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

CONSOLIDATED REPLY BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT, OR FOR RELIEF FROM JUDGMENT

Plaintiffs BP America Inc. ("BPA") and Atlantic Richfield Company ("ARC") submit this consolidated reply in support of their Motion to Alter or Amend Judgment, or For Relief from Judgment (the "Motion"). ECF No. 80. Defendants Sandra-Mae Pickens ("Judge Pickens") and the Yerington Paiute Tribal Court (the "Tribal Court") filed a response on August 15, 2018. ECF No. 82. Defendants Yerington Paiute Tribe (the "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; and Elwood Emm, Linda Howard, Nate Landa, Delmar Stevens, and Cassie Roberts, in their official capacities as Yerington Tribal Council Members (collectively, the "Council Members") filed a separate response on August 27, 2018. ECF No. 85.

INTRODUCTION

This case is not moot. It seeks to enjoin a case in Tribal Court for lack of jurisdiction. The Court dismissed this case as moot on July 26, 2018 (ECF No. 78, the "Dismissal Order") because it understood at the time that dismissal by the Tribal Court meant that other case was no longer at issue. That understanding was not correct. On June 29, 2018, unbeknownst to Plaintiffs and the Court, the Tribe re-filed a virtually identical complaint in Tribal Court. Rather than immediately informing BPA and ARC of that fact, the Tribe waited until July 30, 2018 to personally deliver the Complaint to BPA and ARC. Even worse, the Tribe did not inform this Court of that fact despite having an opportunity to do so. Thus, at the time this Court issued the Dismissal Order, there *was* a pending case in Tribal Court. That point by itself warrants the relief Plaintiffs request in the Motion and should end the inquiry.

Defendants have no real answer for this straightforward analysis. They contend this case remains moot because the Tribal Court *might* also dismiss the new complaint. But whether the Tribal Court will dispose of the case before it is not a question of mootness in this Court. Instead, what matters is that BPA and ARC ask the Court to enjoin an unlawful proceeding *currently pending* in the Tribal Court. The possibility that the Tribal Court might do something in the future does not change the reality that this Court can and should grant an injunction today.

The flaw in Defendants' position is obvious. They say that because there is a chance the

Tribal Court will dismiss the re-filed action, there is nothing for this Court to decide. But that argument conflates mootness with exhaustion of remedies. Whether exhaustion is required is a question for the Court to decide on the merits. It is not, however, a reason to dismiss this case as moot.

Even less persuasively, the Tribe and the Council Members—but, tellingly, *not* Judge Pickens or the Tribal Court—also contend the pending case in Tribal Court was not revived with the re-filing of the complaint on June 29, 2018, but instead only when the Tribe delivered the complaint on July 30, 2018. Not only is this argument wrong, it is irrelevant. Even if, contrary to law, re-filing the complaint was not enough, delivery of that complaint on July 30 certainly was.[1] Because the Tribe delivered the complaint also within the period covered by Rules 59(e) and 60, the Court should reopen this case.

ARGUMENT

I. Defendants Conflate the Issues of Mootness and Exhaustion of Remedies.

Defendants' mootness argument relies on one disjunctive clause from the Court's Dismissal Order: "plaintiffs have failed to show any indication by the Tribe that it will re-file the tribal litigation or that such tribal litigation would then not be dismissed by the Tribal Judge." ECF No. 78 at 2 (emphasis added). Based on that snippet, the Tribe and Council Members claim that "the doctrine of exhaustion of tribal court remedies applies," and that the Motion should be denied because it "fails to show any indication that the pending tribal litigation will not be dismissed by the Tribal Judge." ECF No. 85 at ¶¶ 5-6. For their part, Judge Pickens and the Tribal Court argue that the quoted underlined clause means that "[u]nless and until Plaintiffs exhaust their Tribal Court remedies and Judge Pickens rejects [BPA's] and ARC's forthcoming jurisdiction arguments, this case remains moot."[2] ECF No. 82 at 4.

---

[1] Plaintiffs contend that service of the re-filed Tribal Court complaint continues to be deficient as a matter of law. But this position has nothing to do with mootness. Instead, Plaintiffs maintain service is improper because the Tribe's power to serve stops at the borders of the Tribe's territory and Plaintiffs were not served inside those borders.

[2] These claims also inaccurately characterize and try to shift the burden of proof. Defendants, as the parties asserting mootness, carry the "heavy burden to persuade the court that the challenged conduct cannot reasonably be expected to start up again." *Anderson v. Duran*, 70 F. Supp. 3d 1143, 1153 (N.D. Cal. 2014) (internal quotations omitted).

Defendants misconstrue federal law. As the Court well knows, mootness and exhaustion are independent concepts. On one hand, mootness doctrine exists to ensure that courts hear "cases that present actual, ongoing controversies between litigants." *Pub. Serv. Co. of Colo. v. Shoshone-Bannock Tribes*, 30 F.3d 1203, 1205 (9th Cir. 1994). Just such a controversy—namely, whether the Tribal Court has jurisdiction over BPA and ARC—obviously exists here. Conversely, exhaustion is a "matter of comity" that may, under inapplicable circumstances, require non-Indian litigants to exhaust tribal remedies before suing in federal court.[3] *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1302 (9th Cir. 2013). Mootness depends only on whether a pending case exists in Tribal Court that may need to be enjoined. It does. The exhaustion doctrine may be a reason for the Court to deny injunctive relief. But it is not a reason to dismiss this case without even considering the merits.

Tribal Defendants essentially argue, under the guise of mootness, that the Court somehow resolved whether Plaintiffs must exhaust remedies—without any analysis. The Court, however, did no such thing. Rather, the Court dismissed the case because it wrongly believed that the Tribe had not re-filed its lawsuit. The Court reached that conclusion, moreover, because of the Tribe's misleading statements to the Court. Now that the true story has come out, the Court should reinstate this case because it is clearly not moot. Then, the Court can resolve the disputed substantive issues, including exhaustion of remedies and preemption.

The flaw in Defendants' position is especially apparent when one considers the implications of it. Taken to its logical conclusion, Defendants' argument in favor of mootness would require BPA and ARC to demonstrate that no grounds exist for Judge Pickens to dismiss the complaint currently pending in Tribal Court. BPA and ARC, in other words, would have to argue against the very relief that they are seeking in Tribal Court to obtain relief in this Court. No case requires BPA and ARC to argue against themselves. And, no case can be moot from its very inception.

---

[3] The parties extensively briefed the exhaustion issue in the various motions to dismiss and oppositions to those motions previously filed in this action. Contrary to Defendants' assertions, the quoted portion of the Dismissal Order was not intended to dispose of a key issue related to Plaintiffs' ability to bring this action in the first instance.

In context, Plaintiffs understand the Court's use of the phrase "… or that such tribal litigation would then not be dismissed by the Tribal Judge" to mean the Tribal Court would not accept the complaint for filing or would summarily dismiss it. Neither has happened here. The Tribe filed the new compliant in June 2018, and the Tribal Court has not yet dismissed the case. Instead, Judge Pickens' response to this Motion indicates that she intends to consider the motion to dismiss currently pending in the Tribal Court and to rule on the merits on that motion. ECF No. 82 at 4. As a result, BPA and ARC are being forced to participate once again in an unlawful proceeding that this Court can and should enjoin. BPA and ARC maintain that the Tribal Court should dismiss the case, but to date, the Tribal Court has not ended the proceeding.

II. A Case Is Clearly Pending in Tribal Court.

The Tribe contends that "re-filing of the tribal litigation was of no legal effect unless and until service was effected," so "there was no re-filed tribal litigation until said service was effected." ECF No. 85 at ¶¶ 8-9. This contention is both wrong and irrelevant.[4]

First, a case exists upon the filing of a complaint, which is the specific, discrete act contemplated by the Federal Rules of Civil Procedure. *Cf.* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."). Whether service of the complaint is proper, and whether the court has jurisdiction based on proper service, are separate issues. *Accord* Fed. R. Civ. P. 4 (setting standards for proper service); Fed. R. Civ. P. 12 (providing defenses of "lack of subject-matter jurisdiction," "lack of personal jurisdiction," and "insufficient process").

Second, even if the re-filing of the Tribe's complaint on June 29, 2018 did not revive it, delivering it to BPA and ARC on July 30, 2018 certainly did. Although delivery occurred four days after issuance of the Dismissal Order, it was well within the time allowed by Rules 59(e) and 60 to seek alteration of or relief from a judgment or order based on new information. The only question before the Court for purposes of this Motion is whether the Tribal Court litigation

---

[4] Similarly, the Tribe's claim that BPA's and ARC's "present position in tribal court is that there is *still* no re-filed tribal litigation" because BPA and ARC believe "the case should be dismissed again" is inaccurate and unfounded. BPA and ARC do not dispute that the tribal litigation was re-filed; they dispute the jurisdiction of the Tribal Court and accordingly moved for dismissal of the re-filed Tribal Court action. Obviously, requesting dismissal of an action does not mean that no action has been filed at all.

is currently pending. But that is not a question at all. The Court should amend its Dismissal Order and grant such other relief as it deems appropriate.

III. The Court Should Amend its Judgment to Prevent Prejudice and Preserve Judicial Resources.

Finally, nothing in Defendants' responses refutes the basic point that reinstating this case avoids the wasteful expenditure of judicial resources. The re-filed Tribal Court complaint is *identical* to the original complaint. The parties have extensively briefed the issues raised by the first complaint. They can address the single new issue raised by the new complaint—relating to the manner of service—in supplemental briefing. Denial of the Motion would require BPA and ARC to initiate a new lawsuit seeking the same relief against the same parties on the same claims and arguments based on what amounts to the same case in Tribal Court. The Court should alter or amend its judgment to prevent this prejudice, preserve judicial resources, and avoid unnecessary delays and costs.

CONCLUSION

For these reasons and those stated in the Motion, the Court should alter or amend its judgment under Rule 59(e), or alternatively provide relief from the judgment under Rule 60(b).

Respectfully submitted,

DATED: September 4, 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 4th day of September, 2018 the foregoing **CONSOLIDATED REPLY BRIEF IN SUPPORT OF 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.
1489 Warm Springs Road
Suite 110
Henderson, NV 89014
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