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

11 BP AMERICA INC., and ATLANTIC
 RICHFIELD COMPANY,

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

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 13 Plaintiffs,

**DEFENDANT SANDRA-MAE PICKENS'
 REPLY IN SUPPORT OF MOTION TO
 DISMISS PLAINTIFFS' AMENDED
 COMPLAINT**

14 vs.

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

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 24 Defendants.

25 Defendant Sandra-Mae Pickens, by and through her counsel, Laxalt & Nomura, Ltd., submits
 26 this Reply in support of her Motion to Dismiss Plaintiffs' Amended Complaint. Judge Pickens bases
 27 this Reply on the following Memorandum of Points and Authorities, the pleadings and papers on file,
 and any additional information the Court may consider.

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MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION

Plaintiffs BP America Inc. and Atlantic Richfield Company's (collectively "Plaintiffs") Amended Complaint seeking prospective injunctive relief against Judge Pickens must be dismissed and nothing in Plaintiffs' Response alters this legal reality. Plaintiffs do not identify or allege any facts demonstrating an ongoing violation of federal law by Judge Pickens. As a matter of law, Judge Pickens is within her authority to determine whether jurisdiction is proper and to regulate the proceedings governing that determination. Therefore, *Ex Parte Young*, 209 U.S. 123 (1908), has no application. Plaintiffs' Response also fails to show the Tribal Court plainly lacks jurisdiction over the tribal court action. Accepting the factual allegations in the tribal court action as true, which include allegations of conduct on the Tribe's land, a colorable basis for jurisdiction exists on the face of the tribal court complaint. Plaintiffs' attempt to summarily disregard these allegations does not alter their existence. The law therefore directs that Plaintiffs first exhaust their tribal court remedies before proceeding with this action.¹

II. LEGAL ARGUMENT

A. Plaintiffs identify no conduct by Judge Pickens that is an ongoing violation of federal law and therefore *Ex Parte Young* has no application.

Under *Ex Parte Young* and its progeny, Plaintiffs' claims against Judge Pickens in her official capacity may proceed only where Plaintiffs' Amended Complaint sets forth facts showing "an ongoing violation of federal law and seeks prospective relief." *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007). Based on this understanding of the law, Judge Pickens does not argue that federal courts are without authority to review a tribal court's exercise of jurisdiction, nor does she argue that tribal sovereign immunity bars all suits against tribal judges seeking prospective injunctive relief. Rather, it is Judge Pickens' position that tribal sovereign immunity bars Plaintiffs' claims because Plaintiffs do not meet their burden of alleging facts showing Judge Pickens acted in violation of federal law.

¹ Judge Pickens takes no position with respect to Plaintiffs' arguments premised upon CERCLA and service of process. Plaintiffs raised these same arguments in the motion to dismiss now pending before her. (See Notice of Motion and Motion to Dismiss for Lack of Jurisdiction, ECF No. 60-1.)

1 Nothing in Plaintiffs' Response changes this analysis. Rather than identify facts capable of
 2 supporting their burden, Plaintiffs maintain their assertion that *Ex Parte Young* applies because Judge
 3 Pickens "is the judge presiding over the Tribal Court action" and entered an order setting the briefing
 4 and hearing schedule with respect to Plaintiffs' pending motion to dismiss. (Am. Compl., ¶¶ 11, 28,
 5 ECF No. 37.) These allegations are incapable as a matter of law of supporting any application of *Ex*
 6 *Parte Young*. In *Vaughn*, the Ninth Circuit held mere allegations that one is responsible for exercising
 7 authority over a matter will not support an application of *Ex Parte Young*. 509 F.3d at 1093 ("Charles
 8 Vaughn, the Tribal Chairman, is responsible for exercising executive authority over the Tribe. BNSF
 9 has not alleged that Vaughn is in any way responsible for enforcing the tax. Therefore the *Ex Parte*
 10 *Young* exception does not apply to Vaughn") Plaintiffs' Response offers no contrary legal
 11 authority.

12 Judge Pickens' act of simply entering a scheduling order with respect to Plaintiffs' pending
 13 motion to dismiss for lack of subject matter jurisdiction does not support an application of *Ex Parte*
 14 *Young*. It is settled law that courts have jurisdiction to determine their own jurisdiction. In *Stoll v.*
 15 *Gottlieb*, 305 U.S. 165, 171-72 (1938), the United State Supreme Court made this plain:

16 A court does not have the power, by judicial fiat, to extend its jurisdiction over
 17 matters beyond the scope of the authority granted to it by its creators. There
 18 must be admitted, however, a power to interpret the language of the
 19 jurisdictional instrument and its application to an issue before the court.
 20 Where adversary parties appear, a court must have the power to determine
 whether or not it has jurisdiction of the person of a litigant, or whether its
 geographical jurisdiction covers the place of the occurrence under
 consideration. Every court in rendering a judgment, tacitly, if not expressly,
 determines its jurisdiction over the parties and the subject matter.

21 *See also United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("[I]t is familiar law that a federal court
 22 always has jurisdiction to determine its own jurisdiction."); *Steel Co. v. Citizens for a Better Env't*,
 23 523 U.S. 83, 94 (1998) ("[t]his question the court is bound to ask and answer for itself, even when not
 24 otherwise suggested, and without respect to the relation of the parties to it.");
 25 *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *Yanow v.*
 26 *Weyerhaeuser Steamship Co.*, 274 F.2d 274 (9th Cir., 1959).²

27 ² Courts are also expected to hear and decide the cases presented to them. *See Pierson v. Ray*,
 28 386 U.S. 547, 554 (1967) (it is a judge's duty to decide all cases within his jurisdiction that are
 brought before him"); *TPO, Inc. v. McMillen*, 460 F.2d 348, 358 (7th Cir. 1972) (issuing writ of

1 Because Judge Pickens possesses jurisdiction to determine her jurisdiction, it necessarily
2 follows she was acting within her jurisdiction when setting a briefing schedule on Plaintiffs' motion
3 to dismiss. Again, it is established law that courts have the inherent authority to manage the
4 proceedings before them and regulate the conduct of those appearing before the court. *See Chambers*
5 *v. NASCO, Inc.*, 501 U.S. 32, 46–50 (1991) (recognizing courts have “certain implied powers” that
6 are “governed not by rule or statute but by the control necessarily invested in courts to manage their
7 own affairs so as to achieve the orderly and expeditious disposition of cases”). Therefore, so long as
8 Judge Pickens does not rule on the merits of the Tribe’s claims before first determining her
9 jurisdiction to do so (if it even exists), she does not act in violation of federal law. To hold otherwise
10 would equate to a holding that this Court exceeds its jurisdiction by applying the Local Rules in cases
11 where there this Court’s jurisdiction is challenged. Such an argument is contrary to basic logic and
12 settled legal principles.

13 The law, therefore, is clear: Judge Pickens is not in violation of federal law by merely
14 presiding over the tribal court action and entering a briefing schedule with respect to Plaintiffs’
15 motion to dismiss. Plaintiffs cite no legal authority to the contrary. In those cases relied on by
16 Plaintiffs, the presiding tribal court took *substantive action* with respect to the merits of the
17 claims/issues before it. In *Crowe & Dunlevy, P.C. v. Stidham*, 609 F. Supp. 2d 1211, 1215 (N.D.
18 Okla. 2009), for example, the presiding tribal court judge entered an order directing the plaintiff law
19 firm to “return all attorneys' fees paid from the Thlopthlocco Treasury with proof of repayment.” In
20 *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1134 (9th Cir. 1995), the Navajo Nation Supreme
21 Court found it possessed jurisdiction over the dispute and entered a decision on the merits. In *Salt*
22 *River Project Agr. Imp. & Power Dist. v. Lee*, No. CV-08-08028-PCT-JAT, 2013 WL 321884, at *2
23 (D. Ariz. Jan. 28, 2013), the Navajo Nation Supreme Court ruled on the merits of claims, holding that
24 the Navajo Preferences in Employment Act applied to the plaintiff. In *Anderson v. Duran*, 70 F.
25 Supp. 3d 1143, 1154 (N.D. Cal. 2014), the tribal court exercised its purported jurisdiction and entered
26 a TRO against the federal court plaintiff.

27 mandate regarding referral to magistrate judge and stating it is the “responsibility of judges to decide
28 the cases before them.”) Because Judge Pickens has jurisdiction to decide the issue of the tribal court
jurisdiction and is expected to decide the matter before her, it would be improper for her to readily
defer to another court to decide the issue.

1 Unlike the cases relied on by Plaintiffs, there is no indication or allegation Judge Pickens
2 exercised jurisdiction over the merits of the claims before her or made any determination with respect
3 to the Tribal Court's jurisdiction. Because Plaintiffs are unable to show Judge Pickens exceeded her
4 authority by doing nothing more than setting a briefing schedule, *Ex Parte Young* has no application
5 and Plaintiffs' present action fails against Judge Pickens.

6 **B. Jurisdiction over the tribal court action is colorable from the face of the tribal court
7 complaint and therefore Plaintiffs must first exhaust their tribal court remedies.**

8 "A federal court must give the tribal court a full opportunity to determine its own jurisdiction,
9 which includes exhausting opportunities for appellate review in tribal courts." *Boozer v. Wilder*, 381
10 F.3d 931, 935 (9th Cir. 2004) (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16–17 (1987)).
11 Where tribal subject matter jurisdiction is plausible on the face of the tribal court complaint, federal
12 district courts should first require nonmembers to exhaust their tribal court remedies before
13 entertaining a challenge to that jurisdiction. *See Id.*; *Evans v. Shoshone-Bannock Land Use Policy*
14 *Comm'n*, 736 F.3d 1298, 1302 (9th Cir. 2013); *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1131
15 n.1 (9th Cir. 2006). In assessing whether jurisdiction is colorable from the face of a tribal court
16 complaint, the U.S. Supreme Court has made clear that tribes have jurisdiction to regulate
17 nonmember activity within their borders "that directly affects the tribe's political integrity, economic
18 security, health, or welfare." *Montana v. United States*, 450 U.S. 566, 565 (1981).

19 Plaintiffs' Response does not dispute this is the state of the law. Plaintiffs instead contend
20 tribal court jurisdiction is not plausible on the face of the tribal court complaint and therefore
21 Plaintiffs need not exhaust their tribal court remedies before proceeding with this action. In support
22 of this position, Plaintiffs' sole argument is that tribal courts are without jurisdiction where the
23 conduct giving rise to the claims is alleged to have occurred somewhere other than tribal land.

24 Even accepting Plaintiffs' legal arguments with respect to *Montana* and its progeny as true,
25 Plaintiffs' Response fails to show jurisdiction is facially implausible based on the allegations in the
26 tribal court complaint. Directly contrary to Plaintiffs' assertions, the tribal court complaint contains
27 multiple allegations of conduct occurring on tribal land. Paragraph 8 of the tribal court complaint
28 alleges, "Metals, radioactive materials, and other toxic and hazardous substances have been and are
being release into the environment from the Defendants Mine Site, sections of which are on the
Plaintiff's property." (Tribal Complaint, ECF No 3-2.) Paragraph 26 states in relevant part that

1 “There is no safe way to dispose of toxic and hazardous substances in and around the Mine Site,
2 which is *located in part on*, and generally in direct proximity to, Plaintiff’s property.” (*Id.* (emphasis
3 added).) Paragraph 36 of the tribal court complaint states:

4 Defendants’ wrongful conduct as set forth above, including but not limited
5 Defendants’ intentional past, present and continuing acts and/or omissions,
6 resulting in Defendants’ *intentionally depositing onto* and/or intentionally
7 failing to remove and/or properly dispose of toxic and hazardous substances
8 and intentionally allowing toxic and hazardous substances to remain on
Plaintiff’s property, surrounding environment and community resulted in the
direct physical invasion of Plaintiffs property properties [sic] by toxic and
hazardous substances.

9 (*Id.* (emphasis added).)

10 The Supreme Court has generally stated subject matter jurisdiction is determined by the
11 allegations in the complaint, “not upon the facts as they may turn out, or by a decision of the merits.”
12 *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933). Therefore, in assessing whether
13 jurisdiction is colorable for purposes of determining whether Judge Pickens may rule on Plaintiffs’
14 motion to dismiss, her sole obligation is to examine the allegations in the tribal court complaint,
15 nothing more. Given the allegations identified above, tribal court complaint makes plain the Tribe is
16 alleging misconduct at the mine and that the mine is located, at least in part, on the Tribe’s property.
17 Furthermore, the Tribe alleges that Plaintiffs are engaging in intentional conduct on the Tribe’s
property by “intentionally depositing” hazardous substances thereupon.

18 Accepting the Tribe’s allegations of on reservation conduct as true, and without looking
19 beyond the complaint, the question then becomes whether the Tribe’s allegations are sufficient to
20 show Plaintiffs’ alleged misconduct “has some direct effect on the political integrity, the economic
21 security, or the health or welfare of the tribe.” *Montana*, 450 U.S. at 566. If the challenged conduct is
22 so severe that it might “imperil the subsistence’ of the tribal community” then jurisdiction is at least
23 plausible and Plaintiffs must first exhaust their tribal remedies. *Plains Commerce Bank v. Long*
Family Land & Cattle Co., Inc., 554 U.S. 316, 341 (2008).

24 As explained in Judge Pickens’ Motion, the case law indicates the alleged misconduct by
25 Plaintiffs, if true, might be sufficient to support the exercise of tribal court jurisdiction. As previously
26 stated, the Tribe alleges that Plaintiffs’ acts and/or omissions *caused* the environmental problems that
27 occurred on tribal land and to tribal members. These problems include contaminated groundwater the
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1 Tribe uses for drinking water and irrigation, hazardous dust that blows on tribal land, and damage to
2 the Tribe's wetlands and natural habitats. According to the allegation in the tribal court complaint,
3 Plaintiffs' actions potentially imperil the subsistence of the tribal community:

4 Toxic and hazardous substances have contaminated, and continue to
5 contaminate, soil sediment, air, water treatment facility waste, groundwater,
6 and surface water, so that Plaintiff is, and continues to be, exposed through
7 inhalation, dermal contact, absorption, consumption and ingestion. The
8 ongoing presence of toxic and hazardous substances has impacted Plaintiffs
9 property, and deprived Plaintiff of the free use and enjoyment of same.
10 Furthermore, these toxic and hazardous substances pose health risks and
11 threats including cancer, neurological damage, and kidney and liver damage,
12 as well as developmental behavior and learning problems. As a result of
13 Defendants' failure to properly remediate toxic and hazardous substances,
14 Tribal members are at risk of developing these and other serious latent
15 diseases, along with myriad other adverse medical conditions.

16 (Tribal Complaint, ¶ 22, ECF No 3-2.) Other courts have held allegations of similar misconduct
17 sufficient to support jurisdiction under the second *Montana* exception. *See FMC Corp. v. Tribes*, No.
18 4:14-CV-489-BLW, 2017 WL 4322393, at *11 (D. Idaho Sept. 28, 2017); *Elliott v. White Mountain*
19 *Apache Tribal Court*, 566 F.3d 842, 850 (9th Cir. 2009) (holding that allegations of the destruction of
20 millions of dollars of the tribe's natural resources was sufficient under *Montana*.)

21 Rather than address the sufficiency of the Tribe's allegations, Plaintiffs attempt to distinguish
22 the case relied on by Defendants by arguing that the cited case each involve allegations of on-
23 reservation conduct, which Plaintiffs assert is lacking here. As stated above, however, this assertion
24 is untrue. The Tribe's allegations, when viewed through the legal frame work of Defendants' cited
25 cases, therefore indicate there is at least a plausible basis for jurisdiction by the Tribal Court.
26 Consequently, Judge Pickens was under no obligation to *sua sponte* dismiss the tribal court complaint
27 and Plaintiffs must exhaust their tribal court remedies before proceeding with this action. Only then
28 can Judge Pickens fully assess whether or not the Tribe's allegations will ultimately prove sufficient
to sustain jurisdiction over the merits of the Tribe's claims.

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I certify that I am an employee of Laxalt & Nomura, Ltd. and not a party to, nor interested in, the within action; a true and correct copy of the foregoing *DEFENDANT SANDRA-MAE PICKENS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT* was filed electronically through the Court's CM/ECF electronic notice system to the attorneys associated with this case.

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DATED this 20th day of December, 2017.


KATHIE MARTIN