ROBERT A. DOTSON
Nevada Bar No. 5285
JILL I. GREINER
Nevada Bar No. 4276
Dotson Law
One East First Street, 16th Floor
Reno, NV 89501
Tel: 775.501.9400
Fax: 775.853.2916
rdotson@dotsonlaw.legal
jgreiner@dotsonlaw.legal

Kenzo Kawanabe – Admitted *Pro Hac Vice*
Adam Cohen – Admitted *Pro Hac Vice*
Constance L. Rogers – Admitted *Pro Hac Vice*
Jennifer S. Allen – Admitted *Pro Hac Vice*
Davis Graham & Stubbs LLP
1550 17th Street, Suite 500
Denver, CO 80202
Tel.: 303.892.9400
Fax: 303.893.1379
kenzo.kawanabe@dgslaw.com
adam.cohen@dgslaw.com
connie.rogers@dgslaw.com
jennifer.allen@dgslaw.com

Attorneys for Plaintiffs
BP America, Inc., and Atlantic Richfield Company

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BP AMERICA, INC., and ATLANTIC RICHFIELD COMPANY,

Plaintiffs,

v.

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-00588-LRH-WGC

PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT, OR FOR RELIEF FROM JUDGMENT

Plaintiffs BP America Inc. ("BPA") and Atlantic Richfield Company ("ARC") (collectively, "Plaintiffs") move under Fed. R. Civ. P. 59(e) to alter or amend the Court's July 26, 2018 Order dismissing the case, or, in the alternative, under Fed. R. Civ. P. 60(b) for relief from that Order. The Court's Order was based on the mistaken belief that there was no pending action in Yerington Paiute Tribal Court (the "Tribal Court") following the Tribal Court's dismissal of the case in that court on June 25, 2018. In fact, the Yerington Paiute Tribe (the "Tribe") re-filed its Tribal Court complaint (without modification) on June 29, 2018, but did not inform either the Plaintiffs or this Court of that development. Plaintiffs only learned of the re-filing of the Tribe's complaint (and thus the pendency of the Tribal Court action) when they received a date-stamped copy of it approximately one month later, on July 30, 2018.

Certificate of Conferral

While conferral is not required, counsel for BPA and ARC conferred with counsel for Defendants Yerington Paiute Tribe; Laurie 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 Elm, Linda Howard, Nate Landa, Delmar Stevens, and Cassie Roberts (in their official capacities as Yerington Paiute Tribal Council Members); Yerington Paiute Tribal Court; and Sandra-Mae Pickens (in her official capacity as Judge of the Yerington Paiute Tribal Court) ("Judge Pickens") (collectively, the "Defendants"). Counsel for the Tribe and Tribal Council Members oppose this Motion. Counsel for the Tribal Court and Judge Pickens informed counsel for BPA and ARC that they were unaware that the complaint had been re-filed in Tribal Court and have filed a correction with this Court. ECF No. 79.

INTRODUCTION

The Court should amend its Order dismissing the case as moot because the Order is based on inaccurate information about the status of proceedings against BPA and ARC in the Tribal Court. As outlined extensively in previous briefing, this case is about whether the Tribal Court can exercise jurisdiction over a lawsuit initiated by the Tribe against BPA and ARC regarding off-Reservation activities. On June 25, 2018, the Tribal Court dismissed (without prejudice) the Tribe's suit against BPA and ARC for insufficient service of process. This Court then dismissed

the present action as moot, reasoning that the relief sought by Plaintiffs had already been accomplished by the Tribal Court's order. ECF No. 78.

What the Defendants failed to mention in any of their filings or in discussions with counsel for BPA and ARC is that the Tribe had re-filed its complaint against BPA and ARC in Tribal Court within days of the Tribal Court's dismissal order. Except for the date and the case number, the re-filed complaint is a word-for-word duplicate of the Tribe's previous complaint. The fact that the exact same lawsuit (albeit now with a different Tribal Court case number) is presently pending against BPA and ARC in Tribal Court should materially change this Court's analysis with respect to mootness and warrants a reconsideration by the Court of its decision to dismiss the case. In short, new information that came to light only after issuance of the Order upends the Court's finding that "plaintiffs have failed to show any indication by the Tribe that it will refile the tribal litigation or that such tribal litigation would then not be dismissed by the Tribal Judge." ECF No. 78 at 2. Additionally, Plaintiffs should be given relief from the Judgment as it was based on admittedly incorrect statements by counsel for the Tribal Court and Judge Pickens, as well as a lack of candor from counsel for the Tribe and members of the Tribal Council, concerning the status of the Tribal Court action.

BACKGROUND

In August 2017, the Tribe filed a lawsuit against BPA and ARC in Tribal Court, alleging various tort claims and seeking substantial monetary damages allegedly arising out of off-Reservation conduct. *See* Declaration of Kenzo Kawanabe ¶ 3, filed herewith. On September 22, 2017, BPA and ARC initiated this lawsuit, seeking declaratory and injunctive relief against efforts by the Defendants to maintain, prosecute, or exercise jurisdiction over BPA and ARC in connection with the suit pending in Tribal Court. ECF No. 1. Since that time, the parties have submitted extensive briefing in response to Plaintiffs' Motion for Preliminary Injunction and Defendants' Motions to Dismiss.

On June 25, 2018, the Tribal Court dismissed the Tribe's suit for insufficient service of process. *See* Exhibit 1 to Declaration of Kenzo Kawanabe. Unbeknownst to BPA and ARC, the Tribe re-filed its complaint in Tribal Court four days later, on June 29, 2018, as evidenced by the

clerk of the Tribal Court's date-stamp and signature. *See* Exhibit 2 to Declaration of Kenzo Kawanabe. The re-filed complaint is an exact replica of the Tribe's original complaint except for the document date (June 28, 2018), and reflects an "e-signature" by counsel for the Tribe Austin Tighe.

On July 2, 2018, counsel for BPA and ARC first conferred with counsel for Defendants regarding a draft status report to be filed with this Court informing it of the Tribal Court's ruling. *See* Exhibit 3 to Declaration of Kenzo Kawanabe. On July 5, 2018, Mr. Kawanabe (counsel for BPA and ARC) asked Mr. Tighe (counsel for the Tribe) by email: "[D]oes the YPT intend to re-file in Tribal Court or any other court? If so, would you please give me an approximate timeframe?" *Id.*. Mr. Tighe responded, but did not answer the question about the Tribe's intent to re-file. *Id.* Mr. Kawanabe repeated his question in a subsequent email, asking "would you let me know where and when the Tribe intends to re-file?" *Id.* Mr. Tighe responded to that question in his next email (also dated July 5), stating: "As to your question, you'll be second to know." *Id.*

At the time of Mr. Tighe's response, the Tribe's second iteration of its complaint had already been on file with the Tribal Court for six days. BPA and ARC, however, had no way of knowing that. They had not yet been provided with the Tribe's complaint, Mr. Tighe said nothing about the re-filing when specifically asked, and the Tribal Court does not have an electronic or publicly available filing system. BPA and ARC reasonably relied on their communications with opposing counsel, who gave no indication of the re-filing and pendency of the Tribal Court action.

On July 9, 2018, BPA and ARC filed a supplement to their earlier status report notifying this Court of the Tribal Court's order dismissing the action. ECF No. 75. BPA and ARC argued that, despite the Tribal Court's ruling, this case was not moot because the Tribe could re-file at any time and because the voluntary cessation exception to mootness applied. *Id.* That same day, counsel for the Tribe and members of the Tribal Council filed their own supplemental status report, stating without elaboration that the Tribal Court's order mooted this action. ECF No. 76. The Tribe failed to mention it had already re-filed its complaint against BPA and ARC ten days

prior. On July 10, counsel for the Tribal Court and Judge Pickens also filed a supplemental status report. ECF No. 77. That status report went beyond the one filed by the Tribe and argued, with some detail, why this case was moot. The Tribal Court and Judge Pickens stated affirmatively: "There is no longer a lawsuit pending in the Tribal Court against BPA and ARC." ECF No. 77 at 3 n.1; *see also id.* at 2 (arguing that the case was moot because this Court should not render a judgment about "a case which is *not yet even pending* before the Tribal Court" (emphasis in original)); *id*. at 3 (again stating that a case "is *not even pending* in Tribal Court" (emphasis in original)). These statements were factually incorrect at the time they were made, as today's correction filed by Judge Pickens and the Tribal Court concedes. Even after the clerk of the Tribal Court issued summonses to both BPA and ARC on July 11, 2018, *see* Exhibits 4-5 to Declaration of Kenzo Kawanabe, none of the Defendants supplemented their status reports to inform the Court of the pendency of the Tribal Court action until today.

On Thursday, July 26, 2018, the Court issued its order dismissing this case as moot. ECF No. 78. In support of its finding, the Court explained that "even though that dismissal in Tribal Court was without prejudice, plaintiffs have failed to show any indication by the Tribe that it will refile the tribal litigation or that such tribal litigation would then not be dismissed by the Tribal Judge." *Id*. at 2. The very next Monday (July 30, 2018), the Tribe sent[1] BPA and ARC its month-old complaint. *See* Exhibits 6-7 to Declaration of Kenzo Kawanabe.

BPA and ARC respectfully request that the Court reconsider its Order based on the Defendants' failure to disclose material facts. Specifically, at the time they filed status reports with this Court, the Tribe had already re-filed its complaint against BPA and ARC in Tribal Court, and the Tribal Court had signed and dated the complaint (with the Tribal Court signing the summons one day later). The existence of a pending suit against BPA and ARC makes clear that this case is not moot and was not moot at the time of the Court's dismissal. Because the Court's Order was based on incorrect facts, it should be amended pursuant to Fed. R. Civ. P. 59(e). Plaintiffs are also entitled to relief from the judgment under Fed. R. Civ. 60(b) as it was

[1] BPA and ARC reserve all rights including, but not limited to, asserting insufficient service of process.

procured through Defendants' apparent concealment or incorrect statements.

LEGAL STANDARD

Fed. R. Civ. P. 59(e) gives the Court discretion to alter or amend its judgment. "In general, there are four basic grounds upon which" the Court may grant "a Rule 59(e) motion. . . : (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). "A district court has considerable discretion when considering a motion to amend a judgment under Rule 59(e)." *Turner v. Burlington N. Santa Fe R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003). Here, BPA and ARC move the Court to amend its judgment to correct manifest errors of law and fact, to present newly discovered evidence, and to prevent injustice.

Fed. R. Civ. P. 60(b) permits a Court to grant relief from a judgment due to "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud…, misrepresentation, or misconduct by an opposing party; … or (6) any other reason that justifies relief." For motions under Fed. R. Civ. P. 60(b)(3), "the moving party must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and the conduct complained of prevented the losing party from fully and fairly presenting the defense." *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004). "District courts have wide discretion to grant Rule 60(b) relief[.]" *Boddicker v. Esurance Inc.*, 770 F. Supp. 2d 1016, 1019 (D. S.D. 2011).

ARGUMENT

I. The Court's Order Is Based on an Error of Fact and Should Be Amended.

The Court's July 26, 2018 Order should be amended pursuant to Fed. R. Civ. P. 59(e) because it was based on inaccurate information, as shown by newly discovered evidence of the Tribe's decision to immediately re-file its complaint in Tribal Court. The Court found that "the

dismissal of the underlying tribal litigation moots the present action because plaintiffs' only requested relief in the present complaint is for dismissal of the tribal litigation." ECF No. 78 at 1. Moreover, "even though dismissal in Tribal Court was without prejudice, plaintiffs have failed to show any indication by the Tribe that it will refile the tribal litigation or that such tribal litigation would then not be dismissed by the Tribal Judge." *Id.* at 2. Both findings were premised on the assumption that no action was then pending in Tribal Court. It is now clear that assumption was wrong—the Tribe immediately re-filed its complaint and did so without informing Plaintiffs or the Court. Because there was and still is a pending case against BPA and ARC in Tribal Court, a live controversy exists between the parties over the scope of the Tribal Court's jurisdiction.

A case is only moot if "interim relief or events have eradicated the effects of the defendant's act or omission, and there is no reasonable expectation that the alleged violation will recur." *N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1352-53 (9th Cir. 1984). "Where the threatened harm still exists…the case remains alive and suitable for judicial determination." *Pub. Serv. Co. of Colo. v. Shoshone-Bannock Tribes*, 30 F.3d 1203, 1205 (9th Cir. 1994). There can be no question that the threatened harm to BPA and ARC still exists. The Tribe is actively suing BPA and ARC in Tribal Court on the exact same basis and with the same claims as the first suit.

The mere replacement of the first complaint with its exact duplicate does not render the underlying Tribal Court action moot. In *Pub. Serv. Co. of Colo.*, the plaintiff alleged that an ordinance passed by the Shoshone-Bannock Tribes was preempted by federal law. 30 F.3d at 1205. The tribe changed the law at issue and argued that that change rendered the federal case moot. *Id.* The court rejected that argument, explaining: "The Tribes have merely replaced one regulation alleged to be preempted by [federal statute] with another which is alleged to be similarly preempted." *Id.* This change did not render the case moot because "a specific controversy—whether or not the measures that the Tribes are currently taking to regulate the transportation of hazardous materials across the reservation are preempted by federal law—continues." *Id.* at 1205-06. The same logic applies here. The Tribe asserts the same claims on

the same facts in Tribal Court, and the exact same controversy over whether the Tribal Court has jurisdiction over BPA and ARC for activities beyond the Reservation boundary continues. "This is no abstract or hypothetical dispute, but a continuing, concrete disagreement between the parties." *Id.* at 1206.

In *Boxx v. Long Warrior*, the lower court amended a judgment based on similar facts. 265 F.3d 771, 773-74 (9th Cir. 2001). A proceeding was pending in tribal court, the defendants in tribal court sued in federal court to stop the tribal court proceeding, the tribal court dismissed the case for lack of jurisdiction, and the federal court dismissed its case as moot. *Id.* After the federal court's dismissal, the plaintiff in tribal court appealed the decision of the tribal court and, on that basis, the plaintiff in federal court moved to amend the federal court's dismissal of the action as moot. *Id.* The federal court unsurprisingly granted that motion and amended the judgment. *Id.* Similarly here, new information about the factual circumstances surrounding the litigation in Tribal Court merits a reversal of the previous order dismissing this case as moot. *See also Verizon South, Inc. v. Owle*, No. CIV. 2:06CV29, 2006 WL 3833448, *1 (W.D.N.C. 2006) ("[I]f the status of that [tribal court] action changes, the Plaintiff may renew the motion [for preliminary injunction].").

II. Amending the Judgment Is Necessary to Prevent Prejudice.

Amending the judgment to allow the case to continue would prevent prejudice to Plaintiffs and avoid a needless waste of judicial resources. The complaint filed in June 2018 is identical in substance to the complaint filed in August 2017, and the parties have already extensively briefed the issues raised by that complaint. The only difference is the manner of service, which can be dealt with by allowing supplemental briefing on that issue. Forcing BPA and ARC to initiate another lawsuit and re-brief the same issues will only delay the relief sought and impose unnecessary costs on all parties. This case is ripe for resolution on the current record and BPA and ARC urge that resolution should go forward now.

III. The Court's Order Was Based on Opposing Counsel's Apparent Lack of Candor and Incorrect Statements.

BPA and ARC are also entitled to relief from the judgment under Fed. R. Civ. P. 60(b)

because the Defendants either failed to disclose material facts or made incorrect statements to BPA, ARC, and this Court. Counsel for Judge Pickens and the Tribal Court, not knowing themselves that the Tribe had refiled its complaint on June 29, 2018, conceded as much in the correction they filed today. Defendants prevented BPA and ARC from presenting vital facts regarding the question of mootness and prevented the Court from fairly evaluating the issue.

In *Schrebier Foods, Inc. v. Beatrice Cheese, Inc.*, the court affirmed the lower court's decision to grant a motion under Fed. R. Civ. P. 60(b)(3) because counsel withheld important information about the status of a patent at issue in the litigation. 402 F.3d 1198 (Fed. Cir. 2005). In ordering a new trial, the court examined the prejudice to the other party, concluding that, had the opposing party known about the status of the patents, "it would have had strong argument that the [] patent was unenforceable and that the damages should have been reduced." *Id.* at 1205; *see also Boddicker*, 770 F. Supp. 2d at 1021 (granting a Rule 60(b)(3) motion because defendant's "misrepresentation or fraud prevented [plaintiff] from fully and fairly presenting his case and further prevented the court from fully and fairly deciding the COBRA claim."). BPA and ARC have been prejudiced in a similar manner.

CONCLUSION

BPA and ARC respectfully request that the Court alter or amend its judgment under Rule 59(e) to find that this case presents a live controversy and is not moot, or alternatively provide relief from the judgment under Rule 60(b) due to the incorrect representations of opposing counsel. The Court should grant such other relief as it deems appropriate, given the need for this Motion derives solely from the Tribe's failure to timely inform the Court and Plaintiffs of, and Judge Pickens' and the Tribal Court's incorrect statements about, the re-filing of the Tribal Court complaint and pendency of the Tribal Court action.

Respectfully submitted,

DATED: August 13, 2018

DOTSON LAW

By: *s/Robert A. Dotson*
Robert A. Dotson (SBN 5285)
Jill I. Greiner (SBN 4276)
One East First Street
City Hall Tower, Suite 1600
Reno, NV 89501
Tel: 775.501.9400
rdotson@dotsonlaw.legal
jgreiner@dotsonlaw.legal

and

DAVIS GRAHAM & STUBBS LLP

By: *s/Kenzo S. Kawanabe*
Adam S. Cohen
Kenzo S. Kawanabe
Constance L. Rogers
Jennifer S. Allen
1550 17th Street, Suite 500
Denver, CO 80202
Tel: 303.892.9400
Fax: 303.893.1379
adam.cohen@dgslaw.com
kenzo.kawanabe@dgslaw.com
connie.rogers@dgslaw.com
jennifer.allen@dgslaw.com

Attorneys for Plaintiffs BP America Inc., and Atlantic Richfield Company

CERTIFICATE OF SERVICE

Pursuant to F.R.C.P. 5(b) and Section IV of the District of Nevada Electronic Filing Procedures, I hereby certify that I am an employee of Davis Graham & Stubbs LLP, and that on this 13th day of August, 2018 the foregoing **PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT, OR FOR RELIEF FROM JUDGMENT** was filed and served via CM/ECF upon the following:

Daniel T. Hayward
Ryan W. Leary
Laxalt & Nomura Ltd.
9790 Gateway Drive, Suite 200
Reno, NV 89521
Tel.: 775.322.1170
Fax: 775.322.1865
dhayward@laxalt-nomura.com
rleary@laxalt-nomura.com

Attorneys for Sandra-Mae Pickens

Charles R. Zeh
Law Offices of Charles R. Zeh
575 Forest Street, Suite 200
Reno, NV 89509
Tel.: 775.323.5700
Fax: 775.897.8183
crzeh@aol.com

Attorney for Yerington Paiute Tribal Court

Michael Angelovich, Esq.
Austin Tighe, Esq.
NIX, PATTERSON & ROACH, LLP
3600 N. Capital of Texas Highway
Suite 350
Austin, TX 78746
Tel.: 512.328.5333
Fax: 512.328.5335
mangelovich@nixlaw.com
atighe@nixlaw.com

Attorneys for Yerington Paiute Tribe, Laurie A. Thom, Albert Roberts, Elwood Emm, Linda Howard, Nate Landa, Delmar Stevens, and Cassie Roberts

Robert F. Saint-Aubin, Esq.
Saint-Aubin Chtd.
3753 Howard Hughes Parkway
Suite 200
Las Vegas, NV 89169
Tel.: 702.985.2400
Fax: 949.496.5075
rfsaint@me.com

Attorneys for Yerington Paiute Tribe, Laurie A. Thom, Albert Roberts, Elwood Emm, Linda Howard, Nate Landa, Delmar Stevens, and Cassie Roberts

s/ Melissa Kemp
an Employee of Davis Graham & Stubbs LLP