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Hon. Lonny R. Suko

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, WASHINGTON DEPARTMENT OF LICENSING, CHRISTINE GREGOIRE, Governor, and ALAN HAIGHT, Director of Washington State Department of Licensing;

Plaintiffs,

v.

THE TRIBAL COURT FOR THE CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, and its CHIEF TRIBAL COURT JUDGE TED STRONG, and the CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a Federally Recognized Indian Tribe,

Defendants.

NO. CV-12-3152-LRS

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

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I. INTRODUCTION

Come now, the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation" or "Nation") and submit this threshold Motion to Dismiss.[1]

Plaintiffs have failed to plead facts that would allow this Court to look beyond their failure to mediate; Plaintiffs have not exhausted their Yakama Tribal Court remedies before proceeding in this federal forum; Plaintiffs have not presented evidence of a clear and unequivocal waiver of Yakama sovereign immunity; nor have Plaintiffs presented a valid federal question. For these reasons, the Complaint fails to provoke subject matter or personal jurisdiction and should be dismissed under FED. R. CIV. PROC. 12(b)(1) and 12(b)(2). Further, Plaintiffs fail to state a claim upon which relief can be granted and should be dismissed pursuant to FED. R. CIV. PROC. 12(b)(6).

Facts that are material to the legal jurisdictional issues raised in the instant

[1] This includes a continuing objection to the sufficiency of Plaintiffs' alleged service of process under FED. R. CIV. PROC. 12(b)(5). *See Tonasket v. Sargent*, 830 F.Supp.2d 1078, 1082 (E.D. Wash. 2011) ("[T]ribal officials acting within the scope of their authority[] are immune from . . . court process."). The Nation does not hereby waive, alter or otherwise diminish any rights, privileges, remedies or services guaranteed by the Treaty With The Yakama of 1855, 12 Stat. 951 (1859) ("Treaty"). Nor does the Nation in any way waive its or any Yakama officer or agent's sovereign immunity, or otherwise consent to the jurisdiction of this Court.

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Motion to Dismiss have already been presented to the Court. For the sake of judicial economy, the Nation incorporates herein the factual expositions presented in Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction, ECF No. 57, and those presented to the Tribal Court on December 6, 2012, in *Confederated Tribes and Bands of the Yakama Nation v. Haight*, No. R-13-019 (Yakama Nation Tribal Ct. Dec. 6, 2012), ECF Nos. 7-8. The Nation accepts the allegations in Plaintiffs' Complaint as true only for the purpose of this Motion.

II. STANDARDS OF REVIEW FOR A MOTION TO DISMISS

Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." FED. R. CIV. PROC. 12(h)(3). In determining the presence or absence of federal jurisdiction, this Court must apply the "'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). Subject matter jurisdiction must exist at the time the action is commenced and must be disclosed in the complaint. *Morongo Band of Mission Indians v. Cal.*

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State Bd. of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988). If jurisdiction is lacking, "the district court has no power to do anything with the case except dismiss." *Id.* (quotation omitted). Jurisdiction is, in other words, a threshold issue, which must be addressed prior to any consideration of the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998).

When motions to dismiss for lack personal and subject matter jurisdiction are asserted pursuant to FED. R. CIV. PROC. 12(b)(1) and 12(b)(2), the plaintiff bears the burden of proof that jurisdiction exists. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). The motion may "either attack the allegations of the complaint or may . . . attack[] the existence of . . . jurisdiction in fact." *Thornhill Publ'g Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). When considering a motion that challenges the existence of jurisdiction in fact, no presumption of truthfulness attaches to the plaintiff's allegations. *Id.* In resolving a motion to dismiss for lack of personal and subject matter jurisdiction, the Court is not limited to allegations in the complaint, and may consider materials outside the pleadings without converting the motion into one for summary judgment. *Assoc. of American Medical Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

In testing a complaint's legal adequacy under FED. R. CIV. PROC. 12(b)(6), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. PROC. 8(a)(2). While "detailed factual

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allegations" are not required, a complaint must have sufficient factual allegations to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1940, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1940. Accordingly, under FED. R. CIV. PROC. 12(b)(6), "[d]ismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

III. ARGUMENT

A. Because Plaintiffs Have Failed To Mediate, Their Complaint Must Be Dismissed.

In the Ninth Circuit, "[f]ailure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal." *Brosnan v. Dry Cleaning Station Inc.*, No. 08-2028, 2008 WL 2388392, at *1 (N.D. Cal. June 6, 2008); *see also B & O Mfg., Inc. v. Home Depot U.S.A., Inc.*, 2007 WL 3232276, *8 (N.D. Cal. Nov. 1, 2007) ("A claim that is filed before a mediation requirement . . . is satisfied shall be dismissed."); *Delamater v. Anytime Fitness, Inc.*, 722 F.Supp.2d 1168 (E.D. Cal. 2010) (same); *see also e.g. HIM Portland, LLC v. De Vito Builders, Inc.*, 317 F.3d 41, 44 (1st Cir. 2003); *Kemiron Atlantic, Inc. v. Aguakem Intern., Inc.*, 290 F.3d 1287 (11th Cir. 2002); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979); *3–J Hospitality, LLC v. Big*

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Time Design, Inc., 2009 WL 3586830, at *2 (S.D. Fla. Oct. 27, 2009); *Darling's v. Nissan North America, Inc.*, 117 F.Supp.2d 54, 61 (D. Me. 2000).

"To determine whether a contract makes mediation a condition precedent to filing a lawsuit, a court applies standard principles of contract construction." *Centaur Corp. v. ON Semiconductor Components Industries, LLC*, No. 09-2041, 2010 WL 444715, at *3 (S.D. Cal. Feb. 10, 2010); *see also Cunningham & Associates v. ARAG*, 842 F.Supp.2d 25, 29 (D.D.C. 2012) (same). "Under general contract law, the plain and unambiguous meaning of an instrument is controlling, and the Court determines the intention of the parties from the language used by the parties to express their agreement." *A–J Marine, Inc. v. Corfu Contractors, Inc.*, 810 F.Supp.2d 168, 185 (D.D.C. 2011) (quotation omitted).

1. Clear And Unambiguous Contractual Language Requires Mediation.

The text of the Consent Decree can only be read in a manner that compels mediation as a condition precedent to filing a lawsuit.[2] The mediation/arbitration clause that binds the parties reads as follows:

> 4.7 Should a dispute arise between the Yakama Indian Nation and the State of Washington upon an issue of compliance with the Consent Decree by either government, or by their officers, employees or agents, the Tribe and the State shall attempt to resolve the dispute through the following dispute resolution process:

[2] Indeed, the Tribal Court has already held as much. *See* ECF No. 8, at 86-98. As discussed below, that court's findings are not yet reviewable in this forum.

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> a. Either party may invoke the dispute resolution process by notifying the other, in writing, of its intent to do so. The notice shall set out the issue(s) in dispute and the position of the party giving notice as to each such issue.
>
> b. The first stage of the process shall include a face-to-face meeting between representatives of the two governments to attempt to resolve the dispute by negotiation. The meeting shall be convened within thirty (30) days of the written notice described in ¶ 4.7.a. The representatives of each government shall come to the meeting with the authority to settle the dispute.
>
> c. If the parties are unable to resolve the dispute within sixty (60) days of the date of the written notice described in ¶ 4.7.a, the parties shall engage the services of a mutually-agreed-upon qualified mediator to assist them in attempting to negotiate the dispute. If the parties cannot agree who the mediator should be, the mediator shall be a person or persons selected by the Court pursuant to Local Rule 39.1(d)(1). Cost for the mediator shall be borne equally between the two governments.
>
> d. Both parties shall pursue the mediation process in good faith until the dispute is resolved or until the mediator determines that the parties are not able to resolve the dispute. If the parties cannot agree on a format for the mediation process, the format shall that directed by the mediator. If the dispute is resolved, the resolution shall be memorialized by the mediator and shall bind the parties.

ECF No. 6, at 58-59. In 2006, the following provision was added to ¶ 4.7d:

> If the dispute is not resolved by mediation, the parties may agree to have a neutral third party arbitrator make a final binding decision resolving the dispute, or if a dispute is unresolved for more than 180 days, either party may give notice of intent to terminate this agreement as provided for *infra*.[3]

[3] "*Infra* is used as a citational signal to refer to a later-cited authority." BLACK'S LAW DICTIONARY (9th ed. 2009) (emphasis in original).

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Id. at 76. With ¶ 4.7d, the following ¶ 4.27 was added, *infra*:

> [I]f a party objects to continued participation in the processes and framework provided for in this decree and desires to withdraw and terminate the agreement, it may do so only upon not less than one hundred either (180) days written notice to the other party and a government to government meeting or consultation between them occurs to discuss their proposed reasons for doing so.

Id. at 81. The following preamble was also added in 2006:

> The parties agree to resolve further disputes exercising mutual good faith on a government to government basis and, to the extent they are unable to resolve such disputes, the dispute resolution process in ¶ 4.7 shall apply.

ECF No. 6, at 76. Under the plain meaning of the words agreed upon by the parties, then, if the parties have a dispute about the interpretation or implementation of the contract,[4] it requires that:

(1) "[T]he dispute resolution process in ¶ 4.7 **shall** apply." ECF No. 6, at 76 (emphasis added).

(2) "[T]he Tribe and the State **shall** attempt to resolve the dispute through the . . . dispute resolution process[.]" *Id.* at 57 (emphasis added).

(3) "[T]he parties **shall** engage the services of a mutually-agreed-upon qualified mediator[.]" *Id.* at 57-58 (emphasis added).

(4) "Both parties **shall** pursue the mediation process in good faith until the dispute is resolved or until the mediator determines that the parties are not able to resolve the dispute." *Id.* at 58 (emphasis added).

[4] "[W]here the dispute occurs as a fairly direct result of the performance of contractual duties . . . then the dispute can fairly be said to arise out of or relate to the contract in question." *Telecom Italia, Spa v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1116 (11th Cir. 2001).

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(5) If the dispute is not resolved by mediation, two options arise:

a. "[T]he parties **may** agree to have a neutral third party arbitrator make a final binding decision[.]" *Id.* at 76 (emphasis added).

b. [I]f a dispute is unresolved for more than 180 days, either party **may** give notice of intent to terminate[.]" *Id.* (emphasis added). This "notice of intent to terminate," *id.*, must be "written" and can only occur after "a government to government meeting or consultation between [the parties] occurs to discuss their proposed reasons for doing so." *Id.* at 81.

Reading ¶ 4.27 (step 5b) of the contract in isolation, as Plaintiffs have urged the Court to do elsewhere, it may appear that the parties may "terminate the consent decree" prior to "the mediator determin[ing] that the parties were at an impasse." ECF No. 58, at 3. But as the Court is well aware, "no provision should be read in isolation. Rather, a contract ought to be read as a whole and 'in a manner that gives meaning to all of its provisions and makes sense.'" *Bell/Heery v. U.S.*, 106 Fed.Cl. 300, 309 (Fed. Cl. 2012) (quoting *McAbee Const., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996)). Indeed, in order to ensure that ¶ 4.27 was not interpreted in a way that would allow the parties to skirt alternative dispute resolution, a provision was simultaneously added in 2006 to clarify and reiterate that, "to the extent [the parties] are unable to resolve such disputes, the dispute resolution process in ¶ 4.7 **shall** apply." ECF No. 6, at 76 (emphasis added).

Again, "where the language of the particular agreement or provision is clear and unambiguous, the Court must assume that the meaning ordinarily ascribed to the words used reflects the intentions of the parties." *Pillsbury Winthrop Shaw*

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Pittman, LLP v. Capitol Hill Grp., 447 B.R. 387, 394 (D.D.C. 2011). Thus, where a mediation clause "is phrased in mandatory terms," *i.e.* uses the terms "will" or "shall," "[this] mandatory language . . . creat[es] a structure in which litigation becomes appropriate" only after mediation has been fulfilled. *Centaur*, 2010 WL 444715, at *3; *Kempner Mobile Electronics, Inc. v. Southwestern Bell Mobile Systems*, LLC, 02-5403, 2004 WL 2609188, at *3 (N.D. Ill. Nov. 16, 2004) (same).

Here, as in *Centaur* and the numerous cases cited *supra*, there is no question that mediation is required prior to any litigation. The contract uses mandatory language in at least four places to indicate that mediation is a condition precedent. But mediation has not run its course yet. Plaintiffs' Complaint must be dismissed.

2. The Rules Of Contractual Interpretation Require Mediation.

First, if the Court finds any contractual language to be ambiguous, it must "invoke the familiar rule that the contract should be construed against its drafter."[5] *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 248 (1995) (O'Connor, J., concurring). Here, Plaintiffs' drafted the contract. *See* ECF No. 7, at 71-78. Plaintiffs do not, and cannot, dispute as much. *See generally* ECF No. 58. Obviously, the Nation construes now, and has always construed, the mediation

[5] Ironically, while Plaintiffs assert that the Consent Decree may be "properly terminated by written notice" at any time and without fulfilling mediation to completion, ECF No. 1, at 12, their own law counsels for a reading that comports with that of the Nation. *See generally* WASH. REV. CODE. § 43.376.020.

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clause in a manner that compels mediation as a condition precedent. *See generally* ECF No. 55.

Second, "[t]he Federal Arbitration Act, although it does not explicitly govern the mediation clause in the parties' contract, creates a federal policy in favor of alternative dispute resolution."[6] *Centaur*, 2010 WL 444715, at *3 (citation omitted). Therefore, just as "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," the court resolves any doubts about the parties' mediation clause in favor of mediation. *Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *see also Solvay Pharmaceuticals, Inc. v. Duramed Pharmaceuticals, Inc.*, 442 F.3d 471, 482 n. 10 (6th Cir. 2006) (same); *Cunningham & Associates*, 842 F.Supp.2d at 29 (noting a "long-standing and very strong public policy in this country favoring mediation").

Finally, Plaintiffs' repeated conjecture that mediation would be "unfruitful" and "unsuccessful" do not present grounds for denying a motion to dismiss for lack of mediation. ECF No. 58, at 1. In *Cunningham*, this exact argument was rejected by the Court. 842 F.Supp.2d at 30 ("Whether or not it is reasonable to expect that . . . mediation will resolve this dispute, the plaintiffs agreed to this clause and must

[6] It does not, however, present a federal question. *See e.g. Credit Suisse First Boston LLC v. Chai*, 317 F.Supp.2d 380 (S.D.N.Y. 2004); *see also generally Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 945 (9th Cir. 2004).

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abide by its provisions.") (citing *Leake v. Prensky*, 798 F.Supp.2d 254, 259 (D.D.C. 2011)). Likewise, in *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. National Mediation Board*, 930 F.2d 45 (D.C. Cir. 1991), it was held that even a mediator's statement that "mediation has failed" is not enough to release the parties from mediation without a formal declaration of unresolvability:

> It could be said at any stage in a mediation process prior to a successful conclusion of a collective bargaining agreement that mediation up to that point had failed. . . . Whether mediation will eventually work is truly unknowable – one of the chief attributes of mediation is that the passage of time alone will produce an atmosphere more conducive to settlement. . . . [O]ur review in this area has focused not on whether mediation could work but on the amount of time the [mediator] has held a [party] in mediation and that we have suggested that we will order the [mediator] to end mediation only after a theoretical time limit ("a period that is completely and patently unreasonable") has passed with no resolution.

Id. at 48-49.

Here, the mediator has not declared that "the parties are not able to resolve the dispute," as required by the contract. ECF No. 6, at 58. Plaintiffs have not argued, and cannot argue, that he has. *Cf.* ECF No. 56, at 2 ("[T]he mediator in the dispute . . . has not yet declared that the parties are unable to resolve the dispute . . ."). Plaintiffs' speculation that further mediation would be "unsuccessful" does not present grounds for denying a motion to dismiss. ECF No. 58, at 1. Indeed, Plaintiffs admit that their speculation has no bearing on mediation. *See* ECF No. 1, at 11 ("Once engaged, the neutral controls the conduct of the mediation process.").

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Plaintiffs' hypothesized unresolvability is simply not what the parties agreed to. *See* ECF No. 6, at 58. ("Both parties **shall** pursue the mediation process in good faith until the dispute is resolved or until the mediator determines that the parties are not able to resolve the dispute.") (emphasis added). To the extent the Court empathizes with the Plaintiffs' frustration with the multi-tiered alternative dispute resolution process that Plaintiffs designed, "it cannot grant relief contrary to the clear terms of the contract." *Leake v. Prensky*, 798 F.Supp.2d 254, 259 (D.D.C. 2011).

B. Because Plaintiffs Have Failed To Exhaust Their Tribal Remedies, Their Complaint Must Be Dismissed.

"[A]s a general rule, if a tribe has not explicitly waived exhaustion, courts lack discretion to relieve its litigation adversary of the duty of exhausting tribal remedies before proceeding in a federal forum." *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 32 (1st Cir. 2000). This rule is inclusive of any "issue of tribal court jurisdiction" which "must [be] fully exhaust[ed] before filing a case in federal court." *Eastern Shawnee Tribe of Oklahoma v. Douthitt*, No. 11-0675, 2012 WL 3637623, at *3 (N.D. Okla. Aug. 22, 2012) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987); *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir. 1993)); *see also Bank of America, N.A. v. Swanson*, 400 Fed.Appx. 159, 161 (9th Cir. 2010), cert. denied, 131 S.Ct. 2099 (2011) ("Generally, the rule of tribal exhaustion requires that federal courts give precedence to tribal courts to determine in the first instance the extent of their own

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jurisdiction to hear a particular case."); *Stock West Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992) (district courts must "dismiss the action, notwithstanding the fact it has subject matter jurisdiction over a civil action against a non-Indian, to permit a tribal court to determine in the first instance whether it has the power to exercise subject-matter jurisdiction . . . ."); *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 65 (2d Cir. 1997) ("[P]arties who challenge, under federal law, the jurisdiction of a tribal court to entertain a cause of action must first present their claim to the tribal court before seeking to defeat tribal jurisdiction in any collateral or parallel federal court proceeding"). Where tribal remedies have not been exhausted, a plaintiff's suit must be dismissed per FED. R. CIV. PROC. 12(b)(1). *Ninigret Development Corp.*, 207 F.3d at 35; *Landmark Golf Ltd. Partnership v. Las Vegas Paiute Tribe*, 49 F.Supp.2d 1169 (D. Nev. 1999).

An exception to this rule exists, however, where a tribal court's jurisdiction is not "colorable" or "plausible."[7] *Rincon*, 2012 WL 2928605, at *1. Any finding

[7] Other exceptions to this rule do exist, but are inapplicable here. Plaintiffs cannot allege that the Tribal Court's assertion of jurisdiction has been "motivated by a desire to harass" – indeed, its assertion served the purpose of simply compelling the parties to mediate in mutual good faith on a government-to-government basis. *Nat. Farmers Union v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985); *cf. generally* ECF No. 7, at 12-26. Nor can Plaintiffs, as discussed *infra*, genuinely allege that "exhaustion would be futile because of the lack of an adequate

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that a tribal court has not presented a "colorable or plausible" claim of jurisdiction is disfavored. *Whitetail v. Spirit Lake Tribal Court*, No. 07-0042, 2007 WL 4233490, at *1 (D.N.D. Nov. 28, 2007); ("Strengthening the authority of the tribal courts is favored . . . ."); *Aernam v. Nenno*, No. 06-0053, 2006 WL 1644691, at *10 (W.D.N.Y. June 9, 2006) ("[I]n order to foster an increased understanding of tribal sovereignty, encourage deference to and support for tribal courts, and advance cooperation, communication, respect, and understanding in the interaction of tribal, state, and federal courts, . . . considerations of comity . . . favor a ruling that [tribal courts are] the appropriate forum for adjudication . . . ."); *Prescott v. Little Six, Inc.*, 897 F.Supp. 1217, 1223 (D. Minn. 1995) (same).

The standard for a litigant to prove that tribal jurisdiction is "colorable" or "plausible" is quite low. *See Rincon*, 2012 WL 2928605, at *1 ("[T]he standard (to determine whether tribal exhaustion is required) is lower [than the standard to determine whether tribal jurisdiction actually exists]: Tribal jurisdiction need only be 'colorable' or 'plausible.'") (quoting *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848 (9th Cir. 2009)); *cf. FMC v. Shoshone–Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990) ("[F]actual findings in a tribal court's decision regarding tribal jurisdiction is reviewed for clear error.").

"[E]xhaustion is mandatory . . . when a case fits within th[is] policy."

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opportunity to challenge the [tribal] court's jurisdiction." *Nat. Farmers*, 471 U.S. at 856 n.21.

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Gaming World Intern., Ltd. v. White Earth Band of Chippewa Indians, 317 F.3d 840, 849 (8th Cir. 2003) (citing *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991)).

Here, the Yakama Tribal Court has provisionally found that it has jurisdiction on the following independent bases – all of which now necessitate a finding that "jurisdiction remains plausible." *City of Wolf Point v. Mail*, No. 10-0072, 2011 WL 2117270, at *2 (D. Mont. May 24, 2011). Again, as very recently determined by the Ninth Circuit, it is not for this Court to "now decid[e] whether the tribe actually has jurisdiction." *Rincon*, 2012 WL 2928605, at *1. Rather, the Court must defer to the Tribal Court until it fully and finally adjudicates these provisional rulings on jurisdiction.[8]

[8] Any argument that the Tribal Court system is biased, incompetent, or that adjudication therein would be futile should not be entertained by this Court:

> Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. The Supreme Court, citing the promotion of tribal self-government and principles of comity (as opposed to a jurisdictional prerequisite), has required litigants to exhaust their tribal court remedies before a district court may evaluate the existence of a tribal court's jurisdiction. This exhaustion policy provides a tribal court the first opportunity to examine its own jurisdiction . . . . Allegations of local bias and tribal court incompetence, however, are not exceptions to the exhaustion requirement. After exhaustion is completed, litigants may seek federal court review of a tribal court's ruling that it had jurisdiction. But unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it must enforce the

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(1) **The Tribal Court has provisionally found that the action arose on Yakama Reservation trust land.** *See* ECF No. 8, at 82 (finding that "the civil obligations incurred by Defendants arose, and continue to arise, on Yakama Reservation trust land"); *cf. Water Wheel Camp Rec. Area v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011) (tribal court jurisdiction where "the non-Indian activity in question occur[s] on tribal land"); *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir. 1999) ("Analysis of Indian jurisdiction over cases involving non-Indians generally turns on whether the tribe controls the land on which the dispute arose."); *see also* Tribal Court Order at 3-4, ¶ 5 ("[T]he Treaty With the Yakamas recognizes the Yakama Nation's authority to . . . regulate, non-Indian entities on Yakama trust lands."); *cf. Ford Motor Co. v. Kayenta Dist. Ct.*, 7 Am. Tribal Law 652, 658 (Navajo 2008) (Treaty with the Navajos' right to exclude afforded the Navajo Tribal Court the "jurisdiction to regulate non-Indians on tribal trust land"), *aff'd*, *Ford Motor Co. v. Todecheene*, 488 F.3d 1215 (9th Cir. 2007).

> tribal court judgment without reconsidering issues decided by the tribal court.

Burrell v. Armijo, 456 F.3d 1159, 1167-68 (10th Cir. 2006) (internal citation and quotation omitted); *see also Adams v. Moapa Band of Paiute Indians*, 991 F.Supp. 1218, 1221 (D.Nev. 1997) (holding that the exception to the exhaustion requirement does not apply unless the record contains "proof of bad faith or a motive to harass"); *cf.* ECF No. 64, at 6; ECF No. 64.

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In the Ninth Circuit, any presumption that tribal jurisdiction does not extend to nonmembers, *see Montana v. U. S.*, 450 U.S. 544 (1981), is inverted when an action arises on tribal trust land.[9] *Water Wheel*, 642 F.3d at 814; *see also Admiral Ins. Co. v. Blue Lake Rancheria Tribal Court*, No. 12-1266, 2012 WL 1144331, at *5 (N.D. Cal. Apr. 4, 2012) ("In the Ninth Circuit, **the *Montana* exceptions do not apply to jurisdictional questions over claims arising on tribal land within a reservation** . . . .") (quotation omitted; emphasis added); *Wellman v. Chevron*, 815 F.2d 577, 578 (9th Cir. 1987) (same). "Court[s] **cannot** conclude that [a] tribal court's lack of jurisdiction over Plaintiff's claim is 'plain' [when it involves] activities conducted on tribal land." *Grand Canyon Skywalk Dev't v. Vaughn*, No. 11-8048, 2011 WL 2491425, at *3 (D. Ariz. Jun. 23, 2011) (emphasis added); *see also Grand Canyon Skywalk Dev't v. Vaughn*, No. 11-8048, 2011 WL 2981837, at *2 (D. Ariz. Jul. 22, 2011) (where a "contract in question concerns" an action that arises "on reservation land[,] . . . [T]he Court cannot conclude that there is a 'plain' lack of tribal court jurisdiction . . . as required to avoid exhaustion").

Numerous courts hold that "a breach of contract occurs where the contract is

[9] The Ninth Circuit has made clear that *Montana* and its progeny – *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), *Nevada v. Hicks*, 533 U.S. 353 (2001), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) – are inapplicable when a dispute arises on tribal trust land, as here. *See generally Water Wheel*, 642 F.3d 802.

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to be performed." *Stickland v. Trion Group, Inc.*, 463 F.Supp.2d 921, 925 (E.D. Wis. 2006). Other courts hold that a contract is breached "where the agreement was entered into and where performance began." *Moncevoir Hyppolite v. Gorday*, No. 89-1843, 1990 WL 80684, at *7 (S.D. Fla. Mar. 22, 1990). In Washington State, a contract is breached where the contract was "negotiat[ed] for, enter[ed] into, carr[ied] out, and terminat[ed]." *Harrison v. Puga*, 480 P.2d 247, 257 (Wash. Ct. App. 1971). Elsewhere, the place of injury is where the plaintiff resides and sustains the economic impact of the loss. *In re Countrywide Financial Corp.*, 834 F.Supp.2d 949, 957 (C.D. Cal. 2012). The Restatement (Second) of Conflict of Laws § 188(2) (1971) combines these tests[10]:

> In the absence of an effective choice of law by the parties, the contacts to be taken into account . . . to determine the law applicable to an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the

[10] In at least two cases that the Nation is aware of, Ninth Circuit courts have employed the Restatement (Second) of Conflict of Laws to determine whether tribal jurisdiction is colorable or plausible. *See e.g. Stock West*, 964 F.2d at 920; *Espil v. Sells*, 847 F.Supp. 752 (D. Ariz. 1994). Both of these cases involved a dispute over "where" a contract claim "arose" and whether or not that was on tribal land for the purpose of the exhaustion requirement. In both cases, the courts found that this was a question for the tribal forum to answer in the first instance. As discussed *infra*, the facts of this suit counsel for the same.

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> subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Here, Plaintiffs' breach of Consent Decree "occurred" on Yakama trust land. *Water Wheel*, 642 F.3d at 813-14. The Consent Decree was negotiated on Yakama trust lands. ECF No. 7, at 70-77. The Consent Decree was executed at the Yakama Nation Main Agency Offices, on Yakama Nation trust land. ECF No. 8, at 27. A majority of the negotiations occurred on Yakama Nation trust land. *Id.* The place of performance was only to be on Yakama Nation trust land – the subject matter being Yakamas and transactions taking place on Yakama Nation trust land only. *Id.* The subject of the Consent Decree is fuel sold on Yakama trust lands. The impact of economic loss will be felt on Yakama lands. Any cost of litigation to force mediation will derive from the Nation's fisc. *Id.*

Importantly, though, these are facts for the Tribal Court to fully and finally address. In the Ninth Circuit, if there is any dispute over "where" exactly the contract dispute "arose" for the purpose of establishing jurisdiction, "[t]hese issues relevant to the Tribal Court's jurisdiction should be addressed to the Tribal Court in the first instance." *Admiral Ins.*, 2012 WL 1144331, at *6; *see also Landmark Golf*, 49 F.Supp.2d at 1175-76 ("Where there is a colorable question as to whether the disputed issue actually involves a reservation affair or arises on the reservation, a federal court **must** defer to the tribal court to make the determination.") (emphasis added); *Stump*, 191 F.3d at 1072 (holding that where "there is a genuine dispute

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over whether the [contractual] claim arose[,] it is not plain that the tribal court lacks jurisdiction" and that the plaintiff "is required to exhaust its remedies in tribal court before challenging tribal jurisdiction in federal court"); *Progressive Northwestern Ins. Co. v. Nielsen*, No. 01-0091 2002 WL 417402 (D.N.D. Jan. 8, 2002) (same); *Malaterre v. Amerind Risk Management*, 373 F.Supp.2d 980, 985 n.5 (D.N.D. 2005) (even where a tribe's argument as to where a contract claim arises "appear[s] to be questionable at best" federal courts must "afford the tribal courts the first opportunity to address such matters.").[11]

[11] Any argument that the rule of *Water Wheel* applies only to disputes involving a lease of tribal land, *see* ECF No. 64, at 3, cannot withstand the rulings of *Grand Canyon Skywalk*, and *Admiral Ins*. *Grand Canyon Skywalk* specifically held that where a "contract in question . . . concerns the activities of a non-Indian on [tribal] land . . . the Court cannot conclude that there is a 'plain' lack of tribal court jurisdiction over this claim as required to avoid exhaustion." *Grand Canyon Skywalk*, 2011 WL 2981837, at *2. Thus, any argument that the contract at issue in this dispute do not "concern[] the activities of a non-Indian on [tribal] land," this is an argument that must be presented to the Tribal Court before it can be presented in this forum. *See e.g. Admiral Ins.*, 2012 WL 1144331, at *6 (tribal court remedies must be exhausted over a breach of contract claim involving a non-Indian "entered into off tribal lands" where the claims pertaining to the breach of contract

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(2) The Tribal Court has provisionally found that even if *Montana* did apply here, **Defendants entered into a consensual relationship with the Yakama Nation**; *i.e.* the Consent Decree. *See* ECF No. 8, at 82. ("[T]he dispute at issue arose out of a consensual relationship with the Yakama Nation, the contract sought to be enforced"); *cf. Montana*, 450 U.S. at 565 (tribal courts have jurisdiction over "consensual relationships with the tribe"); *Dish Network Corp. v. Tewa*, No. 12-8077, 2012 WL 5381437, at *8 (D. Ariz. Nov. 1, 2012) (tribal jurisdiction exhaustion required where "a plausible, colorable argument" that a "consensual relationship" exists). The Consent Decree could have, but did not in any way, disclaim Tribal Court jurisdiction over its enforcement.

Any argument that *Montana*'s "consensual relationship" test applies only to "commercial relationships between the tribe . . . and private actors, not public agencies or officials" is mistaken.[12] ECF No. 10, at 6. In *City of Wolf Point*, this exact issue was addressed. 2011 WL 2117270. In that Ninth Circuit District Court case, the state argued that exhaustion was not required "because tribal jurisdiction cannot be exercised over state officers who act in their official capacities." *Id.* at

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may have "arose" on tribal land). This rule in no way "swallow[s] the rule of *Montana*" – the *Water Wheel* rule is not an exception to the *Montana* rule. As discussed *supra*, the *Montana* rule does not apply on tribal lands. ECF No. 64 at 3.

[12] Plaintiffs themselves have already submitted that state/tribal fuel tax agreements "are private, consensual relationships." ECF No. 1, at 7.

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*1. The court disagreed:

> Whether the events alleged in the tribal court complaint occurred on Indian land or on non-Indian land . . . is not settled. In *Hicks*, claims were asserted against state officials who entered a reservation to search the home of a tribal member who was suspected of committing crimes outside the reservation. The facts here are distinctly different. The claims in this case are for acts and conduct alleged to have been carried out against Indians within the exterior boundaries of the reservation. . . . **[T]he Ninth Circuit [has] specifically declined to address whether agents of a State may be sued in tribal court**. . . . [N]umerous questions are raised by the pleadings in the tribal court action that may bear directly upon whether that forum has jurisdiction over the matter before it. Those questions cannot appropriately be addressed short of full and final resolution of all issues in that case. **A conclusion that the tribal court has jurisdiction remains plausible. Further proceedings in this Court are premature absent exhaustion of tribal court remedies. The case should be dismissed**.[13]

Id. at *2 (quotation and citation omitted; emphasis added); *see also Hicks*, 533 U.S.

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[13] Although Plaintiffs argue elsewhere that *Wolf Point* does not apply to a state/tribal contract dispute, *see* ECF No. 64, at 5, they fail to cite to any authority that holds to the contrary. This is their burden; one that they cannot meet. There simply is no authority holding that a plaintiff seeking adjudication in a tribal forum cannot make a "'colorable' or 'plausible'" under the "lower" standard necessary to require tribal court exhaustion. *Rincon*, 2012 WL 2928605. Indeed, *Hicks* expressly refused to hold as Plaintiffs argue it did. 533 U.S. at 373. The Ninth Circuit Court of Appeals has held that the "limited nature of *Hicks*'s holding" renders that language "inapplicable" to cases where, as here, the facts of that case can be distinguished. *McDonald v. Means*, 309 F.3d 530, 540 (9th Cir. 2002).

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at 373 ("**We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law enforcement duties. Action unrelated to that is potentially subject to tribal control** . . . .") (emphasis added); *Water Wheel*, 642 F.3d at 809 (citing *Hicks*' "explicitly narrow" exception as being a "state's considerable interest in executing a search warrant for an off-reservation crime").

Other cases that involve states are not on point here because they all, like *Hicks*, involve state agents being sued for, *inter alia*, federal civil rights violations and money damages for performance of law enforcement duties. *See County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998) (no *Montana* "consensual relationship" jurisdiction over a law enforcement contractual dispute); *MacArthur v. San Juan County*, 497 F.3d 1057, 1072 (10th Cir. 2007) ("[T]his case is unique in that the consensual relationship at issue involves . . . an exercise of the **police power** on non-Indian land."); *id.* at 1074 n.10 (expressing "no opinion" on non-"police power" relationships). Further, these cases explicitly do not apply where, as here, a state's "activity occurs on Indian land." *Id.*; *see also Water Wheel*, 642 F.3d at 814 (same). Here, the "Yakama Nation is suing Defendants to enjoin and restrain Defendants from breaching, and continuing to breach, the Consent Decree." ECF No. 7, at 15. This has no bearing on Plaintiffs' "police power."

The facts in this case are strikingly similar to those in *City of Wolf Point* warrant the same result. Plaintiffs are not exercising law enforcement duties on

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tribal land. The state's interest in terminating the Consent Decree is raising revenue from Yakama lands, and not one of "police power," even broadly defined. *See e.g. Township of Lyndhurst v. Priceline.com Inc.*, 657 F.3d 148, 158 (3rd Cir. 2011) (noting a "clear distinction between the power of taxation for revenue and police powers") (quotation omitted); *County of Monroe, Florida v. Priceline.com, Inc.*, No. 09-10004, 2009 WL 4890664, at *6 (S.D. Fla. Dec. 17, 2009) ("taxing power . . . is fundamentally different from [state] police power"). Proceedings in this Court are premature absent exhaustion.

(3) The Tribal Court has provisionally found that even if *Montana* does apply, **Defendants' breach of the Consent Decree will harm the Nation's political integrity, economic security, and health and welfare.** *See* ECF No. 8, at 82; *cf. Montana*, 450 U.S. at 566 (tribe has jurisdiction over non-Indians whose "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."). The Ninth Circuit very recently confirmed this rule in *Rincon*, 2012 WL 2928605; *see also Evans v. Shoshone-Bannock Land Use Policy Comm'n*, No. 12-0417 (Dec. 20, 2012), ECF No. 62.

Further, in *Water Wheel* the Ninth Circuit held that where the power "to manage and control an asset capable of producing significant income" was at issue, tribal jurisdiction exists. 642 F.3d at 819. Here, the subject matter of the Consent Decree surely meets this standard. Pursuant to R.Y.C. § 30.11.02 the Nation charges a tax of $0.055 per gallon of fuel sold to Yakamas. ECF No. 8, at 20.

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Recognizing the high poverty and unemployment rates on the Reservation, the Yakama tax is used to fund valuable services provided by the Nation to its citizens.[14] *See* R.Y.C. § 30.11.08 (Yakama petroleum retailers must "give Yakamas employment preference"); R.Y.C. § 30.11.12 (fuel tax revenues "shall be a benefit to the health, safety and general welfare of all residents of the Yakama Reservation"); ECF NO. 56, at 91 (discussing the Yakama Nation Tribal Transit Program; a program funded by the Nation to provide transportation services to disadvantaged Yakamas). Were Plaintiffs to "terminate" the Consent Decree, Yakamas would pay $.28125 more for each gallon of gas. ECF No. 8, at 26, ¶ 29. This is a 200% increase in state-initiated per-mile charges on Yakamas. *Id.* "For those Yakamas who live paycheck-to-paycheck or without employment, which is too many Yakamas, these [additional state] surcharges are significant" as they "prevent certain Yakamas from travelling at all," thereby "ultimately prevent[ing] Yakamas from their way of Indian life." *Id.* at 27, ¶ 33. Indeed, although roughly

[14] In contrast, Washington State's motor vehicle taxes are used *exclusively* to fund state highway and county arterial construction and maintenance. Although not directly at issue, the Treaty With The Yakamas, 2 Stat. 951 (1859) [hereinafter "Treaty"], guarantees that the state cannot charge Yakamas for highway and county arterial construction and maintenance. *U.S. v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007).

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70% of Yakamas have reliable transportation, their inability to utilize that transportation has caused "difficulty [in] obtaining employment." ECF NO. 56, at 89, 91. Also due to this lack of mobility, "[l]ow-income individuals have difficulty accessing education and social services that will assist individuals to become self-sufficient citizens." *Id.* at 91. Plaintiffs simply cannot provide any argument to contradict the Nation's position – their breach of the Consent Decree will harm the Nation's political integrity, economic security, and health and welfare

Plaintiffs make much of the Supreme Court's decision in *Plains Commerce* to argue that "in order for the exhaustion doctrine to apply 'the nonmember conduct that the tribe seeks to regulate must do more than injure the tribe, it must imperil the subsistence of the tribal community.'" ECF No. 10, at 7-8 (quoting *Plains Commerce*, 544 U.S. at 341). While this may be true, this is a matter for the Tribal Court to determine in the first instance. Indeed, even the district court in *Plains Commerce* has recently held that it must "defer in the first instance to the Tribal Court to determine the effect of the Supreme Court's decision in *Plains Commerce*":

> Th[e "patently violative of express jurisdictional prohibitions"] exception to the tribal-court exhaustion doctrine "refers to specific prohibitions on designated tribal remedies or to prohibitions on a tribal forum's assertion of jurisdiction over a dispute." "A substantial showing must be made by the party seeking to invoke [the express jurisdictional prohibition] exception to the tribal exhaustion rule." **Indeed, "tribal courts rarely lose the first opportunity to determine jurisdiction because of an 'express jurisdictional prohibition.'" The majority of cases applying the "express**

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> **jurisdictional prohibition" exception involve statutes that grant the federal government exclusive jurisdiction**. . . . However, there is nothing in the Supreme Court's decision [in *Plains Commerce*] that provides an express jurisdictional prohibition to further Tribal Court proceedings . . . . There is no applicable statute granting exclusive federal jurisdiction here. . . . In short, there is nothing about the presently pending Tribal Court case . . . that triggers an express jurisdictional prohibition of a Tribal Court proceeding.

Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., No. 12–3021, 2012 WL 6731812, at *1, *7-*8 (D.S.D. Dec. 28, 2012) (citations omitted, emphasis added).

Respectfully, because the Tribal Court's jurisdiction over this dispute is colorable, plausible, and not patently violative of express jurisdictional prohibition, this Court "lack[s] discretion to relieve [Plaintiffs] of the duty of exhausting tribal remedies before proceeding in [this] federal forum." *Ninigret Development*, 207 F.3d at 32. Plaintiffs' Complaint must be dismissed.

C. Because Plaintiffs Have Not Pled A Waiver Of Tribal Sovereign Immunity, Their Complaint Must Be Dismissed.

Plaintiffs state in their Complaint that the Nation has waived any sovereign immunity as a defense to this Court's jurisdiction "under the terms of the consent decree . . . because the Nation has twice before invoked this Court's jurisdiction over their disputes concerning motor vehicle fuel taxation." ECF No. 1, at 5. Plaintiffs are mistaken.

"[T]he law in this jurisdiction is clear that tribal sovereign immunity may only be waived by the tribe expressly or by Congress' unequivocal abrogation."

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Tonasket v. Sargent, 830 F.Supp.2d 1078, 1081 (E.D. Wash. 2011); *see generally Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Okla. Tax Com'n v. Potawatomi Ind. Tribe*, 498 U.S. 505, 510 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). "Indian tribes, and tribal officials acting within the scope of their authority, are immune from lawsuits or court process in the absence of congressional abrogation or tribal waiver." *Tonasket*, 830 F.Supp.2d at 1082. Tribal sovereign immunity "'is an immunity from suit rather than a mere defense to liability.'" *Id.* (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143- 44 (1993)). Tribal immunity extends to claims for declaratory relief and is not defeated by a claim that a tribe acted beyond its power. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991).

Plaintiffs' theory of waiver has been rejected by the Ninth Circuit in the recent decision of *Miller v. Wright*, 699 F.3d 1120 (9th Cir. 2012). In *Miller*, the plaintiffs brought a suit for injunctive relief against the Puyallup Tribe in the U.S. District Court for the Western District of Washington.[15] The plaintiffs argued that

[15] Notably, the plaintiffs did so only after the Tribal Court dismissed the action on jurisdictional grounds, and the Tribal Court of Appeals affirmed the dismissal. *Miller*, 699 F.3d at 1123.

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the tribe waived its sovereign immunity by "ceding its authority to Washington State when entering into [a] tax contract" and by agreeing to dispute resolution procedures therein. *Id.* at 1124.

The District Court first found that the tax contract only settled "'longstanding dispute about the state's power to tax cigarette sales by tribal retailers on Indian reservations to non-Indians,'" by allowing "'the state to retrocede its cigarette taxes to the tribe for transactions covered by a [state tax] in exchange for the tribe's agreement to impose a cigarette tax equal to the state's and to use the proceeds to fund essential tribal government services.'" *Id.* at 1125 (quoting *United States v. Wilbur*, 674 F.3d 1160, 1165-66 (9th Cir. 2012)). The Court then found that "[n]othing about compliance with [the contract] evidences a clear waiver by the Tribe of its sovereign immunity" as required by Ninth Circuit precedent *Id.* (citing *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418–19 (2001); *Maxwell v. County of San Diego*, 697 F.3d 941, 953 (9th Cir. 2012)).

Here, too, the tax contract between the parties settled "longstanding dispute[s] about the state's power to tax" and contains absolutely no "waiver by the Tribe of its sovereign immunity." *Id.* (quotation omitted). Plaintiffs cite to no provision of the Consent Decree that clearly and unequivocally waves the Nation's sovereign immunity because there is no such provision. Plaintiffs have failed to meet their burden to show that sovereign immunity has been waived by the

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Consent Decree. They provide no proof. Their Complaint must be dismissed. *See e.g. Tonasket*, 830 F.Supp.2d 1078.

Plaintiffs' argument that the Nation has waived its sovereign immunity by agreeing to the dispute resolution procedures of the Consent Decree was also addressed in *Miller*. In *Miller*, like here, the tax contract included provisions to resolve disputes using mediation; a protocol for notifying the other party that a violation has occurred; a procedure for establishing whether a violation has in fact occurred; an opportunity to correct such violation; and a provision providing for termination of the agreement should the violation fail to be resolved through mediation and/or arbitration. WASH. REV. CODE § 43.06.465(10). In looking for a waiver for sovereign immunity in this contract, the Court stated:

> The inclusion of a mediation provision to resolve disputes between the State of Washington and the Tribe does not evidence a clear and explicit waiver of immunity. As a preliminary matter, mediation generally is not binding and **does not reflect an intent to submit to adjudication by a non-tribal entity.** Moreover, the [tax contract] in this case did not . . . subject[the Tribe] to the jurisdiction of the state . . . . The Tribe did not waive its sovereign immunity when it executed the [tax contract].

Id. at 1127-28 (emphasis added).

Here, too, the Consent Decree evidences no "clear and explicit waiver of immunity."[16] In fact, tribal immunity is not even mentioned.[17] The only clause

[16] Again, although it is clear that no waiver exists here, this is an issue for the Tribal Court to determine in the first instance before the jurisdiction of this forum

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that can *arguably* be said to have, at one point, waived the Nation's immunity is ¶ 4.2 of the 1994 Consent Decree. That clause reads, in relevant part:

> Subject to [the alternative dispute resolution clause at] ¶ 4.7, either the Yakama Indian Nation or the State of Washington may initiate an action in this Court at any time **for the limited purpose of requesting the Court to enforce the Consent Decree. . . . The parties consent to such an action being brought for the limited purpose of enforcing this Consent Decree**, including an action to recover monies alleged to be owed either party . . . .

ECF No. 8, at 40. But this provision was stricken out of the agreement, in 2006:

> The parties agree to modify the terms of the 1994 Consent Decree, as set out below: . . . **The parties agree that the provisions of . . . ¶ 4.2 for maintaining the continuing jurisdiction of the court <u>should be deleted.</u>** The parties agree to resolve further disputes exercising mutual good faith on a government-to-government basis and, to the extent they are unable to resolve such disputes, the dispute resolution

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can be provoked; and at this early stage in that litigation, the issue has yet to be so examined or even raised. *See Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1299-1300 (8th Cir. 1994) ("[E]xhaustion of tribal remedies permits . . . 'a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed [in the federal district court].'") (quoting *National Farmers Union*, 471 U.S. at 856-57); *City of Wolf Point*, 2011 WL 2117270, at *2 (same).

[17] *See* ECF No. 8, at 56-57 ("This Consent Decree and order addresses only the taxation and regulation of motor vehicle fuel and special fuel and shall not be construed as affecting any other area of Tribal or State taxation or regulation.").

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process in ¶ 4.7 shall apply.

ECF No. 8, at 62 (emphasis added). By any stretch of interpretation, the Nation has not waived its sovereign immunity from suit.

Yet even were there a question of the parties' intent regarding this clause, this ***still*** merits a reading that leaves the Nation's immunity in tact. First, again, any waiver of tribal sovereign immunity must be "strictly construed," *Ramey Const. v. Apache Tribe of Mescalero Reserv.*, 673 F.2d 315, 320 (10th Cir. 1982), and where there is any question of interpretation the Court must assume a "strong presumption" against waiver. *Demontiney v. U.S. ex rel. Dept. of Interior*, 255 F.3d 801, 811 (9th Cir. 2001). Second, again, because Plaintiffs drafted the Consent Decree, any ambiguous language therein should be interpreted in favor of the Nation. *Northwest Administrators, Inc. v. B.V. & B.R., Inc.*, 813 F.2d 223, 226 (9th Cir. 1987).

Pleading a waiver of tribal sovereign immunity is a "jurisdictional prerequisite." *Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040, 1044 (8th Cir. 2000). Here, Plaintiffs have failed to meet their burden. This Court lacks jurisdiction over the Nation. Plaintiffs' Complaint must be dismissed pursuant to FED. R. CIV. PROC. 12(b)(1).

D. Because Plaintiffs Cannot Assert An *Ex Parte Young* Exception To Tribal Sovereign Immunity, Their Complaint Must Be Dismissed.

In what appears to be an attempt to manufacture an exception to tribal immunity, Plaintiffs have named Judge Ted Strong as a party to this action. *See*

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generally ECF No. 1. Plaintiffs' legal theory carries no merit, for at least two reasons.

First, in this Circuit, a suit filed against a tribal official **acting in his official capacity** is barred by the tribe's immunity **unless the official acted outside the scope of his authority**. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 728 (9th Cir. 2008). *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176 (9th Cir. 2012) is not to the contrary. *Salt River* was a FED. R. CIV. PROC. 19 case, and did not overturn the surplus of Ninth Circuit law that disagrees with Plaintiffs. *See e.g. Hirsh v. Justices of Supreme Court of State of Cal.*, 67 F.3d 708 (9th Cir. 1995). Rather, as the doctrine was recently clarified by the Ninth Circuit in *Miller*:

> A suit against the Tribe and its officials in their official capacities is a suit against the tribe [and] is barred by tribal sovereign immunity unless that immunity has been abrogated or waived. Tribal sovereign immunity extends to tribal officials when acting in their official capacity and within the scope of their authority. **A plaintiff cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity**. The Tribe's sovereign immunity thus extends to its officials who [a]re acting in their official capacities and within the scope of their authority . . . .

699 F.3d at 1128-29 (citation omitted; emphasis added).

Here, as in *Miller*, Plaintiffs did not file a "separate and distinct claim" against Judge Strong – they filed a suit against the Nation and added the Chief Judge in a blatant attempt to "circumvent tribal immunity by the simple expedient of naming an officer of the Tribe." *Id.* at 1129. In order to skirt the general rule

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that "judges [sued] in their official capacity . . . for acts performed within the scope of [their] authority is equivalent to suing the [tribe] itself," Plaintiffs must show that the acts performed by Judge Strong were outside of the scope of his authority. *Marsh v. Randolph*, No. 09-0013, 2012 WL 397778, at *4 (E.D. Tenn. Feb. 7, 2012). Here, because adjudication of disputes before the Tribal Court is not outside of that scope of authority,[18] Plaintiffs' Complaint must be dismissed. *Cf. In re Franceschi*, 268 B.R. 219, 224 (9th Cir. 2001) (noting "an exception to this rule where 'extraordinary circumstances' exist, for example, where the . . . tribunal is incompetent by reason of bias") (quoting *Hirsh*, 67 F.3d at 713).

Second, even were the *Ex Parte Young* doctrine to apply to Defendants in this instance – it does not – the doctrine only "allows federal courts to award prospective injunctive relief against [tribal] officials for violations of *federal* law." *Warren*, 859 F.Supp.2d at 542 (emphasis added); *see also id.* at 543 ("[T]he doctrine of *Ex parte Young* applies to violations of federal law only."). Here, as discussed *infra*, although Plaintiffs have alleged that this lawsuit arises "under a treaty of the United States," ECF No. 1, at 5, they have no right to assert a claim pursuant to that federal law – Plaintiffs are not a beneficiary of that agreement and the Treaty did not create a private cause of action for nonparties thereto. The

[18] Judge Strong is also judicially immune, as the action taken was beyond merely "colorable" or "plausible" and therefore "not in the complete absence of all jurisdiction." *Penn v. U.S.*, 335 F.3d 786, 789 (8th Cir. 2003).

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Treaty has no place in this contractual dispute.

Finally, even were *Ex Parte Young* to apply to the Defendants, and even were a federal question properly before the Court – it is not – the *Ex Parte Young* doctrine does not provide the relief requested. *Ex Parte Young* applies "when a party seeks only prospective equitable relief – as opposed to any form of money damages or other legal relief. *Ex Parte Young* will not go so far as to allow federal jurisdiction over a suit that seeks to redress past wrongs – only ongoing violations are covered." *LaFavre v. Kansas ex rel. Stovall*, 6 Fed.Appx. 799, 805 (10th Cir. 2001) (quotation omitted). Nor does the doctrine "allow an award for monetary relief that is the practical equivalent of money damages, even if this relief is characterized as equitable." *Id.* Here, Plaintiffs are seeking "[d]amages in an amount to be proven at trial" and that the Court "confirm the [Plaintiffs'] ability to assess and collect the full amount of motor vehicle fuel and special fuel taxes." ECF No. 1, at 15. Plaintiffs are barred from seeking this relief, as it is either retrospective or the practical equivalent of monetary damages.

E. Because Plaintiffs Have Not Presented A Valid Federal Question, Their Complaint Must Be Dismissed.

Plaintiffs assert that this Court has jurisdiction because their causes of action "aris[e] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Absent Plaintiffs' question of Tribal Court jurisdiction – which, as

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discussed above, is not properly before this Court[19] – their Complaint fails to identify a federal question. As such, at this time it is "appropriate to enter judgment of dismissal in favor of the Defendants without prejudice to re-filing a subsequent action depending on the ruling of the Tribal Court." *Plains Commerce*, 2012 WL 6731812, at *8.

1. Plaintiffs Cannot Assert A Claim Arising Under The Treaty With The Yakama.

Plaintiffs assert that "[t]his court has subject matter over plaintiffs' claims under 28 U.S.C. § 1331 as the claims involve a federal question under a treaty of the United States." ECF No. 1, at 5; *see also* ECF No. 1-2 (citing the Treaty with the Yakama, 12 Stat. 951 (1855), as the "U.S. Civil Statute under which [they] are filing"). Plaintiffs are incorrect.

It was long ago established that a litigant may not gain access to federal court by artful pleading, and that only those allegations necessary to state a claim for the relief requested are to be considered in deciding whether a plaintiff's claim "arises under" federal law. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667

[19] *See Auto–Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation*, 495 F.3d 1017, 1021 (8th Cir. 2007) ("[E]ven where a federal question exists, due to considerations of comity, federal court jurisdiction does not properly arise until available remedies in the tribal court system have been exhausted."); *Plains Commerce*, 2012 WL 6731812, at *3 (same).

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(1950). Thus, a plaintiff may not "sneak" into federal court by inserting into his complaint federal claims that rebut defenses he anticipates his opponent will raise. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908); *see also NSI Intern., Inc. v. Mustafa*, No. 09-1536, 2009 WL 2601299, at *5 (E.D.N.Y. Aug. 20, 2009) ("[A] mere impact on a federal issue or federal claim, as a collateral consequence of a state law cause of action, is not sufficient to meet the standard required for federal question jurisdiction.") (citing *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 813 (1986)). "Jurisdiction does not attach merely because, in the course of the litigation, it may become necessary to construe a law or treaty of the United States." *Phelps v. Hanson*, 163 F.2d 973, 974 (9th Cir. 1947).

Plaintiffs are thus precluded from bringing a claim arising under the Treaty. "An action arises under a treaty only when the treaty expressly or by implication provides for a private right of action." *Columbia Marine Services, Inc. v. Reffet, Ltd.*, 861 F.2d 18, 21 (2d Cir. 1988). An entity that is not a beneficiary to a treaty cannot assert right of action thereunder. *LeClerc v. Webb*, 419 F.3d 405, 412 n.12 (5th Cir. 2005). Only a "signatory tribe[] can exercise treaty rights . . . because a treaty is a contract between sovereigns . . . ." *State v. Posenjak*, 126 Wash.App. 1060 (Wash. Ct. App. 2005) (citing *United States v. Washington*, 641 F.2d 1368, 1372 (9th Cir. 1981); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979)).

Here, although they are bound by it, Plaintiffs are neither a signatory nor a

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beneficiary to the Treaty. Plaintiffs cannot assert a claim that "arise[s] under" the Treaty. Indeed, they do not even attempt to. Aside from asserting in the "jurisdiction" section of their Complaint that Plaintiffs' "claims involve a federal question under a treaty of the United States," neither their Complaint nor any other pleading even mentions the Treaty. ECF No. 1, at 5; *see* also *id.* at 14-15 (asserting causes of action that do not reference or involve the Treaty). Under the well-pleaded complaint rule, "a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." *Louisville & Nashville R.R.*, 211 U.S. 149, 152 (1908). Plaintiffs have not met this burden.

2. The Consent Decree Does Not Present A Federal Question.

"A district court loses all power over determinations of the merits of a case when it is voluntarily dismissed. . . ." *Anago Franchising, Inc. v. Shaz, LLC*, 677 F.3d 1272, 1279-80 (11th Cir. 2012). Plaintiffs' assertion of a federal cause of action arising from "the legal interpretation and construction of provisions of orders and the consent decree entered by this Court in 1994 and 2006" has no basis in federal law. ECF No. 1, at 5.

"Because federal courts are courts of limited jurisdiction, the Supreme Court has held that a motion to enforcement settlement after a case has been dismissed **must** be supported by an independent basis of jurisdiction." *Alvarez v. City of New York*, 146 F.Supp.2d 327, 334 n.5 (S.D.N.Y. 2001) (emphasis added) (citing

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Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377-78 (1994)); *see also O'Connor v. Colvin*, 70 F.3d 530, 532 (9th Cir. 1995) ("When the initial action is dismissed, federal jurisdiction terminates. A motion to enforce the settlement agreement, then, is a separate contract dispute requiring its own independent basis for jurisdiction.") (citation omitted); *Myers v. Richland County*, 429 F.3d 740, 745 (8th Cir. 2005) ("Because an action to enforce a settlement agreement is a claim for breach of contract, it should be heard in state court unless it has its own basis for jurisdiction.") (quotation omitted); *York v. County of El Dorado*, 119 F.Supp.2d 1106, 1108-10 (E.D. Cal. 2000) (denying a motion to "terminate the provisions of the Order of Settlement" because there was no independent basis of jurisdiction).

There is a limited exception to its rule: "the court is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree." *Kokkonen*, 511 U.S. at 381-82. "[T]he Supreme Court's statement [in *Kokkonen*] . . . 'if the parties agree' [means] that the parties must agree to the district court's order retaining jurisdiction . . . ." *Anago Franchising*, 677 F.3d at 1279-80. Not only is a showing of the parties' intent to evoke the court's continuing jurisdiction necessary, but a party seeking to manufacture a federal question vis-à-vis a consent decree must also provide "some evidence that a district court intended to place its 'judicial imprimatur' on the settlement." *Torres v. Walker*, 356 F.3d 238, 245 n. 6 (2d Cir. 2004) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health &*

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Human Res., 532 U.S. 598, 605 (2001)).

The exception to *Kokkonen* cannot apply where, as here, a court's authorization of continued jurisdiction is subsequently revoked. *See Brass Smith, LLC v. RPI Industries, Inc.*, 827 F.Supp.2d 377, 383 (D.N.J. 2011). ("Notwithstanding a federal court's power to retain ancillary jurisdiction over a settlement agreement, a federal court may also decide to terminate or divest itself entirely of jurisdiction over the settlement agreement."). This is particularly true where, also as here, the court's decision to revoke its continuing jurisdiction is based upon the parties' agreement that it should do so. *Anago Franchising*, 677 F.3d at 1279-80.

In *Arata v. Nu Skin Intern., Inc.*, 96 F.3d 1265 (9th Cir. 1996), for instance, the district court had entered an order that "[r]eserve[d] continuing and exclusive jurisdiction" over a settlement agreement. *Id.* at 1267. Then, two years later, the Court modified its order to find that "no further purpose is served by continuing to retain jurisdiction over this matter" and to disclaim the continuing jurisdiction that was previously retained. *Id.* at 1268. When the defendant in the original action sought to enforce the agreement, the District Court denied the motion. *Id.* On appeal, the Ninth Circuit affirmed the decision, holding that "the district court's decision to terminate its previously retained jurisdiction was well within its discretion." *Id.* at 1269; *see also Brass Smith*, 827 F.Supp.2d 377.

Here, the Consent Decree did, prior to 2006, contain a clause retaining this

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Court's jurisdiction: "Subject to [the alternative dispute clause in] ¶¶ 4.7 and 4.7, either the Yakama Indian Nation or the State of Washington may initiate an action in this Court at any time for the limited purpose of requesting the court to enforce the terms of this Consent Decree." ECF No. 6, at 55. But that provision was unmistakably deleted in 2006:

> The parties agree that provisions ¶ 4.1 and ¶ 4.2 for maintaining the continuing jurisdiction of the court should be deleted. The parties agree to resolve further disputes exercising mutual good faith on a government-to-government basis and, to the extent they are unable to resolve such disputes, the dispute resolution process in ¶ 4.7 [of the 1994 Consent Decree] shall apply.

ECF No. 6, at 76 (emphasis added). Thus, just as the District Court did in *Arata*, 96 F.3d 1265, the Court here has disclaimed jurisdiction over this action.

Plaintiffs' arguments to the contrary cannot be sustained. Plaintiffs argue that "[d]eleting provisions for continuing jurisdiction does not require foreclosing the parties from coming back to this Court" to enforce the Consent Decree. ECF No. 59, at 7 n. 1. According to Plaintiffs' interpretation of ¶ H, the clause means that "[w]ithout continuing jurisdiction, the parties must initiate a new case." ECF No. 59, at 7 n. 1. Defendants actually agree on this interpretation. However, this does not evoke the *Kokkonen* exception. To the contrary, according to on-point federal law, **initiation of a new case requires a new federal question**. *Kokkonen*, 511 U.S. 375; *York*, 119 F.Supp.2d 1106; *see also McMahon Foundation v. Amerada Hess Corp.*, 98 Fed.Appx. 267, 270 (5th Cir. 2004) (the exception to

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Kokkonen does not apply where a plaintiff "seek[s] to have its claims adjudicated under a new docket number"); *Bricklayers and Allied Craftworkers v. DiBernardo Tile and Marble Co., Inc.*, No. 08-0044, 2012 WL 3508931, at *3 (N.D.N.Y. Aug. 14, 2012) ("[I]n *Kokkonen*, the Supreme Court emphasized the distinction between a new action to enforce a settlement agreement and merely reopening the dismissed suit . . . .") (quotation omitted). Indeed, in *Ortolf v. Silver Bar Mines, Inc.*, 111 F.3d 85 (9th Cir. 1997), the Ninth Circuit explicitly held that, in light of *Kokkonen*, District Court "orders purport[ing] to reserve a right to the plaintiff 'to reinstitute' the previous lawsuits if the settlement agreements were not performed" do not create a federal question.[20] *Id.* at 87.

In looking to the text, the Consent Decree deletes jurisdictional provisions in "¶ 4.1 **and** ¶ 4.2" of the 1994 version of the contract, not just ¶ 4.1 and whichever provisions of ¶ 4.2. that Plaintiffs now find inconvenient. ECF No. 6, at 76 (emphasis added); *cf.* ECF No. 6, at 23. What does ¶ H do, if not foreclose the parties from "coming back to this Court"? It clearly was meant to do something. *See Burdon Cent. Sugar Refining Co. v. Payne*, 167 U.S. 127, 142 (1897) ("[A] contract must be so construed as to give meaning to all its provisions, and that that interpretation would be incorrect which would obliterate one portion of the

[20] It should be assumed that Judge Imbrogno was aware of *Kokkonen* and *Ortolf* in 2006, and clearly meant the clause removing the Court's jurisdiction to do just that.

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contract in order to enforce another part thereof. . . ."). As discussed above, the added language that "to the extent [the parties] are unable to resolve such disputes, the dispute resolution process in ¶ 4.7 [of the 1994 Consent Decree] **shall** apply" sheds light what the provision was meant to do. ECF No. 6, at 76 (emphasis added). It made "the dispute resolution process in ¶ 4.7 [of the 1994 Consent Decree]" the sole process "to resolve such disputes." *Id.* Plaintiffs' attempt to read ¶ H out of the 2006 additions serves only to "render that broader language meaningless," thereby leaving "a portion of the contract useless, inexplicable, void, or superfluous." *California Indus. Facilities Resources, Inc. v. U.S.*, 104 Fed.Cl. 589, 598-99 (Fed. Cl. 2012) (quotation omitted). This is a disfavored interpretation, and one that should is to be avoided if possible. *Id.*

Finally, even were the Court to find this 2006 modification to the Consent Decree ambiguous, the Nation's interpretation must prevail. As noted above, the Court is to begin with the presumption that it "lack[s] jurisdiction . . . unless the contrary affirmatively appears." *Stock West*, 873 F.2d at 1225. Here, there is simply not enough in the Consent Decree to rebut this presumption. Further, Plaintiffs admit that there exist "conflicting interpretations of ¶ 4.2 and whether portions of that paragraph belong in the language of the 2006 settlement document." ECF No. 59 at 6. Where, as Plaintiffs argue, "there is more than one reasonable interpretation of the contract, the contract is ambiguous [and a]mbiguity is construed against the drafter." *Coker Equipment Co., Inc. v. Wittig*, 366

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Fed.Appx. 729, 731 (9th Cir. 2010); *see also Srch v. 3M Co.*, 259 Fed.Appx. 949 (9th Cir. 2007) (same). Because Plaintiffs drafted the Consent Decree, *see* ECF No. 7, at 71-77, the contract is to be construed against them. The Nation's intent in agreeing to the provision – one "revoke[ing] . . . the District Court's ability to resolve disputes between the Yakama Nation and State of Washington relating to the Consent Decree" – should prevail. ECF No. 55, at 5; see also *Anago Franchising*, 677 F.3d at 1279-80 (a showing of the parties' intent is necessary to defeat the *Kokkonen* presumption).

Plaintiffs simply cannot assert a Treaty claim. Plaintiffs' attempt to enforce the Consent Decree in this Court is not proper. Notwithstanding determination of the Tribal Court's jurisdiction – an inquest that is not yet properly before this Court – a federal question has not been "presented on the face of the plaintiff's properly pleaded complaint." *Lockyer*, 375 F.3d at 838. Plaintiffs' Complaint must be dismissed.

IV. ALTERNATIVE RELIEF

In the alternative, and without waiver of any of the foregoing, Defendants request that the Court stay its hand while compelling Plaintiffs to mediate as required by the Consent Decree and/or exhaust Tribal Court remedies. *See e.g. Milos (1989) Ltd. v. Sunopta Global Organic Ingredients, Inc.*, No. 08-2109, 2008 WL 2561643 (N.D. Cal. 2008) (mediation); *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th Cir. 2008) (exhaustion).

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V. CONCLUSION

Plaintiffs' Complaint must be dismissed. Plaintiffs have failed to plead facts that would allow this Court to look beyond their failure to mediate to impasse; Plaintiffs have not even begun to exhaust their Tribal Court remedies before proceeding in this federal forum; Plaintiffs have not established clear and unequivocal waiver of Yakama sovereign immunity. Nor have Plaintiffs presented a valid federal question.

Plaintiffs' Complaint fails to provoke subject matter or personal jurisdiction and should be dismissed under FED. R. CIV. PROC. 12(b)(1) and 12(b)(2). Further, Plaintiffs fail to state a claim upon which relief can be granted and should be dismissed pursuant to FED. R. CIV. PROC. 12(b)(6).

DATED this 6th day of January, 2013.

s/Gabriel S. Galanda
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CERTIFICATE OF SERVICE

I, Gabriel S. Galanda, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Ave. NE, Suite L1, Seattle, WA 98115.

3. On January 6, 2013, I filed the foregoing document, which will provide service to the following via ECF:

Mary Tennyson

Rob Costello

Bill Clark

The foregoing statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 6th day of January, 2013.

s/Gabriel S. Galanda

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