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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BP AMERICA INC., and ATLANTIC RICHFIELD COMPANY, Plaintiffs, vs. YERINGTON PAIUTE TRIBE; LAURIE A. THOM, in her official capacity as Chairman of the Yerington Paiute Tribe; ALBERT ROBERTS, in his official capacity as Vice Chairman of the Yerington Paiute Tribe; ELWOOD EMM, LINDA HOWARD, NATE LANDA, DELMAR STEVENS, and CASSIE ROBERTS, in their official capacities as Yerington Paiute Tribal Council Members; DOES 1-25, in their official capacities as decision-makers of the Yerington Paiute 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-0588-LRH-WGC **AMENDED MOTION FOR PRELIMINARY INJUNCTION** **REQUEST FOR EXPEDITED CONSIDERATION**

Plaintiffs BP America Inc. ("BPA") and Atlantic Richfield Company ("ARC"), move the Court, under Fed. R. Civ. P. 65, for a preliminary injunction enjoining the Yerington Paiute Tribe (the "Tribe"), the Chairman of the Tribe in her official capacity, the Vice Chairman of the Tribal Council in his official capacity, Elwood Emm, Linda Howard, Nate Landa, Delmar Stevens, and Cassie Roberts, the members of the Tribal Council in their official capacities, the Yerington Paiute Tribal Court (the "Tribal Court"), and the presiding Tribal Court Judge from pursuing and hearing the Tribe's lawsuit against BPA and ARC in the Yerington Paiute Tribal Court captioned *Yerington Paiute Tribe v. BP America Inc. & Atlantic Richfield Co.*, Case No. YCV1017 (the "Tribal Court Action," Complaint attached as Exhibit A to Declaration of Adam S. Cohen in Support of Plaintiffs' Amended Motion for Preliminary Injunction ("Cohen Declaration")). To facilitate the swift resolution of these issues, BPA and ARC request expedited consideration of this Motion.

After BPA and ARC filed their original complaint and motion for preliminary injunction (ECF Nos. 1, 2), defendants moved to dismiss arguing, *inter alia*, that BPA and ARC had sued the wrong tribal officials, and that tribal sovereign immunity barred BPA and ARC's claims. BPA and ARC are thus filing herewith their Amended Complaint, naming as defendants all tribal officials who may have been involved in the decision to file, and are involved in the prosecution of, an *ultra vires* lawsuit against BPA and ARC in Tribal Court. Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), the injunction sought in this amended motion should extend to these tribal officials acting in their official capacities in an ongoing violation of federal law—i.e., the exercise of Tribal Court jurisdiction over the Tribe's claims. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1093 (9th Cir. 2007); *BNSF Ry. Co. v. Ray*, 297 F. App'x. 675, 677 (9th Cir. 2008).

INTRODUCTION

This challenge to Tribal Court jurisdiction begins and should end with two simple propositions: BPA and ARC are not members of the Tribe, and BPA and ARC did not conduct and are not alleged to have conducted any activity on any Tribal lands or property. Under those circumstances, it is settled under longstanding United States Supreme Court case law that the Tribal Court cannot exercise subject-matter jurisdiction over the Tribe's claims.

The premise of the Tribal Court Action is that mining conducted by ARC's predecessor, the Anaconda Mining Company ("Anaconda") in the 1950s-70s at the Anaconda Copper Mine near Yerington, Nevada (the "Mine") caused contamination that migrated onto and now affects unspecified Tribal property. The northern boundary of the Mine is over two miles south of the southern boundary of the Tribe's property composed largely of the former Campbell Ranch and other parcels. The eastern edge of the Mine is one mile west of (and across the Walker River from) the Tribe's Colony in the city of Yerington. The Tribe has not alleged that BPA, ARC, or ARC's predecessor engaged in any activity anywhere other than at the Mine, which overlaps neither the Tribe's reservation nor any Tribal property.

Tribal courts have no jurisdiction over conduct occurring outside their reservations, which is dispositive of the Tribe's attempt to invoke Tribal Court jurisdiction here. Moreover, the Tribe's allegations fit no exception articulated by the Supreme Court to the basic proposition that tribal courts cannot exercise jurisdiction over non-members *even for conduct within a reservation*. For these reasons, BPA and ARC should prevail on their challenge to tribal court jurisdiction, and they do not have to exhaust their remedies in Tribal Court before seeking redress before this Court. The Court should grant injunctive relief prohibiting any further actions in Tribal Court related to the Tribe's claims against BPA and ARC.

FACTUAL BACKGROUND[1]

1. History of the Mine.

The Mine is located in Mason Valley, one mile west of the City of Yerington in Lyon County, Nevada.[2] The Mine is over two miles south of the Tribe-owned Campbell Ranch and other parcels, and west of the Yerington Paiute Indian Colony within the town limits of the City of Yerington (the "Colony," and, together with lands on or near Campbell Ranch, the "Tribal Property").[3] From 1918-1978, the Mine operated as a low-grade copper mine and milling operation.[4] The Mine is approximately 3,400 acres. It includes both private lands owned by Singatse Peak Services, LLC, a mining company, and federal public lands managed by the United States Department of the Interior, Bureau of Land Management (BLM).[5] BPA and ARC own no land within the Mine.

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[1] Many of the facts in this section are matters of public record, appearing in the extensive repository of records maintained by the United States Environmental Protection Agency (EPA). The Court may take judicial notice of such facts, which are not subject to reasonable dispute, when ruling on a motion to dismiss without converting it into a motion for summary judgment. *See, e.g., United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) ("A court may . . . consider . . . matters of judicial notice [] without converting the motion to dismiss into a motion for summary judgment."); *Weingarter v. Chase Home Fin., LLC*, 702 F. Supp. 2d 1276, 1284 (D. Nev. 2010) (court may take judicial notice of "matters of public record"). Most of the documents cited in this section are available online at https://yosemite.epa.gov/r9/sfund/r9sfdocw. nsf/ViewByEPAID/ NVD083917252 ("EPA Public Information Website").

[2] U.S. EPA Region IX, CERCLA Docket No. 9-2007-0005, ¶ 5 ("2007 Administrative Order") (Cohen Declaration, Exhibit B). For the convenience of the Court, BPA and ARC are submitting only the cited pages of the referenced exhibits with this motion. The complete versions of each exhibit are available publicly as noted above, or from BPA at ARC at the request of the Court.

[3] The Tribe's Complaint does not make any reference to its reservation, instead broadly asserting jurisdiction over "Tribal lands" and "Tribal property." Simply because a tribe owns property, however, does not make that property part of the tribe's federally-recognized reservation. The exact geographical boundaries of the Tribe's reservation are not discernable from the Tribe's Complaint or readily accessible from any federal records. From review of relevant county records and federal documents, BPA and ARC are aware of no evidence that all of the lands near Campbell Ranch have been formally recognized as reservation lands.

[4] EPA Fact Sheet (Overview and History of Anaconda Copper Mine (Yerington Mine)), dated Jan. 2005 (Cohen Declaration, Exhibit C); 2007 Administrative Order at ¶ 6.

[5] 2007 Administrative Order at ¶ 5; *see also* EPA Public Information Website (Potentially Responsible Parties section).

The history of copper mining in the area spans nearly a century, and multiple entities have owned and operated the Mine. Empire Nevada Mining & Smelting Company began operating the Mine in 1918.[6] Anaconda entered a lease agreement for the Mine in 1941, conducted exploration from 1942 to 1945, and bought the property in 1951.[7] Anaconda mined and processed copper ore at the Mine until 1977, the same year it was merged with a wholly-owned subsidiary of ARC. Anaconda ceased mining activities in 1978.[8]

In 1982, Don Tibbals purchased the Mine and its former employee housing area, Weed Heights.[9] Tibbals leased portions of the Mine and conducted limited operations.[10] Arimetco, Inc. bought the Mine in 1989 and conducted mining and mineral processing operations until it filed for bankruptcy and abandoned the property in early 2000.[11] The Nevada Division of Environmental Protection (NDEP) subsequently assumed control under its emergency management authority because Arimetco had not engaged in reclamation efforts or closure care.[12] In 2011, Singatse Peak Services, LLC, a subsidiary of Quaterra Resources Inc., acquired the privately-owned portions of the Mine from the Arimetco bankruptcy estate.[13]

BPA and ARC never conducted any mining or other mining-related activities on any Tribal Property.[14] All facilities and operations associated with the Mine, including the waste rock storage

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[6] 2007 Administrative Order at ¶ 7; *see also* Historical Summary Report Anaconda-Yerington Mine Site, 1-1 (2010) ("EPA Report") (Cohen Declaration, Exhibit D).

[7] EPA Report at 1-1.

[8] 2007 Administrative Order at ¶ 7.

[9] *Id.*

[10] EPA Fact Sheet (Site History), dated Oct. 1999 ("1999 EPA Fact Sheet") (Cohen Declaration, Exhibit E).

[11] 2007 Administrative Order at ¶ 7.

[12] EPA Fact Sheet (Site Background), dated March 2011 ("2011 EPA Fact Sheet") (Cohen Declaration, Exhibit F); EPA Report at 1-3.

[13] *See* EPA Public Information Website (Potentially Responsible Parties section).

[14] *See* 2007 Administrative Order at ¶¶ 5-8 (describing history and operations of the Mine without mention of Tribal Property); Fig. 1-1 of EPA Report (Mine is geographically distinct from Tribal Property).

facilities, evaporation ponds, tailings storage, and mill buildings are on either private or federal land.[15] BPA and ARC own no infrastructure or other assets on Tribal Property and have not engaged in any business dealings with the Tribe or involving Tribal members or lands (and the Tribe does not so allege in its Complaint). Neither BPA nor ARC have entered or conducted any operations of any kind on any Tribal Property, the Tribe's reservation, or any lands owned or held in trust by the Tribe with the exception of environmental investigations and response actions performed by ARC under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9604, 9606, at the direction and under the oversight of the NDEP and EPA.[16] These investigations confirm that the plume of mine-impacted groundwater has not reached the Tribe's reservation, any other lands owned by or held in trust for the Tribe, or any water-supply wells owned or operated by the Tribe.[17] Moreover, neither BPA nor ARC have transported, stored, or disposed of, or arranged for the transportation, storage, or disposal of, any mining waste materials or hazardous substances on any portion of the Tribe's reservation or any lands owned by or held in trust for the Tribe.[18]

2. The Wabuska Drain

After assuming lead regulatory oversight of environmental response actions at the Mine from NDEP under CERCLA in late 2004, EPA designated eight Operable Units ("OUs") requiring characterization as part of the CERCLA remedial investigation for the Mine and surrounding areas.[19] OU-1 includes groundwater beneath and downgradient of the Mine. OUs 2-6 and 8 are

[15] *See* Fig. 1-2 of EPA Report.

[16] Amended Complaint ¶ 36.

[17] EPA Memorandum: Yerington Mine Site, Yerington Nevada (16-R09-003), Responses to ARC Responses to Comments on the Background Groundwater Quality Assessment-Revision 2; from R. Ford, B. Butler, and S. Acree to D. Seter (Sept. 2, 2016) (Cohen Declaration, Exhibit G) at 6, 8, Fig. 2.

[18] Amended Complaint at ¶¶ 38-40.

[19] *See* EPA Public Information Website (Investigation and Cleanup Activities section).

Mine facilities (pit lake, process facilities, evaporation ponds, heap leach pads, and tailings and waste rock piles) within the historical Mine site on private and public lands.[20]

OU-7, also known as the Wabuska Drain, is an agricultural return-flow ditch.[21] The approximately 14-mile-long ditch originates on private lands north of the Mine and flows north before crossing lands acquired in 1979 for the Tribe.[22] Construction of the Wabuska Drain began in the 1930s or 1940s, at least initially by the Civil Conservation Corps and under the oversight of the Walker River Irrigation District ("WRID").[23] Its original purpose was to drain farm lands within the District and along the alignment of the Southern Pacific Railroad.[24] It collects seasonal return flows from crop irrigation and runoff from precipitation on local roads.[25] The WRID continues to operate and maintain the Wabuska Drain by clearing brush along its banks and removing vegetation from culverts along its entire length, including the portion that traverses the claimed Tribal Property.[26] The Wabuska Drain is located outside of and is not part of the Mine.

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[20] *Id.*; EPA Fact Sheet, dated March 2011 (Figure 1 showing location of OUs within the Mine's boundaries).

[21] EPA Public Information Website (Investigation and Cleanup Activities section); EPA Report at 2-17.

[22] EPA Report at 2-17 (describing the Drain's "1.1-mile length within the reservation"); Compl. at ¶ 9 (alleging the Drain runs through Tribal property for "approximately 1.7 miles"). BPA and ARC have been unable to verify that the "tribal property" at issue is within the Tribe's formally-recognized reservation, and cite the EPA Report on this issue for illustrative purposes, rather than as establishing the legal fact of the boundaries of the reservation. This parcel was acquired in trust on behalf of the Tribe in 1979. No evidence has been located that this acquisition was ever made part of the Tribe's reservation.

[23] *See Penrose v. Whitacre*, 132 P.2d 609, 610-11 (Nev. 1942) (describing the organization of the Wabuska Drainage Association and initial construction of the drain); EPA Report at 2-17.

[24] EPA Report at 2-17.

[25] *Id.*

[26] *Id.*

Neither Anaconda, ARC, or BPA were or are involved in its construction, operation, or maintenance.[27]

3. State and Federal Remedial Oversight of the Mine.

State and federal governmental agencies have assumed various oversight and response capacities at the Mine. The United States Geological Survey first investigated groundwater in relation to the Mine in the late 1970s.[28] NDEP exercised regulatory authority over the Mine starting in the early 1980s.[29] EPA has conducted and/or directed environmental response activities under its CERCLA authority since 1999.[30] Environmental response activities conducted under state and federal oversight include but are not limited to: implementation of a community bottled water supply program; periodic sampling and monitoring of groundwater and residential domestic water wells; surface and subsurface soil sampling; radiological surveys; implementation of significant interim removal actions; periodic air monitoring; evaluation of effectiveness of existing systems to prevent offsite migration of contaminated groundwater; performance of a CERCLA remedial investigation/feasibility study; and preparation of a human health risk assessment.[31] ARC performed or is performing these activities pursuant to CERCLA Sections 104, 106(a), and 107, 42 U.S.C. §§ 9604, 9606(a), and 9607, under the oversight of NDEP, BLM, and/or EPA, and ARC is in compliance with state and federal administrative orders applicable to the Mine.[32]

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[27] *Id.* at 2-17 to 2-18 (describing the Drain without mention of any ARC ownership or management); Amended Complaint ¶ 40. BPA and ARC reserve all legal rights to assert defenses based on their lack of ownership of the Drain.

[28] EPA Public Information Website (Contaminants and Risks section).

[29] *Id.* (Investigation and Cleanup Activities Section).

[30] 1999 EPA Fact Sheet; 2007 Administrative Order at ¶ 12.

[31] 2011 EPA Fact Sheet; 2007 Administrative Order ¶¶ 16-21; Administrative Order on Consent and Settlement Agreement for Removal Action and Past Response Costs, U.S. EPA Region IX, CERCLA Docket No. 09-2009-0010, ¶¶ 17-23 (Cohen Declaration, Exhibit H). *See generally* EPA Public Information Website (Investigation and Cleanup Activities).

[32] *See generally* EPA Public Information Website (Investigation and Cleanup Activities, Contaminants and Risks).

ALLEGATIONS OF THE COMPLAINT

On August 18, 2017, the Tribe filed a Complaint in the Tribal Court against BPA and ARC. In the Complaint, the Tribe alleges that substances from the Mine have "migrated offsite to surrounding properties" (Compl. at ¶ 18), including "tribal lands" or the Tribe's "property," and have caused property damage and negative health effects to members of the tribe. (*Id*. at ¶ 22). The complaint alleges five causes of action: (1) strict liability; (2) trespass; (3) battery; (4) negligence; and (5) nuisance.

The Tribe did not properly serve BPA and ARC. The Tribe attempted to effect service by sending a copy of the Complaint via Federal Express to BPA and ARC's registered agent in Nevada. In so doing, the Tribe expressly stated that it was not acting pursuant to Nevada law. Indeed, the Tribe claimed that service of its complaint was not subject to the Nevada Rules of Civil Procedure.

In response to the Complaint, BPA and ARC filed a motion to dismiss for lack of subject-matter and personal jurisdiction in the Tribal Court. Alternatively, BPA and ARC asked the Tribal Court to stay its case while this Court considers BPA's and ARC's concurrently filed Complaint for Declaratory and Injunctive Relief and the present Motion.

STANDARD FOR GRANTING INJUNCTIVE RELIEF

To obtain a preliminary injunction, the moving party must demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

The grant of a motion for preliminary injunction is within the district court's discretion "and its order will be reversed only if the court relied on an erroneous legal premise or otherwise abused its discretion." *Chalk v. U.S. Dist. Court Cent. Dist. of California*, 840 F.2d 701, 704 (9th Cir. 1988).

ARGUMENT

I. BPA AND ARC ARE LIKELY TO SUCCEED ON THEIR CLAIM THAT THE TRIBAL COURT LACKS SUBJECT-MATTER JURISDICTION OVER THE TRIBE'S CLAIMS.

The dispositive issue here is whether the Tribal Court's subject-matter jurisdiction extends to non-Indian entities BPA and ARC, who engaged in no activities on Tribal Property or the Tribe's reservation lands. BPA and ARC should prevail on this issue under longstanding Supreme Court and Ninth Circuit precedent that limits the subject-matter jurisdiction of the Tribal Courts, particularly where non-Indian defendants are concerned. This is because: (1) there is no factual dispute that BPA and ARC did not engage in mining or mining-related activity on any Tribal Property or inside the boundaries of the Tribe's reservation; and (2) based on the Tribe's own allegations, no exception applies to the general rule that Tribal Courts lack jurisdiction over non-members who act off the reservation. Moreover, because the Tribal Court plainly lacks jurisdiction, requiring exhaustion of BPA's and ARC's remedies in Tribal Court would only serve to delay, and thus is not required.

A. The Tribal Court Has No Subject-Matter Jurisdiction Because the Tribe Does Not Allege that BPA or ARC Took Any Actions or Engaged in Any Conduct on the Reservation.

Tribal Court jurisdiction fails at the outset, because the Tribe does not and cannot allege that BPA or ARC engaged in any conduct on its reservation. Tribal courts are not courts of general jurisdiction. *See Nevada v. Hicks*, 533 U.S. 353, 367 (2001) ("Respondents' contention that tribal courts are courts of 'general jurisdiction' is . . . quite wrong."). Tribes—and tribal courts and officials—"do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Commerce Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 328 (2008); *see also Hicks*, 533 U.S. at 358 n.2 (noting that the Supreme Court has "le[ft] open" the question of whether tribal courts can ever have jurisdiction over non-member defendants). The scope of the subject-matter jurisdiction of the tribal courts presents an issue "arising under" federal law; federal courts, therefore, have jurisdiction to adjudicate cases such as this one under 28 U.S.C. § 1331. *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852 (1985) ("The question whether an

Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court . . . is a 'federal question' under §1331.").

"[T]ribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009) (*citing Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658 n.12 (2001)); *see also A&A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1415-16 (9th Cir. 1986) ("The Supreme Court has repeatedly recognized that tribal courts have inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians *which are based upon events occurring on the reservation*.") (emphasis added). "The question of a tribal court's subject-matter jurisdiction over a nonmember [] is tethered to the nonmember's actions, specifically the nonmember's actions on the tribal land." *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782 n.42 (7th Cir. 2014) (emphasis omitted); *see also Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998) (noting that no Supreme Court case "purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*") (emphasis in original)). This rule recognizes the significant Due Process concerns that would arise from allowing tribes and tribal courts to exercise jurisdiction beyond the geographical boundaries of their reservations. *See Plains Commerce Bank*, 544 U.S. at 337 ("Indian courts differ from traditional American courts in a number of significant respects.") (internal citation and quotation marks omitted).

In each of the Supreme Court's cases examining the civil adjudicatory jurisdiction of the tribal courts, the claim at issue arose from conduct within the boundaries of a reservation. *See, e.g.*, *Montana v. United States*, 450 U.S. 544 (1981) (attempt to regulate fishing on river within reservation boundaries); *Nat'l Farmers Union*, 471 U.S. at 845 (motorcycle accident at a state-run school on reservation); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (truck accident on a road within reservation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (traffic accident on state highway within reservation); *Hicks*, 533 U.S. at 353 (2001) (Nevada law enforcement executing search warrant in house on reservation); *Plains Commerce Bank*, 554 U.S. at 320 (sale of fee-

owned land on reservation). The jurisdiction of tribal courts is tied to *territory*—and, absent express federal authority stating otherwise, the territory over which a tribal courts' jurisdiction may extend is limited to the federally recognized reservation, and not beyond. *See Phillip Morris*, 569 F.3d at 938.

Not only is the Tribal Court's jurisdiction limited to the spatial boundaries of its reservation—absent express authorization by federal law, the Tribal Court may reach only *conduct* actually engaged in by the purported defendant *on its reservation*. To the extent the Supreme Court has examined tribal court jurisdiction over non-members at all, it has exclusively framed that inquiry in terms of tribal regulation of "the *activities* of nonmembers of the tribe" within a reservation. *Montana*, 450 U.S. at 565. Conduct occurring *off* the reservation—even conduct with incidental or indirect effects *on* the reservation—is not enough. In the Supreme Court's most recent pronouncement on Tribal Court jurisdiction, *Plains Commerce Bank*, the Court made clear that tribes can only regulate "nonmember *activity* on the land, within the limits set forth in our cases." 554 U.S. at 336 (emphasis in original); *see also Jackson*, 764 F.3d at 782 n.42.

The Tribe fails to allege any conduct satisfying this threshold requirement for Tribal Court jurisdiction. The Tribe's Complaint contains no allegation that BPA or ARC conducted any activity at all on any Tribal Property or on the Tribe's reservation (as opposed to alleged off-reservation conduct that purportedly affected unidentified Indian lands). This fact is fatal to Tribal Court jurisdiction.

Knowing that the alleged conduct occurred off its reservation, the Tribe attempts to expand the concept of the Mine to a vague and undefined "Mine Site," "sections of which," the Tribe vaguely alleges, are on its property. (*See, e.g.*, Compl. at ¶¶ 7, 8.) But the Mine and the reservation are miles apart. The Wabuska Drain—although it may traverse portions of tribally-owned lands—is not part of the Mine, and was not built nor ever maintained or operated by Anaconda. Even the Tribe does not allege that BPA, ARC, or ARC's predecessor engaged in any conduct on the portions of the Wabuska Drain that traverse a short length of tribally-owned lands. The mere allegation that substances migrating from the Mine have come to be located on the Tribe's property

is not enough to bring the reservation within the Mine itself or to translocate Anaconda's mining activities onto the reservation. Despite its broad description of mining activity (*e.g.*, Compl. at ¶¶ 11-12), the Tribe does not allege that any of these activities occurred *on* the reservation.

Again, allegations that off-reservation conduct caused adverse effects—including environmental effects—on reservation or other Tribal lands cannot support Tribal Court jurisdiction. In a factually similar case, *UNC Resources, Inc. v. Benally*, 514 F. Supp. 358 (D.N.M. 1981), the court considered an assertion of Navajo tribal court jurisdiction to adjudicate tort claims against United Nuclear Corporation ("UNC"). Tribal members claimed that spilled tailings (wastes) originating from UNC's uranium milling operations on fee land south of the Navajo reservation traveled down an arroyo and through Navajo trust lands occupied by Navajo Indians, injuring livestock and causing other harm. *Id.* at 360. UNC had not engaged in any milling activities on the Navajo's reservation or trust lands. *Id.* at 359. Relying on *Montana* and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the court held that the tribal court's jurisdiction "stops at the reservation boundary." 514 F. Supp. at 362. Based on that threshold principle, the court held that the tribe "cannot assert jurisdiction over [a mining company] based on its off-reservation [mining] operations." *Id.*; *accord UNC Res., Inc. v. Benally*, 518 F. Supp. 1046, 1051-52 (D. Ariz. 1981) (agreeing with the D.N.M. and holding that "UNC's activities giving rise to the dispute are beyond the territorial sovereignty of the tribe"). *See also Jackson*, 764 F.3d at 782 (holding that the tribal court lacked jurisdiction because "the Plaintiffs have not engaged in *any* activities inside the reservation.") (emphasis in original); *Hornell Brewing*, 133 F.3d at 1091 (tribal court did not have jurisdiction where activities of the defendant—such as manufacture, sale, and distribution of the product at issue—did not occur on the reservation).

Because the Tribe does not allege that BPA or ARC engaged in any conduct on the reservation (or any Tribal Property), but rather only that BPA and ARC engaged in off-reservation mining operations, Tribal Court jurisdiction is barred, and BPA and ARC will prevail on their jurisdictional challenge.

B. Where a Non-Indian Defendant *Does* Act on a Reservation, the Tribal Court Has Jurisdiction Only When One of Two Narrow Exceptions Is Met—and Neither Applies Here.

Even if the Tribe had alleged that BPA and ARC entered and engaged in polluting activities on its reservation (which it has not and cannot), the Tribal Court would still have no jurisdiction over the Tribe's claims. The "pathmarking case concerning tribal civil authority over nonmembers" is *Montana v. United States*, 450 U.S. 544 (1981). *Strate*, 520 U.S. at 445. Although *Montana* addressed the limits of a tribe's legislative jurisdiction, the Court's analysis also governs the outer boundaries of a tribe's adjudicative jurisdiction—i.e. the reach of Tribal Courts—because "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.* at 453.[33]

The *Montana* analysis begins with a default rule: "[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. Only two exceptions exist: (1) the tribe may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," (the "consensual relationship" exception); and (2) the tribe may "exercise civil authority over the conduct of non-Indians . . . when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" (the "tribal self-government" exception). *Id.* at 565-66. If neither exception is met, the Tribal Court is without jurisdiction over nonmembers. The Tribe bears the burden of establishing that a *Montana* exception applies if the Tribal Court is to exercise jurisdiction over the Tribe's claims. *Plains Commerce Bank*, 554 U.S. at 330.

C. Neither *Montana* Exception Applies to Confer Jurisdiction on the Tribal Court.

Even had the Tribe alleged activity by BPA or ARC on its reservation, neither *Montana* exception would permit Tribal Court jurisdiction in the underlying case. The Supreme Court has

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[33] While *Montana* directly concerned fee land located within a reservation, the Court has clarified that the *Montana* analysis applies regardless of the ownership of the land at issue—"[t]he ownership status of land . . . is only one factor to consider" in analyzing Tribal Court jurisdiction. *See Hicks*, 533 U.S. at 360 (holding that tribal court did not have jurisdiction over Nevada state law enforcement serving a valid search warrant on reservation).

instructed that those exceptions should be narrowly construed so they do not "severely shrink" the default rule of no jurisdiction. *Plains Commerce Bank*, 554 U.S. at 330.

1. The Tribe Does Not Claim a Consensual Relationship with BPA or ARC.

The first *Montana* exception only covers situations where the defendant voluntarily enters a consensual relationship with the tribe or its members, and the claim asserted arises out of that relationship. Under the consensual relationship exception, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. Nowhere in the Complaint does the Tribe allege a consensual relationship of any kind between the Tribe and BPA or ARC. To the contrary, the Tribe asserts that BPA and ARC "have neither sought nor obtained [the Tribe's] consent to transport or store their toxic and hazardous substances and wastes on [the Tribe's] property." (Compl. ¶ 39.)

2. The Tribe Also Does Not Meet the Tribal Self-Government Exception, Which Requires "Catastrophic Consequences" for Tribal Sovereignty.

The Tribe attempts to invoke the second *Montana* exception, but its allegations fall short of the high bar imposed by *Montana* and its progeny. In its jurisdictional allegations, the Tribe claims that "the acts or omissions giving rise to the claims threaten or have a direct impact on the political integrity, economic security, and/or health, safety and welfare of the Tribe, imperiling the subsistence of the Tribe." (Compl. ¶ 3.) This allegation parrots closely the language of the second *Montana* exception: the tribe may have jurisdiction over "the conduct of non-Indians . . . when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

Since *Montana*, the Supreme Court has confirmed the heightened burden required to establish the tribal self-government exception: "[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Plains Commerce Bank*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566). The challenged conduct must be so severe as to "fairly

be called *catastrophic* for tribal self-government." *Id.* (internal citations omitted, emphasis added); *see also Hicks*, 533 U.S. at 361 (equating the tribal self-government exception with the power of tribes "to make their own laws and be ruled by them"). Even situations involving the death of members of a tribe have been held to be insufficient to establish the tribal self-government exception. *See, e.g.*, *Strate*, 520 U.S. at 457-59 (noting that if all that was required to invoke the second *Montana* exception was reckless driving on roads within the reservation, that "would severely shrink the rule" of *Montana*); *Burlington N. Ry. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999) ("deaths of tribal members" held insufficient to invoke the second exception) *Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997) ("[T]he possibility of injuring multiple tribal members does not satisfy the second *Montana* exception[.]") (citing *Strate*, 520 U.S. at 458).

The Tribe falls short of this standard. It alleges that hazardous substances have affected lands owned by the Tribe; have "damage[d] and devalue[d]" the Tribe's property; "compromise[d] and risk[ed] the health and safety of Tribal members;" can cause "serious latent diseases, along with myriad other adverse medical conditions;" and have damaged wetlands on Tribe-owned lands. (*Id.* ¶9, 10, 22.)

The Tribe never alleges these effects are "catastrophic for tribal self-government." *Plains Commerce Bank*, 554 U.S. at 341. At worst, it contends the off-reservation actions of ARC's predecessor diminished property values and contributed to health problems among Tribal members. Even if these concerns were borne out on the merits (which BPA and ARC dispute), the alleged injuries in no way damage the Tribe's ability "to make [its] own laws and be ruled by them." *Hicks*, 533 U.S. at 361; *see also U.N.C. Resources*, 514 F. Supp. at 361 (tribe's "interest in holding tortfeasors responsible for injuries to Indian land" not sufficient to confer jurisdiction). The Tribe does not allege that BPA and ARC's past conduct "imperil[s] the subsistence" of the Tribe. *Montana*, 450 U.S. at 566.

The longstanding and continued existence of the Tribe proves this point. Anaconda stopped mining in 1977. The Tribe cannot credibly allege that the claimed effects of contamination from the Mine have been "catastrophic for tribal self-government" when the Tribe has persisted

and successfully governed itself since that time. *See Plains Commerce Bank*, 554 U.S. at 341 (noting that fee lands had been alienated fifty years prior to litigation); *see also Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1306 (9th Cir. 2013) (refusing to apply second *Montana* exception based on allegations of groundwater contamination from construction of a home on the reservation, where the reservation "has long experienced groundwater contamination"). The Tribe has not alleged the type of catastrophic-to-self-government injury required to allow Tribal Court jurisdiction under the second *Montana* exception. Thus, the default rule—that the Tribal Court has no jurisdiction over the Tribe's claims—controls.

D. BPA and ARC Need Not Exhaust Tribal Remedies Because the Tribal Court Plainly Lacks Jurisdiction, and Exhaustion Would Serve Only to Delay.

BPA and ARC should not be required to exhaust their jurisdictional challenge in Tribal Court. The Supreme Court has stated that examination of whether a tribal court has jurisdiction generally should be conducted in the first instance by the tribal court itself. *Nat'l Famers Union*, 471 U.S. at 856; *see also LaPlante*, 480 U.S. at 16-17. However, this principle is a "prudential rule based on comity," and not a jurisdictional prerequisite. *Strate*, 520 U.S. at 453 (internal citation and quotation marks omitted); *see also Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004) ("Exhaustion is prudential; it is required as a matter of comity, not as a jurisdictional prerequisite."). The Court has articulated four exceptions, any of which relieve the defendant from having to exhaust tribal court remedies: (1) "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith;" (2) "where the action is patently violative of express jurisdictional prohibitions;" (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction;" and (4) where "it is clear . . . that tribal courts lack jurisdiction [and] adherence to the tribal exhaustion requirement would serve no purpose but delay." *Hicks*, 533 U.S. at 369 (citations and quotation marks omitted); *see also Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir. 2009).

BPA and ARC are relieved of the prudential requirement of tribal exhaustion under the second and fourth exceptions.[34] As to the fourth exception, BPA and ARC are not members of the Tribe, and the Tribe does not allege that BPA and ARC engaged in any conduct on its reservation. Thus, the question of Tribal Court jurisdiction on the facts alleged in the Tribe's Complaint is not even a close one. *See, e.g.*, *Philip Morris*, 569 F.3d at 938 ("[T]ribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries."); *A&A Concrete*, 781 F.2d at 1415-16 (Tribal courts can "adjudicate civil disputes affecting the interests of Indians and non-Indians *which are based upon events occurring on the reservation*.") (emphasis added); *Jackson*, 764 F.3d at 782 n.42 (tribal court jurisdiction "is tethered to . . . the nonmember's actions on the tribal land"); *Hornell Brewing*, 133 F.3d at 1091 (no Supreme Court case "purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*.") (emphasis in original).

As to the second exception, there is no allegation in the Complaint of a consensual relationship between the Tribe and BPA and ARC, and none of the Tribe's allegations of harm even approach the "catastrophic" consequences for self-government required to invoke the tribal self-government exception. *See Plains Commerce Bank*, 554 U.S. at 341.

The assertion of tribal court jurisdiction therefore is not "colorable" or "plausible," see *Evans*, 736 F.3d at 1302. Requiring exhaustion would serve no purpose but to delay the inevitable conclusion that the Tribal Court lacks subject-matter jurisdiction. *See, e.g.*, *id.* at 1306 (plain lack of jurisdiction excused exhaustion); *Red Wolf*, 196 F.3d at 1065-66 (no exhaustion required where "tribal courts plainly do not have jurisdiction over this controversy").

[34] However, as to whether BPA and ARC can receive a fair hearing in Tribal Court, they note that the presiding Tribal Court Judge, the Hon. Sandra-Mae Pickens, was previously associated with the Law Offices of John P. Schlegelmilch. That firm served as local counsel in another pending lawsuit in this District against ARC, *Diamond X Ranch, LLC v. Atlantic Richfield Co.*, Case No. 3:13-cv-00570-MMD0-WGC.

E. Because the Tribe's Claims Implicate CERCLA, They Belong in Federal—Not Tribal—Court.

Exhaustion is also unnecessary because Tribal Court jurisdiction would violate an express jurisdictional prohibition. Though pled in an attempt to escape it, the Tribe's claims unavoidably implicate CERCLA and that statute's grant of exclusive jurisdiction in Section 113(b) to the federal courts. 42 U.S.C. 9613(b) ("the United States District Courts shall have exclusive jurisdiction over all controversies arising under this chapter"). By seeking equitable relief (*see* Compl. at 16 ¶¶ C, E), by repeatedly mentioning "the issuance of certain and numerous administrative violations and orders concerning contamination from the mine site" (*Id.* ¶¶ 17; *see also* ¶¶ 33, 34, 44, 51, 52, 64, 65, 75, 76), and by repeatedly alleging in each of its causes of action that ARC has "failed to properly remediate" toxic and hazardous substances at and surrounding the Mine (*Id.* ¶¶ 7, 17, 22, 24, 26, 27, 32, 33, 43, 44, 46, 50, 52, 63, 74, 76), the Tribe makes plain that its claims are "related to the goals" of the CERCLA cleanup of the Mine, and thus constitute a "challenge to the 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). A claim "challenges" a CERCLA cleanup if it "interfere[s] with the remedial actions selected" or "seeks to improve on the CERCLA cleanup," such as "where the plaintiff seeks to dictate specific remedial actions … [or] alter the method and order of cleanup," among other things. *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330 (9th Cir. 1995); *ARCO Envtl.*, 213 F.3d at 1115; *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 238-39 (9th Cir. 1995). Requested relief that is merely "related to the goals of the [CERCLA] cleanup" is also barred. *Razore*, 66 F.3d at 239.

Common-law claims that challenge a CERCLA clean-up are subject to the exclusive jurisdiction provision of 42 U.S.C. § 9613(b), and thus may *only* be heard by a federal court. *ARCO Envtl.*, 213 F.3d at 1115. Tribal Courts have no jurisdiction to hear such cases. *See AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 905 (9th Cir. 2002) (no tribal court jurisdiction over Federal Communications Act claim subject to exclusive federal-court and FCC jurisdiction). Where exclusive federal jurisdiction exists, allowing Tribal Court jurisdiction would be "patently violative of express jurisdictional prohibitions," and exhaustion is thus not required under the

second exception. *See Hicks*, 533 U.S. at 369; *see also El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484-45 (1999) (where Congress has "expressed an unmistakable preference for a federal forum," tribal courts have no jurisdiction).

Exclusive federal court jurisdiction under CERCLA Section 113(b) also lies because of the nature of the Tribe's claims. CERCLA grants to the United States, any State, and any Indian tribe a statutory cause of action to recover damages for injury to, destruction of, or loss of natural resources. 42 U.S.C. §§ 9607(a)(4)(C), 9607(f)(1). CERCLA defines "natural resources" to include "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States …, any State or local government, … any Indian tribe, or if such resources are subject to a trust restriction on alienation, any member of an Indian tribe." 42 U.S.C. § 9601(16). Any sum recovered under CERCLA for injury to natural resources must be used only to restore, replace, or acquire the equivalent of the injured resources. 42 U.S.C. 9607(f)(1); *see also* 43 C.F.R. § 11.83(a) (defining procedures for determining that natural resource damages fairly represent the costs of restoration, replacement, or acquisition of equivalent natural resources).

Although labeled as tort claims, all of the Tribe's pleaded causes of action are based on alleged pollution-related injuries to natural resources—that is, to soil, sediment, air, groundwater, drinking water, land, and surface waters (Compl. ¶ 22)—and some measure of damages allegedly arising out of those injuries. The claims are inherently claims for natural resource damages. Under CERCLA, this has two critical consequences for the jurisdictional inquiry at hand. First, to the extent the Tribe seeks to collect damages on its claims for any purpose other than the restoration, replacement, or acquisition of the equivalent resource alleged to have been injured, its claims are preempted by CERCLA and thus cannot be heard by any court. *See New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1247-48 (10th Cir. 2006). "CERCLA's comprehensive NRD scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource." *Id.* at 1247; *see also id.* at 1248 ("Clearly, permitting the State to use an NRD recovery, which it would hold in trust, for

some purpose other than to 'restore, replace, or acquire the equivalent of' the injured groundwater would undercut Congress's policy objectives in enacting [CERCLA]."). Second, to the extent the claims *do* seek damages to be used for restoration of natural resources (and thus are not preempted), they are simply mislabeled CERCLA claims that should have been brought under 42 U.S.C. §§ 9607(a)(4)(C). As such, they are subject to the exclusive jurisdiction of this Court. *See* 42 U.S.C. § 9613(b). There is nothing left between those two extremes. Either way, any exercise of Tribal Court jurisdiction over the claims is statutorily barred, and requiring exhaustion would serve only to delay.

F. The Tribal Court Has No Jurisdiction Because BPA and ARC Were Not Validly Served With Process.

Tribal Court jurisdiction is plainly lacking for one final reason. The Tribal Court Action is *ultra vires* because it was never properly served on ARC or BPA. There is a "bedrock principle: An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process." *Murphy Bros., Inc. v. Michetti*, 526 U.S. 344, 347 (1999) (holding that a "courtesy copy" received by fax was insufficient to start a statutory deadline period even in a statute referencing not just receipt by service as the start point for the period but receipt "through service *or otherwise*"). *See also id.* at 351 ("Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights."); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."); *Mississippi Publ'g Corp. v. Murphree*, 326 U.S. 438, 444–45 (1946) ("[S]ervice of summons is the procedure by which a court . . . asserts jurisdiction over the person of the party served.").

The Tribe admits that its attempt to serve process was not done pursuant to Nevada law. Nor does the Tribe attempt to explain how its method of service could possibly comply with federal law. Indeed, the Tribe attempted to "effect[] service" of its Complaint by "Federal Expressing a file-stamped copy of the Complaint" to BPA's and ARC's registered agent, all the

while asserting that the Tribe "is not subject to the Nevada Rules of Civil Procedure governing service of process."[35] Service of process therefore exceeded the Tribe's legislative (and therefore adjudicative) jurisdiction. A valid proceeding requires that service of process be performed consistent with law, but here the Tribe's legal authority to create rules—including rules for serving process—does not and cannot extend beyond the reservation's physical boundaries.

This is no mere technical deficiency. The Tribal Code includes no provision empowering the Tribal Court to exercise jurisdiction over parties served with process outside the boundaries of the reservation. Many states have such laws—for example, Nevada Revised Statutes § 14.065, which states that "[p]ersonal service of summons upon a party outside this state is sufficient to confer upon a court of this state jurisdiction over the party[.]" The Tribal Code includes no such provision, so the Tribal Court lacks authority to exercise jurisdiction over parties served off-reservation. For that reason, the Tribe cannot cure the service of process deficiency noted above.

Because the Tribe does not allege any BPA or ARC conduct on the reservation, and because the Tribe—by acting beyond the boundaries of the reservation while refusing to comply with Nevada service law operative outside the bounds of the Tribe's jurisdiction—has not instituted the Tribal Court Action through lawful authority, the assertion of Tribal Court jurisdiction is fatally flawed, and BPA and ARC must prevail on their jurisdictional challenge.

II. BPA AND ARC WILL SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF.

Because the Tribal Court plainly lacks subject-matter jurisdiction, requiring BPA and ARC to litigate in that forum will cause irreparable harm. Many courts have recognized that being required to litigate in a forum that has no jurisdiction constitutes irreparable harm. *See, e.g.*, *Crowe & Dunlevy, P.C. v. Stidham*, 609 F. Supp. 2d 1211, 1222 (N.D. Okla. 2009) (finding irreparable harm when "significant risk that [movant] will be forced to expend unnecessary time, money, and effort litigating the issue[s]" in the Tribal Court "which likely does not have jurisdiction"), *aff'd* 640 F.3d 1140 (10th Cir. 2011) ; *Benally*, 518 F. Supp. at 1053 (finding movant "faced with the

[35] *See* August 22, 2017 letters from Austin Tighe to BPA and ARC transmitting copies of the Tribe's Complaint (Cohen Dec. Exhibit I).

possibility of irreparable injury if it were forced to appear and defend in Tribal Court" when "very probable" that court lacked jurisdiction).

If the Court does not issue injunctive relief, BPA and ARC will be forced to defend a case through trial and possibly appeal in an unfamiliar forum that lacks all of the Constitutional protections enjoyed by defendants in federal and state courts. *See Plains Commerce Bank*, 544 U.S. at 337 ("Indian courts differ from traditional American courts in a number of significant respects." (internal citation and quotation marks omitted)). Moreover, BPA and ARC will be subject to the "laws and regulations that govern tribal territory"—laws that neither BPA nor ARC has "consented [to], either expressly or by [their] actions." *Id.* Under the Tribal Code, the Tribal Court can purportedly decide the Tribe's claims based on "traditional customs of the Tribe," rather than state or federal law. *See* Yerington Paiute Code § 1-40-020(a) ("In any matter not covered by this Code or any ordinance, the Tribal Court shall apply the traditional customs of the Tribe…"). It is also not clear that, under the limited jurisdiction of the Tribal Court, BPA and ARC will have access to all of the discovery and witnesses (in particular, third-party witnesses) necessary for them to defend themselves against the Tribe's claims.

Thus, BPA and ARC will suffer irreparable harm if the Tribal Court maintains jurisdiction and the Tribe pursues its claims in that venue.

III. THE BALANCE OF INTERESTS FAVORS BPA AND ARC.

Before issuing an injunction, "the district court has a duty to balance the interests of all parties and weigh the damage to each." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (internal quotation marks omitted). Absent an injunction, BPA and ARC will expend substantial resources to defend against the Tribal Court Action in a court that lacks jurisdiction. *See, e.g., Crowe & Dunlevy, P.C.*, 609 F. Supp.2d at 1224 (finding movant's injury of "wasted time, effort, and money spent on litigating a matter before a court who is likely without jurisdiction over it" outweighed possible harm to non-movant). The Tribe, on the other hand, can pursue its claims in a different (and proper) forum.

Though the Tribe will likely argue that its sovereign authority would be prejudiced by an injunction, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564; *see also Sprint Commc'n Co., L.P. v. Native Am. Telecom, LLC*, No. CIV. 10-4110-KES, 2010 WL 4973319, at *7 (D. S.D. Dec. 1, 2010) (finding "strong policy favoring tribal self-government" but that "this policy ends when [the tribal court] lacks jurisdiction to hear the matter before it"). Therefore, enforcing clear federal law recognizing the inherently limited nature of the Tribal Court's jurisdiction will not harm the Tribe, and the balance of harms thus tips in favor of BPA and ARC.

IV. THE PUBLIC INTEREST WOULD BE SERVED BY GRANTING INJUNCTIVE RELIEF.

Plaintiffs and the public have an interest in not being forced to litigate actions in Tribal Court when they are not Tribe members and have no connection to the Tribe. *See Crowe & Dunlevy, P.C.*, 640 F.3d 1140, 1158 (10th Cir. 2011) ("We simply are not persuaded the exertion of tribal authority over . . . a non-consenting, nonmember, is in the public's interest."). Moreover, enforcing federal jurisdictional limitations on Tribal Court jurisdiction serves the public interest generally: if BPA and ARC, because Anaconda once owned a mine within several miles of the Reservation, can be sued in Tribal Court, it would materially increase uncertainty for all businesses operating near reservations that are not even conducting business with the relevant tribes. This uncertainty is not in the public's interest.

V. THE COURT SHOULD RESOLVE THIS MATTER ON AN EXPEDITED BASIS.

BPA and ARC seek expedited consideration of this Motion, given that the Tribe's Complaint has been filed in the Tribal Court Action. Though BPA and ARC have filed a Motion to Dismiss or in the Alternative to Stay in the Tribal Court, it is possible that before this Court can rule, the Tribal Court may rule on the underlying action. For that reason, BPA and ARC respectfully request that the Court and resolve this matter on an expedited basis.

CONCLUSION

BPA and ARC are not members of the Tribe, and they have not engaged in any conduct on the reservation. For those reasons, the Tribal Court lacks subject-matter jurisdiction over this case. Because BPA and ARC would suffer irreparable harm if forced to litigate in a Tribal Court that lacks subject-matter jurisdiction, and the Tribe can seek comparable relief in a different forum, the Court should grant injunctive relief, and prohibit (1) the Tribe (including Chairman Thom in her official capacity, Vice-Chairman Roberts in his official capacity, and the other tribal council defendants in their official capacities, and any Does who attempt to prosecute this *ultra vires* action) from pursuing its claims against BPA and ARC in Tribal Court, and (2) the Tribal Court (including Judge Pickens in her official capacity) from taking any further action in the Tribal Court Action, other than dismissing the Tribal Court Action.

DATED: November 16, 2017

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I hereby certify that I am an employee of DOTSON LAW, and that on this date; I caused to be served a true and correct copy of the foregoing by:

☐ (BY MAIL) on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Dotson Law, mail placed in that designated area is given the correct amount of postage and is deposited that same date in the ordinary course of business, in a United States mailbox in the City of Reno, County of Washoe, Nevada.

☒ By electronic service by filing the foregoing with the Clerk of Court using the CM/ECF system, which will electronically mail the filing to the following individuals.

☐ (BY PERSONAL DELIVERY) by causing a true copy thereof to be hand delivered this date to the address(es) at the address(es) set forth below.

☐ (BY FACSIMILE) on the parties in said action by causing a true copy thereof to be telecopied to the number indicated after the address(es) noted below.

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