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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 office 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 3:17-cv-00588

**Yerington Paiute Tribal Court's
Opposition to Plaintiffs' Amended
Motion for Preliminary Injunction (ECF
No. 38)**

COMES NOW, the defendant, Yerington Paiute Tribal Court (Tribal Court), by and through legal counsel, Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., in opposition to the amended motion, ECF No. 38, of the plaintiffs, BP America Inc., (BP) and Atlantic Richfield Company (ARCO) for a preliminary injunction. This amended opposition is based upon the accompanying points and authorities and upon all other documents and records on file herein. In submitting this opposition, the Tribal Court reserves and does not waive its

1 sovereignty and preserves all of its defenses to this dispute including challenges to the Court's
2 jurisdiction.

3 **I. Introduction**

4 The plaintiffs have once again moved this Court for a preliminary injunction under Rule
5 65, FRCP, seeking to preclude the amended complaint (Tribal Court complaint), ECF No. 3-2,
6 filed by the Yerington Paiute Tribe (the Tribe) in the Tribal Court from proceeding there against
7 the plaintiffs. The plaintiffs have also filed in this Court, an amended complaint (the Federal
8 complaint) ECF No. 37,¹ which the instant amended motion for a preliminary injunction
9 accompanies. The Tribal Court has filed a motion to dismiss the amended Federal court
10 complaint, ECF No. 37, which the plaintiffs amended motion, ECF No. 38, accompanies, on the
11 grounds that this Court lacks jurisdiction to hear the amended complaint against the Tribal Court
12 due to the Tribe's sovereign immunity. The Tribal Court's amended motion to dismiss also
13 argues that this Court should not proceed with the amended complaint because the plaintiffs,
14 herein, still have failed to exhaust their Tribal remedies.

15 BP and ARCO filed in Tribal Court, a motion to dismiss the Tribal complaint. *See*, ECF
16 38, p. 8;13-14. That motion remains pending. The Tribal Court judge, Sandra-Mae Pickens, has
17 not even had the chance, yet, to rule on that motion. *See*, Tribal Court Judge Pickens' Motion to
18 Dismiss Amended Complaint, ECF No. 41, p. 5;7-9. The plaintiffs, with their amended Federal
19 complaint, and the instant amended motion for a preliminary injunction, seek to pre-empt the
20 Tribal Court Judge, Sandra-Mae Pickens, from even considering whether she has jurisdiction to
21 hear the case against the plaintiffs which the Tribe filed before her in the Tribal Court.

22 As shown in the Tribal Court's motion to dismiss the amended Federal complaint, herein,
23 the Tribal Court enjoys the protection of sovereign immunity from suit, which ousts the Court of
24

25 ¹The plaintiffs' amended complaint, ECF No. 37, changes very little, if anything at all, as to the
26 Tribal Court. Furthermore, nothing has changed between the time that the plaintiffs filed their original
27 complaint, ECF No. 1, and their amended complaint. That is to say, Judge Pickens has yet to rule in
28 response to the plaintiff's motion to dismiss for the want of jurisdiction the Tribal Court proceedings,
Yerington Paiute Tribe v. BP America Inc, & Atlantic Richfield Co., Case No., YVC1017. She has not
yet determined whether she has jurisdiction over the Tribe's Tribal Court complaint against the plaintiffs,
here, the defendants before Judge Pickens. *See*, Pickens' motion to dismiss amended Complaint, ECF
No. 41, p. 8;13-14.

1 jurisdiction over the Tribal Court. *See*, Tribal Court's Points and Authorities in Support of
2 Motion to Dismiss Amended Complaint, pp. 5-10. *See also*, *Michigan v. Bay Mills Indian*
3 *Community*, 134 S.Ct. 2024 (U.S. 2014), 2014 U.S. LEXIS 3596. Furthermore, the doctrine of
4 *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908), permitting under the proper circumstances,
5 suits against public officials, has no application against Tribes and their agencies. *See*, *Norton v.*
6 *Ute Indian Tribe of the Uintah and Ouray Reservation*, 852 F.3d 1236, 1251 (10th Cir., 2017).
7 The plaintiffs' amended motion for a preliminary injunction is without basis as applied to the
8 Tribal Court. That is, if the Court lacks jurisdiction to hear the plaintiffs' amended Federal
9 complaint, there is no jurisdiction to consider the plaintiffs' amended motion for a preliminary
10 injunction, either, as elucidated below. Moreover, the motion for a preliminary injunction is
11 premature, for failure to exhaust tribal remedies, as explained in the Tribal Court's amended
12 motion to dismiss. *See*, Tribal Courts' Points and Authorities in Support of Motion to Dismiss
13 Amended Complaint, pp. 11-12.

14 The motion for a preliminary injunction should, therefore, be denied.

15 **II. The Plaintiffs Fails To Establish That This Court Has Jurisdiction Over The**
16 **Yerington Paiute Tribal Court**

17 It will be recalled that the plaintiffs concede in their amended complaint that the
18 Yerington Paiute Tribe is Federally recognized. *See*, amended comp., ECF No. 37, ¶ 1, p.2.
19 Indeed, they must. *See*, 82 FR 4915, p. 4919, 01/17/2017.

20 The plaintiffs also admit that the Yerington Paiute Tribal Court is an integral part of the
21 Tribe's government. Plaintiffs state: "The Tribal Court is the judicial arm of the Tribal
22 government, and is located at 171 Campbell Lane, Yerington, Nevada 89447." Amended comp.,
23 ¶ 10, p. 3, ECF No. 37.

24 Equally important, the plaintiffs' amended complaint and pleadings in this case, nowhere,
25 show that either Congress or the Tribe has waived the Tribe's sovereign immunity from suit.²
26

27 ²The Tribal Court made clear in both its motion to dismiss, ECF No. 28/28.1, the original
28 complaint, ECF No. 1, and its opposition to the plaintiffs' original motion for a preliminary injunction,
ECF No. 2, that the complaint and motion for preliminary injunction were devoid of any information that
either Congress or the Tribe had waived Tribal sovereign immunity. The Tribal Court made clear when

1 Similarly, the plaintiffs make no showing that either the Tribe or Congress has waived the Tribal
2 Court's sovereign immunity from suit. It cannot be gainsaid, therefore, that as a Federally
3 recognized Tribe, the Yerington Paiute Tribe is immune from suit and that, therefore, this Court
4 lacks jurisdiction to hear the plaintiffs' amended complaint against the Tribe on sovereign
5 immunity grounds.

6 It is well established that the only path to jurisdiction over a sovereign Tribe is for either
7 Congress or the Tribe, to have expressly waived the Tribe's sovereign immunity from suit.
8 *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct.
9 1700, 140 L.Ed.2d 961 (1998). That path has not been taken. Those waivers are nowhere
10 evident, here. Thus, the Tribe may not be haled into this Court to defend the Federal complaint,
11 ECF No. 1, because the plaintiffs have failed in their burden, *see, Pistor v. Garcia*, 791 F.3d
12 1104, 1111 (9th Cir. 2012), to show that this Court has jurisdiction over the Tribe.

13 Similarly, then, the Court has no jurisdiction over the Tribal Court. The Tribal Court is
14 an integral part of the Tribe's government, as the plaintiffs admit. It is equally well settled that
15 Tribal sovereignty emanates like an umbrella, extending its protection from suit for departments,
16 entities and divisions of the Tribe. *See, Boney v. Valline*, 597 F. Supp. 2d 11167 (D. Nev.
17 2009); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir., 2008); *Allen v. Gold*
18 *Country Casino*, 464 F.3d 1044, 1046 (9th Cir., 2006); *Marceau v. Blackfeet Hous. Auth.*, 455
19 F.3d 974, 978 (9th Cir. 2006)(overruled on other grounds- by *Marceau v. Blackfeet Housing*
20 *Authority*, 540 F.3d 916 (9th Cir. 2008)(recognizing that tribal sovereign immunity "extends to
21 agencies and subdivisions of the tribe"). The plaintiffs have, therefore, failed in their burden of

22 _____
23 *Footnote 2 continued.*

24 moving to dismiss the original complaint and when opposing the original motion for a preliminary
25 injunction, it would rely upon the absence of information that the Tribe or Congress had abrogated the
26 Tribe's sovereign immunity from suit, to assert that this Court lacked jurisdiction over the Tribal Court.
27 Having been forewarned by the Tribal Court, then, of the absence of any showing the Tribe's sovereign
28 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 immunity from
suit.

1 showing that this Court has jurisdiction over the Yerington Paiute Tribal Court.

2 This Court is without jurisdiction to consider the amended complaint to which the
3 plaintiffs' motion for a preliminary injunction appends.

4 **III. Because the Plaintiffs Fail In Their Burden of Proving That This Court Has**
5 **Jurisdiction Over the Tribal Court And Because, It Is In Any Event Patently Clear,**
6 **The Court Lacks Jurisdiction To Hear the Amended Federal Complaint Against the**
7 **Tribal Court, The Amended Motion For Preliminary Injunction Must Be Denied**

8 It is fundamental that before a court may act, it must have jurisdiction to act and,
9 therefore, this Court must consider its jurisdiction, before proceeding further with the case before
10 it. A court may not pretermitt the question of jurisdiction. *See, Ashcroft v. Iqbal*, 556 U.S. 662,
11 670, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)(“we are not free to pretermitt the question” of
12 jurisdiction).

13 This principle applies with full force to applications for injunctive relief. “A district court
14 may not grant a preliminary injunction if it lacks subject matter jurisdiction over the claim before
15 it.” *Shell Offshore Inc. v. Greenpeace, Inc.*, 854 F.Supp.2d 839, 842 (D. Alaska, (2012)), citing
16 in footnote 19, *Cooper Indus., Inc. v. U.S.E.P.A.*, 775 F.Supp. 1027, 1036)(citing *City of*
17 *Alexandria v. Helms*, 728 F.2d 643.645-46 (4th Cir., 1984); *Neighborhood Toxic Cleanup*
18 *Emergency v. Reilly*, 716 F.Supp. 828, 830 (D.N.J., 1989)). *Shell Offshore* also cited, WRIGHT
19 & MILLER, FED. PRAC. & P. § 2941, at 35. Then, in *Ferm v. McCarty*, Slip Copy, 2013 WL
20 12129861, U.S.D.C. Nev., 1/20/2013, Magistrate Leen stated: “If the court lacks subject matter
21 jurisdiction, any request for a preliminary injunction is rendered moot. *Shell*, 864 F. Supp. 2d at
22 842.” Slip Copy *1. *See also, Johnson v. Couturier*, 572 F.3d 1067, 1084 (9th Cir., 2009); *De*
23 *Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 65 S.Ct. 1130 (1945). Or, as
24 stated in *Citizens Concerned for Separation of Church and State v. City and County of Denver*,
25 628 F.2d 1289, 1299 (10th Cir., 1980): “Of paramount significance here, however, rule 65,
26 [FRCP],... does not confer either subject matter or personal jurisdiction on the court.”

27 This should end the matter for the application of the plaintiffs' amended motion for a
28 preliminary injunction applicable to the Tribal Court. The Tribal Court, as briefly explained
above, and in greater detail in its amended motion to dismiss, falls within the umbrella of the

1 Tribe's sovereign immunity which has not been abrogated in any way as applied to this lawsuit.
2 The plaintiffs have, therefore, failed in their burden of establishing that this Court has jurisdiction
3 to hear their amended complaint, ECF No. 37, as to the Tribal Court, such that there is no
4 authority or jurisdiction in this Court to subject the Tribal Court to injunctive relief. Plaintiffs'
5 application for an injunction is patently moot, and the motion must be denied as applied to the
6 Tribal Court.

7 As a subheading, the exhaustion of tribal remedies also requires denial of the plaintiffs'
8 amended motion for a preliminary injunction against the Tribe. *See*, Tribal Court's Points and
9 Authorities in Support of Motion to Dismiss Amended Complaint, pp. 10-12. But, this Court
10 should not even have to go that far as it is ousted of jurisdiction to hear the case against the
11 Tribal Court in the first place for the want of jurisdiction on sovereign immunity grounds.

12 **IV. Grounds For Granting A Rule 65, FRCP, Motion For Preliminary Injunction Are**
13 **Lacking And This Constitutes An Additional Reason For Denying The Plaintiffs'**
14 **Amended Motion For A Preliminary Injunction Against The Tribal Court**

15 It is well settled that to successfully pursue a motion for a preliminary injunction under
16 Rule 65, FRCP, the moving party, the plaintiffs herein, must be able to establish the likelihood of
17 success on the merits. *See, Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The
18 plaintiffs fail on this count, as well. They have no ability to show the likelihood of success on
19 the merits because as shown, above and in the Tribal Court's Points and Authorities in Support
20 of Motion to Dismiss the Amended Complaint, pp. 5-11, this Court lacks jurisdiction over the
21 Tribal Court. And, because the Court has no jurisdiction by reason of sovereign immunity, over
22 the Tribal Court, the complaint is clearly subject to dismissal. Therefore, any request for a
23 preliminary injunction is rendered moot. *Shell*, 864 F. Supp. 2d at 842. Slip Copy *1.

24 This inexorably leads to the conclusion, the plaintiffs have no likelihood of success on the
25 merits, such that grounds for granting the plaintiffs' Rule 65, FRCP motion do not exist as
26 applied to the Tribal Court. Dismissal of the Federal case for the want of jurisdiction hardly
27 comports with a success for the plaintiffs on the merits. Plaintiffs' amended motion as to the
28 Tribal Court must be denied for the want of proof of this essential element for relief under Rule
65, FRCP.


CONCLUSION

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2 For the want of jurisdiction, which is lacking due to tribal sovereign immunity, and on
3 tribal exhaustion of remedies grounds, the plaintiffs' amended motion for a preliminary
4 injunction under Rule 65, FRCP, against the Yerington Paiute Tribal Court should be denied.
5 Since, further, the plaintiffs cannot establish that they are likely to succeed on the merits, the
6 Rule 65, FRCP, amended motion must also be denied for failure to prove an essential element for
7 securing relief under Rule 65, FRCP.

8 The Tribal Court also asks for all other relief deemed appropriate in the premises.

9 Dated this 30th day of November, 2017.

The Law Offices of Charles R. Zeh, Esq.

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11 
By: /s/ Charles R. Zeh, Esq.
Charles R. Zeh, Esq.

Attorneys for Yerington Paiute Tribal Court

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing *Yerington Paiute Tribal Court's Opposition to Plaintiffs' Amended Motion for Preliminary Injunction (ECF No. 38)*, 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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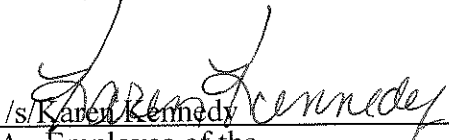
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Dated this 30th day of November, 2017.


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