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11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13 BP AMERICA INC., and ATLANTIC)
14 RICHFIELD COMPANY,)
15)
16 Plaintiffs,)

17 v.)

18 YERINGTON PAIUTE TRIBE, et al.,)
19)
20 Defendants.)

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

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION TO ALTER OR
AMEND JUDGMENT, OR FOR RELIEF
FROM JUDGMENT (ECF NO.80)**

21
22 Defendants Yerington Paiute Tribe; Laurie A. Thom, in her official as Chairman of the
23 Yerington Paiute Tribe; Albert Roberts, in his official capacity as Vice Chairman of the
24 Yerington Paiute Tribe; and Elwood Emm, Linda Howard, Nate Landa, Delmar Stevens, and
25 Cassie Roberts, in their official capacities as Yerington Tribal Council Members (collectively,
26 the "Tribe"), file this Response to Plaintiffs' (herein "BP") Motion to Alter or Amend Judgment,
27 or for Relief from Judgment (ECF No. 80, herein "Motion). This Response is based on the
28 following points and the pleadings and papers on file in this matter. Finally, in filing this

1 Response, the Tribe does not waive, and expressly reserve, their sovereign immunity and all
2 rights and defenses attendant thereto, as well as all defenses to this Court’s jurisdiction. The
3 Tribe therefore would respectfully show as follows:

4 1. BP’s Motion should be denied. This Court held in its dismissal Order, “[BP] ha[s]
5 failed to show any indication that the Tribe will refile the tribal litigation *or that such tribal*
6 *litigation would then not be dismissed by the Tribal Judge.*” ECF No. 78, at 2:4-7, emphasis
7 added. The highlighted portion of that sentence remains as true today as when it was written.
8 BP’s present Motion focuses only upon the fact that the tribal litigation has been refiled—a fact
9 contemplated by both courts and all parties since the Tribal Judge entered her dismissal order—
10 and fails to discuss, let alone show, any indication that the refiled tribal litigation will not be
11 dismissed by the Tribal Judge.

12 2. The Tribal Judge could rule at any time on her jurisdiction because the refiled tribal
13 litigation is identical to the prior litigation in that court. As BP told this Court in its present
14 Motion, the tribal court “complaint filed in June 2018 is identical in substance to the complaint
15 filed in August 2017.” ECF No. 80, at 8:19-20. Also, as BP told this Court in its present
16 Motion, “the parties have already extensively briefed the issues raised by that complaint.” *Id.*

17 3. Accordingly, BP filed a motion to dismiss the refiled tribal court complaint on August
18 17. That motion is substantively identical to its motion to dismiss the original complaint, except
19 for a one-paragraph argument that the refiled tribal litigation was not legally served. BP moves
20 the Tribal Judge to dismiss due to inadequate service (the ground upon which she dismissed the
21 original complaint), as well as lack of personal and subject matter jurisdiction (the two grounds
22 not ruled upon in her prior dismissal order). The Tribal Judge may dismiss the refiled complaint
23 on any of those grounds.

24 4. Three business days later, the Tribe filed its response to BP’s motion to dismiss the
25 refiled tribal court complaint. The Tribe’s response simply attached and fully incorporated its
26 response to BP’s motion to dismiss the original complaint, and addressed in one paragraph BP’s
27 argument challenging the legality of service. *See* Exhibit 1.

28 5. The Tribe strongly agrees with BP’s statement that “[t]his case is ripe for resolution
on the current record...” ECF No. 80, at 8:24-25. The Tribal Judge can immediately decide
whether she has jurisdiction and, because the doctrine of exhaustion of tribal court remedies
applies, should do so in the first instance.

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2 6. At bottom, BP’s present Motion before this Court fails to show any indication that the
3 pending tribal litigation will not be dismissed by the Tribal Judge. Because that failure was one
4 of the bases for this Court’s dismissing BP’s case as moot, this Court should deny BP’s present
5 Motion.

6 7. Tellingly, BP doesn’t even try to show any such indication. Instead, it dramatically
7 impugns both the Tribe and the undersigned, accusing the Tribe of “failure to timely inform the
8 Court” that the tribal litigation was refiled.

9 8. The refiling of the tribal litigation was of no legal effect. Says who? Both BP in its
10 repeated filings in both this Court and tribal court and, most notably, the Tribal Judge in her
11 dismissal order: Without proper service of a summons along with a complaint pursuant to the
12 strictures of the Nevada Rules of Civil Procedure, there is no jurisdiction over a defendant by the
13 tribal court. Hence, the refiling of the tribal litigation was of no legal effect unless and until such
14 service was effected.

15 9. That service was effected on July 30—three weeks after the undersigned filed the
16 Tribe’s Status Report with this Court (ECF No. 76), and four days after this Court dismissed
17 BP’s case (ECF No. 78). *See* Motion, BP Ex. 6-7. It remains the undersigned’s belief—based
18 on BP’s position and the Tribal Judge’s dismissal order—that there was no refiled tribal
19 litigation until said service was effected. BP’s present position in tribal court is that there is *still*
20 no refiled tribal litigation because BP can never be served by the Tribe in that court on these
21 claims, and therefore the case should be dismissed again. As well, having already won the last
22 motion to dismiss in tribal court and with another one already pending, BP’s harried cries of
23 injustice are all the more “curious”.

24 10. In impugning the Tribe and its counsel, BP directs this Court’s attention to a series of
25 email exchanges between counsel. But it fails to include the entire conversation. On August 13,
26 *before* BP filed its present Motion, the undersigned emailed BP’s counsel that, as promised, he
27 was the second to know about the refiled tribal litigation; second only to BP’s registered agent
28 for service. *See* Exhibit 2. That same August 13 email—again, sent *before* BP filed its present
Motion and never responded to—explained to BP’s counsel why he was not notified of the
complaint prior to service:

1 “I would have offered to send you a copy of the tribal court lawsuit, but your clients were
2 adamant last time that they would not accept same. We offered to work with you on
3 service, and your clients refused. Given your clients’ historical position on service and
4 pursuant to the express language of the tribal court’s most recent order, I had no choice
5 but to follow formal procedure. Seems ironic (at best) that you are now complaining that
6 I did so.”

7 *Id.*

8 11. Nevertheless, despite this explanation, and notwithstanding BP’s counsel’s prior and
9 present insistence that there is no valid tribal court action without proper service, much ado is
10 now made about “timely informing”, and being “second to know”, as if something nefarious is
11 afoot. All because (1) previously, BP’s July 9 Status Report arguing against mootness was
12 unpersuasive, despite expressly contemplating that the “Tribe could re-file at any time” (ECF
13 No.75); and (2) presently, BP still cannot refute the second stated basis for this Court dismissing
14 BP’s case as moot. The undersigned continues to disagree with BP’s assertion in counsel’s email
15 exhibits that, had this Court known that the tribal court complaint had been refiled before July
16 26, “the [dismissal] ruling would presumably have been different.” That bold assertion is belied
17 by this Court’s holding that “[BP] ha[s] failed to show any indication that the Tribe will refile the
18 tribal litigation *or that such tribal litigation would then not be dismissed by the Tribal Judge.*”
19 ECF No. 78, at 2:4-7, emphasis added.

20 12. The Tribal Judge has already ruled on jurisdiction once, and BP won. BP’s present
21 Motion before this Court fails to show any indication that the pending tribal litigation will not be
22 dismissed by the Tribal Judge, just as she did last time. Because BP’s failure was one of the
23 bases for this Court dismissing BP’s case as moot, this Court should deny BP’s present Motion.
24 Moreover, as BP itself has stated, “[t]his case is ripe for resolution on the current record...” ECF
25 No. 80, at 8:24-25. That statement is as true in tribal court as it is here. The Tribal Judge can
26 immediately decide whether she has jurisdiction and, because the doctrine of exhaustion of tribal
27 court remedies would have applied in this case, should be permitted to do so in the first instance.

28 13. In sum, this Court properly dismissed BP’s case as moot on multiple grounds. The
fact that there existed a filed, but not properly served—and therefore, according to BP and the
Tribal Judge, legally ineffective—tribal court complaint when this Court ruled, does not entirely
negate that ruling. To wit, there remains zero indication from BP that the refiled tribal litigation
will not be dismissed, again, by the Tribal Judge.

1 WHEREFORE, The Tribe respectfully requests that this Court deny Plaintiffs' Motion to
2 Alter or Amend Judgment, or for Relief from Judgment, in its entirety.

3 DATED: August 27, 2018.

4 Respectfully submitted,

5
6 By: /s/ Austin Tighe
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18 *Laurie A. Thom, in her official as Chairman of the*
19 *Yerington Paiute Tribe; Albert Roberts, in his*
20 *official capacity as Vice Chairman of the Yerington*
21 *Paiute Tribe; and Elwood Emm, Linda Howard,*
22 *Nate Landa, Delmar Stevens, and Cassie Roberts,*
23 *in their official capacities as Yerington Tribal*
24 *Council Members*

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT, OR FOR RELIEF FROM JUDGMENT (ECF NO.80)**, was made through the court's electronic filing and notice system (CM/ECF) or, as appropriate, by first class mail, addressed to the following on August 27, 2018.

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/s/ Austin Tighe
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INDEX OF EXHIBITS

Exhibit 1: The Tribe's Response to BP's Motion to Dismiss Refiled Tribal Court Complaint

Exhibit 2: August 13 email correspondence from Tribe's counsel to BP's counsel

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EXHIBIT 1:

The Tribe's Response to BP's Motion to Dismiss Refiled Tribal Court Complaint



Austin Tighe
Of Counsel
atighe@nixlaw.com

August 22, 2018

Via Federal Express

Shelley Cunningham
Clerk and Administrative Secretary
Yerington Paiute Tribal Court
171 Campbell Lane
Yerington, NV 89447
775-783-0200

Re: Case No. YCV 13-18; Yerington Paiute Tribe v. BP America and Atlantic Richfield Company; Yerington Paiute Tribal Court

Dear Ms. Cunningham,

Enclosed for filing in the above-referenced matter is Plaintiff's Response to Defendants' Motion to Dismiss, which they filed last week.

I have enclosed a self-addressed stamped envelope, and respectfully request that you return a file-stamped copy of the filing to me at your convenience.

Should you have any questions or require additional information, please email me at atighe@nixlaw.com or call me at 512-328-5333.

Sincerely,

A handwritten signature in black ink, appearing to read "Austin Tighe", is written over a large, stylized flourish or scribble.

Austin Tighe

cc: All Counsel of Record



1 **Case Number: YCV 13-18**

2
3 **YERINGTON PAIUTE TRIBAL COURT**

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8 YERINGTON PAIUTE TRIBE,

9 Plaintiff,

**PLAINTIFF’S RESPONSE TO
DEFENDANTS’ MOTION TO
DISMISS**

10 -vs-

11 BP AMERICA, INC., and
12 ATLANTIC RICHFIELD COMPANY,

13 Defendants.

14 **PLAINTIFF’S RESPONSE TO DEFENDANTS’ MOTION TO DISMISS**

15 Plaintiff Yerington Paiute Tribe, by its attorneys, files this Response to Defendants’ BP
16 America, Inc., and Atlantic Richfield Company (herein collectively “BP”) Motion to Dismiss,
17 and Memorandum of Points and Authorities in Support thereof, dated August 17, 2018, and
18 would respectfully show as follows:
19

- 20 1. As its Response, Plaintiff fully incorporates by reference, in its entirety, Exhibit “A”.
- 21 2. As to the one new dismissal argument made in this case by Defendants: Plaintiff served
22 the summons and Complaint in this case in a manner recognized by the Nevada Rules
23 of Civil. Defendants nevertheless claim service of process was invalid because the
24 Tribe simply cannot, under any circumstances, serve anyone outside the boundaries of
25 its reservation. *See* Motion to Dismiss, p. 24.
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3. However, this Court held in its June 24 Order as follows: “The Court concludes that service of process in accordance with any of the available avenues listed in NRCP 4 presumptively comport with due process.”

WHEREFORE, Plaintiff hereby respectfully requests that this Court deny Defendants’ Motion to Dismiss in its entirety, and grant whatever other relief, in law or equity, it deems just.

DATED this 22nd day of August, 2018.

By: 

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YERINGTON PAIUTE TRIBE

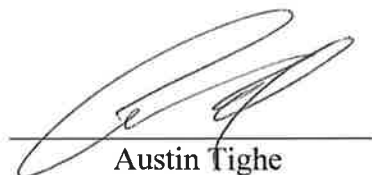
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CERTIFICATE OF SERVICE

I certify that on August 22, 2017, a true and correct copy of the foregoing document was served via **First Class U.S. mail** on counsel for Defendants BP America, Inc., and Atlantic Richfield Company:

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Case Number: YCV 10-17

YERINGTON PAIUTE TRIBAL COURT

YERINGTON PAIUTE TRIBE,

Plaintiff,

-vs-

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO
DISMISS**

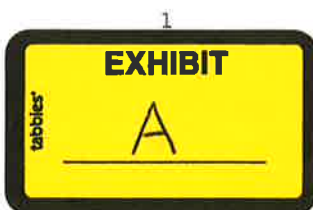
**BP AMERICA, INC., and
ATLANTIC RICHFIELD COMPANY,**

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Yerington Paiute Tribe, by its attorneys, files this Response to Defendants' BP America, Inc., and Atlantic Richfield Company (herein collectively "BP") Motion to Dismiss, including its Memorandum of Points and Authorities in Support of this Response, and would respectfully show as follows:

BP's challenge to this Court's subject matter jurisdiction (Motion, Section I) is founded on a false premise: That the Tribe does "not allege any offensive conduct by Defendants on the Tribe's Reservation." Motion, p. 1. That is not true. The Tribe alleges both conduct, and claims arising, on the Reservation. BP's challenge to personal jurisdiction (Motion, Section II) fails because under the Tribal Code, BP has conclusively consented to this Court's jurisdiction. Furthermore, there are no specific requirements for the method of service of a complaint under the



1 Environmental Office, and showed evidence of hazardous materials. As to the Wabuska Drain,
2 cited in ¶ 9 of the Tribal Court Complaint, that Drain is on the reservation; indisputably carried
3 hazardous waste; originated on the Mine Site controlled by BP; was used for point source discharge
4 beginning in at least 1984, with its return point at or near where the toxic water ponds are located;
5 and was realigned by BP for discharge from the Mine Site through the reservation as late as 2001.
6 These on-reservation activities, evidence of which will be further presented at the hearing
7 scheduled by this Court for January 30, 2018, give rise to this Court's subject matter jurisdiction.
8

9
10 Additionally, the Tribe's Complaint alleges that its claims arose on tribal land, even if BP
11 had not conducted the aforementioned activity on Tribal lands, because pollution and
12 contamination from the Mine Site have been and continue to be found in the Tribe's groundwater,
13 surface water, and soil. *See* Complaint, ¶¶ 8-10, 13, 19-22. BP cites three cases, two arising from
14 the same facts, for the proposition that off-reservation conduct causing adverse effects on tribal
15 land cannot support tribal court jurisdiction. Motion, pp. 11-12. Assuming, *arguendo*, that some
16 of the conduct complained of by the Tribe was "off-Reservation", none of the three cases cited by
17 BP irrefutably foreclose tribal court jurisdiction. In other words, pollution that arose off-
18 Reservation but irrefutably ended up on-Reservation gives rise to this Court's subject matter
19 jurisdiction, and BP cites no authority to the contrary.
20
21

22 BP's primary citation in support of its argument is *UNC Resources, Inc. v. Benally*, 514 F.
23 Supp. 358 (D.N.M. 1981). But *Benally* is distinguishable from the Tribe's case because "all of the
24 land affected [was] outside the boundaries of the reservation", and instead was a "checkerboard
25 area of mixed federal, state, and tribal jurisdiction adjoining the reservation proper". *Id.* at 360.
26 As such, BP's citation to *Benally* for the proposition that tribal court jurisdiction "stops at the
27 reservation boundary" is understandable, but ultimately irrelevant to the facts of *this* case. In
28

1 reservation. *Id.* at 1074-75.

2 In sum, BP concedes that this Court **does** have jurisdiction for conduct that occurs within
3 the boundaries of tribal land. Here, the Tribe *has* asserted conduct within the boundaries of its
4 tribal land by BP and its predecessors. Furthermore, the Tribe has asserted that certain of its
5 contamination *claims* arose on tribal land, even if certain of BP's *conduct* was arguably "off-
6 reservation". As such, this Court has subject matter jurisdiction.

7
8 BP's corollary argument on subject matter jurisdiction and "on-Reservation" is that even
9 if it had engaged in on-Reservation activity, this Court would still not have jurisdiction because
10 BP is not a member of the Tribe, and no exception applies to the rule that Tribal Courts cannot
11 exercise subject matter jurisdiction over nonmembers. Motion, p.12. BP argues that the general
12 rule in *Montana v. United States*, 450 U.S. 544 (1981) controls in this case, and that neither of the
13 two exceptions to *Montana* apply. In *Montana*, the Supreme Court stated that generally, a tribal
14 court's jurisdiction does not extend to the conduct of non-Indians on non-Indian land, with two
15 exceptions: (1) where there is a consensual relationship through commercial dealings, or (2) when
16 the non-Indian's conduct relating to non-Indian land "threatens or has some direct effect on the
17 political integrity, the economic security, or the health and welfare of the tribe." *Id.* at 565-566.

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20 However, in the Ninth Circuit, *Montana's* exceptions are not a prerequisite to tribal court
21 jurisdiction if the claims arise *on* tribal land. In the Ninth Circuit, tribes have jurisdiction over
22 non-Indian conduct on tribal land, irrespective of *Montana*. See *Water Wheel Camp Recreational*
23 *Area, Inc. v. LaRance*, 642 F.3d 802, 813 (9th Cir. 2011); see also *Merrion v. Jicarilla Apache*
24 *Tribe*, 455 U.S. 130, 144 (1982) (recognizing a tribe's inherent authority to exclude non-Indians
25 from trespassing on tribal land, without applying *Montana*); *William v. Lee*, 358 U.S. 217, 225
26 (1959); *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1132 (9th Cir. 2006) ("[W]hether tribal
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1 “directly threatened the tribal community” and thus “threatened the political integrity, the
2 economic security, and the health and welfare of the Tribe”).

3
4 Specifically, BP argues that *Montana*’s second exception does not apply here because the
5 challenged conduct is not severe enough to have catastrophic consequences for the Tribe, citing to
6 *Evans v. Shoshone-Bannock Land Use Policy Comm’n*, 736 F.3d 1298 (9th Cir. 2013) in support.
7 In *Evans*, the Circuit held that the Shoshone-Bannock failed to show that a catastrophic risk was
8 posed by the construction of one single-family home that might add to an existing groundwater
9 contamination problem. Understandably, that did not pose a catastrophic risk. But the Tribe’s
10 case here is much more in line with another Shoshone-Bannock case, that of *FMC Corp. v.*
11 *Shoshone-Bannock Tribes*, 2017 U.S. Dist. Lexis 161387 (D. Idaho, Sept. 28, 2017). There, FMC
12 operated a phosphorous plant for fifty years part of which was on tribal land, which generated and
13 stored hazardous waste and contaminated groundwater in a widespread plume, which cannot be
14 fully contained or eradicated—analogous to the very allegations made by the Tribe in its tribal
15 court complaint: The copper mine operated for more than fifty years; it generated and stored
16 arsenic, uranium, and other hazardous and toxic substances, which have contaminated land, air
17 and water (including a 400,000 acre feet plume contaminated with 95 tons of uranium); and the
18 risks posed by these toxic and hazardous substances, which continue to escape, migrate and
19 pollute, remain today and will never entirely be eradicated. *See, e.g.*, Complaint, ¶¶ 11-13, 16-19,
20 26-28. In *FMC Corp.* the court held:

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23
24 By comparison, the threat in this case is many levels of magnitude greater
25 than the threat in *Evans*. FMC’s waste is radioactive, carcinogenic, poisonous,
26 and massive in size. It is so toxic that there is no safe way to remove it, ensuring
27 that it will remain on the Reservation for decades. While the EPA’s containment
28 program is extensive, it has not prevented lethal phosphine gas from escaping.
Moreover, the EPA cannot say how deep and widespread the deadly plume...
extends underground...

1 BP cites 42 U.S.C. 9613(b) as its primary authority, which provides for exclusive
2 jurisdiction in federal court if claims “arise under” CERCLA. Motion, p. 16. But claims only
3 “arise under” CERCLA if they constitute a “challenge to [a] CERCLA cleanup.” See *ARCO Envtl.*
4 *Remediation, L.L.C. v. Dep’t of Health and Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000).
5 The Ninth Circuit has recognized challenges to a CERCLA cleanup as claims that are related to
6 CERCLA’s remedial goals, interfere with CERCLA remedial actions, seek to improve a CERCLA
7 cleanup, or seek to dictate specific remedial actions or alter the method of cleanup. See *McClellan*
8 *v. Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330 (9th Cir. 1995); *ARCO Envtl.*, 213 F.3d
9 at 1115.
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12 BP’s primary authority, *ARCO Envtl.*, negates the application of exclusive jurisdiction in
13 this case. That case held that CERCLA’s exclusive jurisdiction provision is not intended “to serve
14 as a shield against litigation that is unrelated to disputes over environmental standards.” *ARCO*
15 *Envtl.*, 213 F.3d at 1115; see also *Southeast Texas Environmental, L.L.C. v. BP Amoco Chemical*
16 *Co.*, 329 F. Supp. 2d 853, 871 (S.D. Tex. 2004) (“Because Plaintiffs’ claims bear only on the
17 liability of individual defendants and not on the cleanup itself, the Court concludes that Plaintiffs
18 have not challenged a CERCLA cleanup.”). BP attempts to cast a broad net by arguing that “relief
19 that is merely ‘related to the goals of the [CERCLA] cleanup’ is also barred”. Motion, p. 16. But
20 the sole case it cites in support of this proposition, *Razore v. The Tulalip Tribes of Washington*, 66
21 F.3d 236, 239-40 (9th Cir. 1995), is limited to its facts. In *Razore*, the plaintiffs alleged that the
22 Tulalip Tribes’ claims relating to a CERCLA site triggered exclusive federal jurisdiction. The court
23 found that because (a) the claims would “effectively terminate” the cleanup; (b) the plaintiffs
24 attempted to “dictate specific remedial actions and to alter the method and order for cleanup”; and
25 (c) the plaintiffs own expert admitted that the relief sought would delay the cleanup, the claims
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1 in this chapter shall affect or modify in any way the obligations or liabilities of any person under
2 other Federal or State law, including common law, with respect to releases of hazardous substances
3 or other pollutants or contaminants.").

4
5 Courts have consistently held that these savings provisions evidence congressional intent
6 "to preserve to victims of toxic wastes the other remedies they may have under...state law." *PMC,*
7 *Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 617 (7th Cir. 1998) (citing cases from the 5th, 6th,
8 9th and 10th Circuits), *cert denied*, 525 U.S. 1104 (1999); *see also MSOF Corp. v. Exxon Corp.*,
9 295 F.3d 485 (5th Cir. 2002), *cert denied*, 537 U.S. 1046 (2002); *KFD Enters., Inc. v. City of*
10 *Eureka*, 2014 U.S. Dist. Lexis 64616, *37 ("Recognizing state law tort claims in addition to, or
11 instead of, CERCLA claims neither makes compliance with CERCLA impossible nor stands as an
12 obstacle to its goals."); *In re Pfohl Bros. Landfill Litigation*, 67 F. Supp. 2d 177, 184-85 (W.D.N.Y.
13 1999) (CERCLA neither preempts state law toxic tort claims nor creates a federal cause of action
14 for personal injury or property damage caused by release of hazardous substances). The only case
15 BP cites in support of preemption, *New Mexico v. Gen Elec. Co.*, 467 F.3d 1223 (10th Cir. 2006),
16 is distinguishable based on a complex procedural history that cabined the claims to natural
17 resources, and the fact that the plaintiff in that case directly challenged remediation, which the
18 Tribe has not done here.

19 **II. BP HAS CONCLUSIVELY CONSENTED TO THIS COURT'S JURISDICTION**

20
21 This Court has personal jurisdiction over BP. Tribal Code Section 1-20-020 provides for
22 personal jurisdiction as follows: "The act of entry upon territory within the jurisdiction of the court
23 shall conclusively be deemed consent to the jurisdiction of the court with respect to any civil action
24 arising out of such entry." The Tribe's allegations include multiple specific instances of BP
25 entering Tribal territory. Those allegations establish personal jurisdiction under the Tribal Code.
26
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1 Motion, p. 22. However, federal law has long recognized respect for comity and a resulting
2 deference to a Tribal Court as the appropriate court to determine its own jurisdiction in the first
3 instance. *Grand Canyon Skywalk Dev., LLC v. 'SA' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir.
4 2013).

5
6 The basis for the doctrine of exhaustion of Tribal Court remedies was articulated by the
7 Supreme Court in *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856
8 (1985), citing (1) a congressional policy of supporting tribal self-government and self-
9 determination; (2) a policy of allowing the forum whose jurisdiction is being challenged “the first
10 opportunity to evaluate the factual and legal bases for the challenge”; and (3) judicial economy
11 being best served “by allowing a full record to be developed in the Tribal Court.”

12
13 In *Nat'l Farmers*, the Supreme Court held that as a general rule, exhaustion of Tribal Court
14 remedies “is **required** before such a claim may be entertained by a federal court.” *Nat'l Farmers*
15 *Union*, 471 U.S. at 857 (emphasis added); *see also Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9,
16 17 (1987). The exhaustion requirement is founded upon long-recognized policies of promoting
18 tribal self-government, self-determination, and the orderly administration of justice. *Nat'l*
19 *Farmers*, 471 U.S. at 856-57. “Proper respect for tribal legal institutions, [therefore], requires that
20 they be given a ‘full opportunity’ to consider the issues before them...” *LaPlante*, 480 U.S. at 16.

21
22 If unconditional access to federal district courts were allowed, Tribal Courts would be in
23 direct competition with the federal forum, “thereby impairing the tribal court’s authority over
24 reservation affairs.” *Id.* The “orderly administration of justice” will be served by “allowing a full
25 record to be developed in the Tribal Court...” *Nat'l Farmers*, 471 U.S. at 856. Additionally,
26 exhaustion “will encourage tribal courts to explain to the parties the precise basis for accepting
27 jurisdiction” and thereby “provide other courts with the benefit of their expertise in such matters
28

1 plaintiff's complaint); *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577, 578 (9th Cir. 1987)
2 ("Considerations of comity **require** the exhaustion of tribal remedies before the [tribal court's
3 jurisdiction] may be addressed by the district court.") (emphasis added).
4

5 As such, there is no basis for this Court to stay its proceedings. Tribal Courts are to
6 determine their own jurisdiction in the first instance.

7 WHEREFORE, Plaintiff hereby respectfully requests that this Court deny Defendants'
8 Motion to Dismiss in its entirety, and grant whatever other relief, in law or equity, this Court deems
9 just and proper.
10

11 DATED this 1st day of December, 2017.

12 Respectfully submitted,

13 **NIX, PATTERSON & ROACH, LLP**

14
15 By: 

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26 And

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EXHIBIT 2:

August 13 email correspondence from Tribe's counsel to BP's counsel

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Subject: Re: Motion to Alter or Amend
Date: Monday, August 13, 2018 at 10:33:41 AM Central Daylight Time
From: Austin Tighe
To: Kawanabe, Kenzo, dhayward@laxalt-nomura.com, Mike Angelovich, crzeh@aol.com, ROBERT SAINT-AUBIN
CC: Robert Dotson, Jill Greiner, Cohen, Adam, Rogers, Connie, Allen, Jennifer, Wittkop, Kellen
Attachments: image001.png, image002.png

Dear Counsel:

My clients are opposed.

And you are the second to know, as I represented (“See below.”) you would be. You knew right after the registered agent for service. As you have previously argued, the *filing* of a lawsuit in tribal court means nothing without *formal service*.

I would have offered to send you a copy of the tribal court lawsuit, but your clients were adamant last time that they would not accept same. We offered to work with you on service, and your clients refused. Given your clients’ historical position on service and pursuant to the express language of the tribal court’s most recent order, I had no choice but to follow formal procedure. Seems ironic (at best) that you are now complaining that I did so.

I am not sure I have ever heard of a procedural motion called alter/amend a dismissal order. Anyway, my clients will respond to what you propose, which would essentially be a motion for reconsideration (assuming it is not denied before our response deadline).

In closing, and as to your presumption that “the ruling would presumably have been different”, your quoted language below represents a fragment of the federal court’s dismissal order, and only a partial quote of that very sentence, which continues “or that such tribal litigation would then not be dismissed by the Tribal Judge.”

Thank you,

Austin Tighe
512.328.5333
atighe@nixlaw.com

Please visit our new website: www.nixlaw.com

