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9 *Attorneys for Yerington Paiute Tribal Court*

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

12 **BP America Inc., and Atlantic Richfield**  
13 **Company,**

14 **Plaintiffs,**

15 **vs.**

16 **Yerington Paiute Tribe; Laurie A. Thom,**  
17 **in her official capacity as Chairman of**  
18 **the Yerington Paiute Tribe; Albert**  
19 **Roberts, in his official capacity as Vice**  
20 **Chairman of the Yerington Paiute Tribe;**  
21 **Elwood Emm, Linda Howard, Nate**  
22 **Landa, Delmar Stevens and Cassie**  
23 **Roberts, in their office capacities as**  
24 **Yerington Paiute Tribal Council**  
25 **Members; DOES 1-25, in their official**  
26 **capacities as decision-makers of the**  
27 **Yerington Paiute Tribe; Yerington**  
28 **Paiute Tribal Court; and Sandra-Mae**  
**Pickens, in her official capacity as Judge**  
**of the Yerington Paiute Tribal Court,**

**Defendants.**

**Case 3:17-cv-00588**

**Yerington Paiute Tribal Court's Points**  
**and Authorities in Support of Motion to**  
**Dismiss Amended Complaint for**  
**Declaratory and Injunctive Relief**

**I. Introduction**

Plaintiffs, BP America, Inc., (BP) and Atlantic Richfield Company (ARC) filed an amended complaint, EC No. 37, in this action seeking to prevent the Yerington Paiute Tribe (the Tribe) and the other tribal defendants, including the Yerington Paiute Court, (the Tribal Court) from pursuit of the Tribe's underlying tribal action filed in the Tribal Court styled, *Yerington Paiute Tribe v. BP America Inc. & Atlantic Richfield Co.*, Case No., YVC1017 (the Tribal Court

1 Action). *See*, ECF No. 3-2. As can be seen, the Tribe is the only plaintiff in the Tribal Court  
2 action.

3 In regards to the Tribal Court, little, if anything, was changed by the amended complaint  
4 filed herein. ECF No. 37. BP and ARC, the plaintiffs herein, still assert that: “The principal (sic)  
5 question in this case is whether the Tribal Court has subject-matter jurisdiction over the claims  
6 brought by the Tribe the Tribal Court action.” Comp. ECF No. 37, p. 4, ¶ 14. Arguing that the  
7 Tribal Court does not have jurisdiction over the Tribal Court action, the plaintiffs want this Court  
8 to enjoin the Tribal Court proceedings and relieve BP and ARC from having to contend with the  
9 proceedings, there.<sup>1</sup>

10 BP and ARC are still mistaken. While the plaintiffs’ quote in paragraph 14 may be the  
11 principle question according to their view of the case before this Court, because the jurisdiction  
12 of this Court may not be pretermitted, *see, Ashcroft v. Iqbal*, 556 U.S. 662, 671, 129 S.Ct. 1937,  
13 173 L.Ed.2d 868 (2009)(“we are not free to pretermitt the question” of jurisdiction), the question  
14 to be decided before all others is whether this Court has jurisdiction in the first place, to reach the  
15 question plaintiffs wish to propound.

16 As elucidated, below, this Court does not have jurisdiction over the Yerington Paiute  
17 Tribe by reason of tribal sovereign immunity, sovereignty which has not been waived for the  
18 Tribe or the Tribal Court by either Congress or the Tribe, itself. Since a waiver of sovereign  
19 immunity by Congress or the Tribe is the only avenue, *see, Kiowa Tribe of Oklahoma v.*  
20 *Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 961 (1998);  
21 *Imperial Granite Company v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9<sup>th</sup> Cir.,  
22 1991), for subjecting the Tribe and its institutions such as the Tribal Court, to the jurisdiction of  
23 this Court, *see, Boney v. Valline*, 597 F.Supp.2d 11167 (D. Nev. 2009); *Cook v. AVI Casino*  
24 *Enterprises, Inc.*, 548 F.3d 718 (9<sup>th</sup> Cir., 2008); *Allen v. Gold Country Casino*, 464 F.3d 1044,  
25 1046 (9<sup>th</sup> Cir., 2006); *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978 (9<sup>th</sup> Cir.  
26 2006)(overruled on other grounds- by *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916  
27

28 <sup>1</sup>By submitting this pleading, the Tribal Court reserves and does not waive its sovereignty and  
preserves all of its defenses to this dispute including challenges to the Court’s jurisdiction, which the  
Tribal Court levies with this pleading.

1 (9th Cir. 2008)(recognizing that tribal sovereign immunity "extends to agencies and subdivisions  
2 of the tribe"), the plaintiffs' amended complaint must be dismissed as to the Tribal Court without  
3 regard for the disposition of the question the plaintiffs prematurely pose.

4       Moreover, for reasons of the exhaustion of tribal remedies, the amended complaint should  
5 be dismissed or suspended, pending the disposition of the Tribal Court action, above.  
6 Regardless, the absence of jurisdiction over the Tribal Court requires dismissal of the instant  
7 complaint against the Yerington Paiute Tribal Court.

## 8 **II. THE STANDARD FOR DECIDING A MOTION TO DISMISS**

9       In the face of a motion to dismiss, the plaintiffs' well pled facts are to be taken as true.  
10 *See, Ashcroft v. Iqbal, supra* at 678. There, the Court laid out the Court's definitive view of the  
11 standard by which the adequacy of the pleadings are to be judged when confronted by a motion  
12 to dismiss based upon subject matter jurisdiction involving public officials. And, as indicated,  
13 above, courts are not free to pretermitt the question of subject matter jurisdiction. "Subject matter  
14 jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt." *Id.* at  
15 671.

16       According to *Iqbal*, the plaintiffs must do more than offer a naked claim that the Court  
17 has jurisdiction over the Tribe to subject it to declaratory and injunctive relief. When assessing a  
18 complaint, *Iqbal* holds that a court is "'not bound to accept as true a legal conclusion couched as  
19 a factual allegation....'"*Id.*, at 678. "A pleading that offers 'labels and conclusions' or 'formulaic  
20 recitations of the elements of a cause of action will not do.'" *Ibid.* Furthermore, "...a complaint  
21 does not suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ibid.*

22       This is the context within which the adequacy of the pleadings must be assessed when a  
23 motion to dismiss for the want of jurisdiction based upon Tribal sovereign immunity from suit is  
24 before this Court. *See, Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221  
25 F.Supp.2d 271, 280, 281 (D.C.Conn., 2002). The plaintiffs must do more than offer a naked  
26 claim that the Court has jurisdiction over the Tribal defendants.

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1 **III. WHERE A MOTION TO DISMISS FOR THE WANT OF JURISDICTION IS**  
2 **BROUGHT, THE BURDEN IS UPON THE PARTY ASSERTING**  
3 **JURISDICTION TO AFFIRM THE COURT'S ABILITY TO HEAR THE CASE**

4 Since Federal Courts are courts of limited jurisdiction, it is presumed that a complaint lies  
5 outside the Court's jurisdiction and the "burden of establishing the controversy" rests with the  
6 party asserting jurisdiction. *Kokkonen v. Guardian Life Inc. Co., of America*, 511 U.S. 375, 377  
7 (1994); *Rightheaven, LLC v. Newman*, 838 F.Supp.2d 1071, 1074 (D.Nev., 2011). Thus, while  
8 the Tribal Court has affirmatively placed the Court's jurisdiction at issue through the Tribe's  
9 sovereign immunity, the burden is upon the plaintiffs to establish subject matter jurisdiction of  
10 the Court. *See, Pistor v. Garcia*, 791 F.3d 1104, 1111 (9<sup>th</sup> Cir. 2012); *Stock West, Inc. v.*  
11 *Confederate Tribes*, 873 F.2d 1221, 1225 (9<sup>th</sup> Cir., 1989); *Tosco Corp. v. Communities for a*  
12 *Better Environment*, 236 F.3d 495, 499 (9<sup>th</sup> Cir., 2001) (the plaintiff is required to show this  
13 Court, "...affirmatively and distinctly, the existence of what was essential to federal  
14 jurisdiction..."). And, "[w]hen a district court is presented with a challenge to its subject matter  
15 jurisdiction, '[n]o presumptive truthfulness attaches to [a] plaintiff's allegations' *Robinson*, 586  
16 F.3d at 685 (quoting, *Augustine v. United States*, 704 F.2d 1074, 1077 (9<sup>th</sup> Cir., 1983))." *Pistor*,  
*supra* at 1111.

17 **IV. IMMUNITY FROM SUIT IS A FUNDAMENTAL ATTRIBUTE OF BEING A**  
18 **FEDERALLY RECOGNIZED INDIAN TRIBE**

19 No elaboration is needed to recognize that Tribes retain their inherent sovereignty as  
20 distinct sovereign nations in matters of local governance. *Santa Clara Pueblo v. Martinez*, 436  
21 U.S. 49, 55, 98 S.Ct. 1670 (1978). Nonetheless, the United States Supreme Court revisited the  
22 question of Tribal sovereign immunity in *Michigan v. Bay Mills Indian Community*, 134 S.Ct.  
23 2024 (U.S. 2014), 2014 U.S. LEXIS 3596, when the Court upheld the Sixth Circuit's decision  
24 that Tribal sovereign immunity barred the State of Michigan from suing Bay Mills to cease  
25 operation of a Class III Tribal casino on what the State claimed were non-Indian lands. Clearly,  
26 declaratory and injunctive relief was the subject matter of the dispute.

27 While the case involved an interpretation of the Indian Gaming Regulatory Act (IGRA),  
28 in order to reach the decision rendered, it was necessary for the court to squarely tackle the issue

1 of tribal sovereignty and the barrier it creates for haling tribes into court by aggrieved plaintiffs.  
2 The Court determined that tribal sovereign immunity "...protects Bay Mills from this legal action.  
3 Congress has not abrogated tribal sovereign immunity from a State's suit to enjoin gaming off  
4 reservation or other Indian lands." *Bay Mills, supra*, at 2028.

5 To reach this decision, *Bay Mills* explained that while Tribes are subject to the plenary  
6 authority of Congress, Tribes, nonetheless, "...remain 'separate sovereigns pre-existing the  
7 Constitution.'" *See, Bay Mills, supra* at 2030, quoting *Santa Clara, supra*, at 56. Thus, "...unless  
8 and 'until Congress acts, the tribes retain' their historic sovereign authority. *United States v.*  
9 *Wheeler*, 435 U.S. 313, 323 (1978)." *Bay Mills, supra*, at 2030. As a consequence, "[a]mong the  
10 core aspects of sovereignty that tribes possess -- subject, again, to congressional action -- is the  
11 'common law immunity from suit traditionally enjoyed by sovereign powers.' *Santa Clara*  
12 *Pueblo*, 436 U.S., at 58." *Ibid*.

13 Thus, for the plaintiffs to hale the Tribe into court in this case, they must, first, show that  
14 either Congress unequivocally waived, *see, Santa Clara Pueblo, supra*, at 58, the Tribe's  
15 sovereign immunity, thereby exposing the Tribe's public fisc to the threat of a suit for damages or  
16 declaratory and injunctive relief. Or, the plaintiffs must show that the Tribe, itself, explicitly and  
17 unequivocally, *see, Allen, supra* at 1047, waived its sovereign immunity, thereby consenting to  
18 be haled into Court to the same effect. Those are the only two avenues open to plaintiff for  
19 haling the Tribe into court. *See, Kiowa, supra*, at 754. ("...an Indian tribe is subject to suit **only**  
20 where Congress has authorized the suit or the tribe has waived its immunity." (Emphasis  
21 added)). A failure by the plaintiffs to make either showing ousts the Court of jurisdiction to hear  
22 this dispute against the Tribe and also, the Tribal Court.

23 **A. Tribal Sovereignty Is Co-Extensive With The United States And Protects**  
24 **Tribes Even When Exceeding Their Authority to Act**

25 As a corollary to the Tribe's status "... as distinct, independent political communities,  
26 retaining their original natural rights in matters of local self-government," *Santa Clara Pueblo,*  
27 *supra*, at 55, the Tribe's sovereign immunity from suit is also co-extensive with the United  
28 States. Tribes are immune from suit, just as the United States is immune from suit. *See,*

1 *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1051  
2 (9<sup>th</sup> Cir., 1985), quoting *Kennerly v. United States*, 721 F.2d 1252, 1258 (9<sup>th</sup> Cir., 1983) ("The  
3 common law immunity of [Indian tribes] is co-extensive with that of the United States....").

4 Tribal sovereign immunity, therefore, protects Tribes even when acting outside their  
5 authority. *See, Chemehuevi, supra*, at 1052 ("The tribe remains immune from suit regardless of  
6 any allegation that it acted beyond its authority or outside of its powers."). Importantly, also,  
7 Tribal sovereign immunity applies to a Tribe's commercial as well as governmental activities.  
8 *See, Cook, supra* at 725. Punitive damages are also unavailable against the sovereign at common  
9 law. *See, City of Newport v. Fort Concerts*, 453 U.S. 247 (1981).

10 **B. The Umbrella of Sovereign Immunity That Emanates From**  
11 **the Tribe Extends To Tribal Institutions**

12 Tribal sovereign immunity includes an umbrella of protection which extends to the  
13 agencies and instrumentalities of the Tribe. *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908)  
14 is the seminal case addressing suits against the sovereign. Its doctrine, however, "... has no  
15 application in suits against the States and their agencies, which are barred regardless of the relief  
16 sought." *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 862 F.3d 1236, 1251  
17 (10<sup>th</sup> Cir., 2017). The same principle holds for the Tribe's entities, agencies and departments.  
18 *See, Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292(10<sup>th</sup>  
19 Cir., 2008); *Allen, supra*, at 1047 (casino functioning as an arm of the Tribe enjoys Tribal  
20 sovereign immunity from suit); *Cook, supra* at 725, 726 (tribal casino); *Ramey Constr. Co. v.*  
21 *Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 321 (10<sup>th</sup> Cir., 1982)(inn operating as  
22 a sub-entity of the Tribe and not a separate corporate entity enjoyed tribal sovereign immunity  
23 from suit), *Garcia v. Akwesasne Housing Authority*, 105 F.Supp.2d 12, 15, 16 (N.D.N.Y., 2000),  
24 affirmed in rel. part, vacated in part by *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76 (2<sup>nd</sup>  
25 Cir., 2001). *See also, Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc.*, 221 F.  
26 Supp. 2d 271, 277, (D. Conn. 2002) (sovereignty extends to agencies or entities of the Tribe);  
27 *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 358 (2<sup>nd</sup> Cir., 2002); *Dillon v. Yankton*  
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1 *Sioux Tribal Housing Authority*, 144 F.3d 581 (8<sup>th</sup> Cir., 1998)( housing authority immune from  
2 suit based upon the Tribe's sovereignty).

3 **C. To Be Effective, Any Waiver of Tribal Sovereignty Must Be**  
4 **Unequivocally Expressed; Waivers By Implication Do Not Pass**  
5 **Muster. Any Claim, Therefore, A Tribe Has Waived Sovereign**  
6 **Immunity Must Meet This High Standard Before A Party Is Allowed**  
7 **To Hail The Tribe, And Perhaps, Other Tribal Defendants, Into**  
8 **Court To Be Sued**

9 As explained, both Congress and the Tribe may waive a Tribe's sovereignty. In either  
10 case, however, the waiver must be unequivocally expressed. *See, Allen, supra*, at 1047. "Like  
11 the United States, an Indian tribe can consent to suit, but such consent must be unequivocally  
12 indicated." *Chemehuevi, supra*, at 1052, 1053. "Congress, no less than a tribe itself, cannot  
13 imply a waiver of sovereign immunity but must unequivocally express it." *Ibid.* A waiver,  
14 therefore, of sovereign immunity will not be implied. *See, Santa Clara Pueblo, supra*, at 58.

15 Thus, in *Department of the Army v. Blue Fox*, 525 U.S. 255, 261, 119 S.Ct. 687, 142  
16 L.Ed.2d 718 (1998), in a case discussing the United States' immunity, applicable here, since the  
17 Tribe's sovereignty is co-extensive with the immunity of the United States, the Court stated:

18 We have frequently held, however, that a waiver of sovereign immunity is to be  
19 strictly construed, in terms of its scope, in favor of the sovereign....Such a waiver  
20 must also be 'unequivocally expressed' in the statutory text....Respondent's claim  
21 must meet this high standard. (Internal citations omitted).

22 *See also, Garcia, supra*, at 15, 16, applying this principle within the context of a purported  
23 waiver of tribal sovereignty.

24 Therefore, to proceed with this dispute, plaintiffs have the burden of meeting this "high  
25 standard" by showing the presence of an express and unequivocal waiver of the Tribe's sovereign  
26 immunity, Congressional, Tribal or both. Waivers by implication do not pass muster. *See,*  
27 *Santa Clara Pueblo, supra* at 58. This is a standard, however, the plaintiffs' complaint is  
28 incapable of surmounting.

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1 **V. THIS DISPUTE PROVIDES NO EXCEPTION TO THE UMBRELLA OF**  
2 **PROTECTION FROM SUIT BY REASON OF THE TRIBE'S**  
3 **SOVEREIGN IMMUNITY WHICH PROTECTS THE TRIBE, AND**  
4 **THROUGH IT, THE TRIBAL DEFENDANTS AND, THEREFORE, THE**  
5 **COURT IS OUSTED OF JURISDICTION TO HEAR THIS DISPUTE AS**  
6 **FRAMED BY THE PLAINTIFFS' COMPLAINT**

7 It is conceded that the Tribe, alone, brought suit in the Yerington Paiute Tribal Court,  
8 alleging, *inter-alia*, the intrusion upon the Tribe's land, in its water, and in the air, of hazardous  
9 materials and waste which the Tribe alleges, threatens the very fabric of the Tribe, its  
10 government, and the health and welfare of its members. Tribal Comp., Exhibit A, ECF No. 3-2.  
11 The defendants, in the Tribal Court action, then, brought this suit seeking to bar the Tribal Court  
12 action from proceeding, there. Amended Comp., ¶ B, p. 20, ECF No. 37.

13 BP and Arco, the plaintiffs, herein, concede the following undisputed facts:

14 1. The Yerington Paiute Tribe is a Federally recognized Tribe. Amended Comp., ¶  
15 B, p. 20, ECF No. 37.

16 2. The Yerington Paiute Tribe is the only plaintiff in the Tribal Court proceedings.  
17 Amended Comp., ¶ 1, p. 2, ECF No. 37.

18 3. The Yerington Paiute Tribal Court is an integral part of the governance of the  
19 Tribe. Amended Comp., ¶ 10, p. 3, ECF No. 37. "The Tribal Court is the judicial arm of the  
20 Tribal government, and is located at 171 Campbell Lane, Yerington, Nevada 89447." Amended  
21 Comp., ¶ 10, p. 3, ECF No. 37.

22 4. The amended complaint<sup>2</sup> is devoid of any allegation that Congress has abrogated

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23 <sup>2</sup>This is most telling. The Tribal Court made clear in both its motion to dismiss, ECF No.  
24 28/28.1, the original complaint, ECF No. 1, and its opposition to the plaintiffs' original motion for a  
25 preliminary injunction, ECF No. 2, that the complaint and motion for preliminary injunction were devoid  
26 of any information that either Congress or the Tribe had waived Tribal sovereign immunity. The Tribal  
27 Court made clear when moving to dismiss the original complaint and when opposing the original motion  
28 for a preliminary injunction, it would rely upon the absence of information that the Tribe or Congress  
had abrogated the Tribe's sovereign immunity from suit, to assert that this Court lacked jurisdiction over  
the Tribal Court. Having been forewarned by the Tribal Court, then, of the absence of any showing the  
Tribe's sovereign immunity had been abrogated, the plaintiffs should have and could have clearly cured  
this glaring jurisdictional problem for them in their amended complaint, ECF No. 37, and amended mo-  
tion for a preliminary injunction., ECF No. 38. They have not cured this problem in their amended  
pleadings and this leads inexorably to the conclusion that neither the Tribe nor Congress has abrogated  
the Tribe's sovereign immunity from suit and, therefore, any attempt by the plaintiffs, here, to urge this  
Court to exercise jurisdiction over the Tribal Court must fail by reason of the Tribe's sovereign



1 the Tribe's sovereign immunity from suit.

2 5. The amended complaint is devoid of any allegation that the Tribe has waived its  
3 sovereign immunity.

4 6. The amended complaint is devoid of any allegation that Congress or the Tribe has  
5 waived the Tribal Court's sovereign immunity from suit.

6 7. The amended complaint is devoid of any discussion of Tribal sovereign immunity  
7 and its impact on the jurisdiction of the Court for haling the Tribal Court before this Court and  
8 subjecting it to declaratory and injunctive relief.

9 **A. There Being No Waiver of Sovereignty By The Tribe, the Yerington**  
10 **Paiute Tribe Must Be Dismissed From the Federal Complaint With**  
11 **Prejudice**

11 From the undisputed facts, it is clear, the Tribe remains Federally recognized as a Tribe, a  
12 point the plaintiffs have conceded. Amended Comp., ¶ 1, p. 2, ECF No. 37. Clearly, they must  
13 make this concession. *See*, 82 FR 4915, p. 4919, 01/17/2017.

14 From any fair reading of the plaintiffs' complaint, it is abundantly clear it contains no  
15 suggestion that the Tribe has waived its sovereignty or that the Federal government has taken any  
16 steps to abrogate the Tribe's sovereignty immunity from suit. In a word, the complaint is silent  
17 on the subject. To be sure, the complaint alleges under the Federal question doctrine that the  
18 Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1331. Amended Comp., ¶ 14,  
19 p. 4, ECF No. 37. Indeed, this Court has jurisdiction to determine its own jurisdiction. That is  
20 not to say, however, such inquiry allows the Court to pretermite a jurisdictional challenge due to  
21 sovereign immunity. *See, Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786, 111S.Ct.  
22 2578 (1991)(while granting Federal court jurisdiction, generally, "...no one contends that § 1331  
23 suffices to abrogate immunity to all federal questions.") That is, § 1331 is not, itself, a waiver of  
24 sovereign immunity.

25 There is nothing in the record before this Court that amounts to an explicit waiver in  
26 writing of the Tribe's sovereign immunity from suit. As an explicit waiver of sovereignty by  
27 either the Tribe or Congress is the only avenue, for haling the Tribe into this Court by the

28 \_\_\_\_\_  
immunity from suit.

1 plaintiffs, *Kiowa, supra* at 754, and, as it is their burden to show that such an explicit waiver of  
2 sovereignty exists, *Allen, supra* at 1047, there is no plausible basis for asserting jurisdiction over  
3 the Tribe and haling it before this Court to defend against the plaintiffs' complaint, herein. *See,*  
4 *Bay Mills, supra* at 2028, 2030.

5 The fact that the Tribe initiated suit against the plaintiffs in Tribal Court does not alter  
6 this conclusion. A Tribe that initiates a lawsuit to protect its interests does not waive its  
7 sovereignty from attack, even if it were in the form of a compulsory counterclaim. *See,*  
8 *Oklahoma Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 510, 111  
9 S.Ct. 905 (1991). The suit, therefore, against the Tribe must be dismissed with prejudice for the  
10 want of jurisdiction due to the Tribe' sovereign immunity from suit. *Mills Bay, supra* at 2028,  
11 2030, *Kiowa, supra* at 754.

12 **B. Because The Tribe Is Immune From Suit By Reason of Its Inherent**  
13 **Sovereign Status, Because, Unless Waived, Its Immunity Extends to**  
14 **Agencies or Tribal Departments or Elements of Its Government and**  
15 **Because the Tribe Has Not Waived Sovereignty As To Its Tribal**  
16 **Court the Complaint Against the Tribal Court Must Be Dismissed**  
17 **With Prejudice For the Want Of Jurisdiction Due to Tribal**  
18 **Sovereignty**

19 The analysis, here, builds upon the immediately preceding discussion which establishes  
20 that the Tribe has not waived its sovereignty and is immune from suit in this case. The Court  
21 lacks jurisdiction to permit the plaintiffs from proceeding against the Tribe. As established in  
22 Section IV.B., *supra*, it is beyond dispute that the umbrella of sovereign immunity foreclosing  
23 jurisdiction also extends to agencies or entities or other divisions/arms of the governance of the  
24 Tribe. *See, Native American Distributing, supra* at 1292; *Norton, supra* at 1251.

25 Inasmuch as the plaintiffs' complaint fails to even hint at a waiver of sovereignty and the  
26 Tribe, itself, is clearly immune from suit by reason of its sovereignty, the plaintiffs have supplied  
27 the Court with no plausible basis for the exercise of its jurisdiction over the Tribal Court. The  
28 Tribe, itself, has not waived sovereignty for the purpose of permitting suit to be brought in this or  
any other Court against the Tribal Court. The plaintiffs' amended complaint makes clear, the  
Tribal Court is an extension of the Tribe and integral to its governance. Amended Comp., ¶ 10,  
p. 3, ECF No. 37. Without question, then, the plaintiffs have failed in their burden to make out a

1 case for the exercise of jurisdiction in these proceedings against the Tribal Court and the case  
2 should, therefore, be dismissed for the want of jurisdiction over the Tribal Court due to Tribal  
3 sovereign immunity from suit. *See*, Section IV.B.

4 **VI. TRIBAL COURT EXHAUSTION ALSO REQUIRES DISMISSAL OF THE**  
5 **PLAINTIFFS' FEDERAL COURT COMPLAINT (THE INSTANT DISPUTE).**

6 In the event the Court determines that tribal sovereignty does not preclude the Court from  
7 asserting jurisdiction over the Tribal Court to permit this case to go forward, that is still not the  
8 end of the matter. Tribal Court exhaustion also obtains to leave this case before the Tribal Court,  
9 dismissing these proceedings against the Yerington Paiute Tribal Court.

10 On this point, the Tribal Court concurs with and adopts the analysis set forth in the points  
11 and authorities supporting the Tribal Judge's motion to dismiss the amended complaint  
12 discussing exhaustion, set out at pages 14 through 16, ECF No. 41. Those pages are attached  
13 hereto, as Exhibit 1.

14 The Tribal Court would only add that where, as here, the Tribal Judge argues the second  
15 *Montana* exception to tribal court jurisdiction over non-Indians where the non-Indian's conduct  
16 "...threatens or has some direct effect on the political integrity, the economic security or, the  
17 health or welfare of the Tribe[.]" *Montana v. United States*, 450 U.S. 544, 566, 101 S.Ct. 1245  
18 (1981), the issue before this Court for purposes of the application of the deference to the Tribal  
19 Court to make that determination is not for this Court to decide, now, whether the Tribal Court  
20 actually has jurisdiction over the plaintiffs, herein, the defendants in the Tribal Court  
21 proceedings. Rather, the only question before this Court, presently, is "merely whether ...[the  
22 Tribal Court] can 'make a colorable claim that [it has] jurisdiction.' [*Thlopthlocco Tribal Town*  
23 *v. Stidham*, 762 F.3d 1226, 1240 (10<sup>th</sup> Cir., 2014)]." *Norton, supra* at 1246.

24 Clearly, the Yerington Paiute Tribe (the Tribe), the plaintiff, before the Tribal Court, has  
25 met this standard. The plaintiff alleges harm to the Tribe of epic proportions. That is to say, the  
26 Tribe's complaint alleges conduct resulting in harm that is severe, catastrophic, and a threat to  
27 tribal governance, as well as the health and welfare of the Tribe's membership. *See*, Tribal  
28 Comp., ECF No. 3-2, ¶¶ 3, 8, 9, 10, 16, 17, 20, 21, 22, 29, 36-39, 41, 61 and 69. These

1 allegations are sufficient to place the Tribe's complaint, below, squarely within the second prong  
2 of *Montana*. See, *Evans v. Shoshone-Bannock Land Use Policy Comm'n.*, 736 F.3d 1298, 1306  
3 (9<sup>th</sup> Cir., 2013); *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 846 (9<sup>th</sup> Cir., 2009);  
4 *FMC Corp. v. Shoshone-Bannock Tribes*, 2017 U.S. Dist. Lexis 161387 (D. Idaho, Sept. 28,  
5 2017).

6 That is to say, these allegations in the Tribe's complaint pending before the Tribal Judge  
7 mean the Tribal Court complaint plausibly smacks of jurisdiction over the non-Indian  
8 defendants, there. See, *Montana v. EPA*, 137 F.3d 1135, 1139040, (9<sup>th</sup> Cir., 1998). As such, the  
9 principles of comity and tribal self governance apply to give the Tribal Judge at least the chance  
10 to assess the plausibility of jurisdiction in the Tribal Court. See, *Iowa Mut. Ins., Co. v. La*  
11 *Plante*, 480 U.S. 9, 14 (1987)(citations omitted); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of*  
12 *Indians*, 471 U.S. 845, 857 (1985); *Boozier v. Wilder*, 381 F.3d 931, 935 (9<sup>th</sup> Cir., 2004).

13 "Whether such allegations are sufficiently catastrophic would benefit from full consideration in  
14 the Tribal Court." *Norton, supra* at 1246.

15 The Tribal Court, through the Tribal Court Judge Sandra Mae-Pickens, should be given  
16 the opportunity, therefore, to assess jurisdiction of the Tribal Court over ARC and BP in the  
17 Tribe's case in the Tribal Court. The Tribal Court, itself, should, therefore, not be haled into this  
18 Court, either, for the same reasoning.

### 19 CONCLUSION


20 As for the Tribal Court, the complaint should be dismissed with prejudice. There is no  
21 plausible basis for the exertion of jurisdiction in this matter over the Tribal Court. It is an  
22 integral part of the Yerington Paiute Tribe's government, as the plaintiffs admit, their complaint  
23 in no way suggests a Congressional or Tribal waiver of the Tribe's sovereign immunity that it  
24 inherently possesses, and as a result, the Court is ousted of jurisdiction over the Tribal Court by  
25 reason of sovereign immunity. Should this Court find, however, it retains jurisdiction over the  
26 Tribal Court, the case should nevertheless not proceed in this Court in order to allow the Tribal  
27 Court Judge Sandra-Mae Pickens, the opportunity to assess the Tribal Court's jurisdiction over  
28 the Tribal Court case on the grounds of exhaustion of tribal remedies.

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As to the Tribal Court, however, at bottom, the instant matter before this Court should be dismissed with prejudice. The Tribal Court seeks all other relief deemed necessary in the premises.

Dated this 30<sup>th</sup> day of November, 2017.

The Law Offices of Charles R. Zeh, Esq.

  
By: /s/ Charles R. Zeh, Esq.  
Charles R. Zeh, Esq.

*Attorneys for Yerington Paiute Tribal Court*

**CERTIFICATE OF SERVICE**

I hereby certify that service of the foregoing *Yerington Paiute Tribal Court's Points and Authorities in Support of Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief*, was made through the court's electronic filing and notice system (CM/ECF) or, as appropriate, by first class mail from Reno, Nevada, addressed to the following on November 30, 2017.

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Dated this 30<sup>th</sup> day of November, 2017.

  
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Exhibit List

1. Excerpts of Defendant Sandra-Mae Pickens' Motion To Dismiss Plaintiffs' Amended Complaint, ECF No. 41 3 pages

S:\Clients\Yerington Paiute\BP American\Pleadings\PA's to Dismiss Amended Complaint R3.wpd