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UNITED STATES DISTRICT COURT

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.

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

Assigned to: Hon. William B. Shubb

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT PURSUANT TO F.R.C.P. 12(B)(1)

Date: June 12, 2023
Time: 1:30 p.m.
Courtroom: 5

Complaint Filed: Jan. 27, 2023

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I. INTRODUCTION

In its opposition to the motion to dismiss ("Motion") filed by Pacific Coast Building Products, Inc. ("PCBP"), PCBP Properties, Inc., and PABCO Clay Products, LLC (erroneously named as H.C. Muddox) (collectively, "Defendants"), Plaintiff Buena Vista Rancheria of Me-Wuk Indians (the "Tribe") offers five declarations. Each declaration serves essentially the same purpose: to establish the Tribe's *perception* of Defendants' mining operations and *possible* plans, based on conversations with Defendants' representatives in Fall 2022. As clearly shown in the Motion, however, the Tribe's belief as of late 2022 regarding the scope of Defendants' operations and plans is wrong. The actual plans are memorialized in Defendants' application for a vested rights determination and reclamation plan amendment ("Application"), which was modified to address concerns raised by the Tribe in late 2022 and only recently submitted on March 8, 2023. Tellingly, the Tribe failed to address the substance of the actual Application filed by Defendants, instead relying on declarations stating nothing more than speculative (and now moot) "concerns". A plaintiff's unsubstantiated "concern" that harm will occur cannot form the basis for a cause of action, especially when contradicted by plain facts.

Although the Tribe speculates in its complaint and declarations that mining will cause a plethora of harms, it *admits* that it did not suffer any of those speculative harms as a result of Defendants' 2017 mining operation, which occurred *substantially* closer to the Rancheria property line than the 9.9

acre parcel of land Defendants seek to adjoin under the new Reclamation Plan. (*See* Dkt. No. 26 ¶ 35 ("I have never observed any significant mining operations on the PCBP property since I was elected Chairwoman in 2004."); Dkt. No. 28 ¶ 3 ("During the time I have worked for the Tribe [since 2016], I have never observed . . . any large scale clay mining activities on the Berry Mine property next to the Rancheria.") Nor does the Tribe address Defendants' evidence that operations will not increase from the present production if the Application is approved. The Tribe attempts to sidestep this omission by arguing that it lacked standing to bring *federal* claims in 2017, but that is immaterial. The Tribe could have complained to Defendants or the County, sued in state court, or alleged that it had in fact suffered at least some of the harms it now alleges will occur, to establish that its perceived threat is credible and has *some* basis in reality. Instead, the Tribe's admission that it *did not even notice* Defendants' conduct in 2017 constitutes direct evidence that the Tribe lacks standing to allege that harms such as noise, dust, shaking, and traffic will occur in the future if operations similar in scale commence *farther away* from the Rancheria.

The Tribe's attempts to establish federal jurisdiction over its remaining allegations of harm are equally unavailing. As the Tribe itself admits, the basis for its federal claims is that the Rancheria is held in trust by the United States. (*See* Dkt. No. 25 at 3–7.) This federally-protected possessory interest does not extend to neighboring properties lawfully owned by private companies. Nor does it protect the Tribe's economic interest in

its casino, which is neither "aboriginal" in origin nor tied to the Tribe's right of occupancy. Finally, the Tribe fails to address how the administrative procedure set forth by the U.S. Army Corps of Engineers ("Corps of Engineers") pursuant to its Congressionally-granted authority under section 404 of the Clean Water Act is insufficient to protect the Tribe's interests in its wetlands. Accordingly, to the extent the Tribe seeks to invoke federal jurisdiction on these bases, such claims fail.

In the alternative, this court has discretion to dismiss this case solely on prudential ripeness grounds, and courts within the Ninth Circuit continue to do so absent a showing of hardship. In light of the Tribe's speculative declarations—— which are its sole evidence in this case——the Tribe has failed to show how deferring judicial resolution will impose any practical harm on the Tribe. Therefore, to avoid duplicative factual development, and in the interest of judicial economy, the complaint should be dismissed pending further factual development by the agencies vested with such authority.

II. THE MOTION TO DISMISS SHOULD BE GRANTED.

A. The Tribe's Supporting Declarations Do Not Establish a Credible Threat of Harm.

"Once the moving party has converted [a 12(b)(1)] motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). The Tribe's declarations, which do not

address the substance of the Application nor rebut Defendants' supporting declaration, fall far short of satisfying its burden.

1. *The Tribe Relies on Declarations Recounting Perceived Threats While Ignoring the Substance of the Application.*

The Tribe offers five declarations in support of its allegation that Defendants' proposed operations are "of a substantially greater scope than its past operations." (*See* Dkt. No. 25 at 9–10.) All five declarants recount their perceptions of Defendants' intent and their personal concerns stemming therefrom. (*See* Dkt. No. 25 at 10; Dkt. Nos. 26–30.) Notably, none of the declarants purport to have any mining or geology expertise. (*Id.*)

Declarant Wayne Smith references a September 13, 2022 conversation with PCBP representatives regarding the Tribe's offer to purchase the westernmost portion of the PCBP property (the "Property"), directly adjacent to the casino. (Dkt. No. 30, ¶¶ 3–8.) From 2008 to 2019, the Tribe submitted annual payments to PCBP pursuant to a Ground Lease and Option Agreement ("Option Agreement"). (Declaration of Joshua Kimerer ("Kimerer Decl.") ¶ 5.) The Option Agreement incorporated Defendants' 1977 Reclamation Plan and reserved PCBP's right to mine *any portion* of the 114.27 acres covered by the plan (the same rights it currently holds) which the Tribe did not find objectionable at the time.[1] (*Id.* at ¶ 4.) The Tribe ceased payments in 2019 and

[1] The Tribe's pattern of picking and choosing what conduct it finds objectionable at what time further undercuts the credibility of its claims. For example, the Tribe alleges that irreversible environmental harm and destruction of cultural artifacts will result

opened negotiations to purchase the westernmost portion of the Property (the "Parcel"). (*Id.* at ¶ 6.) In 2021, the Tribe submitted an unsolicited offer. (*Id.*) At the September 2022 meeting, Tribe representatives stated that the Tribe planned to develop a Recreational Vehicle park on the Parcel, instead of the hotel it had previously considered, because cost of a hotel was not right for the casino at that time. (*Id.* at ¶ 8.) Defendants represented that they would be willing to mine what they could from that portion of the Parcel to then make it available for sale. (*Id.* at ¶ 9.) Negotiations ceased due to inability to agree on a purchase price. (*Id.* at ¶ 10.)

From that conversation, the Tribe manufactures the allegation that Defendants intend to engage in "unprecedented" mining operations, an allegation which is now moot, and plainly belied on the face of the Application. (*See* Dkt. No. 8-2, Exh. 2 at 6 (Application) ("Operations will continue at the present pace. Mining will be conducted sporadically and hauling will occur intermittently over the summer months. When hauling, a maximum of four truck movements per day are anticipated."); Dkt. No. 8-1 ¶ 9; see *also* Declaration of Gregory Stevenson In Support of Reply ("Stevenson Reply Decl.") ¶ 11.)

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from Defendants' conduct. Yet, *in the same complaint*, the Tribe prominently highlights its 71,000 square foot casino, which the Tribe constructed *partially on top of* the alleged "Initial Cultural Resources Sensitive Area" in 2019. (*See* Dkt. No. 1 ¶¶ 24, 33.) The Tribe does not and cannot explain how Defendants' proposed mining project, which will be followed by mandatory reclamation of the land, presents a credible threat of harm where the Tribe itself recently constructed a massive casino that has and will have a continuous environmental impact.

In addition, Declarant Padraic McCoy references a December 16, 2022 meeting with PCBP representatives to discuss Defendants' preliminary plan for the Application. (*See* Dkt. No. 29 ¶ 3-8.) In response to the Tribe's concerns expressed at that meeting——namely, proximity to the casino——Defendants narrowed the scope of the Application and the current Reclamation Plan significantly, removing the 41.03 acres closest to the Rancheria and expanding only 9.9 acres to the East, farther away from the Rancheria. (*See* Dkt. No. 8 at 16; Dkt. No. 8-2, Exhs. 2-3.)

Lastly, Declarant Michael Despain, who does not purport to have any personal knowledge regarding Defendant's operations nor geological expertise, speculates from several Google Earth images that "the current activities on the property are inconsequential compared to what PCBP representatives *have told [the Tribe] they would do* adjacent to the Rancheria." (Dkt. No. 28 ¶ 6) (emphasis added.) Mr. Despain's *perceptions*, however, are belied by Mr. Stevenson's declaration, wherein he observes that there *is* evidence of ongoing mining activity in the photographs, including building or removing of stockpiles and progressive reclamation activity as part of the Reclamation Plan. (Stevenson Reply. Decl. ¶ 12.) Moreover, while there are no photographs from 2016-2020, the photograph labeled "2021" accurately reflects the current level of mining activity associated with Defendants' operations, which, as set forth in the Application, Motion, and supporting declarations, will continue at the present pace. (*See id.*; Dkt. No. 8-1 ¶ 9; Dkt. No. 8-2, Exh. 2 at 6 (Application).)

At no point does the Tribe address the actual Application, which was modified in response to the Tribe's concerns. Nor does

the Tribe meaningfully refute Mr. Stevenson's first-hand account of the mining activities he has overseen on the Property since 2013. Put plainly, the Tribe's *perceptions* of Defendants' mining activity, which are contradicted on the face of the *actual* plan and by statements based on both personal knowledge and geological expertise (*see* Stevenson Reply Decl. ¶ 3), do not give rise to credible claims of future harm.

2. *The Tribe's Admission That It Did Not Detect Defendants' Past Mining Operations Is Direct Evidence that the Tribe's Perceived Threat of Future Injury Is Entirely Speculative.*

As Mr. Stevenson submits in his sworn statement, Defendants excavated approximately 11,000 tons of clay approximately 200 feet from the Rancheria in 2017 and continue mining operations approximately 1,500 feet away from the property line to this day. (Dkt. No. 8-1 ¶ 7; Stevenson Reply Decl. ¶ 8.) The Tribe does not (and cannot) dispute this. Instead, Declarants Rhonda Morningstar Pope-Flores and Michael Despain *admit* that they have never observed "significant" or "large-scale" clay mining on the Property even though they both worked for the Tribe in 2017.[2]

The Tribe then takes these admissions——which are direct evidence that similar conduct at further distances will not disturb the Rancheria——and turns them on their head by arguing that because the Tribe does not perceive the activity or any

[2] Declarant Ivan Senock falsely alleges, without citing his source, that the mine is "listed as inactive." This is patently false; the mine is active and listed with the State of California under Mine ID 91-03-0015. (*See* Dkt. No. 8-1 ¶¶ 6-9; Dkt. No. 8-2, Exh. 2 (Application).)

impacts from it, it must not be occurring. That logic makes no sense.

The Tribe admits that Defendants' operations did not disturb the Rancheria in any way in the past, despite the presence of "a cultural center, two homes –including [the home of Ms. Morningstar Pope-Flores]— , a Tribal office, the Tribal cemetery, and traditional gathering places" on the Rancheria.[3] (*See* Dkt. No. 26 ¶ 20.) If the alleged harm was going to be felt on Rancheria at all, it would have already happened when Defendants conducted a three week excavation 250 feet from the property line, and 450 feet from the Tribal Office. (*See* Dkt. No. 8-1 ¶ 7; Stevenson Reply Decl. ¶ 8.) However, because of Defendants' precautions, including Defendants' voluntary imposition of a 200 foot buffer along the property line (*see* Dkt. No. 8-2, Exh. 2 (Application)) and dust suppression methods (Stevenson Reply Decl. ¶ 6), as well as the types of machinery used, scale of Defendants' operations, and the specific topography of the area

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[3] Ms. Morningstar Pope-Flores' assertion that "the situation is now just different" because the Rancheria was not in trust in 2017 and the casino had not yet been built skirts the issue. (*See* Dkt. No. 26 ¶ 36.) The Tribe and Defendants have been in open communication for years; indeed, in addition to negotiations surrounding the sale of the Property, the Tribe purchased materials mined at the Property to construct its casino. (Stevenson Reply Decl. ¶ 9.) In 2015, the Tribe also attempted to negotiate a free easement to construct a gravel road over the portion of the Property identified as the alleged "Initial Cultural Resources Sensitive Area", and PCBP granted the Tribe a separate free easement to access its monitoring wells in 2022. (*Id.*) Thus, although the Tribe has had numerous opportunities to object——formally or informally——to Defendants' supposed "disrespectful" conduct in the past if it was truly "disrespectful," the Tribe never did so. Nonetheless, the Tribe inexplicably now asks this court to entertain its challenge to conduct that, by the Tribe's own admission, has never disturbed the Rancheria.

(*id.*; Dkt. No. 8-1 ¶ 6), Defendants' excavation went entirely undetected by the Tribe. While evidence of past harm may not be enough, on its own, to *establish* standing, affirmative evidence that the alleged harms *have not occurred and do not occur* in connection with the same conduct is a compelling indicator that a plaintiff's allegations lack credibility. *See Jarlstrom v. City of Beaverton,* No. 3:14-CV-00783-AC, 2014 WL 5462025, at *9-10 (D. Or. Oct. 27, 2014)(noting that plaintiff's "failure to allege [intersections] caused accidents in the past does undermine his argument that a credible threat of such injury exists," and holding that "[t]he absence of allegations or evidence of such accidents necessitates a finding that the threat perceived by [plaintiff] is not actual or imminent."); *Herrington v. Johnson & Johnson Consumer Companies, Inc.*, No. C 09-1597 CW, 2010 WL 3448531, at *4 (N.D. Cal. Sept. 1, 2010) (finding plaintiff's allegations of future injury based on carcinogen exposure were too remote where plaintiff did not allege current or past injuries).

B. <u>The Authorities Cited By the Tribe to Establish Standing Are Not Persuasive.</u>

The Tribe alleges, without any factual basis, that imminent and irreversible environmental harm will occur as a result of Defendants' operations. However, as set forth extensively in Section II(C), below, the environmental impact——if any——of Defendants' proposed operations to the Rancheria is currently being evaluated by the Corps of Engineers pursuant to its jurisdiction under section 404 of the Clean Water Act, as well as the county and state agencies. The other harms the Tribe alleges

will occur, such as noise, dust, shaking, and traffic, are transient in nature, not permanent, and can be swiftly addressed if they actually occur. Accordingly, to the extent the Tribe suggests that a lower standard for establishing a credible threat is appropriate here, this case is distinguishable from other environmental injury cases. *See Cent. Delta Water Agency v. United States*, 306 F.3d 938, 949 (9th Cir. 2002) (noting that "[t]he 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*"); *cf. Reilly v. Ceridian Corp.*, 664 F.3d 38, 46 (3d Cir. 2011) (distinguishing environmental injury cases from economic harm cases because "unlike priceless 'mountains majesty,' the thing feared lost here . . . is easily and precisely compensable").

In addition, the cases cited by the Tribe do not support its position that it has demonstrated a credible threat of harm. On the contrary, both of those cases were filed as challenges to final approved plans from which plaintiffs could prove a concrete risk of injury. *See Cent. Delta*, 306 F.3d at 949 (showing of threatened harm based on government's own statistical model which demonstrated that its adopted plan would damage plaintiffs' crops in 16% of plaintiffs' growing season); *Natural Res. Def. Council v. EPA*, 735 F.3d 873, 878 (9th Cir. 2013) (plaintiff organization had standing to challenge Environmental Protection Agency's decision regarding registration of a pesticide used in textiles based on disagreements with EPA's methodology in its report).

Here, in contrast, the Tribe points only to its own declarations recounting out-of-context discussions, while

ignoring the substance of the actual Application that is pending and has not yet been approved. These declarations do not constitute "hard", or even relevant, evidence (*see* Dkt. No. 25 at 11). Rather, the Tribe's exclusive reliance on these declarations demonstrates that the Tribe has not carried its burden to show standing. *See Yount v. Salazar*, No. CV11-8171 PCT-DGC, 2014 WL 4904423, at *7 (D. Ariz. Sept. 30, 2014), *aff'd sub nom. Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845 (9th Cir. 2017) (where plaintiff organization relied solely on the declaration of a member to allege environmental harm, "[b]ut the affidavit fail[ed] to provide any concrete evidence regarding when, how, or even whether [the organization would] actually mine the[] deposits" and "provide[d] no specific information about the grade of the uranium to be mined or what environmental impacts would result from mining it," plaintiff did not satisfy the injury-in-fact requirement).

Similarly, cases relied on by the Tribe regarding "imminence" are factually and procedurally inapposite from the claims presented here. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n. 5 (2013) (finding respondents had *not* demonstrated standing and noting that "plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm"); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 150, (2010) (discussing standing to challenge an injunction that barred an agency from issuing a proposed judgment); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) (petitioner had standing to challenge subcontractor compensation clause where

evidence showed petitioner bid on such contracts at least once per year); *Arizona v. Atchison, T. & S. F. R. Co.*, 656 F.2d 398, 402 (9th Cir. 1981) (finding standing to challenge enacted law); *Commonwealth of Penn. v. State of West Virginia*, 262 U.S. 553, 593 (1926) (same).

Here, the Tribe has not carried its "burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm." See *Clapper*, 568 U.S. at 414 n. 5. Rather, there are a number of contingencies that render the Tribe's claims constitutionally unripe, including county and state evaluation of the Application, approval of the Application, the Corps' of Engineers' evaluation of the environmental impact to the Rancheria, and the numerous opportunities for public comment in connection with both county and federal review. Accordingly, the Tribe has failed to demonstrate both a credible threat and the imminence of that threat for constitutional standing purposes. *See Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F. Supp. 2d 1224, 1239 (E.D. Cal. 2003) (finding plaintiffs lacked standing where no final agency decision had been made and plaintiffs could not demonstrate how they would be harmed without immediate judicial review.)

C. Federal Common Law and the Doctrine of Displacement Foreclose the Tribe's Claims on Additional Grounds.

1. *Federal Common Law Protects a Tribe's Possessory Right of Occupancy on Indian Land.*

The Tribe misunderstands Defendants' position regarding jurisdiction. The Tribe has not alleged credible harms in connection with Defendants' past or current mining practices, as

evidenced by its admission that it was not impacted by the 2017 operation and remains unaffected. In an attempt to plead around this glaring hole in its claims, the Tribe alleges a number of wholly speculative future harms that it claims *could* stem from PCBP's relocation of its current mining project, including: (1) possible disturbance of grave-like structures that *might* be located underneath the Property; (2) disruption to the casino, which was constructed in 2019; and (3) environmental harm to its wetlands. The rank speculation underlying the Tribe's allegations renders them uncredible. In addition, the Tribe is barred from invoking this court's jurisdiction based on these allegations of possible future harm for additional reasons.

Defendants do not dispute that a claim for federal common law trespass[4] may lie where the "possessory rights of Indian

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[4] The Tribe cites a single case, *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Rsrv. v. Enbridge Energy Co., Inc.*, No. 19-CV-602-WMC, 2022 WL 4094073, at *19 (W.D. Wis. Sept. 7, 2022), to support its argument that its nuisance claim is one of federal, as opposed to state, common law. However, *Bad River* does not support such a broad proposition and did not establish a blanket federal common law nuisance claim. It is an interstate pipeline case that did not discuss why federal common law applied to the plaintiff tribe's nuisance claim. *Id.* The federal common law of nuisance was originally developed to address *interstate* pollution, where the laws of different states may be in conflict (*Illinois v. City of Milwaukee*, 406 U.S. 91, 92 (1972)) and is only applied where there is a "uniquely federal interest." *See Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 640 (1981). The Tribe has not cited, nor are Defendants aware of, any federal common law nuisance cases where interstate or transnational pollution was not at issue. Rather, the Tribe appears to bootstrap its nuisance claim to its trespass claim on the assumption that the same federal interest at issue in a trespass claim (i.e., possessory rights to tribal lands) creates a federal common law nuisance claim. However, this argument is a leap that would require the court to "fashion a new federal common law" nuisance cause of action for the Tribe, which is a "disfavored" approach. *See Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791,

tribes to their aboriginal lands" are at issue, provided that such rights have not been extinguished by sovereign action or have been restored through the establishment of a trust. *See Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 667 (1974). In the latter case, however, federal jurisdiction is limited to claims involving a tribe's *possessory* rights to trust property. *See Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1473 (9th Cir. 1989) (distinguishing property alleged to be held in trust from a tribe's "proprietary interest" in artifacts not held in trust); *Kawaiisu Tribe of Tejon v. Salazar*, No. 1:09-CV-01977, 2011 WL 489561, at *5 (E.D. Cal. Feb. 7, 2011) (affirming dismissal of federal common law challenge to construction project on private property where tribe alleged there were numerous grave sites on the property, but did "not allege a current possessory interest in the lands in question.").

Here, the Tribe admits that its aboriginal rights in the region were extinguished by the United States in 1927. (Dkt. No. 25 at 1); *see also Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244 n.16 (1985) ("extinguishment of Indian title requires a sovereign act"). Therefore, the Tribe has no federal common law interest in the properties surrounding the Rancheria, notwithstanding the Tribe's speculation that grave-like sites and items of cultural patrimony *might* exist below the Property. Rather, such claims are the province of state law. *See* Dkt. No. 1 ¶ 55 ("The likely presence of grave-like structures and other

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815 (D. Idaho 1993); *see also Tex. Indus*, 451 U.S. at 640-41 ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law.")

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, which would violate, at minimum, various California state laws.").

Likewise, the Tribe has not cited, nor are Defendants aware of, any authority fashioning a federal common law trespass or nuisance claim to protect a tribe's economic interest in its casino, an interest that is neither "aboriginal" in origin (*see Canadian St. Regis Band of Mohawk Indians v. New York*, 278 F. Supp. 2d 313, 343 (N.D.N.Y. 2003) ("[a]boriginal . . . connotes rights deriving from ancestral use.") (quotation marks and citation omitted)), nor related to the tribe's right to occupy its lands. *See Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708, 715 n.8 (9th Cir. 1980) (rejecting a "Tribe's attempt to style [its] action as a tort action for damage to the Tribe's land" because "[t]he damages sought were not for trespass on the land, for restoration of the land to its original state or for irreparable injury to the land, but rather for" negligent design of a youth center on a reservation.)

Accordingly, to the extent the Tribe attempts to fashion federal common law trespass or nuisance claims in connection with the above interests, such claims do not fall under the "possessory right of occupancy" contemplated by *Oneida* and its progeny.

2. *The Tribe's Federal Common Law Claims to Protect Its Wetlands Are Displaced by the Clean Water Act and Other Federal Legislation.*

The Tribe attempts to argue around the doctrine of displacement by alleging that Congress' legislative solution to

protect Waters of the United States does not go far enough. (*See* Dkt. No. 25 at 19.) This argument ignores both the law and the specific facts of this case.

Congress has spoken directly to the issue here—that is, the appropriate level of federal protection over the Tribe's wetlands. Section 404 of the Clean Water Act, 33 U.S.C. § 1344, grants both the Corps of Engineers and the Environmental Protection Agency ("EPA") the authority to evaluate activity that may impact Waters of the United States, including wetlands. Under Section 404(b), the Corps of Engineers is to evaluate the project under EPA standards; under section 404(c), the EPA retains the power to veto the Corps of Engineers' decision to issue a permit. In addition, section 404(e)(1) requires that the Corps of Engineers provide an opportunity for public comment prior to issuing any permit.

If the Corps of Engineers determines that Defendants' conduct will in fact reach the Rancheria, then the Corps of Engineers will further evaluate the project in accordance with, *inter alia*, the National Environmental Policy Act (requiring federal agencies to assess the environmental effects of their proposed actions before making decisions, and prepare detailed environmental impact statements, *see* 33 C.F.R. Part 325 Appendix B) and the National Historic Preservation Act (requiring agencies to take into account historic property prior to the issuance of any license, *see* 54 U.S.C. § 306108). Therefore, because Congress has delegated authority to the Corps of Engineers and the EPA to evaluate the Tribe's ecological concerns, under Acts which directly address those concerns, the

Tribe's federal common law claims are displaced.[5] *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856 (9th Cir. 2012) (tribe's federal common law claim was displaced because "[w]hen the Supreme Court concluded that Congress had acted to empower the EPA to regulate greenhouse gas emissions . . . it was a determination that Congress had 'spoken directly' to the issue by legislation."); *see also United States v. Questar Gas Mgmt. Co.*, No. 2:08CV167DAK, 2010 WL 5279832, at *5 (D. Utah Dec. 14, 2010) (dismissing tribe's federal common law nuisance claim because "while the court [previously] allowed the Tribe to bring a nuisance action to parallel the government's CAA actions, it was unaware of the law regarding preemption and displacement at that time"); *cf. United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009) (allowing concurrent Clean Water Act and federal common law trespass claims where there was no argument that the Clean Water Act displaced the trespass claim).

Accordingly, because Congress has empowered the Corps of Engineers and EPA to regulate the Tribe's wetlands, the Tribe is

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[5] The Tribe argues that the Clean Water Act does not displace federal common law because the Act incorporates a permitting scheme that allows for the discharge of pollutants. (*See* Dkt. No. 25 at 19.) This is not the test for displacement. Rather, the "relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'" *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 426 (2011) (citation omitted). "The critical point is that Congress delegated to EPA the decision whether and how to regulate . . . the delegation is what displaces federal common law. Indeed, were EPA to decline to regulate [] emissions altogether at the conclusion of its ongoing [] rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the Agency's expert determination." *Id.*

precluded from invoking concurrent federal common law claims to protect the same interest.

D. The Court May Decline Jurisdiction Based Solely on Prudential Ripeness Considerations.

"The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Elkins v. Am. Honda Motor Co.*, No. 819CV00818JLSKES, 2020 WL 4882412, at *4 (C.D. Cal. July 20, 2020) (internal quotation marks omitted)). "Like other challenges to a court's subject matter jurisdiction, motions raising the ripeness issue are treated as brought under Rule 12(b)(1)." *Int'l Franchise Ass'n v. California*, No. 20-CV-02243-BAS-DEB, 2022 WL 118415, at *3 (S.D. Cal. Jan. 12, 2022); *Foster v. Cantil-Sakauye*, 744 F. App'x 469, 469 (9th Cir. 2018) (noting that dismissal of a claim on prudential ripeness grounds is a dismissal for lack of subject matter jurisdiction).

Notwithstanding the authority cited by the Tribe to the contrary,[6] courts within the Ninth Circuit continue to dismiss cases solely on prudential ripeness grounds. *See, e.g., Elkins.*, 2020 WL 4882412, at *4-6 (dismissing solely on prudential ripeness grounds); *Bobbie Carne v. Stanislaus Cnty. Animal Servs. Agency*, No. 1:19-CV-1151 AWI SKO, 2021 WL 1212704, at *6 (E.D.

[6] *Fowler v. Guerin*, 899 F.3d 1112, 1116, n. 1 (9th Cir. 2018), a "*per se* takings" case upon which the Tribe relies, observed in a footnote that the Supreme Court's discussion of prudential *standing* in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) creates "some tension" with prudential ripeness. Nonetheless, the Supreme Court has expressly declined to address or even limit the prudential ripeness doctrine (*see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014)) and the doctrine remains good law.

Cal. Mar. 30, 2021) (same); *Allstate Ins. Co. v. Am. Reliable Ins. Co.*, No. 16-CV-00871-TLN-KJN, 2017 WL 1153041, at *3 (E.D. Cal. Mar. 28, 2017) (same); *AMTAX Holdings 260, LLC v. Washington State Hous. Fin. Comm'n*, No. 21-35789, 2022 WL 2953701, at *1 (9th Cir. July 26, 2022) (same). Where significant administrative review is already underway by agencies that are better suited to develop the factual record, it is particularly appropriate for a court to decline concurrent and duplicative review. *See Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005) (noting that "land use disputes are uniquely matters of local concern more aptly suited for local resolution" prior to judicial intervention.) Such is the case here.

As set forth above, Defendants' mining rights to the Property, and the extent of any environmental impact to the Tribe, are already being evaluated by local, state, and federal agencies, and no final decisions have been issued. Accordingly, there is no compelling reason for the court to intervene at this time. Rather, the court would benefit from deference to government review to bolster the factual record before it. *See Kohn v. State Bar of California*, No. 20-CV-04827-PJH, 2020 WL 4701092, at *4 (N.D. Cal. Aug. 13, 2020) (holding that because agency used "expert consultants" and "routinely handle[s] requests of this sort," the agency was "precisely the agency that should be developing the factual record.") Moreover, Defendants in this case *have* presented a "concrete plan" via the Application and sworn statements of Mr. Stevenson, which directly contradicts the Tribe's speculations that "unprecedented" mining activity will occur. *Cf. Central Delta*, 306 F.3d at 950. Therefore, the

Tribe's assertions that it will suffer hardship absent review are without merit, and this case is not prudentially ripe for review.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss the Tribe's complaint in its entirety.

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