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9
10 **IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

11 BP AMERICA INC., and ATLANTIC
12 RICHFIELD COMPANY,

Case No. 3:17-cv-00588

13 Plaintiffs,

**DEFENDANT SANDRA-MAE
PICKENS' MOTION TO DISMISS
PLAINTIFFS' COMPLAINT**

14
15 vs.

16 YERINGTON PAIUTE TRIBE; LAURIE A.
THOM, in her official capacity as Chairman
17 Of the Yerington Paiute Tribe; YERINGTON
PAIUTE TRIBAL COURT; and SANDRA-
18 MAE PICKENS in her official capacity as
Judge of the Yerington Paiute Tribal Court,
19

20 Defendants.
/

21 Defendant Sandra-Mae Pickens, through her counsel of record, Laxalt & Nomura, Ltd., files
22 this Motion to Dismiss Plaintiffs BP America Inc., and Atlantic Richfield Company's Complaint.
23 This Motion is based on the following Memorandum of Points and Authorities, the pleadings on file,
24 and any additional information this Court may consider.

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2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. INTRODUCTION**

4 Plaintiffs BP America Inc. and Atlantic Richfield Company (collectively “Plaintiffs”) have
5 filed this suit against Defendant Sandra-Mae Pickens in her official capacity as Judge of the
6 Yerington Paiute Tribal Court (the “Tribal Court”) and in violation of the Yerington Paiute Tribe’s
7 sovereign immunity. Judge Pickens, as a Yerington Paiute Tribal official sued in her official capacity,
8 is protected by the Yerington Paiute Tribe’s (the “Tribe”) sovereign immunity, and Plaintiffs have not
9 established that it is proper for this Court to exercise subject-matter jurisdiction over her. *Ex parte*
10 *Young* does not apply to give this Court subject-matter jurisdiction over Plaintiffs’ Complaint because
11 Judge Pickens has not violated federal law, the U.S. Constitution, or federal common law, and
12 Plaintiffs’ allegations otherwise are pure speculation. Because Judge Pickens is protected by the
13 Tribe’s sovereign immunity, this Court lacks subject-matter jurisdiction to hear Plaintiffs’ Complaint
14 and it should be dismissed.

15 Additionally, the Court should decline to hear this case until Plaintiffs have exhausted their
16 tribal remedies. Plaintiffs have been sued in Tribal Court for alleged harm they have caused to the
17 Tribe’s land and Tribal members. Plaintiffs currently have a Motion to Dismiss pending in Tribal
18 Court before Judge Pickens. Because subject-matter jurisdiction is plausible on the face of the Tribal
19 Complaint, this Court should decline to hear this case until Plaintiffs have exhausted their tribal
20 remedies. The Tribal Court is well within its authority to rule on whether or not it has subject-matter
21 jurisdiction over the Tribal Complaint.

22 **II. FACTUAL BACKGROUND**

23 On August 18, 2017, the Tribe filed a Complaint in Tribal Court against Plaintiffs, alleging
24 several torts based on Plaintiffs’ alleged ownership of the Yerington Anaconda Mine Site (the “Mine
25 Site”), located in Yerington, Nevada. (Exhibit A to Declaration of Adam S. Cohen in Support of Pls.’
26 Mot. for Prelim. Inj. at ¶¶5-6, ECF No. 3-2. Hereinafter “Tribal Complaint.”) The Tribe alleges that
27 Plaintiffs’ acts and omissions in failing to remediate the Mine Site have damaged the Tribe’s
28 property, the Tribe’s water supply, and has injured Tribal members. (*Id.* at ¶¶7-10.) The Tribe alleges
that the Tribal Court has subject-matter jurisdiction to adjudicate the case it has filed in Tribal Court

1 against Plaintiffs (the “Tribal Action”), because “the claims herein arose on [the Tribe’s] land, and/or
2 because the acts and omissions giving rise to the claims threaten or have a direct impact on the
3 political integrity, economic security, and/or health, safety and welfare of the Tribe, imperiling the
4 subsistence of the Tribe.” (*Id.* at ¶3.)

5 The Tribe provides the following specific allegations in the Tribal Complaint as to how
6 Plaintiffs’ actions have allegedly threatened or have a direct impact on the health, safety, and welfare
7 of the Tribe:

8 8. Metals, radioactive materials, and other toxic and hazardous substances have been
9 and are being released into the environment from the [Plaintiffs’] Mine Site, sections of which
10 are on [the Tribe’s] property. These substances include uranium, arsenic, lead, mercury,
11 thorium, radium, chloride, sulfate, chromium, iron, aluminum, copper, manganese,
12 molybdenum, nickel, selenium and zinc. These substances have been and are entrained in dust
that affects [the Tribe], and have been and are found in [the Tribe’s] surface water, as wells as
groundwater that migrates beneath and around [the Tribe’s] property and water supply.

13 9. Furthermore and in particular, the Wabuska Drain, an irrigation drain that received
14 wastewater from the Mine Site, runs directly through [the Tribe’s] property for approximately
15 1.7 miles. That contaminated wastewater has run across [the Tribe’s] property for decades,
and continues to damage and devalue [the Tribe’s] property, and compromise and risk the
health and safety of Tribal members.

16 10. Furthermore and in particular, [Plaintiffs’] acts and omissions effectively
17 destroyed [the Tribe’s] wetlands and negatively impacted agriculture and wildlife on and
18 around [the Tribe’s] property. To this day, tail water emanating from the Mine Site into the
wetlands is toxic and hazardous. Tribal wetlands and irrigation have been decimated by
[Plaintiffs’] contamination of both groundwater and surface water.

19 ...

20 16. In 2010, the United States Environmental Protection Agency (“USEPA”)
21 acknowledged for the first time that private water supply wells located off of the Mine Site
22 have been impacted by contamination from the Mine Site. And just this past September, the
EPA published a proposed rule in the Federal Register to add the Mine Site to the NPL list,
23 due to the need for closure and the comprehensive cleanup of heap leach pads and ponds,
process areas, and off-Site groundwater contamination.

24 17.... [Plaintiffs’] have failed for decades to address the damage caused to [the Tribe]
25 or to properly remediate the Mine Site and to prevent the continuing release, discharge and
migration of toxic and hazardous substances.

26 18. As a result, a groundwater plume exists under the Mine Site and has migrated
27 offsite to surrounding properties. Nearly 400,000 acre feet of the groundwater plume is
contaminated with the toxic and hazardous substances listed above, including an estimated 95
28 tons of uranium. Moreover, the aquifer is contaminated with acidic process waters and metals

1 from the process areas, unlined evaporation ponds, and leaking heap-leach pads and tailings
2 piles. The intermediate and deep aquifers are interconnected, and have also been
contaminated.

3 19. [Plaintiffs] have also contaminated domestic wells beyond the Mine Site with
4 certain toxic and hazardous substances including arsenic, gross alpha radiation, and uranium,
5 all at levels exceeding regulatory limits and/or safe amounts. Exposure to uranium can cause
6 cancer and kidney toxicity. Exposure to arsenic can cause skin and lung cancer, liver cancer,
7 bladder cancer, kidney cancer, cancer of the nasal passages, and prostate cancer. Such
8 exposure can also cause skin lesions, peripheral neuropathy, anemia, thickening and
discoloration of skin, stomach pain, nausea, vomiting, diarrhea, and liver effects as well as
9 cardiovascular, pulmonary, immunological, neurological, reproductive, and endocrine system
10 effects. Numerous other toxic and hazardous substances listed above can cause similar health
risks and impacts.

11 20. Localized groundwater is the sole source of drinking water for [the Tribe], and
12 groundwater is used to supplement surface water for irrigation.

13 21. Additionally, [the Tribe's] property and its Tribal members have been exposed to
14 hazardous dust emanating from the Mine Site. [Plaintiffs'] improper storage and disposal of
15 toxic and hazardous substances at the Mine Site contributes to chronic and uncontrolled
16 emissions of particulates containing pollutants and hazardous substances that blow off-site
17 and onto [the Tribe's] property, constituting at least a nuisance, and/or proximately causing a
18 continuing threat to Tribal member's health and environment.

19 22. Toxic and hazardous substances have contaminated, and continue to contaminate,
20 soil, sediment, air, water treatment facility waste, groundwater, and surface water, so that [the
21 Tribe] is, and continues to be, exposed through inhalation, dermal contact, absorption,
22 consumption and ingestion. The ongoing presence of toxic and hazardous substances has
23 impacted [the Tribe's] property, and deprived [the Tribe] of the free use and enjoyment of
24 same. Furthermore, these toxic and hazardous substances pose health risks and threats
25 including cancer, neurological damage, and kidney and liver damage, as well as
26 developmental behavior and learning problems. As a result of [Plaintiffs'] failure to properly
remediate toxic and hazardous substances, Tribal members are at risk of developing these and
27 other serious latent diseases, along with myriad other adverse medical conditions.

28 (Tribal Complaint at 3-6.) Based on the allegations above, the Tribe asserted five causes of action: (1)
strict liability; (2) trespass; (3) battery; (4) negligence; and (5) nuisance. These causes of action were
asserted on behalf of the Tribe and Tribal members. The Tribe is seeking compensatory, special, and
punitive damages against Plaintiffs and for an order for Plaintiffs "to bear the costs of medical
monitoring, including, but not limited to, testing, examination, preventative and diagnostic screening
for conditions that can result from, or potentially result from, exposure to arsenic, uranium, and other
toxic and hazardous materials[.]" (*Id.* at 16.)

1 Plaintiffs filed this action seeking both a preliminary injunction and permanent injunction
2 prohibiting the Tribal Court from hearing the Tribal Action. Plaintiffs have submitted a Motion to
3 Dismiss in Tribal Court, asserting that the Tribal Court does not have subject-matter jurisdiction to
4 hear the Tribe's Complaint. (Pls.' Mot. for Prelim. Inj. 7:21-22, ECF No. 2.) Instead of waiting for a
5 ruling on their Motion to Dismiss and exhausting their tribal remedies, Plaintiffs are asking this Court
6 to interfere with an ongoing Tribal Court proceeding.

7 Plaintiffs have failed to establish that Judge Pickens, and by extension the Tribe, is not
8 protected by tribal sovereign immunity. While Plaintiffs have sued Judge Pickens in her official
9 capacity for prospective injunctive relief, Judge Pickens is still protected by tribal sovereign
10 immunity because Plaintiffs have not alleged that Judge Pickens has violated federal law, the U.S.
11 Constitution, or federal common law. Without such a showing, *Ex parte Young* does not apply to
12 override the Tribe's sovereign immunity. Additionally, the Tribal Court's subject-matter jurisdiction
13 is at least colorable on the face of the Tribal Complaint. Under U.S. Supreme Court precedent,
14 Plaintiffs are required to exhaust their tribal remedies before filing suit in this Court. Because
15 Plaintiffs failed to exhaust their tribal remedies, the Court should decline to hear this matter.

16 **III. LEGAL STANDARD**

17 "Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of*
18 *Am.*, 511 U.S. 375, 377 (1994). Federal courts possess power authorized by the Constitution and
19 federal statutes, and that power cannot be expanded by judicial decree. *Id.* (citations omitted). It is
20 presumed that a cause lies outside of this limited jurisdiction, and "the burden of establishing the
21 contrary rests upon the party asserting jurisdiction." *Id.* (citing *McNutt v. Gen. Motors Acceptance*
22 *Corp.*, 298 U.S. 178, 182-83 (1936)). A plaintiff who files a case in federal court bears the burden of
23 establishing that the court has jurisdiction. *Righthaven LLC v. Newman*, 838 F. Supp. 2d 1071, 1074
24 (D. Nev. 2011) (citing *In re Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001)). Dismissal under
25 FRCP 12(b)(1) is appropriate if the complaint, considered in its entirety, fails to allege facts that are
26 sufficient on their face to establish subject-matter jurisdiction. *In re Dynamic Random Access*
27 *Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008). Courts "do not accept *legal*
28 *conclusions* in the complaint as true, even if 'cast in the form of factual allegations.'" *Lacano Invs.*,

1 *LLC v. Balash*, 765 F.3d 1068, 1071 (9th Cir. 2014) (quoting *Doe v. Holy See*, 557 F.3d 1066, 1073
2 (9th Cir. 2009)) (emphasis in original). FRCP 12(b)(1) is the proper vehicle for seeking dismissal
3 based on sovereign immunity. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015).

4 “Indian tribes are ‘domestic dependent nations’ that exercise ‘inherent sovereign authority.’”
5 *Michigan v. Bay Mills Indian Cmty.*, -- U.S. --, 134 S. Ct. 2024, 2030 (2014) (quoting *Okla. Tax*
6 *Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991)). “Tribal
7 sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear
8 waiver by the tribe.” *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008) (citing
9 *Kiowa Tribe of Okla. v. Mfg. Tech, Inc.*, 523 U.S. 751, 754 (1998)). “It is settled that a waiver of
10 sovereign immunity ‘cannot be implied but must be unequivocally expressed.’” *Santa Clara Pueblo*
11 *v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). “To
12 abrogate tribal immunity, Congress must ‘unequivocally’ express that purpose.” *C&L Enters., Inc. v.*
13 *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Martinez*, 436
14 U.S. at 58).

15 “Absent express waiver, consent by the Tribe to suit, or congressional authorization for such a
16 suit, a federal court is without jurisdiction to entertain claims advanced against the Tribe.” *Evans v.*
17 *McKay*, 869 F.2d 1341, 1345-46 (9th Cir. 1989) (citing *Kennerly v. United States*, 721 F.2d 1252,
18 1258 (9th Cir. 1983)). “In the context of a Rule 12(b)(1) motion to dismiss on the basis of tribal
19 sovereign immunity, ‘the party asserting subject-matter jurisdiction has the burden of proving its
20 existence,’ *i.e.* that immunity does not bar the suit.” *Pistor*, 791 F.3d at 1111 (citing *Miller v. Wright*,
21 705 F.3d 919, 923 (9th Cir. 2012)). “There is a strong presumption against waiver of tribal sovereign
22 immunity.” *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001).

23 **IV. LEGAL ARGUMENT**

24 **A. The Tribe’s Sovereign Immunity Bars Plaintiffs’ Suit Against Judge Pickens**

25 Judge Pickens is a Tribal official and has been sued in her official capacity and is protected by
26 the Tribe’s sovereign immunity. Plaintiffs have made no attempt to argue that tribal sovereign
27 immunity is not a bar to this suit. In fact, Plaintiffs’ Complaint is silent on the topic of tribal
28 sovereign immunity. Because Plaintiffs have not alleged how tribal sovereign immunity does not

1 operate as a bar to this suit, which is Plaintiffs' burden, Plaintiffs have failed to establish that this
2 Court has subject-matter jurisdiction to hear this suit.

3 "Tribal sovereign immunity 'extends to tribal officials when acting in their official capacity
4 and within the scope of their authority.'" *Cook*, 548 F.3d at 727 (quoting *Linneen v. Gila River Indian*
5 *Cnty.*, 276 F.3d 489, 492 (9th Cir. 2002)). "In these cases the sovereign entity is the 'real, substantial
6 party in interest and is entitled to invoke its sovereign immunity from suit even though individual
7 officials are nominal defendants.'" *Cook*, 548 F.3d at 727 (quoting *Regents of the Univ. of Cal. v.*
8 *Doe*, 519 U.S. 425, 429 (1997)). Stated another way, "courts should look to whether the sovereign is
9 the real party in interest to determine whether sovereign immunity bars the suit." *Lewis v. Clarke*, --
10 U.S.--, 137 S. Ct. 1285, 1290 (2017). *See also Forsythe v. Reno-Sparks Indian Colony*, 2017 WL
11 3814660, at *3-*4 (D. Nev. Aug. 30, 2017) (dismissing claims against tribal officers because tribe
12 was real party in interest).

13 "[A]n officer sued in his official capacity is entitled to 'forms of sovereign immunity that the
14 entity, *qua* entity, may possess.'" *Pistor*, 791 F.3d at 1112 (quoting *Kentucky v. Graham*, 473 U.S.
15 159, 167 (1985)). The crucial question in determining whether an officer can invoke tribal sovereign
16 immunity is whether he or she has been sued in his or her individual or official capacity. *Pistor*, 791
17 F.3d at 1112. "[O]fficial capacity suits ultimately seek to hold the entity of which the officer is an
18 agent liable, rather than the official himself: they 'generally represent merely another way of pleading
19 an action against an entity of which an officer is an agent.'" *Pistor*, 791 F.3d at 1112 (quoting
20 *Graham*, 473 U.S. at 165-66). Additionally, in a suit against tribal officers, courts "must be sensitive
21 to whether 'the judgment sought would expend itself on the public treasury or domain, or interfere
22 with the public administration, or if the effect of the judgment would be to restrain the [sovereign]
23 from acting, or to compel it to act.'" *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1088 (9th Cir.
24 2013) (quoting *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992)). If the answer is
25 yes, then the tribal officials are protected by the tribe's sovereign immunity.

26 Plaintiffs have sued Judge Pickens in her official capacity and only as a nominal defendant in
27 order to enjoin the Tribal Court and the Tribe. This is clear from the face of Plaintiffs' Complaint and
28 is undisputed. Plaintiffs make no attempt to establish how Judge Pickens is not protected by Tribe's

1 sovereign immunity. Plaintiffs have not alleged that the Tribe has waived its immunity, nor has it
2 alleged that Congress abrogated its immunity for this suit. Plaintiffs entirely ignore the issue of the
3 Tribe's sovereign immunity in their Complaint. Because Judge Pickens has been sued only in her
4 official capacity for conduct taken in the scope of her authority, she is protected by the Tribe's
5 sovereign immunity and this Court lacks subject-matter jurisdiction to hear this case. Dismissal is
6 appropriate pursuant to FRCP 12(b)(1).

7 *i. Ex parte Young does not apply to give the Court subject-matter jurisdiction*

8 It is presumed that Plaintiffs will attempt to argue that *Ex parte Young* applies because they
9 have sued Judge Pickens in her official capacity for prospective injunctive relief. However, like
10 Plaintiffs' attempt at pleading around sovereign immunity, this argument fails. Plaintiffs' allegations
11 against Judge Pickens are all speculative, and Plaintiffs have not alleged that Judge Pickens is
12 currently in violation of federal law, the U.S. Constitution, or federal common law. Without such a
13 showing, Plaintiffs' Complaint against Judge Pickens fails.

14 *Ex parte Young* "has been extended to tribal officials sued in their official capacity such that
15 'tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly
16 acting in violation of federal law.'" *Burlington N. & Santa Fe R.R. Co. v. Vaughn*, 509 F.3d 1085,
17 1092 (9th Cir. 2007) (quoting *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir.),
18 *overruled on other grounds by Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th
19 Cir. 2000)). The doctrine of *Ex parte Young* also applies to prohibit immunity from applying to an
20 officer who is currently acting under an allegedly unconstitutional statute. *Vaughn*, 509 F.3d at 1092
21 (citing *Ex parte Young*, 209 U.S. 123, 155-56 (1908)). *Ex parte Young* will also apply to override
22 immunity if the plaintiff alleges that the official is in violation of federal common law. *Salt River*
23 *Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1182 (9th Cir. 2012). "In determining
24 whether *Ex Parte Young* is applicable to overcome the tribal officials' claim of immunity, the relevant
25 inquiry is only whether [plaintiff] has *alleged* an ongoing violation of federal law and seeks
26 prospective relief." *Vaughn*, 509 F.3d at 1092 (citing *Verizon Md., Inc. v. Publ. Serv. Comm'n of Md.*,
27 535 U.S. 635, 645-46 (2002)) (emphasis in original).

1 Plaintiffs fail in their Complaint to allege that Judge Pickens is currently violating federal law,
2 the U.S. Constitution, or federal common law. Plaintiffs' only reference to Judge Pickens is that she
3 is the presiding judge of the Tribal Court: "Judge Pickens is the judge presiding over the Tribal Court
4 Action. Judge Pickens is a tribal official sued herein in her official capacity." (Compl. at ¶4, ECF No.
5 1.) Based on those few sentences, Plaintiffs request that this Court enter a preliminary and permanent
6 injunction to prohibit Judge Pickens from taking any *further* action with regards to the Tribal Action.
7 (*Id.* at 10:13-14.) Yet Plaintiffs have not made any allegation that Judge Pickens has taken *any* action,
8 including exercising subject-matter jurisdiction, over the Tribal Action. Accordingly, there is no
9 allegation that Judge Pickens has violated federal law, the U.S. Constitution, or federal common law.
10 Judge Pickens cannot be stripped of her immunity and enjoined based on the simple allegation that
11 she is a judge and that someone has filed a complaint in the court that she presides over. Plaintiffs'
12 Complaint fails to establish that *Ex parte Young* applies to this case with regards to Judge Pickens.
13 Accordingly, Plaintiffs have failed to illustrate that the Tribe's sovereign immunity does not apply to
14 this case. This Court therefore lacks subject-matter jurisdiction to entertain Plaintiffs' Complaint with
15 regards to Judge Pickens.

16 *ii. Jurisdiction in the Tribal Action is Colorable and there has been no violation*
17 *of federal common law*

18 Judge Pickens will not be in violation of federal common law if the Tribal Court hears the
19 Tribal Action, because the Tribal Court's subject-matter jurisdiction is colorable on the face of the
20 Tribal Complaint. The Tribe's allegations in the Tribal Complaint allege that Plaintiffs' actions have
21 harmed Tribal land and Tribal Members. The Tribal Complaint also claims that Plaintiffs' actions
22 have threatened or have some direct effect on the political integrity, the economic security, or the
23 health or welfare of the Tribe. Under U.S. Supreme Court precedent, subject-matter jurisdiction is at
24 least colorable on the face of the Tribal Complaint. If Judge Pickens determines that the Tribal Court
25 has subject-matter jurisdiction to hear the Tribal Complaint, Judge Pickens will not be violating
26 federal common law. Accordingly, *Ex parte Young* would not apply to override the Tribe's sovereign
27 immunity, and the extension of that sovereign immunity to Judge Pickens, who has been sued in her
28 official capacity.

1 “Non-Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to
2 challenge tribal court jurisdiction.” *Evans v. Shoshone-Bannock Land Use Policy Comm’n*, 736 F.3d
3 1298, 1302 (9th Cir. 2013) (quoting *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 846
4 (9th Cir. 2009)). A tribal court may exercise subject-matter jurisdiction pursuant to either its inherent
5 sovereign power or by a congressional statutory grant. *Philip Morris USA, Inc. v. King Mountain*
6 *Tobacco Co.*, 569 F.3d 932, 937 (9th Cir. 2009). While a tribe’s inherent sovereign powers do not
7 extend to the activities of nonmembers of the tribe on non-tribal land, the Court has established that
8 the two *Montana* exceptions, if met, will provide a tribal court with subject-matter jurisdiction over
9 non-tribal members. *Id.* (citing *Montana v. United States*, 450 U.S. 544, 565 (1981)). “The first
10 exception relates to nonmembers who enter consensual relationships with the tribe or its members;
11 the second concerns activity that directly affects the tribe’s political integrity, economic security,
12 health, or welfare.” *Philip Morris*, 569 F.3d at 937 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438,
13 446 (1997)). A nonmember’s federal common law action will fail if the tribal court’s subject-matter
14 jurisdiction is plausible or colorable on the face of the tribal complaint under either of the *Montana*
15 exceptions. *See Evans*, 736 F.3d at 1303; *Philip Morris*, 569 F.3d at 934. A plaintiff must establish
16 that the tribal court lacks subject-matter jurisdiction in order for *Ex parte Young* to apply to the suit.
17 *Norton v. Ute Indian Tribe of the Untah and Ouray Reservation*, 862 F.3d 1236, 1251 (10th Cir.
18 2017).

19 The Court’s second *Montana* exceptions states that “tribes may regulate nonmember ‘activity
20 that directly affects the tribe’s political integrity, economic security, health, or welfare.’” *Evans*, 736
21 F.3d at 1303 (quoting *Strate*, 520 U.S. at 446). It is the tribe’s burden to show that the second
22 *Montana* exception provides a tribal court with subject-matter jurisdiction. *Evans*, 736 F.3d at 1303.
23 The conduct alleged by the tribe “must do more than injure the tribe, it must ‘imperil the subsistence’
24 of the tribal community.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316,
25 341 (2008) (quoting *Montana*, 450 U.S. at 566). “[T]he challenged conduct must be so severe as to
26 ‘fairly be called catastrophic for tribal self-government.’” *Evans*, 736 F.3d at 1306 (quoting *Plains*
27 *Commerce*, 554 U.S. at 341).

1 In *Evans*, the Ninth Circuit Court of Appeals declined to extend the second *Montana*
2 exception to a tribal court where the tribes’ complaint asserted that construction of a single-family
3 home by a nonmember posed catastrophic risks to the tribes’ health, welfare, and self-governance.
4 *Evans* 736 F.3d at 1305-06. The tribes in *Evans* claimed that the construction project presented
5 several environmental harms to the tribe and tribal land, including “(1) groundwater contamination;
6 (2) improper disposal of construction debris; and (3) increased risk of fire.” *Id.* at 1305. In rejecting
7 these potential harms, the court stated the tribes “ha[d] long experienced groundwater contamination,
8 and the [t]ribes proffer no evidence showing that [the nonmember’s] construction would
9 meaningfully exacerbate the problem. Further, the [t]ribes’ generalized concerns about waste disposal
10 and fire hazards are speculative, as they do not focus on [the nonmember’s] specific project.” *Id.* at
11 1306. *But see Elliott*, 566 F.3d at 849 (finding that destruction of millions of dollars of tribe’s natural
12 resources was sufficient to establish *Montana*’s second exception).

13 In the Tribal Action, tribal jurisdiction is plausible on the face of the Tribal Complaint based
14 on the second *Montana* exception, as pled by the Tribe. The Tribal Complaint states that the Tribal
15 Court has subject-matter jurisdiction because “the claims herein arose on [the Tribe’s] land, and/or
16 because the acts and omissions giving rise to the claims threaten or have a direct impact on the
17 political integrity, economic security, and/or health, safety and welfare of the Tribe, imperiling the
18 subsistence of the Tribe.” (Tribal Complaint at ¶3.) The Tribe then alleges at least ten paragraphs
19 where they allege how Plaintiffs’ actions have damaged Tribal land and Tribal members. (*See id.* at
20 ¶¶ 8, 9, 10, 16, 17, 18, 19, 20, 21, and 22.) These allegations include damage to Tribal land caused by
21 pollution and toxic materials being dumped or ending up on Tribal land, the harm to Tribal wetlands
22 and water sources by pollution and toxic materials, and harm inflicted or potentially inflicted to
23 Tribal members. The Tribe then alleges that Plaintiffs’ acts or omissions have given rise to each

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1 cause of action, including the harm or threatened harm to Tribal land and Tribal members.¹ Under
2 *Montana*'s second exception, the Tribal Court's subject-matter jurisdiction is at least plausible.

3 Plaintiffs rely on heavily on the Ninth Circuit's ruling in *Evans*, where the court held that
4 environmental harm was found to not establish the second *Montana* exception. 736 F.3d at 1306. The
5 Tribal Action is distinguishable. In *Evans*, the court found that a single construction project did not
6 cause the tribe's environmental harms. *Id.* The court reasoned that the tribe's generalized concerns
7 about the construction project were speculative, "as they do not focus on [the nonmember's] specific
8 project." *Id.* The court also reasoned that the tribe had suffered groundwater contamination in the past
9 and there was no evidence that the nonmember's "construction would meaningfully exacerbate the
10 problem." *Id.*

11 In the Tribal Action, the Tribe has not alleged that Plaintiffs' failure to remediate the Mine
12 Site has "exacerbated" its environmental problem. Instead, the Tribe alleges that Plaintiffs' acts
13 and/or omissions *caused* its environmental problems that have occurred on Tribal land and to Tribal
14 members. These problems include contaminated groundwater that the Tribe uses for drinking water
15 and irrigation, hazardous dust that blows on Tribal land, and damage to the Tribe's wetlands and
16 natural habitats. Where *Evans* concerned a single, ongoing construction project and the tribe failed to
17 show or allege how the single project was related to the ongoing environmental problems, the Tribe
18 in this case has alleged that Plaintiffs are the cause of the problems. *See also FMC Corp. v.*
19 *Shoshone-Bannock Tribes*, 2017 WL 4322393, at *10-*11 (D. Idaho Sep. 28, 2017) (finding that
20 second *Montana* exception applied under *Evans* framework where the tribe showed "that a failure by
21 the EPA to contain the massive amount of highly toxic FMC waste would be catastrophic for the
22 health and welfare of the [t]ribes[]").

23 The Tribal Court's subject-matter jurisdiction is also plausible on the face of the Tribal
24 Complaint because the alleged harm asserted by the Tribe has occurred on and to Tribal land. In

25 ¹ *See e.g.*, Tribal Complaint at ¶36 ("[Plaintiffs'] wrongful conduct as set forth above, including but not limited to
26 [Plaintiffs'] intentional past, present and continuing acts and/or omissions, resulting in [Plaintiffs'] intentionally
27 depositing onto and/or intentionally failing to remove and/or to properly dispose of toxic and hazardous substances and
28 intentionally allowing toxic and hazardous substances to remain on [the Tribe's] property, surrounding environment and
community resulted in the direct physical invasion of [the Tribe's] property properties [*sic*] by toxic and hazardous
substances."); ¶47 ("As a direct and proximate result of [Plaintiffs'] misconduct as set forth herein, [the Tribe] and Tribal
members have suffered and continue to suffer economic losses, such as costs of medical monitoring and the loss of value
to their property, as well as other damages.").

1 discussing U.S. Supreme Court precedent, the Ninth Circuit stated, “[t]he Supreme Court has strongly
 2 suggested that a tribe may regulate nonmember’s conduct on tribal lands to the extent that the tribe
 3 can ‘assert a landowners’ right to occupy and exclude.’” *Elliott*, 566 F.3d at 849 (quoting *Hicks*, 533
 4 U.S. at 359). The Court has stated, “tribal ownership is a factor in the *Montana* analysis and a factor
 5 significant enough that it may sometimes be dispositive.” *Hicks*, 533 U.S. at 359. *See also Water*
 6 *Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 805 (9th Cir. 2011) (tribes do have
 7 subject-matter jurisdiction pursuant to their inherent sovereign powers “over non-Indian conduct on
 8 tribal land....”). The Tribe asserts that Plaintiffs’ acts and omissions have severally damaged land
 9 owned by the Tribe, with the presence of hazardous contaminants on Tribal land and Tribal water
 10 sources. The Tribal Complaint does not request that Plaintiffs take any actions off Tribal land, only
 11 that damages be awarded for the harm done to Tribal land and for the costs for the medical
 12 monitoring for Tribal members. (Tribal Complaint at 16.) The Tribe’s Complaint, taken as a whole,
 13 suggests that the Tribal Court’s subject-matter jurisdiction is at least plausible. Whether the Tribal
 14 Court does have subject-matter jurisdiction over the Tribal Court action is an issue that should be
 15 addressed first by Judge Pickens. (*See infra* Part B.)²

16 Accordingly, because the Tribal Court’s subject-matter jurisdiction is plausible on the face of
 17 the Tribal Complaint, Judge Pickens would not be in violation of federal common if she determined
 18 that the Tribal Court had subject-matter jurisdiction. Since Judge Pickens will not be in violation of
 19 federal common law, the *Ex parte Young* exception would not apply and Judge Pickens will be
 20 protected by the Tribe’s sovereign immunity since she has been sued in her official capacity and for

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24
 25 ² Plaintiffs’ reliance on the Comprehensive Environmental Response, Compensation, and Liability Act
 26 “(CERCLA)” as a way of foreclosing the Tribal Court’s subject-matter jurisdiction is misplaced. (Compl. ¶32, ECF No.
 27 1.) CERCLA “authorizes private parties to institute civil actions to recover the costs involved in the cleanup of hazardous
 28 wastes from those responsible for their creation.” *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th
 Cir. 2001) (quoting *3550 Stevens Creeks Assocs v. Barclays Bank*, 915 F.2d 1355, 1357 (9th Cir. 1990)). The Tribal
 Complaint does not request funds for cleaning up the alleged hazardous materials released on the Tribe’s land. Instead,
 the Tribal Complaint requests damages for the harm caused to Tribal land and Tribal members. On the face of the Tribal
 Complaint, CERCLA does not apply.

1 actions taken within the scope of her authority. The Tribe's sovereign immunity applies and this
 2 Court lacks subject-matter jurisdiction to consider Plaintiffs' Complaint.³

3 **B. Plaintiffs Must First Exhaust their Tribal Court Remedies**

4 With the issue of Tribal Court subject-matter jurisdiction being plausible on the face of the
 5 Tribal Complaint, Judge Pickens is protected by the Tribe's sovereign immunity. Additionally,
 6 Plaintiffs are required to exhaust their tribal remedies, including exhausting tribal appeals, before
 7 filing their Complaint in this Court. Before filing their Complaint in this Court, Plaintiffs filed a
 8 Motion to Dismiss for lack of subject-matter jurisdiction in Tribal Court. That Motion is still pending
 9 in the Tribal Court. (Pls.' Mot. for Prelim. Inj. 7:21-22, ECF No. 2.) Since Plaintiffs did not exhaust
 10 their tribal remedies and jurisdiction is plausible in Tribal Court, this Court should dismiss this action
 11 on the principles of comity as required by the U.S. Supreme Court and Ninth Circuit Court of
 12 Appeals.

13 The Supreme Court has "repeatedly recognized the Federal Government's longstanding
 14 policy of encouraging tribal self-government." *Iowa Mut. Ins., Co. v. LaPlante*, 480 U.S. 9, 14 (1987)
 15 (citations omitted.) The Court also recognizes the important role tribal courts play in self-governance.
 16 *Id.* Accordingly, exhaustion of tribal remedies "is required before such a claim may be entertained
 17 by a federal court." *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004) (*Nat'l Farmers Union Ins.*
 18 *Cos. v. Crow Tribe of Indian*, 471 U.S. 845, 857 (1985)). "A federal court must give the tribal court a
 19 full opportunity to determine its own jurisdiction, which includes exhausting opportunities for
 20 appellate review in tribal courts." *Boozer*, 381 F.3d at 935 (citing *Iowa Mut. Ins.*, 480 U.S. at 16-17).
 21 Exhaustion is required as a matter of comity, but is not required where it is "plain that the tribal court
 22 lacks jurisdiction over the dispute, such that adherence to the exhaustion requirement would serve no
 23 purpose other than to delay." *Boozer*, 381 F.3d at 935 (citing *Hicks*, 533 U.S. at 369). "Delay alone is
 24 not ordinarily sufficient to show that pursuing tribal remedies is futile." *Boozer*, 381 F.3d at 936

25 ³ Judge Pickens has not made a determination on the merits of Plaintiffs' Motion to Dismiss filed in Tribal Court,
 26 alleging that the Tribal Court lacks subject-matter jurisdiction. The statements in this Motion should not be interpreted to
 27 indicate that Judge Pickens has any preconceived notions regarding the merits of Plaintiffs' Motion. Judge Pickens'
 28 submits that the plausibility standard required by the Supreme Court, which governs this Court's ruling, has been met by
 Plaintiffs, but that the plausibility standard has no effect on the ruling in Tribal Court. This is why, as the Supreme Court
 recommends, issues of a tribal court's subject-matter jurisdiction should first be determined by the tribal court. (*See infra*
 Part B.)

1 (quoting *Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1036 (9th Cir. 1999)). Where tribal
2 subject-matter jurisdiction is plausible or colorable on the face of the tribal complaint under either of
3 the *Montana* exceptions, the federal court should require the nonmember to exhaust their tribal
4 remedies in tribal court. *Evans*, 736 F.3d at 1302; *Philip Morris*, 569 F.3d at 941.

5 As discussed above, it is plausible that the Tribal Court would have subject-matter jurisdiction
6 over Plaintiffs, who are nonmembers. The Tribe has alleged that subject-matter jurisdiction is proper
7 in the Tribal Court based on the second *Montana* exception. The Tribe alleges that Plaintiffs' acts and
8 omissions have harmed the Tribe, Tribal property, and Tribal members and it is seeking damages for
9 that harm. The allegation that Plaintiffs' actions and omissions have caused the harm to the property
10 and water supply of the Tribe, and that those actions and omissions have caused toxic materials such
11 as uranium, arsenic, lead, and mercury to be present on Tribal land is sufficient to establish in this
12 Court that Plaintiffs' actions are catastrophic. Under *Montana* and the Court's policy that tribal courts
13 determine their own subject-matter jurisdiction, the Tribal Complaint has plead sufficient allegations
14 so that this Court would not commit error by allowing the Tribal Court to determine whether subject-
15 matter jurisdiction exists over the Tribal Action. *See also Water Wheel*, 642 F.3d at 808 (courts have
16 "recognized that because tribal courts are competent law-applying bodies, the tribal court's
17 determination of its own jurisdiction is entitled to some deference") (citations and quotation marks
18 omitted).

19 Plaintiffs have filed this suit before the Tribal Court had an opportunity to determine for itself
20 whether it had subject-matter jurisdiction over the Tribal Action. Based on principles of comity, this
21 Court should dismiss or stay this action pending the Tribal Court's determination of whether it has
22 subject-matter jurisdiction. The Tribal Court's jurisdiction is colorable under established principles,
23 and precedent requires that the Tribal Court determine for itself whether subject-matter jurisdiction
24 exists. Accordingly, Plaintiffs are first required to exhaust their tribal remedies before filing suit in
25 this Court.

25 **V. CONCLUSION**

26 Based on the foregoing, Plaintiffs' filings in this case were not proper. Plaintiffs have failed to
27 establish that the Tribe and Judge Pickens are not protected by tribal sovereign immunity. Plaintiffs
28

1 have made no showing that *Ex parte Young* applies to deprive Judge Pickens of her immunity
2 protection. Judge Pickens has committed no ongoing violation of federal law, the U.S. Constitution,
3 or federal common law, and Plaintiffs have not alleged as much. If Judge Pickens determines that she
4 may hear the Tribal Action, she will not be in violation of federal common law because the Tribal
5 Court's subject-matter jurisdiction is plausible and colorable on the face of the Tribal Complaint.
6 Because there is no violation of federal common law, the *Ex parte Young* exception will not apply.
7 Since the Tribe's sovereign immunity applies, this Court lacks subject-matter jurisdiction to consider
8 Plaintiffs' case. Finally, Plaintiffs have failed to exhaust their tribal remedies, which they are required
9 to do. Defendant Sandra Mae Pickens respectfully requests that this Court grant her Motion to
10 Dismiss.

11 DATED this 26th day of October, 2017.

12 

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I certify that I am an employee of Laxalt & Nomura, Ltd. and not a party to, nor interested in, the within action; that on the 26th day of October, 2017, a true and correct copy of the foregoing *DEFENDANT SANDRA-MAE PICKENS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT* was filed electronically through the Court's CM/ECF electronic notice system to the attorneys associated with this case.

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