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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BP AMERICA INC., and ATLANTIC RICHFIELD COMPANY,
Plaintiffs,

vs.

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

CASE NO. 3:17-cv-0588-LRH-WGC

CONSOLIDATED RESPONSE TO MOTIONS TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Defendants cannot point to a single case from any court permitting a tribe to do what this Tribe seeks to do here—exert civil jurisdiction over non-tribal members based on their alleged off-reservation conduct. This assertion of extraterritorial tribal power is unprecedented, and should be rejected.

Rather than defend their jurisdictional theory, Defendants assert that they are untouchable in federal court, and that the Tribe, the Tribal Court, the Tribal Court Judge, the Tribe's Chairman and Vice-Chairman, every member of the Tribal Council, and any Tribal official with any decision-making authority, are each cloaked by sovereign immunity. If Defendants were correct, no federal court could ever determine tribal jurisdiction matters in this posture, contradicting decades of Supreme Court tribal jurisdiction caselaw under *Montana v. United States*, 450 U.S. 544 (1981), and *Ex parte Young*. *See Salt River Project Agricultural Improvement and Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012).

Because BP America Inc. ("BPA") and Atlantic Richfield Co. ("ARC") sued the tribal officials in their official capacities and allege that those officials are acting beyond their authority and violating federal law in maintaining the Tribe's *ultra vires* lawsuit in Tribal Court, *Ex parte Young* permits this Court to exercise jurisdiction notwithstanding tribal sovereign immunity. And because the Tribal Court is plainly without jurisdiction over the Tribe's claims (because they arose from off-reservation conduct, are subject to the exclusive jurisdiction of this Court under 42 U.S.C. § 9313(b), and because the Tribe has failed to properly serve BPA and ARC with process), BPA and ARC need not exhaust their remedies in Tribal Court before obtaining a preliminary and permanent injunction in this Court. The motions to dismiss should be denied.[1]

LEGAL STANDARD

All defendants have moved to dismiss BPA and ARC's complaint for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). The Ninth Circuit recognizes two types of 12(b)(1) attacks: facial and factual. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1038-39

[1] Per the Court's order (ECF No. 58), this brief responds to all three motions to dismiss filed by Defendants (ECF Nos. 41, 51, 53-1.).

(9th Cir. 2004). In ruling on a facial attack on the sufficiency of the allegations of the complaint to establish jurisdiction, "the reviewing court must accept as true the allegations of the complaint." *U.S. ex rel. Lujan v. Hughes Aircraft Corp.*, 243 F.3d 1181, 1189 (9th Cir. 2001). In ruling on a factual attack, in contrast, "a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

It is not clear from Defendants' motions whether their attack on the complaint is factual or facial. If the former, then the Court must accept BPA and ARC's allegations—including, for example, their allegation that no groundwater contamination from the mine has reached the reservation—as true. If the latter, then the Court should take into account the voluminous "matters of public record," *id.* submitted by BPA and ARC in support of their amended motion for preliminary injunction (ECF No. 38) when ruling on the motions to dismiss. Defendants, in contrast, have presented the Court with no factual material.

ARGUMENT

I. THE TRIBE'S SOVEREIGN IMMUNITY DOES NOT BAR THE COURT FROM EXERCISING JURISDICTION OVER BPA AND ARC'S CLAIMS.

Defendants argue that tribal sovereign immunity prevents this Court from exercising jurisdiction over the Tribe, the Tribal Court, and the Tribe's officials (the Chairman, Vice-Chairman, every Tribal Council member, and Judge Pickens). They argue sovereign immunity bars this Court from deciding the inarguably federal question of whether the Tribal Court may exercise subject-matter jurisdiction over the Tribe's claims. *See Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852 (1985) (the scope of tribal court jurisdiction is a question of federal law); *Ariz. Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1132 (9th Cir. 1995) (non-Indian challenging exercise of tribal adjudicatory power states a claim that arises under federal law, and a federal court is empowered to determine whether a tribal court has exceeded the lawful limits of its jurisdiction).

Defendants overlook crucial limitations on the doctrine of tribal sovereign immunity. They use much of their briefs arguing that sovereign immunity has not been abrogated or waived; but BPA and ARC are not arguing waiver or abrogation. In a case like this, sovereign immunity is not the issue. When tribal officials act in their official capacities in a manner contrary to federal law, they may be sued for prospective, nonmonetary relief notwithstanding tribal sovereign immunity. This principle arises from *Ex parte Young*, 209 U.S. 123 (1908), which holds that "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011).

Ex parte Young and its progeny limit the sovereign immunity of tribes and permit suits seeking prospective, non-monetary relief against tribal officials who are alleged to have acted contrary to federal law. *See Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2035 (2014) ("[T]ribal immunity does not bar [] a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct.") (emphasis in original); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) ("As an officer of the [Tribe], [the Tribe's Governor] is not protected by the tribe's immunity from suit."); *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1307 n. 10 (9th Cir. 2013) (tribal sovereign immunity does not bar suits against tribal officers for prospective relief when allegedly acting in violation of federal law); *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012) (*Ex parte Young* "permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law"); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092-93 (9th Cir. 2007) (*Ex parte Young* exception applied to tribal official allegedly acting in violation of federal law); *Aspaas*, 77 F.3d at 1133-34 ("Tribal sovereign immunity . . . does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law."); *Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) (injunction against officials acting in violation of federal law did not violate principles of sovereign immunity). Because BPA and ARC allege that tribal officials—including the Chairman,

Vice-Chairman, each Council member, and Tribal Court Judge—have engaged in conduct in their official capacities that violates federal law, sovereign immunity does not bar jurisdiction over those claims.

In addition, BPA and ARC's claims against the Tribe and Tribal Court should also proceed. The Tribe's argument runs headlong into what the Supreme Court has repeatedly labeled a federal question. Based on this authority, dismissal is inappropriate.

A. The Tribe's Sovereign Immunity Does Not Bar Suits Against Tribal Officials in Their Official Capacities for Violations of Federal Law.

Determining whether claims fall within the *Ex parte Young* exception to tribal sovereign immunity requires a "straightforward inquiry into [1] whether the complaint alleges an ongoing violation of federal law and [2] seeks relief properly characterized as prospective." *Vaughn*, 509 F.3d at 1091 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). The focus is squarely on the plaintiff's allegations, not the merits of the claim. *Verizon*, 535 U.S. at 646; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) ("*An allegation* of an ongoing violation of federal law where the relief requested is prospective is ordinarily sufficient to invoke the *Young* fiction.") (emphasis added). This test is met here.

1. BPA and ARC Seek Only Non-Monetary, Prospective Relief.

The *Ex parte Young* doctrine applies when the plaintiff seeks only prospective, non-monetary relief. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102-03 (1984). Defendants rely on *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008) to argue that tribal sovereign immunity extends to tribal officials "when acting in their official capacity and within the scope of their authority," implying that the Ninth Circuit has somehow rejected *Ex parte Young* in the tribal context. *Id.* at 727. But the plaintiff in *Cook* sought more than $1 million in monetary damages, rather than prospective, nonmonetary relief. *Id.* at 721. *Ex parte Young* was thus not at issue. Many of the other immunity cases cited by Defendants involved plaintiffs

seeking damages in addition to prospective relief,[2] or did not concern Tribal officials under *Ex parte Young*.[3] Here, BPA and ARC indisputably seek only prospective relief. *Cook* and other cases involving monetary damages do not apply, and the first requirement of *Ex parte Young* is met.

2. BPA and ARC Have Sufficiently Alleged an Ongoing Violation of Federal Law.

The second *Ex parte Young* requirement is also met, as BPA and ARC have sufficiently alleged an ongoing violation of federal law. BPA and ARC claim that "the subject-matter jurisdiction of the Tribal Court does not encompass claims like those brought by the Tribe" against BPA and ARC. (ECF No. 37 at 1.) BPA and ARC further allege that they are not members of the Tribe and conducted no activity on any Tribal lands, and that "the Tribal Court lacks subject-matter jurisdiction over the Tribal Court action." (*Id.* at 10-11 at ¶¶ 32-40, 14 at ¶ 56.) And they allege that "[t]he Tribal Court lacks jurisdiction to adjudicate the Tribal Court Action, as a matter of federal law," identifying with specificity the activities that Tribal officials have taken beyond the scope of their authority. (*Id.* at 17 at ¶ 71.)

These allegations establish—for the purposes of *Ex parte Young*—that any exercise of Tribal Court jurisdiction over the Tribe's claims in the Tribal Court Action here constitutes the

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[2] *See, e.g., Forsythe v. Reno-Sparks Indian Colony*, 2017 WL 3814660, at *1 (D. Nev. Aug. 30, 2017) (construction bid); *Kennerly v. United States*, 721 F.2d 1252, 1255 (9th Cir. 1983) (monies transferred from account); *Kiowa Tribe v. Mfg. Techs, Inc.*, 523 U.S. 751, 753 (1998) (promissory note); *Lewis v. Clarke*, 137 S. Ct. 1285 (2017) (car accident); *Linneen v. Gila River Indian Community*, 276 F.3d 489, 491 (9th Cir. 2002) (plaintiff seeking "damages of $8 million"); *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1081 (9th Cir. 2013) (shooting victim's family's lawsuit); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1291 (10th Cir. 2008) (breach of contract); *Pistor v. Garcia*, 791 F.3d 1104, 1109 (9th Cir. 2015) (detention and seizure); *Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 217 (10th Cir. 1982) (contract retainage).

[3] *Allen v. Gold Country Casino*, 464 F.3d 1044, 1045 (9th Cir. 2006) (employment case); *Demontiney v. United States*, 255 F.3d 801, 803 (9th Cir. 2001) (monies owed on construction project); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 582 (8th Cir. 1998) (employment discrimination).

requisite ongoing violation of federal law.[4] *See, e.g.*, *BNSF Ry. Co. v. Ray*, 297 F. App'x. 675, 677 (9th Cir. 2008) ("Because Plaintiffs have alleged an ongoing violation of federal law—the unlawful exercise of tribal court jurisdiction—and seek prospective relief only, tribal sovereign immunity does not bar this action."); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1155-56 (10th Cir. 2011) ("[W]e hold that the alleged unlawful exercise of tribal court jurisdiction in violation of federal common law is an ongoing violation of 'federal law' sufficient to sustain the application of the *Ex parte Young* doctrine."); *Anderson v. Duran*, 70 F. Supp. 3d 1143, 1153 (N.D. Cal. 2014).[5]

i. Tribal Court Judge Pickens Is Not Immune

BPA and ARC allege a sufficient factual nexus between Judge Pickens and the ongoing violation of federal law to invoke *Ex parte Young*. *See Vaughn*, 509 F.3d at 1092 (requiring that the official against whom relief is sought have "the requisite enforcement connection to" the challenged activity). BPA and ARC allege that Judge Pickens "is the presiding judge of the Tribal Court" and that she "is the judge presiding over the Tribal Court Action." (ECF No. 37 at 3 ¶ 11.) Judge Pickens is the tribal official charged with presiding over the *ultra vires* lawsuit filed by the Tribe. She has the authority to dismiss that lawsuit (including doing so *sua sponte*). Judge Pickens is also actively overseeing the action, including by entering a scheduling order setting the briefing and hearing schedule. (*Id.* at 9-10 ¶ 28; *see also* Exhibit 3 to Declaration of Kenzo Kawanabe, filed herewith.) Plaintiffs allege that "Judge Pickens is acting, has acted, threatened to act, or may act under the purported authority of the Tribal Court beyond the scope of her or its lawful authority in presiding over the Tribal Court Action. (*Id.* at 15-16 at ¶ 60; 18 at ¶ 72.) They seek relief

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[4] Defendants also argue that BPA and ARC have not alleged a violation of federal law because the principle of tribal court exhaustion requires that the jurisdictional question be answered, in the first instance, in the Tribal Court. The exhaustion argument is addressed below in Section II.

[5] These allegations of conduct beyond the scope of the officials' authority in violation of federal law distinguish this case from cases such as *Cook*, 528 F.3d at 727, and *Forsythe*, 2017 WL 3814660, at *4, in which the plaintiffs alleged that the officials acted within their authority. The Tribe also cites *Pennhurst*, 465 U.S. at 106, but that case involved the entirely different question of whether a state's Eleventh Amendment immunity could be circumvented by a suit against state officials in federal court for alleged violations of state—not federal—law.

against her specifically (in her official capacity), asking the Court to enter "[p]reliminary and permanent injunctive relief prohibiting Judge Pickens, in her official capacity, from taking any further actions with regard to the Tribal Court Action." (*Id.* at 22 ¶ L.) These facts (which must be taken as true) connect Judge Pickens's actions and omissions with the ongoing violation of federal law alleged by BPA and ARC—the maintenance of the Tribal Court Action. *See, e.g., Vaughn*, 509 F.3d at 1092 (explaining that, at the pleading stage, plaintiff "is not required to 'prove' anything; it is sufficient that [plaintiff] has alleged a violation of federal law").

In response, Judge Pickens argues, in effect, that she hasn't done anything yet and thus has not engaged in any conduct that violates federal law. (ECF No. 41 at 9-10.) This is incorrect, as she has entered a scheduling order and scheduled a hearing. Even so, her argument fails because in *Vaughn*, the Ninth Circuit recognized that there is no imminence requirement in the *Ex parte Young* analysis: "the requirement that the violation of federal law be 'ongoing' does not require [plaintiff] to show that the tribal officials have enforced the challenged statute." 509 F.3d at 1092. Hence, all that matters is that BPA and ARC have alleged that the tribal official defendants "have acted, have threatened to act, *or may act* under the purported authority of the Tribe . . . and in violation of federal law." *Id.* (emphasis added) ; *see also Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002) (no ripeness requirement under *Ex parte Young*).

Here, no one disputes that the Tribe has sued ARC and BPA in Tribal Court and that case is currently pending before Judge Pickens. It is sufficient for *Ex parte Young* purposes that Judge Pickens currently maintains and may continue to exercise jurisdiction over this suit in Tribal Court in violation of federal common law. Judge Pickens cites no case in support of her position. In fact, many courts have entertained suits seeking injunctive relief against tribal court judges under *Ex parte Young*. *See, e.g., Crowe & Dunlevy, P.C. v. Stidham*, 609 F. Supp. 2d 1211, 1219-20 (N.D. Okla. 2009) (citing numerous federal cases), *aff'd* 640, F.3d 1140 (10th Cir. 2011); *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1251 (10th Cir. 2017) (tribal court judges not immune in federal tribal court jurisdiction lawsuit); *Aspaas*, 77 F.3d at 1133-34; *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 2013 WL 321884, *5-6 (D.

Ariz. Jan. 28, 2013) (tribal court justices not immune); *Ray*, 297 F. App'x. at 677 (affirming injunction against tribal court judge regarding tribal court jurisdiction and exhaustion not required); *Anderson*, 70 F. Supp. 3d at 1153 (injunction granted against tribal council leaders and tribal court judge regarding tribal court action).

This case should be no different. The Court should hold that tribal sovereign immunity does not bar BPA and ARC's action against Judge Pickens in her official capacity.

ii. The Other Tribal Officials Are Not Immune.

BPA and ARC also have pleaded the requisite enforcement nexus between the tribal Chairman, Vice-Chairman, and Council members and the alleged ongoing violation of federal law. *See Vaughn*, 509 F.3d at 1092 (requiring that the official against whom relief is sought have "the requisite enforcement connection to" the challenged activity). BPA and ARC allege that Chairman Thom, Vice-Chairman Roberts, and Council Members Emm, Howard, Landa, Stevens, and Roberts (1) are all Tribal officials sued in their official capacity (ECF No. 37 at 2-3 ¶¶ 2-8), and (2) are alleged to have initiated, managed, and continued to pursue the Tribal Court Action, including engaging in numerous litigation tasks, in their official capacities. Their actions have and will force BPA and ARC to incur costs to engage counsel, respond to the Tribe's lawsuit, file this action, appear in an unfamiliar forum, and generally defend themselves against the Tribe's *ultra vires* lawsuit. (*Id.* at 5-9, ¶¶ 19-26.) Each is acting beyond the scope of their and its authority in ongoing violation of federal law, because each of them continues to manage, supervise, and pursue the Tribal Court Action in a court that lacks subject-matter jurisdiction. (*Id.* at 16-17 ¶¶ 61 to 67, 18-19 ¶¶ 73-79.)

These allegations—again, which must be taken as true—establish responsibility for the Tribal Court Action (or authority to halt it) and sufficiently connect each official's actions and omissions with the ongoing violation of federal law alleged by BPA and ARC—the maintenance of the Tribal Court Action.

The Tribe and its officials argue that litigation against BPA and ARC involves "the very core of tribal governance and sovereignty," (ECF No. 51 at 6) but they cite no cases establishing

that pursuing litigation involves these core sovereign powers. *Cf. Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985) (addressing a tribe's power to expel from the reservation persons convicted of crimes); *Norton*, 862 F.3d at 1245-46 (trespass claim involving state law enforcement forbidding tribal law enforcement officer to tend to injured tribe member implicates "a hallmark of Indian sovereignty"). But the power to pursue litigation beyond the subject-matter of the Tribal Court is simply not within the sovereign power of the Tribe. "When the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984). "Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power that it does not possess." *Id.*

It is telling that each Defendant claims immunity, and none of them admits any responsibility over the Tribal Court Action. For example, in her initial Motion to Dismiss, Chairman Thom initially insisted that "[t]he lawsuit was authorized by tribal council, not by the Chairman, who does not vote on such resolutions."[6] (ECF No. 27 at 3.) In response to the Chairman's arguments, BPA and ARC amended their complaint to add the Vice-Chairman, every Council member, and any John or Jane Doe with authority regarding the Tribal Court Action. Some official or group of officials must be accountable for pressing the Tribe's case in Tribal Court. Yet the Tribe and its officials have still not provided their governance documents and argue that "adding six tribal officials who allegedly 'could have' authorized a lawsuit, hired a lawyer, etc. fails to fix BP's jurisdictional problems." (ECF No. 38 at 3.)

Realistically, for litigation to be pursued, a client representative must undertake certain actions. *Whichever* tribal official is taking and will take those actions, *Ex parte Young* gives this Court jurisdiction over that (or those) officials. Moreover, unlike cases where tribal officials were

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[6] BPA and ARC have no way to discover this information or verify this assertion, as the Tribe's governing documents are not available to BPA and ARC. Moreover, despite requests for such documents, the Tribe has not yet provided Bylaws or any other governance documents which have been requested. (*See* Exhibits 4-8 to Declaration of Kenzo Kawanabe, filed herewith.)

sued merely for casting votes,[7] BPA and ARC have alleged that tribal officials' continued pursuit of litigation and injury to BPA/ARC make each of these officials subject to the *Ex parte Young* exception. Thus, other courts have permitted suits against tribal chairs or council members under *Ex parte Young*. *See, e.g.*, *Nisqually Indian Tribe v. Gregoire*, 2008 WL 1999830, at *5-6 (W.D. Wash., May 8, 2008) (finding tribal chairman not protected by tribal immunity); *see also Luckey v. Harris*, 860 F.2d 1012, 1015 (11th Cir. 1988) (responsibility, not personal action, is all that is required for injunctive relief against state officers in their official capacity).

B. Sovereign Immunity Does Not Protect the Tribe and Tribal Court When Acting Beyond the Scope of Their Authority.

In addition to proceeding against tribal officials pursuant to *Ex parte Young*, BPA and ARC may also maintain their claims against the Tribe and Tribal Court directly, notwithstanding sovereign immunity. The Supreme Court has repeatedly held that the scope of tribal court jurisdiction is a federal question, and that a federal court may enjoin a tribal court action that exceeds the federal limitations on the power of a tribe. The entire line of *Montana* cases demonstrates that federal courts possess the power to enforce federal limitations on tribal court jurisdiction. And the corollary of the principle of tribal court exhaustion is that a federal court has jurisdiction over actions such as this one, if only to determine whether the plaintiff is required to exhaust the jurisdictional question in tribal court before returning to federal court.

At least one circuit has expressly held that parties sued in tribal court may maintain an action in federal court against the tribe itself notwithstanding sovereign immunity, as long as they seek only prospective, injunctive relief. *See Comstock Oil & Gas, Inc. v. Ala. & Coushatta Indian Tribes*, 261 F.3d 567, 571 (5th Cir. 2001) (affirming jurisdiction over both tribal council members under *Ex parte Young* and over the tribe itself, pursuant to circuit precedent that "the Tribe ha[s] sovereign immunity from an award of damages only"). That explicit holding has echoes in Ninth

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[7] *See Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (vote to block access to road to which plaintiff had no property rights insufficient to invoke *Ex parte Young*); *South Fork Livestock Partnership v. United States*, 183 F. Supp. 3d 1111, 1116 (D. Nev. 2016) (mere vote is insufficient).

Circuit precedent. As the Ninth Circuit has explained, "one of the historic purposes of sovereign immunity" is protecting "the sovereign Tribe's treasury." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (citing *Alden v. Maine*, 527 U.S. 706, 750 (1999)). Suits such as this one for declaratory and injunctive relief do not bring that "historic purpose" of sovereign immunity into play.

II. THE TRIBE'S ALLEGATIONS DO NOT DEMONSTRATE COLORABLE OR PLAUSIBLE TRIBAL COURT JURISDICTION, AND BPA AND ARC NEED NOT EXHAUST THEIR TRIBAL COURT REMEDIES.

Defendants also argue that BPA and ARC must exhaust their remedies in Tribal Court before seeking relief in federal court. This is so, Defendants claim, because Tribal Court jurisdiction over the Tribe's claims is "colorable" or "plausible." *See Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1302 (9th Cir. 2013). Defendants are wrong. The Tribe's complaint does not allege any conduct by BPA and ARC on the Tribe's reservation, and Defendants' after-the-fact attempts to argue to the contrary stretch the Tribe's allegations farther than they will bear. At most, the Tribe alleged that BPA and ARC engaged in conduct off the reservation that caused harm (via migration and other indirect effects) on tribal lands (which BPA and ARC dispute). Defendants have cited no case sustaining tribal court jurisdiction under those circumstances. For that reason alone—because tribal courts have no jurisdiction over claims based on conduct occurring outside of the reservation—tribal court jurisdiction is not colorable or plausible here, the Tribal Court plainly lacks jurisdiction, and BPA and ARC are not required to exhaust. It is important to note, however, that even though the Tribal Court lacks jurisdiction, the Tribe is not without redress; it must simply seek that redress in a court of competent jurisdiction.

Because the Tribe has alleged no on-reservation conduct by BPA and ARC, the court need not even conduct a *Montana* analysis. Even if the Court were to do so, however, Tribal Court jurisdiction is plainly lacking because the Tribe has not alleged a consensual relationship and its subsistence has not been imperiled by BPA and ARC's conduct.

Finally, exhaustion is not required because Tribal Court jurisdiction would violate the express jurisdictional prohibitions in CERCLA, and because the Tribe has not validly served BPA and ARC with process.[8]

A. Where a Tribe Alleges No On-Reservation Conduct, Its Courts Have No Jurisdiction, and the Court Need Not Even Conduct a *Montana* Analysis.

Tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation." *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008). Tribal courts therefore are not courts of general jurisdiction. *See Nevada v. Hicks*, 533 U.S. 353, 367 (2001). Rather, "[t]he jurisdiction of tribal courts does not extend beyond tribal boundaries." *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 938 (9th Cir. 2009); *see also A&A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1415-16 (9th Cir. 1986) ("[T]ribal courts have inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians *which are based upon events occurring on the reservation.*") (emphasis added); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782 n.42 (7th Cir. 2014) ("The question of a tribal court's subject-matter jurisdiction over a nonmember [] is tethered to the nonmember's actions, specifically *the nonmember's actions on the tribal land.*") (emphasis in original); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998) (explaining that no Supreme Court case even "purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*") (emphasis in original). In short, there can be no dispute that tribal courts have no jurisdiction over claims based on conduct that occurred outside of a reservation. This point should begin and end the analysis here—a tribal court cannot exercise jurisdiction over a non-member defendant who has not acted on the reservation.

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[8] The Tribe implies in a footnote that BPA and ARC have somehow waived their objection to tribal court jurisdiction by agreeing to a briefing schedule and hearing date in tribal court. (ECF No. 51 at 15-16 n.4.) Such implication is disingenuous, however, as the Tribe specifically agreed that BPA and ARC would not waive objections to tribal court jurisdiction. (*See* Exhibit 2 to the Declaration of Kenzo Kawanabe, filed herewith.)

Montana and its progeny focus on a different question—whether a tribal court may exercise jurisdiction over claims against non-Indians that arose from conduct on a reservation. *See, e.g.*, *Montana*, 450 U.S., at 547 (attempt to regulate fishing on river within reservation boundaries); *Nat'l Farmers Union*, 471 U.S. at 845 (motorcycle accident at a state-run school on reservation); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (truck accident on a road within reservation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (traffic accident on state highway within reservation); *Hicks*, 533 U.S. at 353 (2001) (Nevada law enforcement executing search warrant in house on reservation); *Plains Commerce Bank*, 554 U.S. at 320 (sale of fee-owned land on reservation). The location of the alleged conduct is thus dispositive to the jurisdictional analysis. *See Plains Commerce Bank*, 554 U.S. at 332 ("*Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests.") (emphasis in original).

1. The Tribe Has Not Alleged Any On-Reservation Conduct.

The Tribal Court complaint does not allege that BPA or ARC engaged in any conduct on the reservation. Indeed, the word "reservation" does not appear anywhere in the Tribal Complaint and the Tribe does not even describe the reservation's boundaries. By contrast, EPA published documents show the Tribe's lands are more than two miles north and approximately one mile east of the mine. (ECF Nos. 38 at 3-6, 39-4.) The Tribe does not dispute the accuracy of the EPA's documents, the EPA's conclusion that groundwater contamination from the mine has not reached the reservation, or this Court's ability to consider these public documents. Nor does the Tribe allege even that BPA and ARC acted on any other lands owned by or held in trust for the Tribe. The truth, therefore, is plain—none of the challenged conduct occurred on the reservation, so the Tribal Court has no jurisdiction.

Defendants argue that the Tribe's complaint actually *does* allege on-reservation conduct. (*See, e.g.*, ECF No. 51 at 10-11 (pointing to paragraphs 8, 26, 27, 36, and 39 in the Tribal Complaint).) The allegations in the cited paragraphs, however, fall short. Paragraphs 8 and 26 allege that portions of the undefined "Mine Site" are located on tribal land. As explained above

and in the Amended Motion for Preliminary Injunction (ECF No. 38), this is incorrect based on unrebutted EPA documents. Even if sections of the "Mine Site" were on tribal property, merely alleging geographic overlap is different from alleging on-reservation conduct. Paragraph 27 alleges that BPA and ARC disposed of hazardous substances "near and around Plaintiff's property," and "fail[ed] to properly remediate" hazardous substances "on and around Plaintiff's property," but there is still no allegation of actual conduct on the Tribe's property, and certainly not on the reservation. Paragraph 36 refers generically to "Defendants' wrongful conduct as set forth above" allegedly "resulting in" hazardous substances being deposited or remaining on the Tribe's property and the "surrounding environment," but none of the allegations assert that BPA or ARC entered the reservation or transported or stored anything on the reservation. And EPA has confirmed that no groundwater contamination from the mine has reached the reservation. (*See* ECF No. 39-7.)

The Tribe contends that Paragraph 39 of the Tribal Complaint contains "allegations that BP 'transport[ed] and store[d] their toxic and hazardous substances and waste's **on [the Tribe's] property**.'" (ECF No. 51 at 10 (alterations and emphasis in original).) It doesn't. Paragraph 39 actually reads: "Defendants have neither sought nor obtained Plaintiff's consent to transport or store their toxic and hazardous substances and wastes on Plaintiff's property." (ECF No. 3-2 ¶ 39.) In an attempt to manufacture on-reservation conduct, the Tribe has twisted an allegation that BPA and ARC lacked consent to transport or store materials on the reservation into an allegation that BPA and ARC *actually transported and stored* materials on the reservation. Brackets and alterations cannot change the content of Paragraph 39. Neither Paragraph 39 nor any other paragraph alleges on-reservation conduct by BPA and ARC.

The Tribe argues that it will (sometime in the future) prove that tailings from the mine were brought (by someone) onto the reservation. (ECF No. 51 at 11.) These allegations do not appear in the Tribe's complaint, and should not be part of the Court's analysis. But even if the Tribe's unsupported statements in its motion are taken at face value, the Tribe *still* has not alleged that BPA and ARC brought these materials onto the reservation. The Tribe's pleadings state that

"tailings taken from the Mine Site, and delivered and deposited on tribal land including the Colony, were used for backfill around utilities and for the foundations of numerous buildings on the reservation." (*Id.* at 11.) Even knowing that whether BPA and ARC acted on the reservation is dispositive, the Tribe still does not (and cannot) allege that either entity did so.

Finally, the Tribe claims that the primary conduit for alleged contamination—the Wabuska Drain—is on the reservation. (ECF No. 51 at 11.) The status of the land traversed by the Drain has nothing to do with tribal court jurisdiction, which turns on the location of BPA and ARC's conduct. Moreover, the Tribe offers no proof that the Wabuska Drain is actually within the boundaries of the Tribe's reservation. The portion of the Campbell Ranch through which the drain passes was acquired by the United States in trust for the Tribe in 1979. (*See* Ex. 9 to the Declaration of Kenzo Kawanabe, filed herewith.) Simply because that parcel is owned in trust for the Tribe, however, does not make it part of the reservation. Adding trust lands to a tribe's reservation requires further public action, such as an administrative proclamation process or act of Congress.[9] Had the Tribe gone through such a process for the parcel through which the Drain passes, it would be documented in public records—for example, in the Federal Register. But no such evidence exists. Thus, the portion of the Campbell Ranch traversed by the Wabuska Drain is not, in fact, part of the Tribe's reservation.

At bottom, the Tribal Complaint offers two types of conduct as a hook for tribal-court jurisdiction: (1) general allegations of activities at or near the mine, miles away from the reservation and (2) allegations of passive migration of contamination onto tribal land. Because "[t]he question of a tribal court's *subject matter jurisdiction* over a nonmember…is tethered to the *nonmember's* actions, specifically the *nonmember's actions on the tribal land*," *Jackson*, 764 F.3d

[9] *See, e.g.*, PL 95-337, 92 Stat. 455 (Aug. 5, 1978) (statute adding 2,700 acres to the Paiute and Shosone Tribes of the Fallon Indian Reservation and Colony, Fallon, Nevada); Bureau of Indian Affairs, *Acquisition of Title to Land Held in Fee or Restricted Fee Statute (Fee-to-Trust Handbook)* 41-45 (available at https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/raca/pdf/idc1-024504.pdf) (describing proclamation process).

at 782 n.42 (emphasis in original), neither type of allegation is sufficient to establish plausible or colorable jurisdiction.

2. Because The Tribe Has Not Alleged On-Reservation Conduct, Jurisdiction Is Plainly Lacking and No *Montana* Analysis Is Necessary.

Because the Tribal Complaint does not allege actions by BPA or ARC on the reservation (or even on other tribal lands), the Tribal Court is without jurisdiction and the court need not conduct a *Montana* analysis. *See Jackson*, 764 F.3d at 782 n.42. Defendants try to distinguish the cases relied on by BPA and ARC, but those attempts fail. More importantly, they miss the point. To establish "plausible" or "colorable" tribal court jurisdiction, defendants must do more than distinguish BPA and ARC's many cases stating the black-letter principle that tribal courts have no jurisdiction over off-reservation conduct. Instead, they must point to *some case, from some court* establishing the opposite—that a tribal court may exercise jurisdiction over claims alleging on-reservation *effects* stemming from off-reservation *conduct*. But they haven't, because they can't.

Instead, Defendants point the Court to still more cases involving on-reservation conduct. They rely heavily on *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), but that case arose from a claim for violation of a lease of a recreational area located on a reservation, and a claim of jurisdiction over an individual who lived on the reservation for over 20 years. *Id.* at 805. The *Water Wheel* court recognized that tribal courts have no jurisdiction over off-reservation conduct; in discussing *Philip Morris*, the *Water Wheel* court observed that where "the activity in question occurred off reservation [] [t]he tribal court clearly lacked jurisdiction and, arguably, *Montana* did not even apply." *Id.* at 815.

On its face, *Water Wheel* primarily concerns the scope of tribal court jurisdiction over different types of land within a reservation. *Id.* at 812-13. Its analysis of a tribe's "power to exclude" concerned a tribe's power to exclude *the defendant*—i.e. the person or entity engaging in conduct on the reservation. *Id.* at 811 ("Here, through its sovereign authority over tribal land, [the tribe] had power to exclude Water Wheel and Johnson, who were trespassers on the tribe's land and had violated the conditions of their entry."). The Ninth Circuit's analysis says nothing about the power claimed by the Defendants here—to assert extraterritorial jurisdiction beyond the

bounds of the reservation based on the asserted *consequences* of off-reservation conduct.[10] *See also Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207 n.60 (7th Cir. 2015) ("We do not believe that [the reasoning of *Water Wheel*] can be reconciled with the language that the [Supreme] Court employed in *Hicks* and *Plains Commerce Bank*.")

Even the Tribe recognizes the limitations of *Water Wheel*. In discussing its holding, the Tribe says that "[i]n the Ninth Circuit, tribes have jurisdiction over *non-Indian conduct on tribal land*." (ECF No. 51 at 9-10 (emphasis added).) In other words, even the Tribe concedes—rightly—that *Water Wheel* permits it only to regulate conduct occurring on Indian land, and does not stretch far enough to allow it to regulate non-Indian conduct *off* tribal lands. The other cases cited by defendants are to similar effect. *See, e.g.*, *Marrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133 (1982) (severance tax on on-reservation oil & gas leases); *Williams v. Lee*, 358 U.S. 217, 217-18 (1959) (collection action for goods sold on reservation); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1129 (9th Cir. 2006) (on-reservation truck accident); *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1072 (9th Cir. 1999) (on-reservation car accident).[11]

As to the cases relied on by BPA and ARC, defendants cannot explain away the common denominator that tribes have no power to regulate or adjudicate off-reservation conduct. Defendants first try to distinguish *UNC Res., Inc. v. Benllay*, 514 F. Supp. 358 (D.N.M. 1981)

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[10] *Water Wheel* is also distinguishable because it does not involve a countervailing state interest—a factor recognized as relevant to determining whether exhaustion is required. *See* 642 F.3d at 814 (the *Montana* analysis does not apply to dispute over tribal land inside a reservation if "there are not competing state interests at play"). As the court explained in *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013), "land ownership may sometimes prove dispositive, but when a competing state interest exists courts must balance that interest against the tribe's." *Id.* at 1205; *see also Hicks*, 533 U.S. at 364 (balancing state interest in law enforcement against tribe's interests in regulating conduct by nonmembers on tribal land). Here, unlike in *Water Wheel*, there are compelling countervailing state and federal interests in regulating the conduct at issue, as discussed below regarding CERCLA.

[11] *Admiral Ins. Co. v. Blue Lake Rancheria Tribal Court*, 2012 WL 1144331 (N.D. Cal. Apr. 4, 2012) is entirely inapposite, as it involved a contract dispute between a tribal entity and a non-Indian defendant corporation that had contractually consented to tribal court jurisdiction.

(*UNC I*) and *UNC Res. v. Benally*, 518 F.Supp. 1046 (D. Ariz. 1981) (*UNC II*) by arguing that the contamination in those cases did not reach the reservation. Not so. As the court explained in *UNC II*, "[t]he course of the river carried this radioactive waste material across the New Mexico-Arizona state line and onto the Navajo reservation." 518 F. Supp. at 1048. In fact, the court explicitly noted that "even though the injuries occurred on the reservation, the attempt to provide a tribal forum to redress such injuries cannot be said to be clearly related to tribal self-government or internal relations since UNC's allegedly tortious conduct occurred off the reservation." *Id.* at 1051. The situation here is the same. Similarly, the Tribe cites *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997) for the proposition that *UNC II* is outdated, but the court's discussion in *Kerr-McGee* focuses on *UNC II*'s analysis of the Price-Anderson Act, which is not at issue here. *Kerr-McGee Corp.*, 115 F.3d at 1506 n.3. Hence, the *UNC* cases remain the only authority cited by either party addressing off-reservation mining activities leading to alleged environmental contamination migrating onto tribal lands. And both cases unambiguously confirm that the Tribal Court lacks jurisdiction in such circumstances.

Defendants also try to distinguish *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998) and *Jackson* by arguing that, in both cases, there was no connection to the reservation. But that is exactly BPA and ARC's point—they also have engaged in no conduct on the reservation, *Montana* does not apply, and the Tribal Court has no jurisdiction.

3. Defendants' Claim of Tribal Court Jurisdiction Here Is Tantamount to an Assertion that the Tribe Can Regulate Off-Reservation Mining.

Pursued to its logical end, Defendants' argument amounts to an assertion that the Tribe has the power to regulate mining activities—such as those engaged in by ARC's predecessor—located entirely off the reservation.[12] The Supreme Court and Ninth Circuit have held that the reach of a tribe's court goes no further than the tribe's authority to regulate. "The plausibility of tribal court

[12] Most certainly, mining regulation is something that invokes a substantial state interests. In Nevada, mining and mine site reclamation is closely regulated by the Nevada Bureau of Mining and Reclamation under NAC 445A.350-447, NAC 519A.010-415, NRS §§ 445A.300-730, and NRS §§ 519A.010-280.

jurisdiction depends on the scope of the Tribe's regulatory authority, as a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Evans*, 736 F.3d at 1302; *see also Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008) (affirming the principle that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction" and holding "that the Tribal Court lacks jurisdiction to hear the Longs' discrimination claim because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land."); *Jackson*, 764 F.3d at 782 ("[I]f a tribe does not have the authority to regulate an activity, the Tribal Court similarly lacks jurisdiction to hear a claim based on that activity.").

If this Court were to find that the Tribal Court plausibly has jurisdiction over the Tribe's claims, the corresponding conclusion would be that the Tribe also can enact and enforce laws and regulations concerning off-reservation mining and environmental remediation to which BPA and ARC—or any other non-Indian engaged in off-reservation conduct with some conceivable on-reservation effect—would be subjected (recognizing that allowing states to bring state-law nuisance claims against out-of-state sources of water pollution would allow them "to do indirectly what they could not do directly—regulate the conduct of out-of-state sources"). But the Supreme Court and Ninth Circuit have repeatedly held that a tribal court cannot adjudicate a dispute concerning conduct that the tribe does not have legislative authority to regulate. Defendants cite to no authority that would allow a tribe, whose jurisdiction is cabined by geography, to reach beyond its reservation to regulate the extraterritorial conduct of nonmembers. Thus, the Tribal Court plainly lacks adjudicative jurisdiction as well. Allowing a tribe to regulate the economic activity of non-Indians miles away from any reservation would upend the notion of Indian tribes as limited, dependent sovereigns, and work a seismic change in federal Indian law.[13]

[13]The Tribe's theory of jurisdiction is particularly troubling here, where the Tribe also claims that its assertion of extraterritorial jurisdiction is effectively unreviewable in federal court due to tribal sovereign immunity.

B. Even if the *Montana* Analysis Applies, the Tribe's Allegations Do Not Plausibly or Colorably Meet Either *Montana* Exception.

Because BPA and ARC engaged in no conduct on the reservation, *Montana* does not apply. Even if it did, however, the Tribe's allegations do not meet either exception, and so jurisdiction in the Tribal Court still would not be colorable or plausible.

Defendants have not claimed any consensual relationship giving rise to the first *Montana* exception, but they do argue that the second *Montana* exception is satisfied because the contamination that allegedly has reached the reservation poses a threat to the Tribe's health and welfare. (ECF No. 51 at 13-15; ECF No. 41 at 11-12; ECF No. 53-1 at 11-12.) The Supreme Court has held that to meet the second *Montana* exception, a tribe must show that the conduct "do[es] more than injure the tribe, it must 'imperil the subsistence' of the tribal community….[T]ribal power must be necessary to avert catastrophic consequences." *Plains Commerce*, 554 U.S. at 342; *see also Evans* , 736 F.3d at 1305-06; *Cnty. of Lewis v. Allen*, 163 F.3d 509, 516 (9th Cir. 1998) (the second *Montana* exception does not apply simply because "the tribe has an interest in the safety of its members").

The Tribe's allegations do not rise to the level of a catastrophic threat to tribal self-government. The Tribe has alleged that off-reservation conduct by ARC's predecessor has led to diminished property values and adverse health effects among tribal members on the reservation. These alleged injuries have no connection to the Tribe's ability to "make [its] own laws and be ruled by them," *Hicks*, 533 U.S. at 361. They do not threaten the "subsistence" of the Tribe, and do not, as a matter of law, amount to "catastrophic consequences" in the absence of tribal court jurisdiction. *Plains Commerce Bank*, 554 U.S. at 341.

Defendants rely on *Eliot v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2009), *FMC Corp. v. Shoshone-Bannock Tribes*, 2017 WL 4322393 (D. Idaho 2017), and *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998). None are on point. *Eliot* concerned a wildfire started by a nonmember on the reservation; there were no allegations of off reservation activities that allegedly affected the reservation. 566 F.3d at 844. As to *FMC Corp.*, the contamination at issue

emanated from a phosphorus production plant located on the reservation, and the operator had consented to tribal court jurisdiction. 2017 WL 4322393 at *1 (D. Idaho 2017).[14]

The Tribe argues that *Montana v. EPA* stands for the proposition that alleged contamination of a tribe's water is enough to meet the second *Montana* exception. (ECF No. 51 at 14.) That case, once again, involved only on-reservation conduct. *Id.* at 1139-40. Moreover, the issue was not exhaustion of tribal remedies but rather whether the EPA could designate a tribe for "treatment as state status" under the Clean Water Act and the EPA's related regulations. *Id.* at 1138-40. The Clean Water Act regulations applied in *Montana v. EPA* were an express delegation of federal statutory authority to tribes, and no such delegation is at issue here. To the extent the second *Montana* exception was at issue at all in *Montana v. EPA*, it was only because the EPA adopted something akin to it as part of its regulations. Those regulations required the tribe only to show that "[t]he potential impacts of regulated activities on the tribe must be 'serious and substantial.'" *Id.* at 1139. Even if an unrelated regulation were relevant here, this regulation predates *Plains Commerce Bank* and the clarification from the Supreme Court that the second *Montana* exception is limited to situations involving "catastrophic consequences" to tribal self-government. In light of *Plains Commerce Bank*, *Montana v. EPA* cannot mean that water quality concerns, by themselves, are sufficient to meet the second *Montana* exception.

Other cases from the Ninth Circuit show that simply alleging water contamination is insufficient. In *Evans*, 736 F.3d at 1302, the Ninth Circuit rejected a tribe's allegations of ground water contamination as grounds to require exhaustion. Defendants argue that *Evans* does not apply because the scope of the harm was smaller than alleged here. But the tribe's allegations in *Evans* suffer from the same problems as the Tribe's allegations here—they were unsubstantiated and speculative, and contrary to public EPA documents. Allegations of water contamination may, in some instances, implicate tribal sovereignty, but only when the contamination originates from

[14] *FMC* is currently on appeal. *See FMC Corporation v. Shoshone-Bannock Tribes*, No. 17-35865 (9th Cir., Oct. 24, 2017).

sources on the reservation and the tribe can show serious catastrophic harm resulting from that contamination. Neither condition is met here.

C. CERCLA Establishes Exclusive Jurisdiction In This Court And Preempts The Tribe's Claims.

Exhaustion also is not required in this case because allowing Tribal Court jurisdiction would patently violate the express jurisdictional prohibitions of CERCLA. *See Hicks*, 533 U.S. at 369 (exhaustion not required "where the action is patently violative of express jurisdictional prohibitions"). This is the case here because: (i) § 113(b) of CERCLA, 42 U.S.C. § 9613(b), establishes exclusive original jurisdiction over all CERCLA controversies in the federal district courts; (ii) the Tribe's lawsuit challenges a CERCLA cleanup, meaning that it may be brought *only* in federal court; and (iii) the Tribe's claims are preempted by CERCLA in any event.

1. CERCLA's Exclusive Jurisdiction Provision Excuses BPA and ARC from Any Exhaustion Requirement.

Exhaustion is unnecessary "where the action in tribal court is patently violative of express jurisdictional provisions." *Nat'l Farmers*, 471 U.S. at 856 n.21. Where a statute places jurisdiction over a claim in the federal courts—exclusive of all other courts, including tribal courts—tribal exhaustion is not required. *See Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1097-98 (8th Cir. 1989). "Cases in which tribal courts are not given the first opportunity to determine their jurisdiction typically involve situations where the federal court has exclusive jurisdiction …." *Kerr-McGee*, 115 F.3d at 1502.

CERCLA is just such a statute. Section 113(b) states that, with two exceptions not relevant here, "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy." In *Blue Legs*, the Eighth Circuit held that very similar language in another federal environmental statute—the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6792(a)(1)—"leads us to conclude that exhaustion of tribal remedies is not required in this case." 867 F.3d at 1098. Plaintiffs there sued the Oglala Sioux Tribe in federal court alleging

that the tribe's operation of a garbage dump violated RCRA. The tribe argued that respect for tribal self-government meant the suit must initially be brought in tribal court. Based on RCRA's requirement that "any action under paragraph [6972](a)(1) of this section shall be brought in the district court for the district in which the alleged violation occurred," the Eighth Circuit disagreed and refused to dismiss the case based on exhaustion. *Id.*

The Tribe cites three cases purportedly to the contrary, but none is on point. (ECF No. 51 at 17.) First, *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992) interpreted 28 U.S.C. § 1355, which says "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of any action" for penalties incurred under federal law. 957 F.2d at 726-27. "Since a tribal court is not a state court," the Ninth Circuit held, "it does not fall within the exclusive jurisdiction provision of section 1355," and the district court was not obligated to hear the case. *Id.* CERCLA's exclusive jurisdiction provision, by contrast, provides that federal-court jurisdiction is exclusive of *all* courts for *all* causes of action, not just state courts. Second, the Tenth Circuit in *Kerr-McGee* held that the Price-Anderson Act, which—unlike CERCLA—contains "no explicit mention of exclusive federal court jurisdiction," does not so obviously preempt tribal jurisdiction as to trigger the "patently violative" exception to the tribal exhaustion rule. 115 F.3d at 1501-02. And third, *Landmark Golf Limited Partnership v. Las Vegas Paiute Tribe*, 49 F. Supp. 2d. 1169, 1173-75 (D. Nev. 1999) involved no statutory exclusive jurisdiction provision at all.

2. Because the Tribe's Complaint Challenges a CERCLA Cleanup, This Court's Exclusive Jurisdiction Precludes Tribal Court Jurisdiction.

Because the Tribe's claims challenge the CERCLA cleanup of the mine, they fall within the scope of CERCLA's exclusive jurisdiction provision. "[Section] 113(b) confers on the federal district courts 'exclusive original jurisdiction over all controversies arising under [CERCLA].'" *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health and Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000). "In addition, with exceptions not relevant here, § 113(h) postpones federal jurisdiction 'over challenges to [CERCLA] removal or remedial action.'" *Id.* (citing 42 U.S.C. § 9613(h)). "Reading § 113(b) to be coextensive with § 113(h), [the Ninth Circuit has] held that jurisdiction

under § 113(b) is 'more expansive than ... those claims created by CERCLA,' and 'cover[s] any 'challenge' to a CERCLA cleanup.'" *Id.* (quoting *Fort Ord Toxics Project, Inc. v. California Envtl. Protection Agency*, 189 F.3d 828, 832 (9th Cir.1999)). Thus, if a case or claim constitutes a challenge to a CERCLA cleanup, it is subject to § 113(b)'s exclusive jurisdiction provision, and can only be brought, if at all, in federal court. *Id.*

The Ninth Circuit has adopted a liberal standard for determining whether claims challenge a CERCLA cleanup. A claim need not be expressly brought pursuant to CERCLA to be a challenge. *ARCO Envtl.*, 213 F.3d at 1115. Instead, an action constitutes a challenge "if it is related to the goals of the cleanup," "seeks to dictate specific remedial actions," "postpone[s] the cleanup," "impose[s] additional reporting requirements on the cleanup," or "alter[s] the method and order of cleanup." *Id.* Where EPA adopts a cleanup plan, and a party's lawsuit "seeks to improve on the CERCLA cleanup" because that party "clearly wants more," the action is a challenge and the statute's exclusive jurisdiction provision is triggered. *McLellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330 (9th Cir. 1995).

There is no dispute that a CERCLA response action at the mine is ongoing. EPA has directed this effort—which includes a community bottled water supply program, sampling and monitoring of water and soil, implementation of interim removal actions, and performance of a CERCLA remedial investigation/feasibility study ("RI/FS")—since 1999. (*See* ECF No. 38 at 7.) The Tribe admits that numerous administrative orders have been issued concerning contamination from the mine. (ECF No. 3-1, ¶ 17.) It also acknowledges the "ongoing remedial investigations, feasibility studies, and interim remedial activities on the mine site." (ECF No. 51 at 18.) These response actions are sufficient to trigger CERCLA's enforcement bar and exclusive jurisdiction in this court. *See, e.g., Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1018, 1023 (3d Cir. 1991) (preliminary CERCLA remedial investigation triggers § 113(h)); *Razore*, 66 F.3d at 239 (RI/FS triggers § 113(h) even if actual cleanup has not begun).

The only remaining question is whether the Tribe's claims challenge the EPA-ordered CERCLA investigations and cleanup. They do. The Tribe complains that "Defendants have done

nothing for Plaintiff except hand out bottled water to Tribal members." ECF No. 3-2 ¶ 2. ARC provides bottled water to residents north of the mine site pursuant to a CERCLA administrative order issued by EPA.[15] The Tribe alleges that "Defendants have failed for decades to address the damage caused to Plaintiff, or to properly remediate the Mine Site and to prevent the continuing release, discharge and migration of toxic and hazardous substances," "despite . . . the issuance of certain and numerous administrative violations and orders." (ECF No. 3-2 ¶ 17.) Although it is undisputed that ARC has been performing CERCLA response actions and an RI/FS at the site under EPA orders since at least 2005, the Tribe's complaint asserts repeatedly that ARC "failed to remediate" or "failed to properly remediate" contamination at and from the mine. (ECF No. 3-2 ¶¶ 7, 17, 22, 24, 26, 27, 32, 34, 44, 46, 50, 52, 63, 65, and 74.)

The Tribe does not allege ARC violated any remediation order issued by EPA. Rather, the allegation is that the remedial actions themselves are insufficient. The Tribe thus (a) acknowledges that EPA has a plan for the site cleanup; (b) challenges the goals of the cleanup; (c) seeks to improve on the CERCLA cleanup; and (d) "clearly wants more" than what EPA has required of ARC. *McLellan*, 47 F.3d at 330. That is a consummate challenge. It necessarily invokes CERCLA § 113(h), and consequently § 113(b)'s exclusive jurisdiction provision.

The Tribe wrongly argues an action for monetary relief cannot amount to a CERCLA challenge. It is true that "every action that increases the cost of a cleanup or diverts resources or personnel from it does not thereby become a 'challenge' to the cleanup." *McLellan*, 47 F.3d at 330.[16] But where a monetary claim "has the potential to interfere with the ongoing cleanup because

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[15] *See* U.S. EPA Region IX, Unilateral Administrative Order for Initial Response Activities, CERCLA Docket 9-2005-0011, at 10 ¶ 15.f(3) (Exhibit 10 to Declaration of Kenzo Kawanabe, filed herewith)).

[16] In *Beck v. Atl. Richfield Co.*, 62 F.3d 1240 (9th Cir. 1995), the court held a claim for compensatory damages due to alleged illegal use of the plaintiff's water in a CERCLA cleanup was not a challenge to the remedy under § 113(h). Plaintiffs did not contend the remedy was a failure or that contamination was not being addressed to their satisfaction. Rather, they alleged a remedial activity (water diversion) was causing financial injury (loss of water). Resolving the claim required only compensation, not altering the terms of the cleanup in a way that was more protective. *Id.* at 1243. By contrast, resolving the Tribe's claims here will necessarily require that the factfinder assess whether the CERCLA cleanup is inadequate or too slow—that is, if

it could affect Defendant's ability and willingness to perform the necessary cleanup," a challenge exists, and the claim is subject to CERCLA §§ 113(h) and 113(b). *See Diamond X Ranch, LLC v. Atl. Richfield Co.*, 51 F. Supp. 3d 1015, 1022 (D. Nev. 2014) (dismissing claim for monetary penalties as CERCLA challenge).

If a case questions a CERCLA response action, it is related to the goals of the cleanup and thus constitutes a challenge. Any argument that the Tribe is "not seeking to alter or expand" the CERCLA response action "but rather only to acquire money damages" should, in the words of the Tenth Circuit, "fall on deaf ears." *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006). Accepting the Tribe's argument would place BPA and ARC "in the unenviable position of being held liable for monetary damages because they are complying with an EPA-ordered remedy which [they] have no power to alter without prior EPA approval." *Id.* at 1250, *see also* 42 U.S.C. § 9622(e)(6) (prohibiting any remedial activity at a CERCLA site not authorized by EPA). A plaintiff cannot "achieve indirectly through the threat of monetary damages . . . what it cannot obtain directly through the ongoing CERCLA-mandated remediation." 467 F.3d at 1250. The Tribe's claims are subject to the exclusive jurisdiction of this Court, and requiring exhaustion would violate that express jurisdictional prohibition.

3. Because the Tribe Alleges Injury to Its Natural Resources, Its Claims Are Preempted by CERCLA.

Even if the Tribe's claims were not subject to CERCLA exclusive jurisdiction, they would still be preempted. The foundation of the Tribe's claims is alleged contamination of its surface water, groundwater, water supply, wetlands, wildlife, soil, air, sediment, land, and surrounding environment. (ECF No. 3-2 ¶¶ 8, 10, 22, 25, 57, 58, and 59.) Whether stated that way or not, the Tribe's complaint plainly alleges injury to the natural resources belonging to or held in trust for the Tribe. *See* 42 U.S.C. § 9601(16) (defining "natural resources" under CERCLA to include "land,

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ARC, despite complying with EPA's orders, has "failed to properly remediate" the contamination that the CERCLA action is intended to address.

fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to … [or] held in trust by … any Indian tribe").

CERCLA provides a "comprehensive damages scheme which addresses damage assessment for natural resource injury, damage recovery for such injury, and use of such recovery." *New Mexico*, 467 F.3d at 1244; 42 U.S.C. § 9607(a)(4)(c). Damages recovered for injury to natural resources are "available for use *only* to restore, replace, or acquire the equivalent of such natural resources." 467 F.3d at 1245 (emphasis added); 42 U.S.C. § 9607(f)(1). Thus, "[t]he *measure* and *use* of damages arising from the release of hazardous waste is restricted to accomplishing CERCLA's essential goals of restoration or replacement, while also allowing for damages due to interim loss of use." 467 F.3d at 1245 (emphasis in original).

Where, as here, the resources alleged to be contaminated are trust resources owned or managed by the United States, a state, or a tribe, "the trustee as fiduciary should restore or replace the corpus of the trust" using any damages it recovers. *Id.* at 1247. That is one of the core purposes of CERCLA's liability scheme. Consistent with this objective, "CERCLA's comprehensive NRD scheme *preempts* any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource." *Id.* at 1247 (emphasis added).

If the Tribe were suing to recover damages to be used for restoration of injured natural resources, perhaps *New Mexico* would not apply. But the Tribe has disclaimed any such intent. As stated in the Tribe's Motion: "[r]estoration, replacement or acquisition of equivalent resources *is not sought*" in this case. (ECF No. 51 at 18 (emphasis added).) Because injury to natural resources is the *sine qua non* of the Tribe's claims, and because none of the damages it seeks to recover will be used for the purpose that CERCLA requires, the claims are preempted by federal law and cannot proceed in tribal (or any) court.

The Tribe seeks refuge in CERCLA's savings clauses, *see* 42 U.S.C. §§ 9614(a), 9652(d), but these provisions do not protect the Tribe's claims. CERCLA preempts any claim designed to achieve something other than restoration of injured natural resources "notwithstanding CERCLA's

saving clauses because we do not believe Congress intended to undermine CERCLA's carefully crafted NRD scheme through these saving clauses." *New Mexico*, 467 F.3d at 1247. "The restrictions on the use of NRDs in § 9607(f)(1) represent Congress' considered judgment as to the best method of serving the public interest in addressing the cleanup of hazardous waste." *Id.* The Tribe cites several cases for the principle that Congress, in passing CERCLA, preserved state law remedies for pollution victims. None of these cases address claims based on alleged injury to natural resources owned by a tribe; none involve a tribe with a statutory cause of action for natural resource damages under CERCLA; none mention *New Mexico*; and none apply here.[17]

The Tribe tries to distinguish *New Mexico* based on its "complex procedural history that cabined the claims to natural resources, and the fact that the plaintiff in that case directly challenged remediation…." (ECF No. 51 at 19.) But this is precisely why *New Mexico* should control. The "complex procedural history" arose because New Mexico sought (unsuccessfully) to avoid litigation in federal court by voluntarily dismissing its CERCLA claims and proceeding only on its state law claims. *New Mexico*, 467 F.3d at 1237. The Tribe is doing something very similar: attempting to avoid a federal forum by inartfully pleading its natural resource damages claims as something else.

As a result, the Tribal Court lawsuit is plainly violative of CERCLA's exclusive jurisdictional provision. Because CERCLA preempts the Tribe's claims, Tribal Court jurisdiction is neither plausible or colorable, and exhaustion should not be required.

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[17] *See PMC Inc. v. Sherwin Williams Co.*, 151 F.3d 610 (7th Cir. 1998) (private dispute over cleanup costs); *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485 (5th Cir. 2002) (property damages case between companies); *KFD Enters. v. City of Eureka*, 2014 WL 1877532 (N.D. Cal., May 9, 2014) (company seeking property damages and cleanup costs); *Pfohl Bros. Landfill Litig.*, 67 F. Supp. 2d 177 (W.D.N.Y. 1999) (personal injury claims). Unlike tribes, individuals cannot bring a CERCLA claim for injury to natural resource damages. 42 U.S.C. § 9607(f)(1); *Nat'l Ass'n of Mrs. v. U.S. Dept. of the Interior*, 134 F.3d 1095, 1113 (D.C. Cir. 1998).

D. Jurisdiction Is Also Plainly Lacking Because the Tribe Failed to Validly Serve BPA and ARC With Process.

In serving BPA and ARC with process, the Tribe expressly disavowed any compliance with the Nevada Rules of Civil Procedure. (*See* ECF No. 39-9.) Now, it claims that (a) "There are no specific requirements for service under tribal court rules," and (b) "Service of a complaint in tribal court is not controlled by the Nevada Rules of Civil Procedure, nor by the Federal Rules of Civil Procedure." (ECF No. 51 at 16.) The sum of these two assertions is a claim that *no law* governs the Tribe's service of process.[18] Had BPA and ARC been served on the reservation, within the territorial jurisdiction of the Tribal Court, the Tribe's argument might have some merit. But they were not—their registered agent in Nevada was sent the complaint (without a summons instructing BPA and ARC when and how to respond) via FedEx.

If a putative defendant lives in Canada, an American plaintiff cannot validly serve her with process merely by mailing a complaint across the border; rather, the plaintiff must comply with all applicable Canadian law and international treaties. *See, e.g.*, *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698-99 (1988) (under the Hague Service Convention, "[o]nce a central authority receives a request in the proper form, it must serve the documents by a method prescribed by the internal law of the receiving state or by a method designated by the requester and compatible with that law"). The same is true for the Tribe. In order to validly serve BPA and ARC in Nevada, the Tribe was required to follow Nevada law.

The Tribe's failure to abide by basic principles of service cannot be brushed aside as a mere technicality. "An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process." *Murphy Bros., Inc. v. Michetti*, 526 U.S. 344, 347 (1999). By not only failing, but affirmatively disavowing any intention to follow Nevada law in serving BPA and ARC, the Tribe has refused to take the

[18] This assertion is just one of many aspects of this case that are troubling from a Due Process perspective, such as the Tribe's refusal to make its laws publicly available or to identify for BPA and ARC the laws under which it believes they are liable. (*See* Declaration of Kenzo Kawanabe ¶¶ 1-16 (describing BPA and ARC's attempts to gain access to Tribal laws and regulations).)

necessary steps for the Tribal Court to acquire jurisdiction over them. For that reason, the Tribal Court Action is not properly at issue, the Tribal Court plainly lacks jurisdiction, and exhaustion is not required.

CONCLUSION

The Court should deny the motions to dismiss, and grant the relief requested in BPA and ARC's Amended Motion for Preliminary Injunction.

DATED: December 14, 2017

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b) and Section IV of the District of Nevada Electronic Filing Procedures, I hereby certify that I am an employee of Dotson Law, and that on December 14, 2017, I caused to be served a true and correct copy of the foregoing document via CM/ECF filing system and electronic mail upon the following:

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