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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

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

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The Confederated Tribes and Bands of the Yakama Nation ("Nation") respectfully requests again that Plaintiffs' Complaint be dismissed.[1]

Plaintiffs have filed a Complaint (1) "alleg[ing] that the Yakama Nation Tribal Court [("Tribal Court")] and its Chief Judge Ted Strong have exceeded the lawful limits of the Tribal Court's jurisdiction," ECF No. 78, at 1-2; (2) seeking damages allegedly caused by the "Nation's failure to abide by the . . . provisions of the consent decree"; (3) "declaratory and/or injunctive relief . . . to confirm the DOL's ability to assess and collect the full amount of motor vehicle fuel and special fuel taxes"; and (4) declaratory and/or injunctive relief . . . to confirm the lawful termination of the consent decree." ECF No. 1, at 14-15.

With respect, at this juncture the Court lacks jurisdiction to even assess the propriety of Plaintiffs' requested relief.

ARGUMENT

In 1994, **the Nation prevailed** in a lawsuit against the state. *Teo v. Steffenson*, No. 93-3050. Plaintiffs now seek to unilaterally deprive the Nation of

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[1] This includes a continuing objection to the sufficiency of Plaintiffs' alleged service of process under FED. R. CIV. PROC. 12(b)(5). Plaintiffs did not properly effect service. 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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the benefit of the Consent Decree entered in that lawsuit, without concession on their part. The Nation would never have agreed to release the state on these terms.[2] What the Nation did agree to was an alternative dispute resolution process that allows the parties to resolve disputes without resorting to a federal forum until certain processes had been completed. With respect, this dispute is not properly before this Court.

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

The Nation seeks only to mediate "in good faith until the dispute is resolved or until the mediator determines that the parties are not able to resolve the dispute,"

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[2] Only an Order of this Court can "terminate" the Consent Decree. *See Nehmer v. U.S. Dept. of Veterans Affairs*, 494 F.3d 846, 859 (9th Cir. 2007) ("[A] party . . . cannot dictate the meaning of the decree to the court or relieve itself of its obligations under the decree without the district court's approval."). And the Court can only do so after making a specific finding that the "objective of the Consent Decree has . . . been achieved." *Johnson v. Sheldon*, No. 87-0369, 2009 WL 3231226, at *7 (M.D. Fla. Sept. 30, 2009). Here, the objective of the Consent Decree – "the establishment of a cooperative framework for the taxation and regulation" – has not been achieved. ECF No. 6, at 50; *see also E.E.O.C. v. Product Fabricators*, 666 F.3d 1170, 1172 (8th Cir. 2012) ("Consent decrees should . . . further the objectives of the law on which the complaint was based."). The parties agree that the Consent Decree does not work as written, but disagree as to the process for modifying and/or vacating that agreement: Plaintiffs believe that they can elect to cease compliance at will, while the Nation believes that a formal process for modification and/or vacation of the Consent Decree must be followed.

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as explicitly required by the Consent Decree. ECF No. 6, at 59.

Plaintiffs' argument that the Consent Decree does not require the parties to engage in mediation is irreconcilable with its text. ECF No. 78, at 17. Plaintiffs argue that a so-called "right-to-terminate clause added at the end of ¶ 4.7(d)" permits at-will non-compliance with the Consent Decree at either parties' election. *Id.* What Plaintiffs fail to grasp, however, is that the referenced "termination" clause is only triggered "**[i]f the dispute is not resolved by mediation**." ECF No. 6, at 76 (emphasis added). In full, the clause at issue states:

> 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.*

Id. This text clearly requires that once the mediator declares the dispute unresolvable, the parties may either request arbitration or, if 180 days have passed since the mediator's declaration, petition the Court to vacate or amend the Consent Decree – but the ability to do either is not triggered until "the mediator determines that the parties are not able to resolve the dispute." ECF No. 6, at 59.

Even were the Consent Decree ambiguous, the "long-standing and very strong public policy in this country favoring mediation" requires that the mediation requirement be construed broadly. *Cunningham & Assoc. v. ARAG*, 842 F.Supp.2d

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25, 29 (D.D.C. 2012).[3]

The Nation does not request that the parties "stay in mediation indefinitely." ECF No. 78, at 16. The Nation agrees with Plaintiffs that "requirements for audit and record keeping are difficult to administer for both parties," ECF No. 8, at 6-8, and that they "are not working administratively for either the Yakama Nation or the Department."[4] ECF No. 56-3, at 80. But it remains the Nation's position that only mediation will create a Consent Decree that will "work" for both parties. And, with respect, the mediator is better positioned than this Court to guide the parties to that

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[3] The understanding of the parties also leads to this conclusion. *See Teo*, No. 04-3079, ECF No. 3, at 3 (Plaintiffs' interpreting the Consent Decree to mean that before a party can "properly invoke the jurisdiction of the court, . . . Paragraph 4.6 requires that the dispute resolution process . . . must first be followed in good faith **to completion without successful resolution**") (emphasis added).

[4] The Consent Decree required that the Nation "require under tribal law that the fuel records of all Yakama businesses operating filling stations on the Reservation . . . be made available to the Tribe." ECF No. 6, at 64. The Nation has fulfilled this requirement. *See* R.Y.C § 30.11.07. Both the state and the Nation are responsible for enforcing R.Y.C § 30.11.07 and the Consent Decree. ECF No. 6, at 56. The Consent Decree specifically provides that if R.Y.C § 30.11.07 is not followed by Yakama businesses, the state may conduct a review or inspection at the retail site. ECF No. 6, at 65. If the Nation objects, "the mediator shall have the authority to resolve the dispute." *Id.* To the Nation's knowledge, the state has not attempted to enforce R.Y.C § 30.11.07, or any other term of the Consent Decree. ECF No. 6, at 56. On that point, the Nation notes that "Rule 60 does not relieve parties from strategic mistakes." *Tareco Prop. v. Morriss*, 321 F.3d 545, 549 (6th Cir. 2003).

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resolution. While the Nation understands Plaintiffs' desire to end mediation as soon as possible, "one of the chief attributes of mediation is that the passage of time alone will produce an atmosphere more conducive to settlement." *Int'l Ass'n of Machinists v. Nat'l Mediation Bd.*, 930 F.2d 45, 48 (D.C. Cir. 1991).

Indeed, as Plaintiffs have yet to submit a "proposed modification" to the Consent Decree that "is suitably tailored" to address the parties' concerns, the Nation is perplexed as to how the Court can provide Plaintiffs' desired relief any swifter than mediation can. *Cmty. Ass'n for the Restoration of the Env't v. Nelson Faria Dairy*, No. 04-3060, 2011 WL 6934707, at *10 (E.D. Wash. 2011) (quotation omitted). Plaintiffs' mere pursuit of Rule 60(b) relief – if that is in fact the relief they are seeking here; it is not clear – "does not affect the [Consent Decree]'s finality or suspend its operation." FED. R. CIV. PROC. 60(c)(2).

To be clear, Paragraph 4.9 of the Consent Decree unambiguously requires that Plaintiffs "shall refrain from collecting its motor vehicle fuel or special fuel taxes as to seventy-five (75) percent of the gallons of gasoline [delivered] to tribally-licensed Yakama businesses operating filling stations on the Reservation." ECF No. 6, at 77. While it is true that the 25/75 arrangement may be adjusted based upon "the amount of fuel actually used by the Nation and its members," ECF No. 78, at 4, Paragraph 4.17 provides that records provided by the Nation "shall be the **exclusive** basis" for calculation of any shift in the 25/75 arrangement. ECF No. 6, at 80 (emphasis added). And "[i]f the records are not kept, and not made

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available to the auditors" – as Plaintiffs allege the Nation has done here, *see* ECF No. 78, at 5 – "**there shall be no adjustment in the amount of tax paid** . . . ." ECF No. 6, at 80-81 (emphasis added). The 25/75 arrangement serves as a default, and Plaintiffs admit that the Nation has paid 25% of all taxes on every drop of fuel delivered to the Reservation. ECF No 6, at 104. If Plaintiffs desire to amend that arrangement in the absence of the Nation's records, it must be accomplished through the dispute resolution process of Paragraph 4.7. But even if Paragraph 4.7 were disregarded, the *immediate* result is the same. Whether the mutual goal of updating the Consent Decree is accomplished by litigation or through mediation, the 25/75 arrangement will be sustained pending resolution of the dispute.

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

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

Federal courts are presumptively without jurisdiction. *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994). The burden of establishing the contrary rests upon the party petitioning the Court. *Id.* It is well established that "[w]hen the initial action is dismissed, federal jurisdiction terminates [and a] motion to enforce the settlement agreement, then, is a separate contract dispute requiring its own independent basis for jurisdiction." *O'Connor v. Colvin*, 70 F.3d 530, 532 (9th Cir. 1995) (citation omitted). Plaintiffs argue, however, that the Consent Decree meets the exception to this rule regarding dismissed lawsuits announced in *Kokkonen*:

> [W]here a dismissal order does neither contains a provision explicitly

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> retaining jurisdiction over the settlement agreement nor language incorporating the terms of the agreement in the order, the district court is without jurisdiction to rule on a motion to enforce a settlement agreement. But if the dismissal order does contain such language, a district court has ancillary jurisdiction to enforce the terms of the settlement agreement . . .

Lehman v. Diamond Dev., No. 10-0197, 2012 WL 5938166, at *2 (M.D. Pa. Nov. 27, 2012) (citing *Kokkonen*, 511 U.S. at 380-81).

Generally, judicial oversight to enforce an agreed obligation is the *sine qua non* for a consent decree: "The parties to a consent decree expect and achieve a continuing basis of jurisdiction to enforce the terms of the resolution of their case in the court entering the order." *Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002). This "continuing basis of jurisdiction" is not permanent, however – it can be revoked. *See e.g. Arata v. Nu Skin Intern.*, 96 F.3d 1265, 1268 (9th Cir. 1996); *see also U.S. v. Volvo Powertrain*, 854 F.Supp.2d 60 (D.D.C. 2012) ("'[D]istrict courts enjoy no free-ranging . . . jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order.'") (quoting *Pigford v. Veneman*, 292 F.3d 918, 924 (D.C. Cir. 2002)). The Court's continuing basis for jurisdiction was deleted here.

According to Plaintiffs, the 2006 modifications to the Consent Decree that deleted the provisions "for maintaining the continuing jurisdiction of the court" had no effect. According to Plaintiffs, the Court's divestment of its "continuing jurisdiction" only means that "a party seeking to modify or enforce a decree must reopen the case or file a new action" pursuant to Rule 60. ECF No. 78, at 12-14

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(quotation omitted). Plaintiffs are only partially correct.

a. Scope Of Relief Under Rule 60

Plaintiffs are correct that Rule 60 allows that a Court may *always* "entertain an independent action" to **vacate or modify** a Consent Decree, regardless of whether it subsequently revoked its continuing jurisdiction. FED. R. CIV. PROC. 60(d)(1). The relief available under that Rule, however, "is fairly circumscribed" and does not cover the relief that Plaintiffs have requested. *Oneida Indian Nation v. Cnty. of Oneida*, 214 F.R.D. 83, 90 (N.D.N.Y. 2003) (quotations omitted). Where, as here, the "continuing jurisdiction" of a Consent Decree has been deleted, the district court's jurisdiction is available only "for the **limited purpose of reopening and setting aside** the [Consent Decree]" under Rule 60. *Federated Towing & Recovery v. Praetorian Ins.*, 283 F.R.D. 644, 655 (D.N.M. 2012) (quotation omitted). As noted by the Court in *York v. Cnty. of El Dorado*, 119 F.Supp.2d 1106 (E.D. Cal. 2000):

> *Kokkonen* did contain a comment that Rule 60(b) might be available to reopen a case for purposes of proceeding with the litigation. However, that is not what the County proposes here. It proposes that the court reopen the judgment for the purpose of terminating the settlement . . . . The *Kokkonen* Rule 60(b) comment . . . does not apply to the situation where the parties desire to tinker in federal court with the previous settlement.[5]

[5] As discussed *supra*, the parties agreed that any "tinkering" with the previous settlement should be done in mediation and/or arbitration. Once an agreement has been reached there, *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992),

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Id. at 1109; *see also Hagestad v. Tragesser*, 49 F.3d 1430, 1433 n.3 (9th Cir. 1995) (noting that "*Kokkonen* overruled Ninth Circuit precedent . . . referring to the 'inherent supervisory power'" of a Court to enforce its orders) (citation omitted).

Here, Plaintiffs argue that in addition to vacating a Consent Decree, "a party seeking to . . . **enforce** a decree [may] file a new action" pursuant to Rule 60.[6] ECF No. 78, at 12-14 (emphasis added). This is incorrect; Rule 60 simply does not provide this type of relief. *See Hagestad*, 49 F.3d at 1433 ("[A]ll proceedings to 'enforce'" a consent decree under Rule 60 "must be dismissed."). Indeed, "courts have repeatedly denied efforts by litigants to sidestep consensual resolutions by resort to Rule 60(b)." *In re AMC Realty Corp.*, 270 B.R. 132, 145 (S.D.N.Y. 2001); *see also McAlpin v. Lexington 76 Auto Truck Stop*, 229 F.3d 491, 503 (6th Cir. 2000) ("[A] dismissed suit can be reopened under [Rule] 60(b)(6) by reason of breach of the agreement . . . . However, [the] enforcement of a settlement agreement, whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires

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provides that the parties may petition the Court to modify the Consent Decree.

[6] Elsewhere, "Plaintiffs ask the Court to interpret [the] Consent Decree." ECF No. 78, at 12; *but see In re Valdez Fisheries Dev. Ass'n*, 439 F.3d 545, 550 (9th Cir. 2006) ("So far as the application of the *Kokkonen* principle is concerned, we find no relevant difference between a proceeding to enforce a settlement agreement and one to interpret it.")

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its own basis for jurisdiction.") (citation omitted); *Fairfax Countywide Citizens Ass'n v. Fairfax Cnty.*, 571 F.2d 1299, 1305-06 (4th Cir. 1978) (Rule 60(b)(6) relief merely "restores the litigants to the *status quo ante*").[7] Rule 60 only allows courts to vacate or modify a consent decree. Plaintiffs have asked the Court to do neither.

b. Deletion Of The Court's "Continuing Jurisdiction"

"In July, 2004, the Yakama Nation filed a petition to invoke the continuing jurisdiction of the court to enforce the terms of the Consent Decree." ECF No. 6, at 74. As noted above, the ability to invoke this type of continuing jurisdiction was forfeited in 2006, however, by an Order of this Court. ECF No. 6, at 76; *see Pigford*, 292 F.3d at 924 ("[D]istrict courts enjoy no free-ranging 'ancillary' jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree . . . ."); *Brass Smith v. RPI Indus.*, 827 F.Supp.2d 377, 783 (D.N.J. 2011) ("[A] federal court may also decide to terminate or divest itself entirely of jurisdiction over the settlement agreement."); *Perry-Bey v. City of Norfolk*, 678 F.Supp.2d 348, 388 n.36 (E.D. Va. 2009) ("a consent decree . . . does not generally result in continuing jurisdiction in perpetuity . . . [if] the language" states otherwise); *Keepseagle v. Glickman*, 194 F.R.D. 1, 3 (D.D.C. 2000) (same).

It takes an incredible leap of logic to interpret the Court's deletion of its

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[7] Here, of course, the *status quo ante* would completely bar the state from collecting any tax at all, per the Court's 1993 injunction. *Teo v. Steffenson*, No. 93-3050 (E.D. Wash. Aug. 23, 1993).

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"continuing jurisdiction" as not "terminat[ing] its continuing jurisdiction" in such a way to limit the relief available to the parties. *Arata*, 96 F.3d at 1268; *see also Cooper v. City of Ashland*, 187 F.3d 646, 646 (9th Cir. 1999) (a petition for "completion of an essential element of [a consent] agreement" is barred by *Kokkonen*); *Ortolf v. Silver Bar Mines*, 111 F.3d 85, 87 (9th Cir. 1997) ("[O]rders [that] purport to reserve a right to the plaintiff 'to reinstitute' the previous lawsuits if the settlement agreements were not performed . . . do not commit the court to enforcing the settlement agreement."); *McMahon Found. v. Amerada Hess*, 98 Fed.Appx. 267, 270 (5th Cir. 2004) (no continuing enforcement jurisdiction where a party "seek[s] to have its claims adjudicated under a new docket number").[8] The Court's 2006 modification cannot be read in a way that retained this Court's continuing jurisdiction to enforce or interpret the Consent Decree.[9]

The Nation's position is bolstered by the Consent Decree itself. The 2006

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[8] Local Rule 7.1(g)(2) says nothing of unpublished authority. *Cf.* ECF No. 78 at 14. Local Rule 7.1(f)(2) states that "unpublished decisions may be cited [for] persuasive . . . precedential value." *See also* FED. R. APP. PROC. 32.1; *see e.g. Smith v. Frakes*, No. 12-5197, 2012 WL 3038519, at *2 (W.D. Wash. June 8, 2012).

[9] *New York v. Microsoft*, 231 F.Supp.2d 203 (D.D.C. 2002) is on point here:

> [T]he district court's power over a consent decree, reflecting the hybrid between judicial order and contract, is limited to two sources. A district court may interpret and enforce a decree **to the extent authorized by the decree itself** or by the related order. Additionally, a district court may modify a decree pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure.

Id. at 257-58 (citing *Pigford*, 292 F.3d at 924).

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Consent Decree expressly deleted the provision allowing that a "party may petition the Court for enforcement of the Consent Decree," as the Nation had done in 2004. ECF No. 6, at 58, 74.[10] That provision was replaced with the following arbitration clause: "If the dispute is not resolved by mediation, the parties may agree to have a numeral third party of arbitrator make a final binding decision resolving the dispute . . . ." *Id.* at 76. The parties agreed in 2006, as did the Court, that mediation, followed by arbitration, if elected – not litigation – was the proper way to resolve disputes relating to the enforcement of the Consent Decree.

The only relief available to Plaintiffs – by way of Rule 60 or otherwise – is the vacation or modification of the Consent Decree.

2. Plaintiffs Have Not Plead A Claim Upon Which Relief May Be Granted.

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[10] Plaintiffs argument that this section of the Consent Decree was left unscathed in 2006 is incorrect. ECF No. 78, at 15-16. As evidenced by the Nation's 2004 petition to invoke the "continuing jurisdiction" of the Court:

> This is a Petition by the Yakama Nation to invoke the continuing jurisdiction of the Court to enforce the terms of a Consent Decree entered by the Court on November 2, 1994. That decree provides, in pertinent part, that either party '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.' . . . [T]he parties agreed to a formula for resolving the issues in this case. The solution was . . . a dispute resolution procedure, specifically, mediation. The Court, however, reserved jurisdiction to resolve matters relating to the enforcement of the decree.

Teo, No. 04-3079, ECF No. 1, at 1-2. This is the "continuing jurisdiction" that was deleted in 2006, but that Plaintiffs are nonetheless attempting to evoke here.

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It appears that Plaintiffs are now for the first time attempting, in their opposition to the instant motion, to petition the Court to vacate and/or modify the Consent Decree pursuant to Rule 60. ECF No. 78, at 14. Although, as discussed above, the Court does have the limited jurisdiction to grant this relief, such a claim does not appear in the Complaint.

The only reference to a possible Rule 60 claim appears in the context of Plaintiffs' Count II, where they request "declaratory and/or injunctive relief . . . to the extent necessary to confirm the lawful termination of the consent decree." ECF No. 1, at 15-16. This reference to "termination," however, is simply too oblique to adequately place the Nation on notice that Plaintiffs are asserting a claim for Rule 60 relief. If Plaintiffs seek to vacate and/or alter the Consent Decree, they must plainly and specifically state so. *Jachetta v. U.S.*, 653 F.3d 898, 906 (9th Cir. 2011); *see also Lockyer v. Dynegy*, 375 F.3d 831, 838 (9th Cir. 2004) ("[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint."); *Williams v. U.S.*, No. 12-0375, 2012 WL 3202405, at *3 (D. Hawaii July 11, 2012) (a complaint "must clearly state the relief sought and the factual and legal basis" therefore).

Indeed, unless and until Plaintiffs file a motion specifically seeking Rule 60 relief, stating under which subsection of that Rule they are moving, the Court is barred from addressing the issue. *See* FED. R. CIV. PROC. 60(b) (relief must be sought "on motion"). In *Kalt v. Hunter*, 66 F.3d 1002 (9th Cir. 1995), for instance,

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the Ninth Circuit refused to grant Rule 60(b) relief because, as here, the party seeking enforcement of a consent judgment "did not seek Rule 60(b)(6) relief" but instead pled an "independent action seeking equitable relief." *Id.* at 1006 (citing *Kokkonen*, 511 U.S. at 378); *see also McAlpin*, 229 F.3d at 504 (dismissing where the movant "fail[ed] to move the district court for relief pursuant to" Rule 60(b) and instead brought a motion "for enforcement of the Agreement"); *Nelson v. Napolitano*, 657 F.3d 586, 590 (7th Cir. 2011) (same).

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

1. It Is Not 'Plain' That Tribal Court Jurisdiction Is Lacking.

Plaintiffs argue "it is 'plain' that tribal court jurisdiction is lacking, so [Tribal Court] exhaustion would serve no purpose other than delay." ECF No. 78, at 9 (quoting *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)). According to Plaintiffs, this is because "there is no authority holding that a State sovereign entity is subject to the jurisdiction of a tribal court." *Id.* Plaintiffs are mistaken.[11]

To begin, the issue at hand is not whether Plaintiffs are definitively subject to

[11] Plaintiffs also argue that tribal exhaustion is not necessary because it is "prudential, not jurisdictional." ECF No. 78, at 8. Be that as it may, in the Ninth Circuit at least, "[t]he requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Burlington N. R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1244 (9th Cir.1991). For the reasons discussed in the Nation's moving papers, Plaintiffs' attempt to state a claim under the Treaty is clearly lacking.

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tribal jurisdiction, but whether the Tribal Court has been able to make its own jurisdictional decision. The Nation need only show that tribal jurisdiction is "colorable" or "plausible" – a standard that is considerably lower. *Rincon Mushroom v. Mazzetti*, No. 10-56521, 2012 WL 2928605, at *1 (9th Cir. 2012). Ninth Circuit authority requires tribal court remedies to be exhausted. *City of Wolf Point v. Mail*, No. 10-0072, 2011 WL 2117270, at *2 (D. Mont. May 24, 2011).

At any rate, there is very recent authority holding that a state subdivision **is** subject to tribal court jurisdiction. In *Salt River Project Agr. Imp. & Power Dist. v. Lee*, No. 08-8018, 2013 WL 321884 (D. Ariz. Jan. 28, 2013),[12] the plaintiff state-subdivision argued that the Navajo Nation did not have jurisdiction over a state-tribal dispute because it was precluded by the rule announced in *Montana v. U.S.*, 450 U.S. 544 (1980): "the inherent powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. As here, the state argued "the Supreme Court's decision in *Nevada v. Hicks* stands for a broad interpretation of *Montana*." *Lee*, 2013 WL 321884, at *10. The Court disagreed.

First, the Court distinguished *Hicks*:

> [T]he Ninth Circuit Court of Appeals' *per curiam* holding in *Water Wheel Camp Recreational Area v. LaRance*, 642 F.3d 802 (9th Cir. 2011), cannot be disregarded by the Court. In *Water Wheel*, the Court of Appeals found that the holding in *Hicks* still allowed only a narrow interpretation of the general rule in *Montana*, where it applied only on

[12] The Salt River Project Agricultural Improvement and Power District is a "political subdivision of the State of Arizona." *Lee*, 2013 WL 321884, at *26.

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> non-Indian land. . . . *Hicks* expressly limited its holding to "the question of tribal-court jurisdiction over state officers enforcing state law" and left open the question of tribal court jurisdiction over nonmember defendants generally. Furthermore, the Court did not overrule its own precedent specifying that *Montana* ordinarily applies only to non-Indian land. . . . To summarize, Supreme Court and Ninth Circuit precedent, as well as the principle that only Congress may limit a tribe's sovereign authority, suggest that *Hicks* is best understood as the narrow decision it explicitly claims to be. Its application of *Montana* to a jurisdictional question arising on tribal land should apply only when the specific concerns at issue in that case exist.

Id. at * 11 (quotation and selected citation omitted). "[T]he specific concerns at issue in that case," of course, were **the exercise of state police power**. *Water Wheel*, 642 F.3d at 814. These concerns did not exist in *Lee*.

Next, the Court held that even if *Montana* did apply, an intergovernmental agreement clearly triggered the first exception to the rule:

> "A tribe may regulate, . . . the activities of nonmembers who enter consensual relationship[s] with the tribe or its members, through commercial dealing . . . or other arrangements." . . . To say that Plaintiffs have not entered into a consensual relationship contemplated by *Montana* would mean that the contractual lease . . . – that Plaintiffs themselves repeatedly refer to as a lease and seek to interpret as a binding contract – is not actually a contract, lease, or other arrangement in spite of the plain meaning of the words. The language of the *Montana* court is unambiguous and, without something more, the Court declines to give new meaning to patently clear words.

Lee, 2013 WL 321884, at *13-14 (quoting *Montana*, 450 U.S. at 565).

Here, as in *Lee*, there is no exercise of state police power at issue. The cases that Plaintiffs rely on do not hold otherwise. *See Cnty. of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998) (state police power); *MacArthur v. San Juan Cnty.*, 497 F.3d

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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."). Indeed, courts have noted a "clear distinction between the power of taxation for revenue and police powers." *Twp. of Lyndhurst v. Priceline.com*, 657 F.3d 148, 158 (3rd Cir. 2011). Likewise here, an intergovernmental agreement – the Consent Decree – clearly triggers the first *Montana* exception.

Because "jurisdiction remains plausible," *Wolf Point*, 2011 WL 2117270, at *2, it is not for this Court to "now decid[e] whether the tribe actually has jurisdiction." *Rincon*, 2012 WL 2928605, at *1. The Court must defer to the Tribal Court until it fully and finally adjudicates these provisional rulings on jurisdiction.

2. Paragraph 4.6 Of The Consent Decree Does Not Create An Exception To Tribal Court Exhaustion.

Plaintiffs argue the Tribal Court jurisdiction is lacking because Paragraph 4.6 of the Consent Decree "provides that a party seeking to enforce the Consent Decree may petition 'the Court.'" ECF No. 78, at 9. That provision states:

> Neither the Yakama Indian Nation, nor the State of Washington, nor officers acting on either government's behalf, may petition the Court to enforce this Consent Decree unless (a) the dispute resolution process described in ¶4.7 has been followed in good faith to completion without successful resolution, or unless (b) the other party fails to enter into the dispute resolution process or terminates the process before its completion.

ECF No. 6, at 56-57. While the Nation is seeking to prevent Plaintiffs from "terminating" the mediation process before its completion, the law is clear that it is up to the Tribal Court to interpret whether this clause precludes its jurisdiction.

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While Judge Imbrogno may have intended that the Court retain continuing jurisdiction for the very limited purpose of enforcing the arbitration and/or mediation provisions of Paragraph 4.7, this does not end the inquiry.[13] Even where a Court does retain continuing jurisdiction, "subsequently-filed actions to enforce [a] Consent Decree" do not "exclud[e] jurisdiction elsewhere . . . unless an agreement contained specific language of exclusion as to a forum." *Hankins v. CarMax*, 2012 WL 113824, at *4 (D. Md. Jan. 13, 2012).

Here, there is no "specific language of exclusion as to a forum" in the Consent Decree. *Id.* In light of the above authority, whether Paragraph 4.7 is exclusively enforceable by this federal court remains a question of fact that should be determined by the Tribal Court in the first instance. *See 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 jurisdiction to hear a particular case."); *Stock West Corp. v. Taylor*, 964 F.2d 912,

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[13] After the 2006 amendments, to "enforce" the Consent Decree can mean only to compel mediation and/or arbitration. In the case that "the dispute resolution process described in ¶4.7 has been followed in good faith to completion without successful resolution" the only option available is a petition to vacate (i.e. "terminate") the Consent Decree pursuant to Rule 60. ECF No. 6, at 56; *see* ECF No. 6 at 76 ("If the dispute is not resolved by mediation[and/or arbitration] . . . either party may give notice of intent to terminate this agreement . . . .").

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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 . . . .").

D. Plaintiffs Have Not Pled A Waiver Of Tribal Sovereign Immunity.

"[T]ribal sovereign immunity may only be waived by the tribe expressly." *Tonasket v. Sargent*, 830 F.Supp.2d 1078, 1081 (E.D. Wash. 2011). Plaintiffs point to no clear and explicit waiver of immunity within the Consent Decree.

Plaintiffs argue that the Court's revocation of its continuing jurisdiction in Paragraph 4.2 did nothing to alter a party's ability to bring an action to enforce the Consent Decree. ECF No. 78 at 15-16. As discussed above, this position is nonsensical. Once the Court deleted its continuing jurisdiction it retained only the ability to consider a Rule 60 motion to alter or vacate the Consent Decree. Disputes over Consent Decree modifications and enforcement disputes were assigned to mediation and/or arbitration. If the dispute cannot be resolved in those forums, a Rule 60 motion to vacate the Consent Decree is available. If the dispute is resolved in those forums, a motion to amend the Consent Decree under Rule 60 is available. But neither petition implicates the Nation's sovereign immunity, at least as to the relief requested here. *See U.S. v. One 1961 Red Chevrolet*, 457 F.2d 1353, 1356 (5th Cir. 1972) ("Rule 60(b) cannot, and should not, serve as a substitute for the governmental consent to be sued."); *U.S. v. One Toshiba Color Television*, 213 F.3d

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147, 158 (3rd Cir. 2000) ("Rule 60(b) may not be used to impose affirmative relief beyond setting aside prior judgment.").

Plaintiffs also argue that by filing a lawsuit in 1994, and invoking the Court's continuing jurisdiction in 2006, the Nation waived its immunity. Plaintiffs are incorrect. Because "the 'terms of [a sovereign's] consent to be sued in any court define that court's jurisdiction to entertain the suit,'" any waiver of sovereign immunity by filing a suit is "limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts." *McClendon v. U.S.*, 885 F.2d 627, 630 (9th Cir. 1989) (quoting *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987)). Thus, any claims in recoupment that the Plaintiffs seek must be of the same kind of that the Nation sought in 1994 in that case. *Kalispel Tribe v. Moe*, No. 03-0423, 2008 WL 687527, at *3 (E.D. Wash. Mar. 12, 2008). And because the Nation was solely seeking declaratory and injunctive relief in the original suit, such relief is all that the Nation could have been possibly be subject to *in the original suit*. All other claims are barred by tribal sovereign immunity. *See id.* ("[C]ounterclaims in response to an Indian tribe's preliminary injunction are barred by sovereign immunity.").

CONCLUSION

In consideration of the above exposition of law, the Nation again respectfully requests that Plaintiffs' Complaint be dismissed.

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DATED this 7th day of February, 2013.

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CERTIFICATE OF SERVICE

I, Anthony S. Broadman, declare as follows:

1. I am 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 7, 2013, I caused the foregoing document to be filed, 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 Bend, Oregon, this 7th day of January, 2013.

s/Anthony S. Broadman

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