tribe,* 779 F.2d 476 (9th Cir. 1985).

[102] *Davis,* 398 F.2d at 85.

[103] *Cook v. AVI Casino Enterprises, Inc.* 548 F.3d 718, 727 (9th Cir 2008), *cert. denied* 129 S. Ct. 2159 (2009).

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Judges are absolutely immune from civil liability for damages for their judicial acts, even when the action she took was in error, was done maliciously, or was in clear excess of her authority."[104] The 9th Circuit has implicitly extended the doctrine of judicial immunity to tribal judges, although not as a bar to injunctive relief.[105]

Judge Cardoza was acting within her official capacity and within the scope of her duties when she issued the Domestic Violence Protection Order of November 6th and while she presided over the Third Party Custody Proceeding.[106] Each of these policies behind sovereign immunity are present here. Even if Sovereign immunity did not insulate the Defendants' from an award of attorney's fee, judicial immunity does would.

Mr. Jones attorney's fees cannot be justifiably attributed the LTC. Instead they are a direct result of his strategic decision to leverage the federal court rather than allow the LTC to rule in the first instance. Moreover, the attorney's fees were incurred by his disregard for the well established doctrine of Exhaustion of Tribal Court Remedies and failure to complete minimum due diligence.[107]

VI. CONCLUSION

For all the reasons stated above, the Motion should be denied.

Respectfully submitted, this 29st day of July, 2013.

By: s/ Mary M. Neil

Mary M. Neil, WSBA #34348
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[104] *Millis v. U.S. Bankruptcy Court for District of Nevada,* 828 F.2d 1385 (9th Cir).
[105] *U.S v. Yakima Tribal Court,* 806 F.2d 853 (9th Cir). See also, *Sandman v. Dakota,* 816 F.Supp. 488.
[106] Title 1 of the Lummi Code of Laws, http://narf.org/nill/Codes/lummi/1Court.pdf (downloaded 7/29/2013)
[107] For example, it is alleged that Judge Cardoza is not licensed in any state. Judge Cardoza is licensed to practice law by Washington State. Decl. McIntyre, ECF No. 53 at 2-3. Others examples are reflected throughout the tribal and federal court record here.

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the persons required to be served in this matter.

By: s/ Mary M. Neil
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