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

10
11 BP AMERICA INC., and ATLANTIC
RICHFIELD COMPANY,

Case No. 3:17-cv-00588

12
13 Plaintiffs,

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

14 vs.

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

19 Defendants.
20 _____/

21 Defendant Sandra-Mae Pickens, through her counsel of record, Laxalt & Nomura, Ltd.,
22 moves the Court for its Order dismissing the Amended Complaint filed by Plaintiffs BP America Inc.
and Atlantic Richfield Company. This Motion is based on the following Memorandum of Points and
23 Authorities, the pleadings on file, and any additional information this Court may consider.

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **I. INTRODUCTION**

26 Plaintiffs BP America Inc. and Atlantic Richfield Company ("BPA" and "ARC", or
27 "Plaintiffs") have filed this suit against Defendant Sandra-Mae Pickens in her official capacity as
28

1 Judge of the Yerington Paiute Tribal Court (the “Tribal Court”) and in violation of the Yerington
2 Paiute Tribe’s sovereign immunity. Judge Pickens, as a Yerington Paiute Tribal official sued in her
3 official capacity, is protected by the Yerington Paiute Tribe’s (the “Tribe”) sovereign immunity, and
4 Plaintiffs have not established that it is proper for this Court to exercise subject-matter jurisdiction
5 over her. *Ex parte Young*, 209 U.S. 123 (1908), does not apply to give this Court subject-matter
6 jurisdiction over Plaintiffs’ Amended Complaint (ECF No. 37) because Judge Pickens has not
7 violated federal law, the U.S. Constitution, or federal common law, and Plaintiffs’ conclusory
8 allegations to the contrary are pure speculation. Because Judge Pickens is protected by the Tribe’s
9 sovereign immunity, this Court lacks subject-matter jurisdiction to hear Plaintiffs’ Amended
10 Complaint and it should be dismissed.

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

18 **II. FACTUAL BACKGROUND**

19 On August 18, 2017, the Tribe filed a Complaint in Tribal Court against Plaintiffs, alleging
20 several torts based on Plaintiffs’ alleged ownership of the Yerington Anaconda Mine Site (the “Mine
21 Site”), located in Yerington, Nevada. (Ex. A to Decl. of Adam S. Cohen in Support of Pls.’ Mot. for
22 Prelim. Inj. at ¶¶5-6, ECF No. 39-1, hereinafter “Tribal Complaint.”) The Tribe alleges that
23 Plaintiffs’ acts and omissions in failing to remediate the Mine Site have damaged the Tribe’s
24 property, the Tribe’s water supply, and has injured Tribal members. (*Id.* at ¶¶7-10.) The Tribe alleges
25 that the Tribal Court has subject-matter jurisdiction to adjudicate the case it has filed in Tribal Court
26 against Plaintiffs (the “Tribal Action”), because “the claims herein arose on [the Tribe’s] land, and/or
27 because the acts and omissions giving rise to the claims threaten or have a direct impact on the
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1 political integrity, economic security, and/or health, safety and welfare of the Tribe, imperiling the
2 subsistence of the Tribe.” (*Id.* at ¶3.)

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

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

11 9. Furthermore and in particular, the Wabuska Drain, an irrigation drain that received
wastewater from the Mine Site, runs directly through [the Tribe’s] property for approximately
12 1.7 miles. That contaminated wastewater has run across [the Tribe’s] property for decades,
and continues to damage and devalue [the Tribe’s] property, and compromise and risk the
13 health and safety of Tribal members.

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

17 ...

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

21
22 17.... [Plaintiffs’] have failed for decades to address the damage caused to [the Tribe]
or to properly remediate the Mine Site and to prevent the continuing release, discharge and
23 migration of toxic and hazardous substances.

24 18. As a result, a groundwater plume exists under the Mine Site and has migrated
offsite to surrounding properties. Nearly 400,000 acre feet of the groundwater plume is
25 contaminated with the toxic and hazardous substances listed above, including an estimated 95
tons of uranium. Moreover, the aquifer is contaminated with acidic process waters and metals
26 from the process areas, unlined evaporation ponds, and leaking heap-leach pads and tailings
piles. The intermediate and deep aquifers are interconnected, and have also been
27 contaminated.

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

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

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

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

(Tribal Complaint at ¶¶8-10, 16-22.) Based on the allegations above, the Tribe asserted five causes of
action: (1) strict liability; (2) trespass; (3) battery; (4) negligence; and (5) nuisance. These causes of
action were asserted on behalf of the Tribe and Tribal members. The Tribe is seeking compensatory,
special, and punitive damages against Plaintiffs and for an order for Plaintiffs "to bear the costs of
medical monitoring, including, but not limited to, testing, examination, preventative and diagnostic
screening for conditions that can result from, or potentially result from, exposure to arsenic, uranium,
and other toxic and hazardous materials[.]" (*Id.* at 16.)

Plaintiffs filed this action seeking both a preliminary injunction and permanent injunction
prohibiting the Tribal Court from hearing the Tribal Action. Plaintiffs have filed a Motion to Dismiss
in Tribal Court, asserting that the Tribal Court does not have subject-matter jurisdiction to hear the

1 Tribe's Complaint. (Pls.' Amended Mot. for Prelim. Inj. at 8:13-14, ECF No. 38.) Instead of waiting
2 for a ruling on their Motion to Dismiss and exhausting their tribal remedies, Plaintiffs are asking this
3 Court to interfere with an ongoing Tribal Court proceeding.

4 Plaintiffs have failed to establish that Judge Pickens -- and by extension the Tribe -- is not
5 protected by tribal sovereign immunity. While Plaintiffs have sued Judge Pickens in her official
6 capacity for prospective injunctive relief, Judge Pickens is still protected by tribal sovereign
7 immunity because she has not violated federal law, the U.S. Constitution, or federal common law. *To*
8 *the contrary, she is a jurist who happens to preside over a tribal court in which a motion to dismiss --*
9 *upon which she has not even ruled -- has been filed in response to a complaint.* Without such a
10 showing, *Ex parte Young* does not apply to override the Tribe's sovereign immunity. Additionally,
11 the Tribal Court's subject-matter jurisdiction is at least colorable on the face of the Tribal Complaint.
12 Under U.S. Supreme Court precedent, Plaintiffs are required to exhaust their tribal remedies before
13 filing suit in this Court. They have failed to do so, and accordingly the Court should decline to hear
14 this matter.

15 **III. LEGAL STANDARD**

16 "Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of*
17 *Am.*, 511 U.S. 375, 377 (1994). Federal courts possess power authorized by the Constitution and
18 federal statutes, and that power cannot be expanded by judicial decree. *Id.* (citations omitted). It is
19 presumed that a cause lies outside of this limited jurisdiction, and "the burden of establishing the
20 contrary rests upon the party asserting jurisdiction." *Id.* (citing *McNutt v. Gen. Motors Acceptance*
21 *Corp.*, 298 U.S. 178, 182-83 (1936)). A plaintiff who files a case in federal court bears the burden of
22 establishing that the court has jurisdiction. *Righthaven LLC v. Newman*, 838 F. Supp. 2d 1071, 1074
23 (D. Nev. 2011) (citing *In re Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001)). Dismissal under
24 FRCP 12(b)(1) is appropriate if the complaint, considered in its entirety, fails to allege facts that are
25 sufficient on their face to establish subject-matter jurisdiction. *In re Dynamic Random Access*
26 *Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008). Courts "do not accept *legal*
27 *conclusions* in the complaint as true, even if 'cast in the form of factual allegations.'" *Lacano Invs.*,
28 *LLC v. Balash*, 765 F.3d 1068, 1071 (9th Cir. 2014) (quoting *Doe v. Holy See*, 557 F.3d 1066, 1073

1 (9th Cir. 2009)) (emphasis in original). FRCP 12(b)(1) is the proper vehicle for seeking dismissal
2 based on sovereign immunity. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015).

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

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

22 **IV. LEGAL ARGUMENT**

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

24 Judge Pickens is a Tribal official and has been sued in her official capacity and is protected by
25 the Tribe’s sovereign immunity. “Tribal sovereign immunity ‘extends to tribal officials when acting
26 in their official capacity and within the scope of their authority.’” *Cook*, 548 F.3d at 727 (quoting
27 *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002)). “In these cases the sovereign
28 entity is the ‘real, substantial party in interest and is entitled to invoke its sovereign immunity from

1 suit even though individual officials are nominal defendants.” *Cook*, 548 F.3d at 727 (quoting
2 *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)). Stated another way, “courts should
3 look to whether the sovereign is the real party in interest to determine whether sovereign immunity
4 bars the suit.” *Lewis v. Clarke*, -- U.S.--, 137 S. Ct. 1285, 1290 (2017). *See also Forsythe v. Reno-*
5 *Sparks Indian Colony*, 2017 WL 3814660, at *3-*4 (D. Nev. Aug. 30, 2017) (dismissing claims
6 against tribal officers because tribe was real party in interest).

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

20 It is clear from the face of the Amended Complaint that Plaintiffs have sued Judge Pickens in
21 her official capacity in order to enjoin the Tribal Court and the Tribe. Plaintiffs have not alleged that
22 the Tribe has waived its immunity, nor has it alleged that Congress abrogated its immunity for this
23 suit. Because Judge Pickens has been sued only in her official capacity for conduct within the scope
24 of her authority, she is protected by the Tribe’s sovereign immunity and this Court lacks subject-
25 matter jurisdiction to hear this case. Dismissal is appropriate pursuant to FRCP 12(b)(1).

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

Presumably Plaintiffs will argue that *Ex parte Young* applies because they have sued Judge Pickens in her official capacity for prospective injunctive relief. *See Burlington N. R. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991) (“tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law”), *overruled on other grounds by Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000). However, as with Plaintiffs’ attempt at pleading around sovereign immunity, this argument fails. Plaintiffs’ allegations against Judge Pickens are speculative, and Plaintiffs have not pled any facts to suggest that Judge Pickens is in violation of a federal statute, the U.S. Constitution, or federal common law. Without such a showing, tribal immunity applies, and Plaintiffs’ Amended Complaint against Judge Pickens fails.

“In determining whether *Ex Parte Young* is applicable to overcome the tribal officials’ claim of immunity, the relevant inquiry is only whether [plaintiff] has *alleged* an ongoing violation of federal law and seeks prospective relief.” *See Burlington Northern & Santa Fe Ry Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (citing *Verizon Md., Inc. v. Publ. Serv. Comm’n of Md.*, 535 U.S. 635, 645-46 (2002)) (emphasis in original). While Plaintiffs do state, in the most conclusory of terms, that Judge Pickens is engaged in an “ongoing violation of federal law” simply by virtue of presiding over the Trial Court Action and entering an Amended Scheduling Order (Am. Compl. ¶28, ECF No. 37), this allegation is insufficient because it does not describe a violation of federal law. In *Vaughn*, the court drew a distinction between allegations which established the applicability of *Ex Parte Young*, and those which did not: The plaintiff railroad, which was seeking to overcome tribal immunity, alleged that the Hualapai Indian Tribe had enacted an illegal “possessory interest tax” against the railroad, and that the tribe’s Finance Director had “already transmitted tax registration forms to BNSF [the Plaintiff], the first step in seeking to impose and collect more taxes.” *Id.* at 1092-93. On the one hand the Court held that this constituted a sufficient allegation that the Finance Director had violated federal law. *Id.* at 1092. However, with respect to the Tribal Chairman, the Court held that the railroad’s generalized alleged that “Defendants have acted ... in violation of federal law ...,” did not

1 not satisfy *Ex Parte Young*, because he was not alleged to be in any way responsible for enforcing the
2 tax. *Id.* at 1093.

3 Plaintiffs' conclusory allegations against Ms. Pickens in this case, like those against the Tribal
4 Chairman in *Vaughn*, are insufficient to establish that the *Ex Parte Young* exception to tribal
5 sovereign immunity applies. To the contrary, Plaintiffs have made only the nonsensical contention
6 that *simply by virtue of being a judge presiding over the court in which the Tribal Action has been*
7 *filed* she is "involved in an *assertion* of jurisdiction over non-Indians BPA and ARC" (Am.
8 Compl. ¶28, ECF No. 37) (emphasis supplied). Judge Pickens has not "asserted" anything. The Tribe
9 filed the Tribal Action, and BPA and ARC have filed a motion to dismiss. It cannot be said that Judge
10 Pickens is engaged in an "ongoing violation of federal law" simply by waiting for briefing to be
11 completed before evaluating and ruling on BPA and ARC's pending Motion to Dismiss. (*Id.*) Nor
12 does Judge Pickens' act of entering an Amended Scheduling Order on November 2, 2017 change the
13 equation. (*Id.* at ¶¶28, 60.) The act of setting extended deadlines for completing briefing on the
14 disputed issue of subject-matter jurisdiction merely indicates that Judge Pickens presently "intends to
15 continue presiding over the case" to the extent of eventually ruling on the pending Motion to Dismiss,
16 which is her task as the presiding judge. Whether she will continue to exercise jurisdiction beyond
17 that point will only be known after she has evaluated the pending Motion to Dismiss and issued her
18 ruling. Judge Pickens' act of simply entering the Amended Scheduling Order adds nothing to this
19 Court's analysis of whether the *Ex Parte Young* exception applies.

20 Plaintiffs request that this Court enter a preliminary and permanent injunction to prohibit
21 Judge Pickens from taking any *further* action with regards to the Tribal Action. (Am. Compl., 22:1-
22 3, ECF No. 37.) Yet the only "action" Plaintiffs allege Judge Pickens has taken to date is to enter an
23 Amended Scheduling Order governing the remaining briefing of BPA and ARC's pending Motion to
24 Dismiss. Judge Pickens has not taken any *substantive* action, including declaring that the Tribal Court
25 has, or does not have, subject-matter jurisdiction over the Tribal Action. Judge Pickens cannot be
26 stripped of her immunity and enjoined based on the simple allegation that she is a judge and that

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1 someone has filed a complaint in the court over which she presides.¹ Plaintiffs' Amended Complaint
 2 fails to establish that *Ex parte Young* applies to this case with regards to Judge Pickens. Accordingly,
 3 Plaintiffs have failed to illustrate that the Tribe's sovereign immunity does not apply to this case. This
 4 Court therefore lacks subject-matter jurisdiction to entertain Plaintiffs' Amended Complaint with
 5 regards to Judge Pickens.

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

8 Judge Pickens will not be in violation of federal common law if the Tribal Court hears the
 9 Tribal Action, because the Tribal Court's subject-matter jurisdiction is colorable on the face of the
 10 Tribal Complaint. The Tribe's allegations in the Tribal Complaint allege that Plaintiffs' actions have
 11 harmed Tribal land and Tribal Members. The Tribal Complaint also claims that Plaintiffs' actions
 12 have threatened or have some direct effect on the political integrity, the economic security, or the
 13 health or welfare of the Tribe. Under U.S. Supreme Court precedent, subject-matter jurisdiction is at
 14 least colorable on the face of the Tribal Complaint. Accordingly, *Ex parte Young* does not apply to
 15 override the Tribe's sovereign immunity, or the extension of that sovereign immunity to Judge
 16 Pickens, who has been sued in her official capacity.

17 “Non-Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to
 18 challenge tribal court jurisdiction.” *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d
 19 1298, 1302 (9th Cir. 2013) (quoting *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 846
 20 (9th Cir. 2009)). A tribal court may exercise subject-matter jurisdiction pursuant to either its inherent
 21 sovereign power or by a congressional statutory grant. *Philip Morris USA, Inc. v. King Mountain*
 22 *Tobacco Co.*, 569 F.3d 932, 937 (9th Cir. 2009). While a tribe's inherent sovereign powers do not
 23 extend to the activities of nonmembers of the tribe on non-tribal land, the Court has established that

24 ¹ The argument that Judge Pickens is engaged in an ongoing violation of federal law simply
 25 because she has not *sua sponte* dismissed the Tribal Court Action pursuant to BPA and ARC's
 26 pending Motion to Dismiss -- without even awaiting a response by the Tribe -- is misplaced. Given
 27 that the principal of tribal court exhaustion is so revered, it would be odd indeed to find that a tribal
 28 court judge has violated federal law through the mere fact that she presides over the tribal court in
 which a case has been filed, where she has not even been allowed time to evaluate and rule upon a
 pending motion to dismiss. See *Iowa Mut. Ins., Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (discussing
 importance of principle of exhaustion of tribal court remedies); *Boozler v. Wilder*, 381 F.3d 931, 935
 (9th Cir. 2004) (same).

1 either of the two *Montana* exceptions, if satisfied, will provide a tribal court with subject-matter
2 jurisdiction over non-tribal members. *Id.* (citing *Montana v. United States*, 450 U.S. 544, 565
3 (1981)). ““The first exception relates to nonmembers who enter consensual relationships with the
4 tribe or its members; the second concerns activity that directly affects the tribe’s political integrity,
5 economic security, health, or welfare.”” *Philip Morris*, 569 F.3d at 937 (quoting *Strate v. A-1*
6 *Contractors*, 520 U.S. 438, 446 (1997)). A nonmember’s federal common law action will fail if the
7 tribal court’s subject-matter jurisdiction is plausible or colorable on the face of the tribal complaint
8 under either of the *Montana* exceptions. *See Evans*, 736 F.3d at 1303; *Philip Morris*, 569 F.3d at 934.

9 The Court’s second *Montana* exception states that “tribes may regulate nonmember ‘activity
10 that directly affects the tribe’s political integrity, economic security, health, or welfare.’” *Evans*, 736
11 F.3d at 1303 (quoting *Strate*, 520 U.S. at 446). It is the tribe’s burden to show that the second
12 *Montana* exception provides a tribal court with subject-matter jurisdiction. *Evans*, 736 F.3d at 1303.
13 The conduct alleged by the tribe “must do more than injure the tribe, it must ‘imperil the subsistence’
14 of the tribal community.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316,
15 341 (2008) (quoting *Montana*, 450 U.S. at 566). “[T]he challenged conduct must be so severe as to
16 ‘fairly be called catastrophic for tribal self-government.’” *Evans*, 736 F.3d at 1306 (quoting *Plains*
17 *Commerce*, 554 U.S. at 341).

18 Plaintiffs rely on heavily on the Ninth Circuit’s ruling in *Evans*, in which the Ninth Circuit
19 Court of Appeals declined to extend the second *Montana* exception to a tribal court where the tribes’
20 complaint asserted that construction of a single-family home by a nonmember posed catastrophic
21 risks to the tribes’ health, welfare, and self-governance. *Evans* 736 F.3d at 1305-06. The tribes in
22 *Evans* claimed that the construction project presented several environmental harms to the tribe and
23 tribal land, including “(1) groundwater contamination; (2) improper disposal of construction debris;
24 and (3) increased risk of fire.” *Id.* at 1305. In rejecting these potential harms, the court explained that
25 the tribes “ha[d] long experienced groundwater contamination, and the [t]ribes proffer no evidence
26 showing that [the nonmember’s] construction would meaningfully exacerbate the problem. Further,
27 the [t]ribes’ generalized concerns about waste disposal and fire hazards are speculative, as they do
28 not focus on [the nonmember’s] specific project.” *Id.* at 1306. *But see Elliott*, 566 F.3d at 849

1 (finding that destruction of millions of dollars of tribe's natural resources was sufficient to establish
2 *Montana's* second exception).

3 The Tribal Action is distinguishable. In *Evans*, the court found that a single construction
4 project did not cause the environmental harms alleged by the tribe. *Id.* The court reasoned that the
5 tribe's generalized concerns about the construction project were speculative, "as they do not focus on
6 [the nonmember's] specific project." *Id.* The court also reasoned that the tribe had suffered
7 groundwater contamination in the past, and there was no evidence that the nonmember's
8 "construction would meaningfully exacerbate the problem." *Id.* In the Tribal Action, subject-matter
9 jurisdiction is colorable on the face of the Tribal Complaint based on the second *Montana* exception,
10 because the Tribe has pled, "the claims herein arose on [the Tribe's] land, and/or because the acts and
11 omissions giving rise to the claims threaten or have a direct impact on the political integrity,
12 economic security, and/or health, safety and welfare of the Tribe, imperiling the subsistence of the
13 Tribe." (Tribal Complaint at ¶3.) The Tribe then set forth at least ten paragraphs in which they
14 alleged how Plaintiffs' actions have damaged Tribal land and Tribal members. (*See id.* at ¶¶8-10, 16-
15 22.) These allegations include damage to Tribal land caused by pollution and toxic materials being
16 dumped or ending up on Tribal land, the harm to Tribal wetlands and water sources by pollution and
17 toxic materials, and harm inflicted or potentially inflicted to Tribal members. The Tribe then alleges
18 that Plaintiffs' acts or omissions have given rise to each cause of action, including the harm or
19 threatened harm to Tribal land and Tribal members.² Under *Montana's* second exception, the Tribal
20 Court's subject-matter jurisdiction is at least plausible.

21 ² See e.g., Tribal Complaint at ¶36 ("[Plaintiffs'] wrongful conduct as set forth above, including
22 but not limited to [Plaintiffs'] intentional past, present and continuing acts and/or omissions, resulting
23 in [Plaintiffs'] intentionally depositing onto and/or intentionally failing to remove and/or to properly
24 dispose of toxic and hazardous substances and intentionally allowing toxic and hazardous substances
25 to remain on [the Tribe's] property, surrounding environment and community resulted in the direct
26 physical invasion of [the Tribe's] property properties [*sic*] by toxic and hazardous substances."); ¶47
27 ("As a direct and proximate result of [Plaintiffs'] misconduct as set forth herein, [the Tribe] and
28 Tribal members have suffered and continue to suffer economic losses, such as costs of medical
monitoring and the loss of value to their property, as well as other damages."); ¶67 ("... Defendants
used, have used, and continue to use their property and Plaintiff's property in a manner that has
resulted in an unreasonable burden on Plaintiff and Tribal members in the form of personal harm,
inconvenience, annoyance, substantial and unreasonable interference with use and enjoyment of their
land and discomfort incidental to contaminant exposure.")

1 In the Tribal Action, the Tribe has not alleged that Plaintiffs’ failure to remediate the Mine
2 Site has “exacerbated” its environmental problem. Instead, the Tribe alleges that Plaintiffs’ acts
3 and/or omissions *caused* environmental problems on Tribal land, and affected Tribal members. These
4 problems include contaminated groundwater that the Tribe uses for drinking water and irrigation,
5 hazardous dust that blows on Tribal land, and damage to the Tribe’s wetlands and natural habitats.
6 *See also FMC Corp. v. Shoshone-Bannock Tribes*, 2017 WL 4322393, at *10-*11 (D. Idaho Sep. 28,
7 2017) (finding that second *Montana* exception applied under *Evans* framework where the tribe
8 showed “that a failure by the EPA to contain the massive amount of highly toxic FMC waste would
9 be catastrophic for the health and welfare of the [tribes]”).

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

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1 Court has subject-matter jurisdiction over the Tribal Action is an issue that should be addressed first
2 by Judge Pickens. (*See infra* Part B.)³

3 Accordingly, because the Tribal Court's subject-matter jurisdiction is plausible on the face of
4 the Tribal Complaint, Judge Pickens would not be in violation of federal common if she were to
5 determine that the Tribal Court has subject-matter jurisdiction. The *Ex parte Young* exception does
6 not apply, and Judge Pickens is protected by the Tribe's sovereign immunity because she has been
7 sued in her official capacity and for actions taken within the scope of her authority. Accordingly, this
8 Court lacks subject-matter jurisdiction to consider Plaintiffs' Amended Complaint.⁴

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

10 Tribal Court subject-matter jurisdiction is plausible based on the allegations of the Tribal
11 Complaint, and therefore Judge Pickens is protected by the Tribe's sovereign immunity. Additionally,
12 Plaintiffs are required to exhaust their tribal court remedies -- including exhausting tribal court
13 appeals -- before filing their Complaint in this Court. Before filing this action, BPA and ARC filed a
14 Motion to Dismiss for lack of subject-matter jurisdiction in Tribal Court. That Motion is still
15 pending. (Pls.' Amended Mot. for Prelim. Inj. at 8:13-14, ECF No. 38.) Accordingly this Court
16 should dismiss this action based on principles of comity.

17 The Supreme Court has "repeatedly recognized the Federal Government's longstanding
18 policy of encouraging tribal self-government." *Iowa Mut. Ins., Co. v. LaPlante*, 480 U.S. 9, 14 (1987)

19 ³ Plaintiffs' reliance on the Comprehensive Environmental Response, Compensation, and
20 Liability Act (CERCLA) as a way of foreclosing the Tribal Court's subject-matter jurisdiction is
21 misplaced. (Am. Compl. ¶58, ECF No. 37.) CERCLA "authorizes private parties to institute civil
22 actions to recover the costs involved in the cleanup of hazardous wastes from those responsible for
23 their creation." *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001)
(quoting *3550 Stevens Creeks Assocs v. Barclays Bank*, 915 F.2d 1355, 1357 (9th Cir. 1990)). The
24 Tribal Complaint does not request funds for cleaning up the alleged hazardous materials released on
the Tribe's land. Instead, the Tribal Complaint requests damages for the harm caused to Tribal land
and Tribal members. On the face of the Tribal Complaint, CERCLA does not apply.

25 ⁴ Judge Pickens has not made a determination on the merits of BPA and ARC's Motion to
Dismiss filed in Tribal Court. The statements in this Motion should not be interpreted to indicate that
26 Judge Pickens has any preconceived notions regarding the merits of Plaintiffs' Motion. Judge
Pickens' submits that the plausibility standard required by the Supreme Court, which governs this
27 Court's ruling, has been met by Plaintiffs, but that the plausibility standard has no effect on the ruling
in Tribal Court. This is why, as the Supreme Court recommends, issues of a tribal court's subject-
28 matter jurisdiction should first be determined by the tribal court. (*See infra* Part B.)

1 (citations omitted.) The Supreme Court has also recognized the important role tribal courts play in
2 tribal self-governance:

3 [R]espect for tribal legal institutions requires that they be given a full opportunity to
4 consider the issues before them and to rectify any errors. The federal policy of
5 promoting tribal self-government encompasses the development of the entire tribal
6 court system, including appellate courts.

6 *Id.* at 16 (internal quotation omitted). As the Ninth Circuit has explained, “A federal court must give
7 the tribal court a *full opportunity to determine its own jurisdiction*, which includes exhausting
8 opportunities for appellate review in tribal courts.” *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir.
9 2004) (emphasis supplied).

10 Exhaustion is not required where it is “plain that the tribal court lacks jurisdiction over the
11 dispute, such that adherence to the exhaustion requirement would serve no purpose other than to
12 delay.” *Boozer*, 381 F.3d at 935 (citing *Hicks*, 533 U.S. at 369). However, “[d]elay alone is not
13 ordinarily sufficient to show that pursuing tribal remedies is futile.” *Boozer*, 381 F.3d at 936 (quoting
14 *Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1036 (9th Cir. 1999)). Where tribal subject-
15 matter jurisdiction is plausible or colorable on the face of the tribal complaint under either of the
16 *Montana* exceptions, the federal court should require the nonmember to exhaust their tribal remedies
17 in tribal court. *Evans*, 736 F.3d at 1302; *Philip Morris*, 569 F.3d at 941.

18 As discussed above, it is plausible that the Tribal Court has subject-matter jurisdiction over a
19 matter involving Plaintiffs, who are nonmembers, based on the second *Montana* exception. The Tribe
20 alleges that Plaintiffs’ acts and omissions have harmed the Tribe, Tribal property, and Tribal
21 members and it is seeking damages for that harm. The allegation that Plaintiffs’ actions and
22 omissions have caused the harm to the property and water supply of the Tribe, and that those actions
23 and omissions have caused toxic materials such as uranium, arsenic, lead, and mercury to be present
24 on Tribal land is sufficient to establish in this Court that Plaintiffs’ actions are catastrophic. Under
25 *Montana* and the Court’s policy that tribal courts determine their own subject-matter jurisdiction, the
26 Tribal Complaint has plead sufficient allegations so that this Court would not commit error by
27 allowing the Tribal Court to determine whether subject-matter jurisdiction exists over the Tribal
28 Action. *See also Water Wheel*, 642 F.3d at 808 (courts have “recognized that because tribal courts are

1 competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to
2 some deference") (citations and quotation marks omitted).

3 Plaintiffs filed this suit before Judge Pickens had the opportunity to determine whether the
4 Tribal Court has subject-matter jurisdiction over the Tribal Action. The Tribal Court's jurisdiction is
5 colorable under the second *Montana* exception, and this Court, based on principles of comity, should
6 dismiss or abate this action pending Judge Pickens' determination of whether the Tribal Court has
7 subject-matter jurisdiction.

8 **V. CONCLUSION**

9 Judge Pickens has committed no ongoing violation of federal law, the U.S. Constitution, or
10 federal common law. She is simply the Judge who happens to preside over the Tribal Action.
11 Subject-matter jurisdiction is colorable on the face of the Tribal Complaint, and thus Judge Pickens is
12 protected against this federal action by sovereign immunity. Furthermore, under principles of tribal
13 exhaustion and comity, she is entitled to evaluate and rule on the issue of whether subject-matter
14 does, in fact, exist in the Tribal Court. Defendant Sandra Mae Pickens respectfully requests that this
15 Court grant her Motion to Dismiss.

16 DATED this 28 day of November, 2017.



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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I certify that I am an employee of Laxalt & Nomura, Ltd. and not a party to, nor interested in, the within action; that on the 28th day of November, 2017, a true and correct copy of the foregoing *DEFENDANT SANDRA-MAE PICKENS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT* was filed electronically through the Court's CM/ECF electronic notice system to the attorneys associated with this case.

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