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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

BUENA VISTA RANCHERIA OF ME-WUK INDIANS, a federally recognized Indian tribe,

Plaintiff,

v.

PACIFIC COAST BUILDING PRODUCTS, INC., a California corporation, PCBP PROPERTIES, INC., a Nevada corporation, and H.C. MUDDOX, a corporate subsidiary of Pacific Coast Building Products, Inc.,

Defendants.

No. 2:23-cv-00168-WBS-CKD

RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT PURSUANT TO F.R.C.P. 12(B)(1)

Date: June 12, 2023
Time: 1:30 p.m.
Courtroom: 5, 14th Floor
Hon. William B. Shubb

Complaint Filed: January 27, 2023

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I. INTRODUCTION

This case asks the Court to decide whether a substantial increase in surface clay mining activities and commencement of new mining activities can be allowed to proceed directly adjacent to Indian trust lands the Buena Vista Rancheria of Me-Wuk Indians ("Tribe") calls home and upon which the Tribe's cultural, natural, and economic resources are solely located. Defendant Pacific Coast Building Products' ("PCBP") factual challenge to this Court's subject matter jurisdiction to hear the Tribe's federal common law nuisance and trespass claims should be denied. Contrary to Defendants' unsupported assertions to this Court, PCBP has made abundantly clear to the Tribe since last year that PCBP will substantially increase current mining activities and commence new mining activities on the PCBP Property imminently. The Court should reject PCBP's effort to force the Tribe to wait until after its cultural, natural, and economic resources have already sustained irreparable injuries from PCBP's disruptive activities before it can seek relief from this Court. By then, it will be too late.

II. FACTUAL BACKGROUND

A. BRIEF HISTORY OF THE BUENA VISTA RANCHERIA OF ME-WUK INDIANS

The Tribe has occupied the Amador County region and the lands upon which the Tribe's 67.5-acre Rancheria property currently sits since time immemorial. Declaration of Chairwoman Rhonda Morningstar Pope-Flores in Support of Response in Opposition to Defendants' Motion to Dismiss Complaint ("Pope Decl."), ¶ 3; Declaration of Ivan Senock in Support of Response in Opposition to Defendants' Motion to Dismiss Complaint ("Senock Decl."), ¶¶ 5, 9; Dkt. No. 1 at 3. Despite generations of abuse, neglect, the Mission period, the Gold Rush, and destructive federal policies toward Indian tribes, including the termination era of the 1950s—all of which stripped away land ownership—the Tribe survived. Pope Decl., ¶ 4; Dkt. No. 1 at 3. In the early twentieth century, the United States created a network of small land parcels called "Rancherias" for landless Indian tribes in California. Pope Decl., ¶ 5; Dkt. No. 1 at 3. The United States purchased the lands constituting the Buena Vista Rancheria in 1927 with money appropriated by the Acts of June 21, 1906 (34 Stat. 325-328), and April 30, 1908 (35 Stat. 70-76). *Id*. The United States' purchase was intended to establish the Rancheria as a reservation for the Tribe to be held in

trust for the benefit of the Tribe and its members in perpetuity. *Id.*; *see also Cty. of Amador, Cal. v. U.S. Dep't of the Interior*, 136 F.Supp.3d 1193, 1201 (E.D. Cal. 2015), *aff'd sub nom. Cnty. of Amador v. U.S. Dep't of the Interior*, 872 F.3d 1012 (9th Cir. 2017).

As an outgrowth of the 1950s federal "termination" era, during which the government disestablished the legal status of many Indian tribes across the country, Congress enacted the 1958 "California Rancheria Act," Pub. L. 85-671 at 72 Stat. 619, amended in 1964 by 78 Stat. 390 ("Termination Act"). Pope Decl., ¶ 6; Dkt. No. 1 at 4. The Termination Act disestablished many California Indian Rancherias, including the Buena Vista Rancheria, and terminated the legal status of the related Indian tribes and their members as Indians under federal law. *Id.* The United States distributed Buena Vista Rancheria lands (a single 67.5-acre parcel) to the Tribe's members, then withdrew the trust status of the Buena Vista Rancheria and dissolved the Rancheria boundaries. Pope Decl., ¶ 7; Dkt. No. 1 at 4. The Termination Act required the United States to improve or construct roads serving the terminated Rancheria lands, to upgrade the related irrigation, sanitation, and domestic water systems, and to provide certain educational and other benefits and services to the terminated Tribe and its members. Pope Decl., ¶ 8; Dkt. No. 1 at 4.

The federal government failed to fulfill its commitments to the terminated California tribes, and litigation ensued against the United States and various California Counties to restore the affected tribes to their pre-termination status. *Id.*; *see also Tillie Hardwick v. United States, et al.*, No. 5:79-CV-01710, 2020 WL 6700466, (N.D. Cal., Nov. 13, 2020). The plaintiff Indians and restored tribes and Rancherias, on the one hand, and the Federal and county defendants (including, with respect to the Tribe, Amador County), on the other hand, settled the case by stipulated judgment. Pope Decl., ¶ 8; Dkt. No. 1 at 4. The settlement generally took the form, first, of a stipulation to restore the terminated tribes and Indians and, second and later, a stipulated judgment to restore the boundaries of the terminated reservations. *Id.*

In the case of the Tribe, a 1983 stipulated judgment restored the individual Indian plaintiffs to their status as Indians under federal law, restored the recognized status of the Tribe, and required the United States to add the restored Tribe to the Bureau of Indian Affairs' ("BIA") Federal Register list of recognized Indian tribes. Pope Decl., ¶ 9; Dkt. No. 1 at 4. A 1987 second stipulated

judgment provided that the Rancheria was "never and [is] not now lawfully terminated," restored the Rancheria's original boundaries, and further declared that all land within the restored Rancheria boundaries is "Indian country"—the legal term of art for lands subject to tribal jurisdiction, as defined by 18 U.S.C. § 1151. Pope Decl., ¶ 10; Dkt. No. 1 at 5. The 1987 stipulated judgment further required the United States and Amador County to treat the Rancheria "as any other federally recognized Indian Reservation," and provided that "all of the laws of the United States that pertain to federally recognized Indian Tribes and Indians" shall apply to the Rancheria. Pope Decl., ¶ 11; Dkt. No. 1 at 5.

The Tribe's struggles were, however, far from over. Pope Decl., ¶ 12; Dkt. No. 1 at 5. The 1983 stipulation contained, among other things, language that required the United States to accept the restored Buena Vista Rancheria lands back into trust so that the restored Tribe and tribal members could enjoy the full benefits of their restoration. *Id*. This "mandatory trust" language was intended to spare the Tribe from navigating the BIA's highly uncertain and often protracted discretionary fee-to-trust process set out in 25 CFR 151. *Id*. In 1996, the Tribe asked BIA to return to trust status the single parcel of land making up the restored Rancheria. Pope Decl., ¶ 13; Dkt. No. 1 at 5. The BIA denied the request and erroneously advised Buena Vista that the request was required to undergo the process set forth at 25 CFR Part 151—as if the *Tillie Hardwick* litigation and the 1983 stipulation had no impact on the matter. *Id*.

In 2010, the Tribe again asked the BIA to acquire title to the restored Rancheria in trust under the express mandatory trust provisions of the 1983 stipulation. Pope Decl., ¶ 14; Dkt. No. 1 at 5. Rather than grant or deny the request, the BIA and various offices within the Department of Interior ("DOI") endlessly bounced the Tribe's request back and forth for ten years of interminable bureaucratic confusion and delay. *Id*.

In 2018, the BIA denied the Tribe's mandatory trust request in a decision that it purported (inaccurately) could not be appealed, and invited the Tribe to file an entirely new application, presumably under the discretionary part 151 regulations. Pope Decl., ¶ 15; Dkt. No. 1 at 5. Finally, the Tribe moved the *Tillie Hardwick* court in July 2020 for enforcement of the 1983 stipulation. Pope Decl., ¶ 16; Dkt. No. 1 at 5. The court granted the Tribe's motion in November 2020, and the

United States acquired the Rancheria in trust for the benefit of the Tribe in March 2021. *Id.* Now, less than two year later, Defendants seek to take actions that threaten the Tribe's full use and enjoyment of its restored federal trust lands, and the invaluable Tribal resources that sit on those lands.

B. THE TRIBE'S RANCHERIA PROPERTY

The Rancheria serves as the Tribe's cultural epicenter, source for economic development, and natural resource management. Pope Decl., ¶ 18; Dkt. No. 1 at 6. The Rancheria is geographically characterized by gently sloping oak woodlands at higher elevation and a valley grassland and wetland area below. Pope Decl., ¶ 19; Dkt. No. 1 at 6. Representing only a small piece of the Tribe's ancestral homelands, the Rancheria is home to the Tribe's Harrah's Northern California Casino, drinking and wastewater treatment plants, a cultural center, two homes, a Tribal office, the Tribal cemetery, and traditional gathering places, as well as a federally recognized wetland preserve. Pope Decl., ¶¶ 20-22; Senock Decl., ¶¶ 6-7; Dkt. No. 1 at 6. Defendants' new and expanded clay mining operation will have immediate detrimental and devastating impacts on the Tribe's cultural, natural, and economic resources. Pope Decl., ¶¶ 17, 33-34, 37-28; Senock Decl., ¶ 15; Dkt. No. 1 at 6.

1. The Tribe's Natural And Cultural Resources On The Rancheria Property

The Rancheria is home to invaluable cultural, archeological, and natural resources that the Tribe maintains, monitors, and uses. Pope Decl., ¶¶ 21; Senock Decl., ¶¶ 6-11; Dkt. No. 1 at 6. The Tribe's cultural center, cemetery, traditional gathering places, and the Tribe's cultivation base for growing traditional vegetation are all located on the Rancheria near the border of the PCBP Property. Pope Decl., ¶¶ 21-26; Senock Decl., ¶¶ 6-10; Dkt. No. 1 at 7. The General Plan for Amador County also lists the Lands of the Rancheria, the PCBP Property, and the surrounding areas to be High to Moderate for Cultural Resource Sensitivity. Senock Decl., ¶ 14.

The Tribe hosts frequent cultural events for Tribal members on the Rancheria near the border of Defendants' new and expanded clay mining operation, including sweat lodges for men and women which are used frequently, and traditional cultural dances that take place several times a year. Pope Decl., ¶¶ 22; Senock Decl., ¶ 9; Dkt. No. 1 at 7. The Tribal cemetery also is located on

the Rancheria, near the border of the Defendants' new clay mining operation. Pope Decl., ¶ 25; Senock Decl., ¶¶ 6-10; Dkt. No. 1 at 7. The Tribe believes that burials of Tribal ancestors including both human remains and items of cultural patrimony extend to the property border shared with Defendants, and likely extend under the surface of the PCBP Property. Pope Decl., ¶ 26; Senock Decl., ¶¶ 6-7; Dkt. No. 1 at 7. Some of the Tribe's governmental offices are located on the Rancheria. Pope Decl., ¶ 27; Senock Decl., ¶ 11; Dkt. No. 1 at 7. Residences used by Tribal members also are located on the Rancheria. Pope Decl., ¶ 28; Dkt. No. 1 at 7.

The Tribe maintains several groundwater monitoring and production wells located on the Rancheria directly adjacent to the location of the Defendants' new clay mining operation. Pope Decl., ¶ 30; Dkt. No. 1 at 7. An aquifer that is vital to both the Tribe and Amador County community is located below the land upon which the Rancheria property and the location of the Defendants' new clay mining operation are situated. Dkt. No. 1 at 7. In certain areas, the water table is located only twenty to forty feet below the surface. *Id.* Directly adjacent to the location of Defendants' new clay mining operation on the Rancheria property is the Tribe's federally recognized wetlands preserve, which the Tribe has worked tirelessly to protect and steward. Pope Decl., ¶ 30; Dkt. No. 1 at 7. The Tribe's wetlands preserve serves as a significant cultural and natural resource for the Tribe. *Id.* The wetlands, drainage systems, and ponds located on the Rancheria property support valuable ecological functions, provide habitat to wildlife, water for cattle, and enable the growth of vegetation that holds cultural importance for the Tribe. *Id.* The Tribe is committed to defending its wetlands resources by maintaining wetland health and preventing habitat loss. *Id.*

2. The Tribe's Economic Resources On The Rancheria Property

Pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*, and an amended compact with the state of California, the Tribe operates a Class III Indian gaming facility called Harrah's Northern California ("Casino") on the Tribe's Rancheria property. Pope Decl., ¶ 31; Dkt. No. 1 at 8. The Tribe's Casino encompasses 71,000 square feet of gaming space with twenty table games, about 750 slot machines, a restaurant, a food outlet, and entertainment facilities. *Id.* The Tribe's Casino has been in operation since April 2019. *Id.*

The Tribe's Casino is the primary economic engine for the Tribe. Pope Decl., ¶ 32; Dkt. No. 1 at 8. The revenue from the Casino funds the Tribal government, and provides critical services for Tribal members. *Id.* The Casino has approximately 300 employees, the vast majority of whom reside in Amador County. *Id.* The Casino also generates a significant amount of state and local tax revenue. *Id.*

C. PCBP'S PROPERTY AND NEW SURFACE MINING OPERATION

PCBP owns all of the land directly adjacent to the eastern boundary of the Tribe's Rancheria ("PCBP Property") – land which was once the Tribe's. Pope Decl., ¶ 3; Dkt. No. 8-1 at 2; Dkt. No. 1 at 8. Portions of the PCBP Property adjacent to the Rancheria have been used for mining intermittently since at least 1976. Dkt. No. 8-1 at 2; Dkt. No. 1 at 9. Since about the time the United States accepted the Rancheria in trust for the Tribe in March 2021, Defendants have not engaged in any large-scale mining operations on the PCBP Property, and the mining activities that have occurred were minimal and discrete, mostly involving moving equipment and piles of dirt. Pope Decl., ¶¶ 35-36; Senock Decl., ¶¶ 3-4; Declaration of Michael DeSpain in Support of Response to Defendants' Motion to Dismiss ("DeSpain Decl."), ¶¶ 2-6, Ex. A; *see also* Declaration of Wayne Smith in Support of Response to Defendants' Motion to Dismiss ("Smith Decl."), ¶¶ 2-8. Indeed, Defendants themselves admit to currently mining less than ten percent of the PCBP Property. *See* Dkt No. 8-1 at 2-3. The mine is listed as "inactive." Senock Decl., ¶ 13.

A portion of the PCBP Property is subject to a vested rights determination and reclamation plan first approved by Amador County in 1977. Dkt. No. 8-1 at 2; Dkt. No. 1 at 9. Defendants have applied to Amador County for a minor amendment to the 1977 Reclamation Plan to facilitate a new clay mining operation about 1,500 feet east of the Rancheria ("Minor Amendment Application"). Dkt. No. 8-1 at 3; *see also* Smith Decl., ¶ 9; McCoy Decl., ¶¶ 3-4. Amador County is likely to approve the Minor Amendment Application within six months to one year. Dkt. No. 8 at 24; Smith Decl., ¶ 12. Defendants have represented to the Tribe that they intend to substantially increase their current clay mining operation: the new surface clay mining operation would take place on approximately forty acres of land adjacent to the Tribe's Rancheria; the new surface clay mining operation would consist of removing the top ten to fifteen feet of the surface across the

entirety of the forty acres; and, would last approximately twelve to fourteen months. Smith Decl., ¶¶ 5-8; McCoy Decl., ¶¶ 3-4; Dkt. No. 1 at 9-10.

Amador County and Defendants maintain that Defendants possess the vested right to conduct any new mining operations on portion of the PCBP Property not subject to the Minor Amendment Application. Smith Decl., ¶¶ 10-11; McCoy Decl., ¶ 5; Dkt. No. 8-1 at 2; Dkt. No. 1 at 9. Amador County and Defendants also insist that any new mining operation on the PCBP Property not subject to the Minor Amendment Application requires no additional permits from Amador County. Smith Decl., ¶ 11; McCoy Decl., ¶ 5; Dkt. No. 1 at 9. This is the area closest to the Rancheria.

The only access to the PCBP Property is on the same road that is used to access the Tribe's Rancheria and the Tribe's Casino. McCoy Decl., ¶ 7; Dkt. No. 1 at 10. Defendants informed the Amador County Agriculture and Natural Resources Committee in May 2022 and the Tribe that they would use the road shared with the Tribe's Rancheria to haul loads and transport equipment to and from the new mining operation, and confirmed the same during the meeting on December 16, 2022. McCoy Decl., ¶ 7.

D. ADVERSE IMPACTS FROM DEFENDANTS' NEW SURFACE CLAY MINING OPERATION

The Tribe's Rancheria is particularly vulnerable to negative impacts for the proposed surface clay mining operation. The Tribe's Casino sits less than 1,500 feet from the area Defendants seek to mine following Amador County's approval of its Minor Amendment Application, and approximately 250 feet from an area Defendants claim they are entitled to mine at any time. Pope Decl., ¶ 34; McCoy Decl., ¶¶ 4-5; Dkt. No. 1 at 11. Defendants' mining operation will create significant noise and vibration that will be felt both outside and inside the Tribe's Casino, and on the land upon which the Tribe's natural and cultural resources are located. Pope Decl., ¶¶ 33-34, 37-38; Senock Decl., ¶¶ 14-15; Dkt. No. 1 at 11. There is a substantial risk that Defendants' new surface clay mining operation will reduce the number of guests coming to the Tribe's Casino. Dkt. No. 1 at 11.

The new surface clay mining operation will also cause health risks to the Tribe, its members who live on the Rancheria, and the employees and guests of the Tribe's Casino, all of

whom will have to avoid the large mining machinery on the road to the Tribe's Rancheria and will be exposed to substantial dust and other fine particulate matters in the air caused by the ten to fifteen feet of surface material that will be removed by the surface mining operation. Pope Decl., ¶¶ 33-34, 37-38; Dkt. No. 1 at 11. This exposure risk will continue for the duration of the proposed surface mining operation commences. Dkt. No. 1 at 11. The impacts to air quality caused by the new surface clay mining operation will be particularly concerning since Amador County only very recently attained the 2015 ozone National Ambient Air Quality Standards based on certified ozone air quality monitoring data for the 2018-2020 calendar years. *Id.* at 11-12.

The Tribe also believes its groundwater and federally protected wetlands may be impacted by the new surface clay mining operation. Pope Decl., ¶¶ 17, 19-20, 29-30, 33-34; Dkt. No. 1 at 12. The likely presence of grave-like structures and other objects of cultural patrimony of the Tribe under the surface of the PCBP Property adjacent to the Rancheria could be disturbed or destroyed by mining operations. Pope Decl., ¶¶ 17, 20-22, 25-26; McCoy Decl., ¶¶ 8-10; Senock Decl., ¶¶ 6-10, 14-15; Dkt. No. 1 at 12.

The Tribe has a sovereign interest in protecting its Rancheria, and being able to exclusively possess and use the Tribe's Rancheria. Pope Decl., ¶¶ 17, 33-34, 37-38; Dkt. No. 1 at 12. The harm to the Tribe's sovereignty cannot be measured monetarily. Defendants' proposed surface clay mining operation will cause immediate harm to the Tribe's Rancheria, which is federal Indian land, which, in turn, will adversely affect the Tribe's ability to self-govern the Rancheria and the Tribe's general economic well-being. *Id.*

III. ARGUMENT

The Tribe and the cultural, natural, and economic resources that sit on the Rancheria face a credible threat of imminent harm sufficient to invoke the Court's jurisdiction. The credible threat that Defendants will substantially increase current mining activities and commence new mining activities on the PCBP Property and the likely harm the Tribe's resources will suffer as a result satisfy the injury requirement of Article III. The Tribe's claims also are constitutionally ripe for judicial resolution now. The Court should not force the Tribe to wait until its cultural, natural, and

economic resources have sustained irreparable injuries to seek relief from this Court. As the Ninth Circuit explained in *Central Delta Water v. United States*, 306 F.3d 938 (9th Cir. 2002):

> The ability to challenge actions creating threatened environmental harms is particularly important because in contrast to many other types of harms, monetary compensation may well not adequately return plaintiffs to their original position. The extinction of a species, the destruction of a wilderness habitat, or the fouling of air and water are harms that are frequently difficult or impossible to remedy. Thus… plaintiffs need not wait until the natural resources are despoiled before challenging the [defendant's] action leading to the potential destruction.

Id. at 950. The Tribe also may bring federal common law nuisance and trespass claims to protect its Rancheria and the Tribal resources that lie within that federal trust land from the impending mining activities Defendants fully intend to carry out directly adjacent to the Rancheria.

A. DEFENDANTS' INTENDED MINING ACTIVITIES CONSTITUTE A CREDIBLE THREAT OF IMMINENT HARM

1. The Tribe Is Not Precluded From Seeking To Protect Its Rancheria-Based Resources

Defendants claim that the Tribe is somehow precluded from now seeking relief in response to Defendants' explicit intention to significantly increase mining activities adjacent to the Rancheria because the Tribe did not complain about Defendants' past mining activities. Dkt. No. 8 at 19. Tellingly, Defendants make this assertion without any citation to legal authority. *See id*. This argument is disingenuous at best.

To begin with, the Tribe received no notice of Defendants' prior mining activity on the PCBP Property. *See* Senock Decl., ¶ 12. More importantly, although Defendants want this Court to have the impression that there is substantial ongoing mining activity on the PCBP Property and its planned mining activities are similar to those that have occurred in the recent past, that is not the case. Indeed, Defendants themselves admit to currently mining less than ten percent of the PCBP Property. *See* Dkt No. 8-1 at 2-3. The upcoming mining activities Defendants intend to implement on the PCBP Property are of a substantially greater scope from their past mining activities. *See* Pope Decl., ¶¶ 35- 36; Smith Decl., ¶¶ 4-8; Senock Decl., ¶¶ 2-4; DeSpain Decl., ¶¶ 2-6, Ex. A; McCoy Decl., ¶ 7. The Tribe has made plain that all it has seen is the occasional movement of dirt and equipment around the PCBP Property since at least 2017—a far cry from the large-scale clay

mining operation Defendants told the Tribe they planned to undertake imminently. Senock Decl., ¶¶ 2-3; DeSpain Decl., ¶¶ 2-6; Smith Decl., ¶¶ 4-8. Moreover, the 2017 mining operation occurred under very different factual circumstances. At that time, the Tribe's Casino was not built, and the United States had not acquired the Rancheria in trust for the Tribe. Pope Decl., ¶ 36. It was not until 2021 that the economic, natural, and cultural resources the Tribe now seeks to protect became subject to federal protections. *Id*. ¶¶ 35-36. In other words, the basis for the Tribe's federal common law claims did not exist until 2021.

2. The Tribe Has Established That A Credible Threat Exists

Defendants' contention that this Court lacks subject matter jurisdiction because the Tribe has failed to allege a credible threat of imminent harm is without merit. *See* Dkt. No. 8 at 18. To satisfy the injury requirements of Article III, the Tribe need only demonstrate a "credible threat" that the feared injury will occur. *See Central Delta Water*, 306 F.3d at 950 ("[A] credible threat of harm is sufficient to constitute actual injury for standing purposes, whether or not a statutory violation has occurred."); *see also Natural Res. Def. Council v. EPA*, 735 F.3d 873, 878 (9th Cir. 2013) ("[A]n injury is 'actual or imminent' where there is a 'credible threat' that a probabilistic harm will materialize."). Defendants have expressed an explicit objective to engage in unprecedented large-scale mining operations adjacent to the Rancheria, which will adversely impact the Tribe's natural, cultural, and economic resources. McCoy Decl., ¶¶ 3-5, 8-11; Smith Decl., ¶¶ 4-8, 13; Pope Decl., ¶ 33; Senock Decl. ¶¶ 5-15. More specifically, Defendants clearly intend to increase mining activities on the portion of the PCBP Property subject to the Minor Amendment Application once approved by Amador County, which is likely to occur within a year at the latest. Smith Decl., ¶ 12; McCoy Decl., ¶¶ 3-4; *see also* Dkt. No. 8 at 24. It also appears that Defendants intend to commence new mining activities on portions of the PCBP Property not subject to the Minor Amendment Application—or subject to any review, approval or permitting by Amador County. Smith Decl., ¶¶ 10-11; McCoy Decl., ¶¶ 5-7. The Tribe has therefore established that a credible threat of injury exists.

3. The Credible Threat Facing The Tribe Is Sufficiently Imminent

Defendants claim that the Tribe does not face an imminent threat because one contingency—Amador County's likely approval of the Minor Amendment Application—must occur prior to commencing *some* of the intended mining activities adjacent to the Rancheria. *See* Dkt. No. 8 at 18-19. The Tribe is not, however, required "to demonstrate that it is literally certain that the harms [it] identif[ies] will come about." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n. 5 (2013); *see also Monsanto Co. v. Geertson Seed Farms*, 564 U.S. 139, 152 (2010) (rejecting the argument that "[b]ecuase petitioners cannot prove that… two events would happen… the asserted harm… is too speculative to satisfy the actual or imminent injury requirement."). Rather, the Tribe need only show that the threatened injury will occur "sometime in the relatively near future," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995), and a mere time delay does not cut against the imminency requirement. *See Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974); *State of Ariz. v. Atchinson, Topeka, and Santa Fe R.R. Co.*, 656 F.2d 398, 402-03 (9th Cir. 1981). In other words, the Tribe "does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Commonwealth of Penn. v. State of West Virginia*, 262 U.S. 553, 593 (1926).

In this case, the Tribe has established that the credible threat it faces is sufficiently imminent. Defendants' intended mining activities on portions of the PCBP Property subject to the Minor Amendment Application will likely occur within six months to a year. *See* Dkt. No. 8 at 24; *see also* Smith Decl., ¶¶ 12-13; McCoy Decl., ¶¶ 3-4. Defendants' intended mining activities on the portions of the PCBP Property not subject to the Minor Amendment Application, and are closest to the Rancheria, could happen at any time. Smith Decl., ¶¶ 10-11, 13; McCoy Decl., ¶¶ 5-7. Defendants have made it abundantly clear that they fully intend to mine portions of the PCBP Property adjacent to the Rancheria. Smith Decl., ¶¶ 3-7; McCoy Decl., ¶¶ 3-7. The Court cannot disregard the hard evidence of Defendants' intentions and the injuries the Tribe faces in favor of the Defendants' general and unsupported protestations regarding its planned mining activities on the PCBP Property. *See Central Delta Water Agency*, 306 F.3d at 950.

B. THE TRIBE'S CLAIMS ARE PRUDENTIALLY RIPE FOR JUDICIAL RESOLUTION

This case is fit for judicial resolution now. Defendants have expressed an "articulated, concrete plan" to substantially increase mining activities on the PCBP Property, which the Tribe has established will likely harm its economic, natural, and cultural resources. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (for a claim to be ripe, there must exist an "articulated, concrete plan" to commit the contemplated injury). The Court should therefore reject Defendants' invitation to decline review the Tribe's claims based on the discretionary and disfavored prudential ripeness doctrine.

1. Defendants Raise Only Discretionary Issues Because Their Ripeness Arguments Represent Merely Prudential—Not Constitutional—Challenges

Defendants argue this Court lacks subject matter jurisdiction because the Tribe's claims are prudentially unripe.[1] *See* Dkt. No. 8 at 22-25; *see also Thomas*, 220 F.3d at 1141-42 (9th Cir. 2000) ("In evaluating the prudential aspects of ripeness, our analysis is guided by two overarching considerations: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."). Defendants' prudential ripeness challenges to the Tribe's claims are, therefore, merely discretionary. *Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1154 (9th Cir. 2017). Because the Tribe has established a sufficient Article III injury in this case, however, Defendants' efforts to have the Court deem the Tribe's "claims nonjusticiable on grounds that are prudential, rather than constitutional, that request is in some tension with the U.S. Supreme Court's recent affirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *California v. Bernhardt*, 460 F.Supp.3d 875, 893 (N.D. Cal. 2020) (internal quotations omitted) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014)); *see also Lexmark Intern., Inc. v. Static Control Components, Inc.*, 573 U.S. 118, 126 (2014). In other words, it is rarely appropriate for federal courts to decline adjudication of a

[1] To the extent Defendants invoke prudential ripeness arguments in support of their motion to dismiss the Tribe's claims for lack of subject matter jurisdiction, their arguments must fail because prudential ripeness does not relate to the Court's subject matter jurisdiction. *See Horne v. Dep't of Agric.*, 569 U.S. 513, 526 (2013) (prudential ripeness concerns "[are] not, strictly speaking, jurisdictional."); *see also In re Coleman*, 560 F.3d 1000, 1008 n. 18 (9th Cir. 2009); *MediNatura, Inc. v. Food and Drug Admin.*, 496 F.Supp.3d 416, 436 (D.D.C. 2020) ("prudential ripeness does not implicate the court's subject-matter jurisdiction").

case in which the plaintiff has satisfied the Constitutional requirements of "Cases" and "Controversies." *See* U.S. Const. art. III, § 2, cl. 1.

The Ninth Circuit likewise considers the doctrine of prudential ripeness to be "a disfavored judge-made doctrine that is in some tension with the U.S. Supreme Court's recent affirmation of the principles that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Fowler v. Guerin*, 899 F.3d 1112, 1116, n. 1 (9th Cir. 2018). In light of this "virtually unflagging" obligation, numerous courts within the Ninth Circuit have declined to dismiss a case based solely on prudential grounds. *See, e.g.*, *Bernhardt*, 460 F.Supp.3d at 894; *Friends of Ak. Nat'l Wildlife Refuges v. Bernhardt*, 381 F.Supp.3d 1127, 1135-36 (D. Ak. 2019); *State ex rel. Becerra v. Sessions*, 284 F.Supp.3d 1015, 1031 (N.D. Cal. 2018); *Nat'l Cmty. Reinvestment Coalition v. Office of Comptroller of the Currency*, No. 4:20-cv-04186-KAW, 2021 WL 4932548, at * 8 (N.D. Cal. Jan. 29, 2021) (slip copy). Accordingly, the Court should decline to dismiss the Tribe's claims based on the discretionary and disfavored prudential ripeness doctrine. Nevertheless, even if the Court were to reach the prudential ripeness doctrine, the Tribe's claims remain prudentially ripe for review.

2. No Further Factual Development Is Necessary And The Tribe Will Suffer Hardship If The Court Declines Review

Defendants contend the Tribe's claims are prudentially unripe because further factual development is necessary to evaluate the Tribe's claims, and the Tribe will not suffer hardship if the Court declines review at this time. Dkt. No. 8 at 22-24. Defendants represent that Amador County must approve Minor Amendment Application before this Court could adjudicate the Tribe's claims, implying that Defendants cannot start any mining activities until they receive that approval. *Id*. at 23-24. Not so. No further factual development is necessary because Defendants have made clear their intention to conduct unprecedented mining on the PCBP Property adjacent to the Rancheria, which is not subject to any County approval. *See* Smith Decl., ¶¶ 3-13; McCoy Decl., ¶¶ 5-7; DeSpain Decl., ¶¶ 2-6, Ex. A; *see also generally* Dkt. No. 8-1.

Defendants have certainly made clear they intend to fully pursue approval of the Minor Amendment Application, which Amador County is likely to approve. Dkt. No. 8-1 at 3; Dkt. No.

8-2, Exs. 1-3; Smith Decl., ¶¶ 3-13; McCoy Decl., ¶¶ 5-7. Contrary to Defendants' sole focus on the aspect of its mining operations subject to the Minor Amendment Application, without any approvals or permits from Amador County, it is certain that Defendants can—and intend to—substantially increase the mining activity on the portions of the PCBP Property subject to the 1977 reclamation plan, and it is certain that Defendants can commence new mining activities on the portions of the PCBP Property not subject to the Minor Amendment Application. Smith Decl., ¶¶ 4, 10-11; McCoy Decl., ¶¶ 5-6. Critically, Defendants have made no representation that they intend to abandon their future plans to substantially increase mining activity on the PCBP Property; instead, Defendants' conduct indicates that they fully intend to pursue all regulatory approvals necessary to increase their mining activities on the PCBP Property. Smith Decl., ¶¶ 3-13; McCoy Decl., ¶¶ 3-7; *see also* Dkt. No. 8-1 at 3-4. The Tribe's claims are therefore fit for judicial resolution at this time without further factual development.

Because the Tribe's claims are fit for judicial resolution, the hardship to the Tribe is irrelevant because hardship is a counterbalance in cases where the issues are not fit for judicial decision. *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838-39 (9th Cir. 2012). If the Court determines that the Tribe's claims are not fit for judicial decision, however, the Tribe has nonetheless demonstrated that it will suffer hardship if judicial consideration is delayed. In the prudential ripeness context, hardship means "hardship of a legal kind, or something that imposes a significant practical harm on the plaintiff." *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1128 (9th Cir. 2009). Delaying review in this case would cause hardship to the Tribe because it would mean that the Court could not review the harm inflicted on the Tribe's resources by the Defendants' future mining operations until the mining activities were already underway—when any review or corresponding Court action would inevitably come too late to adequately redress the Tribe's injuries. *See Ass'n of Irritated Residents v. U.S. EPA*, 10 F.4th 937, 944 (9th Cir. 2021).

More importantly, "a litigant seeking shelter behind a ripeness defense must demonstrate more than a theoretical possibility that harm may be averted." *Riva v. Com. Of Mass.*, 61 F.3d

1003, 1011 (1st Cir. 1995). As the Ninth Circuit noted in *Central Delta Water v. United States*, 306 F.3d 938 (9th Cir. 2002):

> It would be inequitable in the extreme for us to permit one party to create a significantly increased risk of harm to another, and then avoid the aggrieved party from trying to prevent the potential harm because the party that created the risk promises that it will ensure that the harm is avoided, yet offers no specific or concrete plan of action for doing so.

Id. at 950. In this case, Defendants have demonstrated only a theoretical possibility that Amador County will deny the Minor Amendment Application, which only involves a portion of the PCBP Property, and have offered no proof that their substantial increase in mining activities on the PCBP Property likely will not harm the Tribe's resources.

C. THE COURT POSSESSES JURISDICTION OVER THE TRIBE'S FEDERAL COMMON LAW TRESPASS AND NUISANCE CLAIMS

Defendants seek dismissal of the Tribe's federal common law trespass and nuisance claims by singling out only two of the many specific resources the Tribe seeks to protect in this litigation: the Tribe's wetlands and Tribal objects of cultural patrimony. Dkt. No. 8 at 19-21. As thoroughly detailed in the Tribe's Complaint, the Tribe has alleged that far more than just its wetlands and objects of cultural patrimony will be injured if Defendants substantially increased current mining activity and commencement of new mining activities on the PCBP Property adjacent to the Rancheria. *See* Dkt. No. 1 at 10-12. Contrary to the Defendants' misrepresentations, the Tribe alleges that Defendants' mining operations will: likely cause immediate harm to the Tribe's Rancheria, the Tribe's ability to self-govern the Rancheria, and the Tribe's general economic well-being; and, will be highly disruptive to the Tribe's ability to use and enjoy cultural activities on the Rancheria. Pope Decl., ¶¶ 17, 33-34, 37-38; McCoy Decl., ¶¶ 9, 11; Senock Decl., ¶ 15; *see also* Dkt. No. 1 at 10-11, 13. The Tribe also alleges that the noise, dust, and shaking from Defendants' mining activities would hamper the Tribe's ability to use and enjoy the Rancheria, to conduct cultural ceremonies on the Rancheria free from disruption, and would adversely impact the Tribal homes located on the Rancheria as well as threaten the health of those who reside on or visit the Rancheria. Pope Decl., ¶¶ 17, 33-34; Senock Decl., ¶ 15; *see also* Dkt. No. 1 at 10-11. The Tribe

further alleges that Defendants' planned mining operations will likely negatively impact the Tribe's groundwater. Pope Decl., ¶ 17; *see also* Dkt. No. 1 at 11. All of the natural, cultural, and economic resources the Tribe alleges will be harmed are located on the federally protected trust lands of the Rancheria or otherwise fall within the possessory interests associated with the Rancheria. Pope Decl., ¶¶ 17-18, 20-34; Dkt. No. 1 at 6-8, 11-13.

Defendants' intentional omission of the cultural, natural, and economic resources located on the Rancheria that the Tribe seeks to protect in this case, other than the wetlands and objects of cultural patrimony, is telling. Defendants' challenges to the Tribe's federal common law trespass and nuisance claims are predicated only on the Tribe's possessory interest in its wetlands and objects of cultural patrimony. Dkt. No. 8 at 19-21. Even if the Court found that the Tribe could not bring a federal common law trespass or nuisance claim based on alleged injury to the Tribe's wetlands or objects of cultural patrimony, the Tribe's federal common law claims would nonetheless survive because it has alleged injuries related to other Tribal cultural, natural, and economic resources located on the Rancheria.

1. The Tribe May Bring Federal Common Law Trespass And Nuisance Claims Based On The Threats To Resources Located On The Rancheria

Defendants seem to argue this Court lacks subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1362 because the Tribe alleges Defendants' mining activities will adversely impact only the Tribe's objects of cultural patrimony. Dkt. No. 8 at 21. It also appears that within the context of this challenge to the Tribe's federal common law claims, Defendants generally contend the Tribe lacks standing to bring its federal common law trespass and nuisance claims. *See id.* Unbeknownst to Defendants, however, it is well-settled that the Tribe has standing to bring federal common law trespass and nuisance claims to protect their Tribal trust lands and Tribal resources located on those lands. *See, e.g., United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009) ("[f]ederal common law governs an action for trespass on Indian lands."); *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n. 8 (9th Cir. 1994) ("The Supreme Court has recognized a variety of federal common law causes of action to protect Indian lands from trespass…"); *Oneida Cnty. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 235-36 (1985) (right of Indians to occupy lands

held in trust by the United States for their use is "the exclusive province of federal law"); *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1282 (10th Cir. 2010) (recognizing federal common law claim for trespass to Indian trust lands); *Davilla v. Enable Midstream Partners, L.P.*, 913 F.3d 959, 965 (10th Cir. 2019) (federal common law applies to trespass claims on Indian trust land); *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Reservation v. Enbridge Energy Co., Inc.*, ---F.Supp.3d---, 2022 WL 4094073, at *4, 20 (W.D. Wis. Sept. 7, 2022) (recognizing Indian tribe's ability to bring federal common law trespass and nuisance claims). The Tribe's federal common law claims, which seek to protect the rights associated with the Tribe's possessory interests in the Rancheria and the Tribal resources located within that Indian trust land, specifically fall within the jurisdiction conferred on the Court by 28 U.S.C. §§ 1331 and 1362. *See, e.g., Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016, 1018 (9th Cir. 1973) (Indian tribe can sue under 28 U.S.C. § 1362 to safeguard federally protected property rights); *Mescalero Apache Tribe v. Burgett Floral Co.*, 503 F.2d 336, 338 (10th Cir. 1974) (Indian tribe may bring federal common law trespass claim under 28 U.S.C. § 1362 for damage to resources located on Indian reservation); *Pueblo of Isleta ex rel. Lucero v. Univ. Constructors, Inc.*, 570 F.2d 300, 302 (10th Cir. 1978) (district court had subject matter jurisdiction over trespass action brought by Indian tribe to recover damages for injury to Indian trust lands from blasting operations carried on outside the Indian trust land boundaries); *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Reservation*, 2022 WL 4094073, at *4, 20 (district court possessed jurisdiction over federal common law trespass and nuisance claims brought by tribe against oil and gas pipeline company based on tribal concerns about potential environmental impacts of pipeline).

Lastly, Defendants' heavy reliance on *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989), is inapposite. In that case, an Indian village brought an action against individuals for removing native artifacts from fee lands owned by the Indian village. 870 F.2d at 1470. The Ninth Circuit affirmed the district court's determination that the village's common law conversion claims related to the removal of the native artifacts from fee lands did not arise under federal law because the artifacts were not "trust property, nor property held pursuant to federal statute or common law." *Id*. at 1472. *Chilkat Indian Village* is wholly distinguishable from this case, and only serves to

establish the Tribe's federal common law claims. *Chilkat Indian Village* did not present a federal common law trespass or nuisance claim. *Id*. The lands involved in *Chilkat Indian Village* were fee lands—not lands held in trust by the United States for the benefit of a federally recognized Indian tribe. *Id*. The plaintiff in *Chilkat Indian Village* did not bring suit to protect Tribal resources located on Indian trust lands from trespasses or nuisances onto those federal lands, only what appeared to be a common law conversion claim. *Id*. The Court should therefore disregard *Chilkat Indian Village* in its entirety.

2. The Clean Water Act Does Not Displace The Tribe's Federal Common Law Claims Based On Injuries To Its Wetlands

Defendants argue the Tribe's federal common law claims related to its wetlands are displaced by the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.* ("CWA"), under *Milwaukee v. Illinois*, 451 U.S. 304 (1981).[2] Dkt. No. 8 at 20. Again, it is important to note that Defendants' displacement argument applies only to the Tribe's federal common law claims to the extent those claims relate to the alleged injuries to the wetlands. *See id*. Regardless, the CWA does not displace any aspect of the Tribe's federal common law claims because the CWA does not provide a "sufficient legislative solution" to the issues raised by the Tribe's federal common law claims. *See Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856 (9th Cir. 2012); *see also Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 777 (7th Cir. 2011).

The doctrine of displacement rests on the premise that federal common law is subject to the paramount authority of Congress. *Michigan v. U.S. Army Corp. of Eng'rs*, 667 F.3d 765, 777 (7th Cir. 2011); *see also Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423-24 (2011). The important question for the Court's displacement analysis is "whether Congress has provided a sufficient legislative solution" in the CWA to the particular trespass or nuisance at issue to warrant a conclusion that the legislation "has occupied the field to the exclusion of federal common law."

[2] It also is notable that the United States has brought both federal common law trespass claims and claims predicated on CWA violations involving waters of the United States in the same suit. In *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009), the United States, on its own behalf and as trustee on behalf of an Indian tribe, brought both federal common law trespass claims and CWA claims against a group of waterfront homeowners. In evaluating the United States' federal common law trespass claims, the Ninth Circuit explained that "[f]ederal common law governs an action for trespass on Indian lands." *Id.* at 1182. The Court did not dismiss the United States' federal common law trespass claims as displaced by the CWA, and ultimately adjudicated the CWA claims separate from the federal common law trespass claims. *See id*. at 1182-83, 1194-95.

Native Village of Kivalina, 696 F.3d at 856. Put another way, the question "is simply whether the [CWA] speaks directly to the question at issue." *Am. Elec. Power Co., Inc.*, 564 U.S. at 424.

The CWA establishes the basic structure for regulating discharges of pollutants into the waters of the United States, and quality standards for surface waters. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). The CWA enforces these "effluent limitations" on water quality standards by making it unlawful to discharge any pollutant through a point source without or in violation of a permit issued under the Act. *See Arkansas*, 503 U.S. at 101-02; *S. Fla. Water Mgm't Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 101 (2004) (noting that CWA "requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters"). Critically, the CWA allows discharge of pollutants into waters of the United States as long as the polluter has the proper permit. *See* 33 U.S.C. §§ 1311, 1342(a).

In this case, the Tribe does not seek declaratory and injunctive relief that would impose the same limiting regulations as the CWA. *See* Dkt. No. 1 at 2, 13-14. Rather, the Tribe seeks a solution to the serious imminent threat posed by Defendants' proposed mining activities, which not only threaten the Tribe's wetlands, but pose a significant risk to *all* of the Tribe's other cultural, economic, and natural resources located on the Rancheria. *Id.* Defendants' conclusory displacement argument fails to cite any provision of the CWA that provides a legislative solution to the specific issues and alleged injuries the Tribe raises in this litigation. *See* Dkt. No. 8 at 20. It is not sufficient for the purposes of displacement that the CWA generally addresses discharges of pollutants into the waters of the United States, that the CWA's implementing regulations prescribe *some* standards governing limits on pollutants discharged by a particular activity, or even that the U.S. Army Corp of Engineers could theoretically deny a permit. *See Native Village of Kivalina*, 696 F.3d 856 ("The existence of laws generally applicable to the question is not sufficient; the applicability of displacement is an issue-specific inquiry."). Accordingly, the CWA does not displace the Tribe's federal common law claims associated with alleged injuries to its wetlands, or otherwise, because the CWA does not adequately address the specific situation at issue in this case. Defendants' efforts to sidestep the Tribe's claims therefore fail.

IV. CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that the Court deny Defendants' motion. A proposed order accompanies this Response.

DATED: March 29, 2023

Respectfully submitted,

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