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

10 BP AMERICA INC., and ATLANTIC  
RICHFIELD COMPANY,

Case No. 3:17-cv-00588-LRH-WGC

11 Plaintiffs,

12 vs.

**DEFENDANT SANDRA-MAE PICKENS’  
OPPOSITION TO PLAINTIFFS’ AMENDED  
MOTION FOR PRELIMINARY  
INJUNCTION**

13  
14 YERINGTON PAIUTE TRIBE; LAURIE A.  
THOM, in her official capacity as Chairman of  
15 the Yerington Paiute Tribe; ALBERT  
ROBERTS, in his official capacity as Vice  
16 Chairman of the Yerington Paiute Tribe;  
ELWOOD EMM, LINDA HOWARD, NATE  
17 LANDA, DELMAR STEVENS, and CASSIE  
ROBERTS, in their official capacities as  
18 Yerington Paiute Tribal Council Members;  
19 DOES 1-25, in their official capacities as  
decision-makers of the Yerington Paiute  
20 Tribe; YERINGTON PAIUTE TRIBAL  
COURT; and SANDRA-MAE PICKENS in  
21 her official capacity as Judge of the Yerington  
Paiute Tribal Court,

22 Defendants.

23 Defendant Sandra-Mae Pickens, through her counsel of record, Laxalt & Nomura, Ltd., files  
24 this Opposition to Plaintiffs BP America Inc., and Atlantic Richfield Company’s Amended Motion  
25 for Preliminary Injunction (ECF No. 38.) This Motion is based on the following Memorandum of  
26 Points and Authorities, the pleadings on file, and any additional information this Court may consider.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

2

**I. INTRODUCTION**

3 Plaintiffs BP America Inc. and Atlantic Richfield Company (“BPA” and “ARC”, or  
4 “Plaintiffs”) have filed this suit against Defendant Sandra-Mae Pickens in her official capacity as  
5 Judge of the Yerington Paiute Tribal Court (the “Tribal Court”) and in violation of the Yerington  
6 Paiute Tribe’s (the “Tribe”) sovereign immunity. Judge Pickens, as a Yerington Paiute Tribal official  
7 sued in her official capacity, is protected by the Tribe’s sovereign immunity, and Plaintiffs have not  
8 established that it is proper for this Court to exercise subject-matter jurisdiction over her. *Ex parte*  
9 *Young*, 209 U.S. 123 (1908), does not apply to give this Court subject-matter jurisdiction over  
10 Plaintiffs’ Amended Complaint because Judge Pickens has not violated federal law, the U.S.  
11 Constitution, or federal common law, and Plaintiffs’ conclusory allegations to the contrary are pure  
12 speculation. Because Judge Pickens is protected by the Tribe’s sovereign immunity, this Court lacks  
13 subject-matter jurisdiction to hear Plaintiffs’ Amended Complaint and to issue a preliminary  
14 injunction.

15 Additionally, Plaintiffs cannot establish that they have a likelihood of success on the merits  
16 because the Tribal Court’s subject-matter jurisdiction is plausible on the face of the Tribe’s  
17 Complaint. Plaintiffs have been sued in Tribal Court for alleged harm they have caused to the Tribe’s  
18 land and Tribal members. Accordingly, Plaintiffs’ request for a preliminary injunction fails.

19 Judge Pickens’ Opposition to Plaintiffs’ Amended Motion for Preliminary Injunction is based  
20 on her Motion to Dismiss Plaintiffs’ Amended Complaint, also filed today, November 28, 2017 (ECF  
21 No. 41.) Accordingly, Judge Pickens hereby incorporates by reference her Motion to Dismiss  
22 Amended Complaint in full, as if stated herein.

23

**IV. LEGAL ARGUMENT**

24

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

25 Judge Pickens is a Tribal official and has been sued in her official capacity and is protected by  
26 the Tribe’s sovereign immunity. As discussed in Judge Pickens’ Motion to Dismiss Amended  
27 Complaint, Plaintiffs are unable to establish that the *Ex parte Young* exception applies to override  
28 Judge Pickens’ tribal sovereign immunity. (Def. Pickens’ Mot. to Dismiss Am. Cmplt. at pp. 8-14.)

1 Accordingly, Plaintiffs have failed to establish that this Court has subject-matter jurisdiction to  
2 entertain this suit and issue a preliminary injunction.

3 "A district court may not grant a preliminary injunction if it lacks subject matter jurisdiction  
4 over the claim before it." *Shell Offshore Inc. v. Greenpeace, Inc.*, 864 F. Supp. 2d 839, 842 (D.  
5 Alaska 2012) (citing *Cooper Indus., Inc. v. U.S.E.P.A.*, 775 F. Supp. 1027, 1036 (W.D. Mich. 1991)).  
6 See also *Zepeda v. U.S.I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) ("A federal court may issue an  
7 injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the  
8 claim...."); *Ferm v. McCarty*, 2013 WL 12129861, at \*1 (D. Nev. Jan. 29, 2013) ("If the court lacks  
9 subject matter jurisdiction, any request for a preliminary injunction is rendered moot.") (citing *Shell*,  
10 864 F. Supp. 2d at 842); *Sepulveda v. Woodford*, 2011 WL 13122540, at \*1 (E.D. Cal. Feb. 18, 2011)  
11 (citing *Zepeda*, 753 F.2d at 727); *Bear v. C.I.R.*, 799 F. Supp. 1081, 1082 (E.D. Wash. 1991) (court  
12 must determine subject matter jurisdiction before granting equitable relief of injunction).

13 As was discussed at length in Judge Pickens' Motion to Dismiss Plaintiffs' Amended  
14 Complaint, Plaintiffs have not established that this Court has subject-matter jurisdiction to adjudicate  
15 their Amended Complaint. Plaintiffs have not established that Judge Pickens -- and by extension, the  
16 Tribe -- is not protected by the Tribe's sovereign immunity. "Absent express waiver, consent by the  
17 Tribe to suit, or congressional authorization for such a suit, a federal court is without jurisdiction to  
18 entertain claims advanced against the Tribe." *Evans v. McKay*, 869 F.2d 1341, 1345-46 (9th Cir.  
19 1989) (citing *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983)). "Tribal sovereign  
20 immunity 'extends to tribal officials when acting in their official capacity and within the scope of  
21 their authority.'" *Cook v. AVI Casino Enters., Inc.*, 548 F.3d at 727 (quoting *Linneen v. Gila River*  
22 *Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002)). Because Judge Pickens is a Tribal official sued in  
23 her official capacity and for conduct within the scope of her authority, tribal sovereign immunity is a  
24 bar to Plaintiffs' suit and this Court lacks subject-matter jurisdiction. Based on the Court's lack of  
25 subject-matter jurisdiction, Plaintiffs' Amended Motion for Preliminary Injunction should be denied.

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1           **B. Plaintiffs have not Established that they have a Likelihood of Success on the**  
2           **Merits because Tribal Subject-Matter Jurisdiction is Plausible**

3           Plaintiffs have failed to establish that they are likely to succeed on the merits of their claim.

4           The Tribe's allegations in the Tribal Complaint allege that Plaintiffs' actions have harmed Tribal land  
5           and Tribal Members. The Tribal Complaint also claims that Plaintiffs' actions have threatened or  
6           have some direct effect on the political integrity, the economic security, or the health or welfare of  
7           the Tribe. The Tribe's Complaint shows that subject-matter jurisdiction is at least plausible under the  
8           second *Montana* exception. (*See* Def. Pickens' Mot. to Dismiss Am. Cmplt. at pp. 10-14.)

9           Additionally, Plaintiffs are required to exhaust their administrative remedies. (*Id.* at pp. 14-16.)

10          Plaintiffs have failed to establish a required element for the granting of a preliminary injunction and  
11          their Motion should be denied.

12          “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the  
13          merits....” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted).

14          “Non-Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to challenge  
15          tribal court jurisdiction.” *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298,  
16          1302 (9th Cir. 2013) (quoting *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 846 (9th  
17          Cir. 2009)). “A nonmember’s federal common law action will fail if the tribal court’s subject-matter  
18          jurisdiction is plausible or colorable on the face of the tribal complaint under either of the *Montana*  
19          exceptions.” (Def. Pickens’ Mot. to Dismiss Am. Cmplt. at 11:6-8, citing *Evans*, 736 F.3d at 1303;  
20          *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 937 (9th Cir. 2009).)

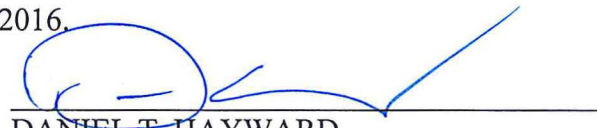
21          As was discussed in more detail in Judge Pickens’ Motion to Dismiss Plaintiffs’ Amended  
22          Complaint, the Tribal Complaint shows that the Tribal Court’s subject-matter jurisdiction is at least  
23          plausible. The Tribe alleges that the Tribal Court can exercise subject-matter jurisdiction based on the  
24          second *Montana* exception because Plaintiffs’ acts and omissions have threatred or have a direct  
25          impact on the political integrity, economic security, and/or health, safety and welfare of the tribe,  
26          which is imperiling the subsistence of the Tribe. The Tribe alleges that Plaintiffs’ acts and omissions  
27          are damaging and have damaged Tribal land, the Tribe’s water sources, and Tribal members and that  
28          this harm is catastrophic. (Def. Pickens’ Mot. to Dismiss Am. Cmplt. at pp. 2-5, 12-13.)

1 Judge Pickens' Motion to Dismiss Plaintiffs' Amended Complaint establishes that the Tribal  
2 Court's subject-matter jurisdiction is at least plausible on the face of the Tribal Complaint and that  
3 Plaintiffs' therefore cannot make out their federal common law cause of action. Additionally, due to  
4 the Tribal Court's subject-matter jurisdiction being plausible, Plaintiffs are required to exhaust their  
5 tribal remedies before filing suit in this Court. Plaintiffs' failure to exhaust their tribal remedies  
6 should result in this Court dismissing this case based on principles of comity. Plaintiffs' Amended  
7 Motion for a Preliminary Injunction fails, and should be denied.

8 **III. CONCLUSION**

9 Based on the foregoing, as well as Judge Pickens' Motion to Dismiss Plaintiffs' Amended  
10 Complaint, Plaintiffs' Amended Motion for Preliminary Injunction fails. Accordingly, Defendant  
11 Sandra Mae Pickens respectfully requests that this Court deny Plaintiffs' Amended Motion for  
12 Preliminary Injunction.

13 DATED this 28<sup>th</sup> day of November, 2016.

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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 28<sup>th</sup> day of November, 2017, a true and correct copy of the foregoing *DEFENDANT SANDRA-MAE PICKENS' OPPOSITION TO PLAINTIFFS' AMENDED MOTION FOR PRELIMINARY INJUNCTION* was filed electronically through the Court's CM/ECF electronic notice system to the attorneys associated with this case.

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