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15 **IN THE UNITED STATES DISTRICT COURT**  
16 **FOR THE DISTRICT OF NEVADA**

17 BP AMERICA INC., and ATLANTIC )  
RICHFIELD COMPANY, )  
18 Plaintiffs, )  
19 vs. )  
20 YERINGTON PAIUTE TRIBE; LAURIE A. )  
THOM, in her official capacity as Chairman )  
21 of the Yerington Paiute Tribe; ALBERT )  
ROBERTS, in his official capacity as Vice )  
22 Chairman of the Yerington Paiute Tribe; )  
ELWOOD EMM, LINDA HOWARD, NATE )  
23 LANDA, DELMAR STEVENS, and CASSIE )  
ROBERTS, in their official capacities as )  
24 Yerington Paiute Tribal Council Members; )  
DOES 1-25, in their official capacities as )  
25 decision-makers of the Yerington Paiute )  
Tribe; YERINGTON PAIUTE TRIBAL )  
26 COURT; and SANDRA-MAE PICKENS in )  
her official capacity as Judge of the Yerington )  
27 Paiute Tribal Court, Defendants. )

CASE NO. 3:17-cv-0588-LRH-WGC  
**REPLY IN SUPPORT OF  
AMENDED MOTION FOR  
PRELIMINARY INJUNCTION**

1 Plaintiffs BP America Inc. (“BPA”) and Atlantic Richfield Company (“ARC”), hereby  
2 reply in support of their Amended Motion for Preliminary Injunction (ECF No. 38, the “PI  
3 Motion”).

#### 4 INTRODUCTION

5 The Court has before it two complementary sets of motions: BPA and ARC’s PI Motion  
6 and Defendants’ motions to dismiss (ECF Nos. 38, 41, 51, & 53-1). These motions address  
7 overlapping topics—principally whether the Tribal Court may assert jurisdiction over the Tribe’s  
8 claims against BPA and ARC, and whether this Court may assert jurisdiction over any or all  
9 Defendants. Rather than respond fulsomely to the PI Motion, Defendants have made their stand  
10 in their respective motions to dismiss, and have filed cursory responses to the PI Motion. (*See*  
11 ECF Nos. 42, 52, & 54.) BPA and ARC are filing herewith a comprehensive response to the  
12 motions to dismiss, addressing all arguments raised therein, that also addresses the arguments  
13 made by Defendants in their responses to the PI Motion. For the sake of judicial efficiency, BPA  
14 and ARC will not repeat those arguments in depth here, and instead they briefly recapitulate their  
15 arguments below, and incorporate by reference the response to the motions to dismiss.

16 In brief, this Court has jurisdiction notwithstanding tribal sovereign immunity, and BPA  
17 and ARC otherwise satisfy the standard for preliminary injunctive relief. The PI Motion should  
18 be granted.

#### 19 ARGUMENT

##### 20 **I. TRIBAL SOVEREIGN IMMUNITY DOES NOT DEPRIVE THIS COURT OF 21 JURISDICTION TO GRANT A PRELIMINARY INJUNCTION.**

22 Defendants argue that tribal sovereign immunity deprives this Court of jurisdiction, thus  
23 preventing the Court from awarding preliminary injunctive relief. (*See* ECF Nos. 42 at 2-3; 52 at  
24 3; 54 at 3-6.) Defendants are wrong. As BPA and ARC argue in detail in their response to the  
25 motions to dismiss (at pages 2-10), tribal sovereign immunity does not prevent this Court from  
26 exercising jurisdiction over the Defendants and granting the PI Motion.

27 BPA and ARC have alleged that the tribal official Defendants are each engaged in an  
28 ongoing violation of federal law (i.e. prosecuting or presiding over the Tribal Court action) in their

1 official capacities. Moreover, BPA and ARC seek only prospective, injunctive relief. Under these  
2 circumstances, this Court possesses jurisdiction to grant an injunction forbidding this conduct  
3 under the *Ex parte Young* doctrine. See *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d  
4 1085, 1092 (9th Cir. 2007) (holding that federal district courts have jurisdiction over claims that  
5 tribal officials are acting or may act in violation of federal law, notwithstanding tribal sovereign  
6 immunity). Similarly, because BPA and ARC are not seeking damages, the Tribe itself and the  
7 Tribal Court similarly may not rely on tribal sovereign immunity. See *Comstock Oil & Gas, Inc.*  
8 *v. Ala. & Coushatta Indian Tribes*, 261 F.3d 567, 571 (5th Cir. 2001) (holding that “the Tribe ha[s]  
9 sovereign immunity from an award of damages only”).

10 Accordingly, based on this authority—and the cases cited and arguments made in the  
11 response to the motions to dismiss—this Court has jurisdiction, and can grant the preliminary  
12 injunction requested by BPA and ARC.

## 13 **II. THE PRELIMINARY INJUNCTION SHOULD BE GRANTED.**

14 Assured of its jurisdiction, the Court can and should grant the PI Motion. Under well-  
15 settled law, a tribal court cannot exercise civil jurisdiction over a non-Indian defendant that has  
16 not acted within the boundaries of the tribe’s reservation. Because Defendants do not allege that  
17 BPA and ARC engaged in any relevant conduct on the Tribe’s reservation, the Tribal Court has  
18 no subject-matter jurisdiction over those claims. BPA and ARC are thus likely to succeed on the  
19 merits of their claims in this Court, and no Defendant has made any argument in response to BPA  
20 and ARC’s arguments regarding any of the other requirements for a preliminary injunction.

### 21 **A. BPA and ARC Will Succeed on the Merits.**

22 As discussed in detail in the response to the motions to dismiss (at pages 11-29), the Tribe  
23 in this case espouses an unprecedented theory of tribal jurisdiction: that a tribal court may exercise  
24 jurisdiction over claims asserted against a non-Indian defendant that did not arise from the  
25 defendant’s conduct on the reservation, but rather from off-reservation conduct allegedly causing  
26 on-reservation harm. The Tribe cannot point to a single case blessing such an expansive view of  
27  
28

1 tribal court jurisdiction. To the contrary, the Supreme Court and many federal courts have  
2 repeatedly recognized that the power of tribal courts is cabined by geography; if a defendant did  
3 not act on the reservation, then the court has no jurisdiction. *See Plains Commerce Bank v. Long*  
4 *Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (tribal sovereignty “centers on the land held  
5 by the tribe and on tribal members within the reservation”); *Philip Morris USA, Inc. v. King*  
6 *Mountain Tobacco Co., Inc.*, 569 F.3d 932, 938 (9th Cir. 2009) (“The jurisdiction of tribal courts  
7 does not extend beyond tribal boundaries.”); *A&A Concrete, Inc. v. White Mountain Apache Tribe*,  
8 781 F.2d 1411, 1415-16 (9th Cir. 1986) (“[T]ribal courts have inherent power to adjudicate civil  
9 disputes affecting the interests of Indians and non-Indians *which are based upon events occurring*  
10 *on the reservation.*”) (emphasis added); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782 n.42 (7th  
11 Cir. 2014) (“The question of a tribal court’s subject-matter jurisdiction over a nonmember [] is  
12 tethered to the nonmember’s actions, specifically *the nonmember’s actions on the tribal land.*”)  
13 (emphasis added); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th  
14 Cir. 1998) (no Supreme Court case “purports to allow Indian tribes to exercise civil jurisdiction  
15 over the activities or conduct of non-Indians occurring *outside their reservations*”) (emphasis in  
16 original).

17 Confronted with the geographical limitations on its power, the Tribe tries to argue that its  
18 allegations in Tribal Court did include a claim that BPA and ARC acted on the reservation. To  
19 support this assertion, though, it can point only to paragraphs alleging generic conduct “near and  
20 around [the Tribe’s] property,” and it even attempts to recast an allegation that BPA and ARC did  
21 not seek consent for storing materials on the reservation into an affirmative statement that they  
22 *actually did* store materials on the reservation. That is not a fair reading of the Tribal Court  
23 complaint. Defendants are thus left with a broad theory of tribal court jurisdiction unsupported by  
24 authority.

25 Because Defendants can point to no supporting authority, BPA and ARC are likely to  
26 succeed on their claim that the Tribal Court lacks jurisdiction over the Tribe’s claims. Indeed,  
27 there is not even a colorable or plausible basis for tribal court jurisdiction in this case. *See Evans*  
28

1 v. *Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1302 (9th Cir. 2013). BPA and  
2 ARC are thus not required to exhaust their remedies in Tribal Court before this Court may rule.  
3 *See also Philip Morris*, 569 F.3d at 945 (excusing the exhaustion requirement because the tribal  
4 court “has no colorable claim to jurisdiction over this dispute”).

5 Exhaustion also is not required here for two additional reasons. First, the Tribe’s claims  
6 are subject to exclusive federal-court jurisdiction under 42 U.S.C. § 9613(b) of CERCLA (MTD  
7 response at 21-28), and so tribal court jurisdiction would contravene the express jurisdictional  
8 prohibition in that statute. Additionally, because the Tribe failed to properly serve BPA and ARC  
9 with process, the Tribal Court plainly lacks jurisdiction over them. (*See* PI Motion at 20-21; MTD  
10 Response at 28-29.)

11 BPA and ARC are likely to prevail on the merits, and so the first requirement of a  
12 preliminary injunction is met here.

13 **B. Defendants Make No Arguments Regarding the Other Elements of a**  
14 **Preliminary Injunction, and Thus Concede Those Elements.**

15 Tellingly, no Defendant addresses any element of injunctive relief other than likelihood of  
16 success on the merits. (*See* ECF Nos. 42, 52, 54.) Thus Defendants do not dispute that (1) BPA  
17 and ARC will suffer irreparable harm absent the injunction, (2) the balance of hardships here favors  
18 BPA and ARC, and (3) the public interest favors granting the injunction. Because Defendants  
19 have failed to argue these points, the Court should treat them as conceded. *See* D. Nev. LR 7-2(d);  
20 *see also Nelson v. Pengilly*, 2016 WL 6106721, at \*2 n.14 (D. Nev. Oct. 18, 2016) (under Local  
21 Rule 7-2(d), failure to respond to an argument made in a motion operates as a concession of that  
22 argument).<sup>1</sup> In any event, for the reasons BPA and ARC have already identified, this litigation is  
23 precisely the sort for which preliminary injunctive relief is most warranted.

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27 <sup>1</sup> Similarly, Defendants have not opposed BPA and ARC’s request that this Court resolve this  
28 motion on an expedited basis.

**CONCLUSION**

For these reasons and those stated in the PI Motion, the Court should grant the preliminary injunction requested by BPA and ARC.

DATED: December 14, 2017

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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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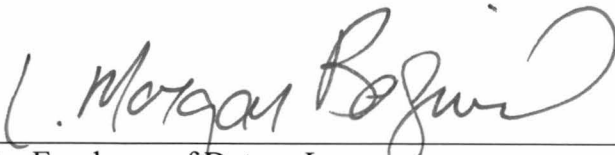
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