Robert F. Saint-Aubin
Nevada State Bar No. 909
rfsaint@me.com
Saint-Aubin Chtd.
3753 Howard Hughes Pkwy Suite 200
Las Vegas, NV 89169
Telephone: (702) 985-2400
Facsimile: (949) 496-5075

Michael Angelovich*
mangelovich@nixlaw.com
Austin Tighe*
atighe@nixlaw.com
NIX, PATTERSON & ROACH, LLP
3600 N Capital of Texas Hwy
Bldg. B, Suite 350
Austin, Texas 78746
Telephone: (512) 328-5333
Facsimile: (512) 328-5335
*Each will timely comply with LR IA 11-2 as necessary

Attorneys for Yerington Paiute Tribe and Laurie A. Thom in her official capacity as Chairman of the Yerington Paiute Tribe

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BP AMERICA INC., and ATLANTIC RICHFIELD COMPANY, Plaintiffs, v. YERINGTON PAIUTE TRIBE; LAURIE A. THOM, in her official capacity as Chairman of the Yerington Pauite Tribe; YERINGTON PAIUTE TRIBAL COURT; and SANDRA-MAE PICKENS in her official capacity as Judge of the Yerington Paiute Tribal Court, Defendants.	Case No. 3:17-cv-00588-LRH-WGC **MOTION TO DISMISS FOR LACK OF JURISDICTION**

Defendants Yerington Paiute Tribe and Laurie A. Thom, in her official as Chairman of the Yerington Paiute Tribe (collectively herein, the "Tribe"), pursuant to Fed. R. Civ. P. 12, hereby file this Motion to Dismiss for Lack of Subject Matter Jurisdiction. In filing this Motion, the Tribe does not waive, and expressly reserves, its sovereign immunity and all rights and defenses attendant thereto, as well as all defenses to this Court's jurisdiction. The Complaint to be dismissed (Dkt. 1)

was filed by BP America, Inc. and Atlantic Richfield Company, who are referred to collectively herein as "BP".

INTRODUCTION

The Tribe is entitled to dismissal under Fed. R. Civ. P. 12 pursuant to the doctrines of sovereign immunity and exhaustion of tribal court remedies, as set forth by the Supreme Court and consistently applied by the Ninth Circuit. The Tribe and Chairman are immune from suit in this forum. Also, the doctrine of exhaustion of tribal remedies holds that a tribal court is the appropriate court to determine its own jurisdiction in the first instance. Because neither of the two narrow exceptions to that doctrine asserted by BP are applicable here, this Court should not make a ruling on tribal court jurisdiction before the tribal court does, and all tribal remedies are exhausted.

STANDARD OF REVIEW

Federal courts are courts of limited jurisdiction, it is presumed that a complaint lies outside a federal court's jurisdiction, and "the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Righthaven LLC v. Newman*, 838 F. Supp. 2d 1071, 1074 (D. Nev. 2011). Dismissal is appropriate if the complainant fails to allege sufficient facts establishing subject matter jurisdiction. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008).

SOVEREIGN IMMUNITY

The Yerington Paiute Tribe is entitled to dismissal because it is immune from suit in this forum. "[T]ribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." *Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1015–16 (9th Cir. 2007). Absent express waiver, consent by the tribe, or congressional authorization for a particular suit, "a federal court is without jurisdiction to entertain claims advanced against [a] Tribe." *Evans v. McKay*, 869 F.2d 1341, 1345-56 (9th Cir. 1989); *Kiowa Tribe of Okla. V. Mfg. Techs., Inc.*, 523 U.S. 751 (754); *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983). BP's Complaint does not allege any express waiver or consent, nor any congressional authorization for its lawsuit. Because none exists. As to the latter ground, BP's reliance on 28 U.S.C 1331 as its jurisdictional basis would fail that test. Congressional abrogation of sovereign immunity may not be implied and must be unequivocally

expressed in explicit legislation. *See White v. Univ. of Cal.*, 765 F.3d 1010, 1024 (9th Cir. 2014) (unless immunity is abrogated in the express language of a statute, sovereign immunity bars suit against the tribe). There is no such express language in 28 U.S.C. 1331, and so BP's claims against the Yerington Paiute Tribe must be dismissed.

The claims against the Chairman of the Yerington Paiute Tribe, Laurie A. Thom in her official capacity, must be dismissed because she is entitled to the same sovereign immunity. "Tribal sovereign immunity extends to tribal officers when acting in their official capacity and within the scope of their authority." *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008); *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002). In such cases, it is the sovereign (the Tribe) which is the "real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Cook*, 548 F.3d at 727.

"Relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). The tribal court lawsuit was filed by the Yerington Paiute Tribe, not by its Chairman. The lawsuit was authorized by tribal council, not by the Chairman, who does not vote on such resolutions. BP has not stated in its complaint why or how the Chairman is sued, beyond its citing to 28 U.S.C. 1331, which is no more availing here than it is in regard to the Yerington Paiute Tribe itself. BP has not alleged that the Chairman has done anything, let alone done anything exceeding her authority, or how she is connected in any way with the tribal court lawsuit. Without such allegations in BP's Complaint, there is nothing to declare as to her, and nothing to enjoin as to her. BP has pled no facts giving rise to a specific exception to her sovereign immunity.

BP will argue that we are ignoring *Ex Parte Young* and its progeny. But it is BP who is ignoring the limited scope of that law. This Circuit has permitted certain declaratory and injunctive lawsuits against tribal officials, but only where it is alleged that those officials acted beyond their authority, in contravention of constitutional or federal statutory law. *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1996); *Burlington N.R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991). BP has not alleged in its complaint that Chairman Thom took *any* action, let alone action

beyond her authority which contravened constitutional or federal statutory law. As such, BP has not alleged any basis to negate Chairman Thom's sovereign immunity, and the claims against her should be dismissed.

EXHAUSTION OF TRIBAL COURT REMEDIES

Alternatively, this Court must dismiss BP's complaint because a tribal court is entitled to determine its own jurisdiction first, before that issue is considered by a federal district court. Federal law has long recognized respect for comity and a resulting deference to a tribal court as the appropriate court to determine its own jurisdiction in the first instance. *Grand Canyon Skywalk Dev., LLC v. 'SA' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013). The basis for the doctrine of exhaustion of tribal court remedies was articulated by the Supreme Court in *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985), citing (1) a congressional policy of supporting tribal self-government and self-determination; (2) a policy of allowing the forum whose jurisdiction is being challenged "the first opportunity to evaluate the factual and legal bases for the challenge"; and (3) judicial economy being best served "by allowing a full record to be developed in the Tribal Court."

In *Nat'l Farmers*, the Supreme Court held that as a general rule, exhaustion of tribal court remedies "is **required** before such a claim may be entertained by a federal court." *Nat'l Farmers Union*, 471 U.S. at 857 (emphasis added); *see also Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). The exhaustion requirement is founded upon long-recognized policies of promoting tribal self-government, self-determination, and the orderly administration of justice. *Nat'l Farmers*, 471 U.S. at 856-57. "Proper respect for tribal legal institutions, [therefore], requires that they be given a 'full opportunity' to consider the issues before them…" *LaPlante*, 480 U.S. at 16. If unconditional access to federal district courts were allowed, tribal courts would be in direct competition with the federal forum, "thereby impairing the tribal court's authority over reservation affairs." *Id.* The "orderly administration of justice" will be served by "allowing a full record to be developed in the Tribal Court…" *Nat'l Farmers*, 471 U.S. at 856. Additionally, exhaustion "will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction" and thereby "provide other courts with the benefit of their expertise in such matters in the event of further judicial review."

Id. at 857. Once remedies have been fully exhausted, a tribal court's determination of its jurisdiction presents a federal question subject to consideration in federal district court. *Yellowstone County v. Pease*, 96 F.3d 1169, 1172 (9th Cir. 1996), *cert denied*, 520 U.S. 1209 (1997).

Following *Nat'l Farmers*, the Ninth Circuit has repeatedly held that a federal district court must give a tribal court a full opportunity to determine its own jurisdiction in the first instance, before the federal district court considers the matter. *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir. 2009); *Crawford v. Genuine Parts Co*., 947 F.2d 1405, 1407 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992); *Alvarez v. Tracy*, 773 F.3d 1011, 1016 (9th Cir. 2013) (exhaustion is a prerequisite to a federal court exercising jurisdiction); *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989) ("Therefore, under *Nat'l Farmers*, the federal courts should not even make a ruling on tribal court jurisdiction…until tribal remedies are exhausted.") (emphasis added).

The Ninth Circuit has consistently applied this doctrine since its inception. "Under the doctrine of exhaustion of tribal court remedies, relief may not be sought in federal court until appellate review of a pending matter in a tribal court is complete." *Atwood v. Fort Peck Tribal Court Assiniboine and Sioux Tribes*, 513 F.3d 943, 948 (9th Cir. 2008); *see also Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004) ("A federal court **must** give the tribal court a full opportunity to determine its own jurisdiction, which includes exhausting opportunities for appellate review in tribal courts." (emphasis added); *Marceau v. Blackfeet Hous. Auth*., 519 F.3d 838, 843 (9th Cir. 2008) ("Ordinarily, exhaustion of tribal remedies is **mandatory**.") (emphasis added); *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 954 (9th Cir. 1998) (federal district court properly required exhaustion in tribal court, including tribal appellate review, before entertaining plaintiff's complaint); *Wellman v. Chevron U.S.A., Inc*., 815 F.2d 577, 578 (9th Cir. 1987) ("Considerations of comity **require** the exhaustion of tribal remedies before the [tribal court's jurisdiction] may be addressed by the district court.") (emphasis added).

In light of the importance of the doctrine of exhaustion of tribal court remedies, federal courts will excuse the failure to exhaust in only four circumstances: (1) when an assertion of tribal jurisdiction is "motivated by a desire to harass or is conducted in bad faith,"; (2) when the tribal court

action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is 'plain' that tribal court jurisdiction is lacking, so that the exhaustion requirement 'would serve no purpose other than delay." *See Elliot,* 566 F.3d at 847; *Burlington N. R.R. Co. v. Red Wolf*, 196 F. 3d 1059, 1056 (9th Cir. 1999).

In its Complaint, BP asserts that two of the four exceptions apply: (2) express jurisdictional prohibition, and (4) plain lack of tribal court jurisdiction. Dkt. 1, ¶¶ 31,32. While BP does take a footnoted-swipe at the integrity of the tribal court judge, its argument is limited to only these two exceptions. In fact, neither exception applies, and as such, there is no basis to avoid or ignore the doctrine of exhaustion of tribal court remedies in this case.

At the outset, it is important to note that a party such as BP, seeking to employ any of the four exceptions, bears the burden of making a *substantial* showing that the exception applies. *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1238 (10th Circuit 2014) (emphasis added). Moreover, any exception is to be applied *narrowly* by the Court. *Id.* at 1239 (emphasis added).

First, as to BP's assertion that tribal court jurisdiction is plainly lacking, that exception fails—and the district court is required to dismiss—if the tribal court's jurisdiction is "colorable" or "plausible". *See Atwood*, 513 F.3d at 948. Deference to tribal courts is required when the disputed issue "'arise[s] on the reservation'" or involves a "'reservation affair'" and no exceptions to the exhaustion rule exist. *See Crawford*, 947 F.2d at 1407. 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. *Stock West Corp. v. Taylor*, 964 F.2d 912, 918-20 (9th Cir. 1992). This is required where, based on the record, "the assertion of tribal court jurisdiction is plausible and appears to have a valid or genuine basis." *Id*. at 919 (emphasis added).

Based on its motion for preliminary injunction (Dkt. 2)[1], BP will argue that the general rule

[1]The Tribe takes the position that because BP's Complaint should be dismissed for lack of jurisdiction, the Tribe should not be required, nor is it proper, to engage in motion practice prior to this Court's determination of this Rule 12 motion. However, because the Tribe anticipates that BP will raise

in *Montana v. United States*, 450 U.S. 544 (1981) controls in this case, and that neither of the two exceptions to *Montana* apply. In *Montana*, the Supreme Court stated that generally, a tribal court's jurisdiction does not extend to the conduct of non-Indians on non-Indian land, with two exceptions: (1) where there is a consensual relationship through commercial dealings, or (2) when the non-Indian's conduct relating to non-Indian land "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id*. at 565-566.

However, in the Ninth Circuit, *Montana's* exceptions are not a prerequisite to tribal court jurisdiction if the claims arise *on* tribal land. In the Ninth Circuit, tribes have jurisdiction over non-Indian conduct on tribal land, irrespective of *Montana*. *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813 (9th Cir. 2011); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (recognizing a tribe's inherent authority to exclude non-Indians from trespassing on tribal land, without applying *Montana*); *William v. Lee*, 358 U.S. 217, 225 (1959); *Smith v. Salish Kootenai Coll*., 434 F.3d 1127, 1132 (9th Cir. 2006) ("[W]hether tribal courts may exercise jurisdiction over a nonmember defendant may turn on how the claims are related to tribal land"); *Grand Canyon Skywalk Dev., LLC*, 715 F.3d at 1200-01.

BP's entire Complaint is premised on the assertion that "The Tribe does not allege that BP or ARC engaged in any conduct or activity on the Tribe's reservation." Dkt. 1, ¶¶ 16, 27. That assertion is especially curious given that BP admits that it does not know where the actual boundaries of the reservation are (Dkt. 2, fn. 19), but even more importantly, *it is simply not true*. The Tribe's complaint *repeatedly* alleges conduct **on** the Tribe's reservation. *See* Dkt. 3, Ex. A, ¶¶ 8, 26, 27, 36, 39.[2] In fact, BP's own Complaint cites to the Tribe's allegation that BP "transport[ed] and store[d]

Foot note 1 continued
many of those same arguments in responding to this Rule 12 motion, in the interest of continuity and judicial economy the Tribe references those arguments throughout this Rule 12 motion.

[2]The tribal court complaint, attached by BP to Dkt. 3, is referenced throughout because it is relevant to this Court's jurisdictional analysis. *Attorneys Process & Investigation Services v. Sac & Fox Tribe*, 609 F.3d 927 (8th Cir. 2010) ("In analyzing the jurisdictional issues we rely on…the allegations in the Tribal Court complaint."). This Court can consider the tribal court complaint through the incorporation by reference doctrine. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Additionally, it is axiomatic that this Court can take judicial notice of said pleading.

their toxic and hazardous substances and waste's **on [the Tribe's] property.**" Dkt. 1, ¶ 18, quoting the Tribe's tribal court compliant, ¶ 39 (Dkt. 3, Ex. A) (emphasis added). These allegations are, at a minimum, sufficient to make tribal court jurisdiction "colorable" or "plausible", and negate BP's assertion that tribal jurisdiction is "plainly" lacking. In this context, the question of whether or not these specific allegations give rise to tribal court jurisdiction must, therefore, be resolved by the tribal court in the first instance. *Elliot*, 566 F.3d at 847.

The Tribe sufficiently alleged claims of on-reservation conduct in the tribal court complaint. The Tribe was not required to plead *all* such details or to mount evidence in that complaint**.** *See In re Metro Sec. Litig*., 532 F. Supp. 2d 1260, 1278 (E.D. Wash. 2007) (purpose of complaint "is not to inform the opposing party of every fact underlying plaintiff's claim"). What the Tribe was referring to in ¶ 39 of its tribal court complaint, where it states that BP "transport[ed] and store[d] their toxic and hazardous substances and waste's on [the Tribe's] property" is that tailings taken from the Mine Site, and delivered to and deposited on tribal land including the Colony, were used for backfill around utilities and for the foundations of numerous buildings on the reservation. These tailings were tested by the EPA and the Tribal Environmental Office, and showed evidence of hazardous materials. These jurisdictional facts, in support of ¶ 39 of the tribal court complaint, will be presented in the tribal court in response to BP's motion to dismiss in that court, along with facts that refute BP's factual allegations regarding the Wabuska Drain (Dkt. 2, pp. 5-6), including that the Wabuska Drain—which is on the reservation and indisputably carried hazardous waste—originated on the Mine Site controlled by BP; was used for point source discharge beginning in at least 1984, with its return point at or near where the toxic water ponds are located; and was realigned by BP for discharge from the Mine Site through the reservation as late as 2001. Whether these allegations and related evidence support tribal court jurisdiction, or whether BP's factual assertions regarding the Drain divorce it from the reservation and disavow tribal court jurisdiction, is for the tribal court to decide in the first instance. *Elliot*, 566 F.3d at 847.

Additionally, the Tribe's complaint alleges that its claims arose on tribal land, even if BP had not conducted the aforementioned activity on tribal lands, because pollution and contamination from the Mine Site have been and are found in the Tribe's groundwater, surface water, and soil. *See* Dkt.

3, Ex. A, ¶¶ 8-10, 13, 19-22. BP cites three cases, two arising from the same facts, for the proposition that off-reservation conduct causing adverse effects on tribal land cannot support tribal court jurisdiction. Dkt. 2, p. 11. Assuming, *arguendo*, that this particular conduct complained of by the Tribe was "off-reservation", none of the three cases cited by BP irrefutably foreclose tribal court jurisdiction or the exhaustion of tribal court remedies in the first instance.

BP's primary case in support of this argument is *UNC Resources, Inc. v. Benally*, 514 F. Supp. 358 (D.N.M. 1981). But *Benally* is distinguishable from the Tribe's case because "all of the land affected [was] outside the boundaries of the reservation", and instead was a "checkerboard area of mixed federal, state, and tribal jurisdiction adjoining the reservation proper". Id. at 360. As such, BP's citation to Benally for the proposition that tribal court jurisdiction "stops at the reservation boundary" (Dkt. 2, p. 11) is understandable, but ultimately irrelevant to the facts of *this* case. In *Benally*, the contamination also stopped at the reservation boundaries; in the present case, it did not.

The second iteration of *Bennally* is no more helpful to BP's argument. *See UNC Res. Inc. v. Benally*, 518 F. Supp. 1046 (D. Ariz. 1981). As BP notes, it arises from the same general facts, and reaches the same general conclusion as its predecessor. Dkt. 2, p. 12. It has subsequently been called "outdated" because it incorrectly predicted the outcome of *Nat'l Farmers* and was based on a "superior federal interest in nuclear power" (*see Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1502 (10th Cir. 1997), *cert denied*, 502 U.S. 1090 (1998)0, and not dispositive on jurisdiction because it was decided before the tribal exhaustion doctrine promulgated in *Nat'l Farmers* (*see El Paso Natural Gas co. v. Neztsosie*, 136 F.3d 610, fn 1 (9th Cir. 1998).

The final case BP relies upon in arguing that "off-reservation" conduct cannot give rise to tribal court jurisdiction is equally unavailing. In *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), there was no connection between the allegations and the reservation. The dispute centered on an alcoholic beverage using tribal names. The brewery responsible for the beverage did not manufacture, sell, or distribute its product on the reservation, and there was no assertion that the second *Montana* exception applied. In the present case, the Tribe has pled facts alleging that the claim arose on the reservation, and the second *Montana* exception applies, making tribal court jurisdiction at least colorable or plausible. *See infra,* pp. 9-11. The

Ninth Circuit distinguished *Hornell Brewing* in a case where Allstate was sued for bad faith in off-reservation settlement activities. In *Allstate Indem. Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999), the Circuit held that tribal court jurisdiction was plausible because Allstate's conduct "related to" the reservation—it sold an insurance policy that covered the reservation, and even though it had never gone onto the reservation, its off-reservation claims adjusting related to the reservation. *Id.* at 1074-75.

In sum, BP concedes that the tribal court has jurisdiction for conduct that occurs within the boundaries of tribal land. Here, the Tribe *has* asserted conduct within the boundaries of its tribal land by BP and its predecessors. Furthermore, the Tribe has asserted that certain of its contamination *claims* arose on tribal land, even if certain of BP's *conduct* was arguably "off-reservation". The Tribe contends that none of the three cases cited by BP automatically negates tribal court jurisdiction over claims arising on tribal land. BP claims that they do. Assessing how these cases apply to the facts of the present case is an issue the tribal court must decide in the first instance. *Elliot,* 566 F.3d at 847; *Admiral Ins. Co. v. Blue Lake Rancheria Tribal Court*, 2012 U.S. Dist. Lexis 48595 (N.D. Cal., April 4, 2012), *citing Stock West,* 964 F.2d at 290.

Even if a *Montana* analysis was triggered because the claims arose "off" tribal land, the Tribe's allegations give rise to one of *Montana's* two recognized exceptions. A tribe has the "inherent power to exercise civil authority over the conduct of non-Indians" if "that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Montana*, 450 U.S. at 566. The Tribe has expressly pled allegations of conduct that threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." See Dkt. 3, Ex. A, ¶¶ 9,10, 19-22, 29, 36-39, 41, 61, 69.

The Ninth Circuit has held that contamination of a tribe's water quality—which is what the Tribe has alleged in part in its tribal court lawsuit—is a threat sufficient to make tribal court jurisdiction "colorable" or "plausible". *Montana v. EPA*, 137 F.3d 1135, 1139-40 (9th Cir. 1998) ("the conduct of users of a small stretch of highway [as in *Strate*] has no potential to affect the health and welfare of a tribe in any way approaching the threat inherent in impairment of the quality of the principal water source."). The Tribe has pled a cause of action for trespass, and related claims, in

connection with the contamination, making tribal court jurisdiction at least "colorable" or "plausible". *See Elliot*, 566 F.3d at 850 (because trespass destroyed tribe's natural resources, the suit was "intended to secure the tribe's political and economic well-being" and thus fit within the Supreme Court's second *Montana* exception); *Attorney's Process & Investigation Services v. Sac & Fox Tribe of Miss. In Iowa*, 609 F.3d 927, 939-40 (8th Cir. 2010) (trespass "directly threatened the tribal community" and thus "threatened the political integrity, the economic security, and the health and welfare of the Tribe"). But again, the tribal court should determine its jurisdiction in the first instance. *Elliot*, 566 F.3d at 847.

BP argues that the *Montana's* second exception does not apply here because the challenged conduct is not severe enough to have catastrophic consequences for the Tribe, citing to *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298 (9th Cir. 2013) in support. In *Evans*, the Circuit held that the Shoshone-Bannock failed to show that a catastrophic risk was posed by the construction of one single-family home that might add to an existing groundwater contamination problem. Understandably, that did not pose a catastrophic risk. But the Tribe's case here is much more in line with another Shoshone-Bannock case, that of *FMC Corp. v. Shoshone-Bannock Tribes*, 2017 U.S. Dist. Lexis 161387 (D. Idaho, Sept. 28, 2017). There, FMC operated a phosphorous plant for fifty years part of which was on tribal land, which generated and stored hazardous waste and contaminated groundwater in a widespread plume, which cannot be fully contained or eradicated—analogous to the very allegations made by the Tribe in its tribal court complaint: The copper mine operated for more than fifty years; it generated and stored arsenic, uranium, and other hazardous and toxic substances, which have contaminated land, air and water (including a 400,000 acre feet plume contaminated with 95 *tons* of uranium); and the risks posed by these toxic and hazardous substances, which continue to escape, migrate and pollute, remain today and will never entirely be eradicated. *See, e.g.,* Dkt. 3, Ex. A, ¶¶ 11-13, 16-19, 26-28. In *FMC Corp*. the court held:

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> By comparison, the threat in this case is many levels of magnitude greater than the threat in *Evans*. FMC's waste is radioactive, carcinogenic, poisonous, and massive in size. It is so toxic that there is no safe way to remove it, ensuring that it will remain on the Reservation for decades. While the EPA's containment program is extensive, it has not prevented lethal phosphine gas from escaping. Moreover, the EPA cannot say how deep and widespread the deadly plume…extends underground…
>
> Under the standard discussed in *Evans*, the record shows conclusively that a failure by the EPA to contain the massive amount of highly toxic FMC waste would be catastrophic for the health and welfare of the Tribes. This is the type of threat that falls within *Montana's* second exception.

Id. at *36-37.[3] BP's argument is belied by the allegations in the tribal court complaint, and by the very EPA documents it cites in its pleadings. The Tribe's case is more in line with *FMC Corp*. than with *Evans*. As such, even if a *Montana* exception is required—and in light of *Water Wheel*, it is not—the Tribe's claim falls within the second exception.

BP has made all of these same arguments in its pending motion to dismiss filed in tribal court. Those arguments are for the tribal court to determine in the first instance. *Elliot*, 566 F.3d 847.[4]

Finally, as to its "plainly" argument, BP challenges the method by which it was served with the tribal court complaint. There are no specific requirements for service under tribal court rules. Service of a complaint in tribal court is not controlled by the Nevada Rules of Civil Procedure, nor by the Federal Rules of Civil Procedure. BP does not, and cannot, point to any tribal court procedures violated by sending the complaint Federal Express to its Registered Agent for Service (Dkt. 3, Ex. H), nor any violation of any tribal court rules. There is no authority cited—because none

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[3]BP also relies, once again, on *Plains Commerce Bank*. Dkt. 2, p. 15. The reason the "catastrophic" test failed in that case was because land owned by a non-Indian for fifty years was simply being sold to another non-Indian. Obviously, that "hardly imperils the subsistence" of the tribe. *Plains Commerce Bank*, 554 U.S. at 341

[4]The Tribe has filed an unopposed motion asking the tribal court to set a hearing on BP's tribal court motion to dismiss for January 30. At least one federal district court, relying on *Atwood,* dismissed the district court case in part because a hearing was already scheduled in tribal court which would "provide [plaintiff] with adequate opportunity to challenge the tribal court's jurisdiction and rulings", and therefore plaintiff "must defend his position in tribal court and exhaust any and all appeals in that jurisdiction prior to coming to this Court." Switzer v. Crow Tribal Courts, 2010 U.S. Dist. LEXIS 86540 (D. Mont., July 7, 2010)

exists—to support the proposition that service by Federal Express on BP's registered agent for service "plainly" negates tribal court jurisdiction. BP's argument here is a kitchen-sink attempt to avoid jurisdiction, and serves only to highlight the weakness of its prior arguments. Whether overnighting a copy of the complaint to BP's registered agent for service is *ultra vires* or an affront to due process, or whether BP's position would require an unwarranted negating of tribal court jurisdiction and is an affront to comity, is for the tribal court to decidein the first instance. *Elliot*, 566 F.3d at 847. Without any specific service requirements to cite to, it cannot be said that the tribal court will "plainly" not have jurisdiction because of the method of service.

Ultimately, the Ninth Circuit has recognized that determining the scope of tribal jurisdiction is "not an easy task." *Elliot*, 566 F.3d at 849. But here, as in *Elliot*, this Court need not make a determination of whether tribal court jurisdiction exists. It need only find it colorable or plausible. *Id.* The allegations in the tribal court complaint make tribal court jurisdiction at the very least colorable or plausible. The determination of that jurisdiction therefore must be decided by the tribal court in the first instance. *Id.* at 847.

Next, BP asserts that it should not have to exhaust tribal court remedies because the Tribe's action is "patently violative of express jurisdictional prohibitions" under CERCLA. A claim that a federal statute deprives a tribal court of jurisdiction will fail unless it can be shown that the statute contains an express jurisdictional prohibition. *See United States v. Plainbull*, 957 F.2d 724, 726-28 (9th Cir. 1992). "A substantial showing must be made by the party seeking to invoke [the 'express jurisdictional prohibition'] exception to the tribal exhaustion rule." *Kerr-McGee Corp.*, 115 F.3d at 1502. Tribal courts, however, "rarely lose the first opportunity to determine jurisdiction because of an 'express jurisdictional prohibition.'" *Id.; Landmark Golf Ltd. Pshp. v. Las Vegas Paiute Tribe*, 49 F. Supp. 2d 1169, 1174 (D. Nev. 1999).

BP fails to make this requisite showing. It cites no case where tribal court jurisdiction violated—let alone *patently* violated—any CERCLA jurisdictional prohibitions, and the state common law claims pled in the tribal court complaint are not patently violative of the CERCLA exclusive jurisdiction prohibitions relied upon by BP.

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BP cites 42 U.S.C. 9613(b) as its primary authority, which provides for exclusive jurisdiction in federal court if claims "arise under" CERCLA. Dkt. 2, pp. 17-19. But claims only "arise under" CERCLA if they constitute a "challenge to [a] CERCLA cleanup." *See ARCO Envtl. Remediation, L.L.C. v. Dep't of Health and Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000). The Ninth Circuit has recognized challenges to a CERCA cleanup as claims that are related to CERCLA's remedial goals, interfere with CERCLA remedial actions, seek to improve a CERCLA cleanup, or seek to dictate specific remedial actions or alter the method of cleanup. *See McClellan v. Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330 (9th Cir. 1995); *ARCO Envtl*., 213 F.3d at 1115.

BP's primary authority, *ARCO Envtl*., negates the application of exclusive jurisdiction in this case. That case held that CERCLA's exclusive jurisdiction provision is not intended "to serve as a shield against litigation that is unrelated to disputes over environmental standards." *ARCO Envtl*., 213 F.3d at 1115; *see also Southeast Texas Environmental, L.L.C. v. BP Amoco Chemical Co*., 329 F. Supp. 2d 853, 871 (S.D. Tex. 2004) ("Because Plaintiffs' claims bear only on the liability of individual defendants and not on the cleanup itself, the Court concludes that Plaintiffs have not challenged a CERCLA cleanup."). BP attempts to cast a broad net by arguing that "relief that is merely 'related to the goals of the [CERCLA] cleanup' is also barred". Dkt 2, p. 18. But the sole case it cites in support of this proposition, *Razore v. The Tulalip Tribes of Washington*, 66 F.3d 236, 239-40 (9th Cir. 1995), is limited to its facts. In *Razore*, the plaintiffs alleged that the Tulalip Tribes' claims relating to a CERCLA site triggered exclusive federal jurisdiction. The court found that because (a) the claims would "effectively terminate" the cleanup; (b) the plaintiffs attempted to "dictate specific remedial actions and to alter the method and order for cleanup"; and (c) the plaintiffs own expert admitted that the relief sought would delay the cleanup, the claims constituted a challenge to the cleanup and thus jurisdiction was exclusively in federal court. *Id.* at 239. None of those facts are present here.

The Tribe does not cite CERCLA in its tribal court complaint, nor seek any form of relief available under its provisions, nor attempt to dictate or delay CERCLA cleanup. As was the case in *ARCO Envtl*., the Tribe does not challenge the selected remedial actions nor does it seek to interfere with the remedial process, elements necessary for the federal courts to exercise exclusive

jurisdiction. Of note, the court held that removal of ARCO's claims to the federal court was improper and, at ARCO's request, remanded the case to the state court in which the case was originally brought. The adequacy of the ongoing remedial investigations, feasibility studies and interim remedial activities on the mine site is neither addressed nor litigated in the tribal court action. The Tribe's action is for tort damages to the Tribe and every person on tribal land, commercial and agricultural operations, tribal government, and tribal property damages separate from natural resources. Restoration, replacement or acquisition of equivalent natural resources is not sought, and would do nothing to compensate the Tribe for the injuries pled in its tribal court complaint. BP's attempt to "re-plead" the tribal court complaint to trigger exclusive federal jurisdiction is pure sophistry.

BP then pivots, arguing alternatively that the Tribe's claims are preempted, and cannot be brought in *any* court. Dkt. 2, p. 19. This argument also fails to negate tribal court jurisdiction. "CERCLA does not completely occupy the field of environmental regulation." *ARCO Envtl*., 213 F.3d at 1114. Indeed, CERCLA includes several provisions indicating Congress's desire to avoid interfering with state law claims. *See, e.g.,* 42 U.S.C. § 9614(a) ("Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances ..."); 42 U.S.C. § 9652 ("Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.").

Courts have consistently held that these savings provisions evidence congressional intent "to preserve to victims of toxic wastes the other remedies they may have under…state law." *PMC, Inc. v. Sherwin-Williams Co*., 151 F.3d 610, 617 (7th Cir. 1998) (citing cases from the 5th, 6th, 9th and 10th Circuits), *cert denied*, 525 U.S. 1104 (1999); *see also MSOF Corp. v. Exxon Corp*., 295 F.3d 485 (5th Cir. 2002), cert denied, 537 U.S. 1046 (2002); *KFD Enters., Inc. v. City of Eureka*, 2014 U.S. Dist. Lexis 64616, *37 ("Recognizing state law tort claims in addition to, or instead of, CERCLA claims neither makes compliance with CERCLA impossible nor stands as an obstacle to its goals."); *In re Pfohl Bros. Landfill Litigation*, 67 F. Supp. 2d 177, 184-85 (W.D.N.Y. 1999)

(CERCLA neither preempts state law toxic tort claims nor creates a federal cause of action for personal injury or property damage caused by release of hazardous substances). The only case BP cites in support of preemption, *New Mexico v. Gen Elec. Co*., 467 F.3d 1223 (10th Cir. 2006), is distinguishable based on a complex procedural history that cabined the claims to natural resources, and the fact that the plaintiff in that case directly challenged remediation, which the Tribe has not done.

At bottom, while CERCLA's exclusive federal court jurisdiction fails as a bar to tribal exhaustion of remedies because the Tribe's complaint is not "patently violative of express jurisdictional provisions", BP can still argue exclusive federal jurisdiction in the tribal court—as it has in the motion to dismiss that it filed in tribal court. But again, that would be an issue for the tribal court to determine in the first instance. *Elliot*, 566 F.3d at 847.

CONCLUSION

Based on the allegations, or lack thereof, in BP's complaint, the Yerington Paiute Tribe and Laurie A. Thom, in her official capacity as Chairman of the Yerington Paiute Tribe, are protected by sovereign immunity, and BP's complaint against them must be dismissed.

Additionally, or in the alternative, the tribal court is the appropriate court to determine its own jurisdiction in the first instance, and none of the exceptions to this doctrine of exhaustion of tribal remedies are applicable here. While the Tribe contends that tribal court jurisdiction is clear, it is at a minimum "colorable" or "plausible", and therefore deference and attendant dismissal are required.

WHEREFORE, the Yerington Paiute Tribe and Laurie A. Thom, in her official capacity as Chairman of the Yerington Paiute Tribe, respectfully pray for this Court to dismiss BP's Complaint for Declaratory and Injunctive Relief, and for such other and further relief as the Court deems appropriate.

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DATED this 26th day of October, 2017.

Respectfully submitted,

By: /s/ *Robert F. Saint-Aubin*

Robert F. Saint-Aubin
Nevada State Bar No. 909
rfsaint@me.com
Saint-Aubin Chtd.
3753 Howard Hughes Pkwy Suite 200
Las Vegas, NV 89169
Telephone: (702) 985-2400
Facsimile: (949) 496-5075

Michael Angelovich*
mangelovich@nixlaw.com
Austin Tighe*
atighe@nixlaw.com
NIX, PATTERSON & ROACH, LLP
3600 N Capital of Texas Hwy
Bldg. B, Suite 350
Austin, Texas 78746
Telephone: (512) 328-5333
Facsimile: (512) 328-5335

**Pro Hac Vice to be Filed as Necessary*

Attorneys for Yerington Paiute Tribe and Laurie A. Thom, in her official capacity as Chairman of the Yerington Paiute Tribe

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing *Motion to Dismiss for Lack of Jurisdiction,* was made through the court's electronic filing and notice system (CM/ECF) or, as appropriate, by first class mail from Reno, Nevada, addressed to the following on October 26, 2017.

Adam S Cohen
Davis Graham & Stubbs LLP
1550 Seventeenth St., Ste 500
Denver, CO 80220

Constance L. Rogers
Davis Graham & Stubbs LLP
1550 17th Street, Suite 500
Denver, CO 80202

Jill Irene Greiner
Dotson Law
One East First Street
City Hall Tower, 16th Floor
Reno, NV 89501

Kenzo Sunao Kawanabe
Davis Graham & Stubbs LLP
1550 Seventeenth St., Ste 500
Denver, CO 80202

Kyle Wesley Brenton
Davis Graham & Stubbs LLP
1550 Seventeenth St., Ste 500
Denver, CO 80202

Robert A Dotson
Dotson Law
One East First Street, Ste 1600
Reno, NV 89501

Daniel T. Hayward
Laxalt & Nomura Ltd
9600 Gateway Dr
Reno, NV 89521

Charles R. Zeh, Esq.
The Law Offices of Charles R. Zeh, Esq.
575 Forest Street, Suite 200
Reno, NV 89509

Dated this 26th day of October, 2017.

/s/*Robert Saint-Aubin*