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 13 MUDDOX

14 UNITED STATES DISTRICT COURT

15 EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

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

19 Plaintiff,

20 v.

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

27 Defendants.

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

*Assigned to: Hon. Carolyn K. Delaney*

DEFENDANTS':

- (1) NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT PURSUANT TO F.R.C.P. 12(b)(1);
- (2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

*[Request for Judicial Notice, Declaration of Gregory Stevenson, Exhibits, and Proposed Order submitted concurrently herewith]*

Date:

Time:

Courtroom: 24

Complaint filed: January 27, 2023

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that, on \_\_\_\_\_, 2023, at \_\_\_\_\_ p.m., or as  
3 soon thereafter as the Court is available, in Courtroom 24 on the 8th Floor of the United  
4 States Courthouse, 501 I Street, Sacramento, California, Defendant PACIFIC COAST  
5 BUILDING PRODUCTS, INC., (“PCBP”), PCBP PROPERTIES, INC., and H.C.  
6 MUDDOX (collectively, “Defendants”), will and hereby do move the Court pursuant to  
7 Federal Rules of Civil Procedure 12(b)(1) for an order dismissing Plaintiff Buena Vista  
8 Rancheria of Me-Wuk Indians’ (“Tribe”) Complaint for Declaratory and Injunctive Relief  
9 (“Complaint”). This Motion is made upon the following grounds:

10 1. The Complaint should be dismissed pursuant to Rule 12(b)(1) because the  
11 Tribe has not alleged credible threats of harm and, therefore, this court lacks subject matter  
12 jurisdiction under Article III of the U.S. Constitution.

13 2. The Complaint should be dismissed pursuant to Rule 12(b)(1) because the  
14 Clean Water Act, 33 U.S.C. §§ 1251, *et. seq.*, partially displaces the Tribe’s federal  
15 common law claims and the Tribe’s remaining allegations of harm do not constitute  
16 federal interests sufficient to invoke this court’s jurisdiction under 28 U.S.C. §§ 1331 and  
17 1362.


18 3. The Complaint should be dismissed pursuant to Rule 12(b)(1) under the  
19 doctrine of prudential ripeness because Defendants only just submitted their application for  
20 a vested rights determination and reclamation plan amendment (“Application”) with  
21 Amador County on March 8, 2023. The Application has not yet been approved, and will  
22 be subject to local and state review before Defendants can begin implementation of the  
23 plan. In addition, the U.S. Army Corps of Engineers has yet to evaluate Defendants’  
24 proposed mining project. Therefore, the Tribe’s claim of alleged imminent harm is  
25 baseless and premature.

26 Defendants’ Motion is based on this Notice of Motion and Motion, the attached  
27 Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice  
28 and Affidavit of Gregory Stevenson, any additional briefing on this subject, and the

1 evidence and arguments that will be presented to the Court at the hearing on this matter.

2 Dated: March 15, 2023

3 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

4  
5 By   
6 \_\_\_\_\_  
7 JEFFREY J. PARKER

8 Attorneys for Defendants  
9 PACIFIC COAST BUILDING PRODUCTS,  
10 INC., PCBP PROPERTIES, INC., and H.C.  
11 MUDDOX  
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**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page**

I. INTRODUCTION..... 8

II. SUMMARY OF ALLEGATIONS AND STATEMENT OF FACTS..... 9

    A. The Tribe Does Not Allege That It Has Been Harmed by the PCBP Entities’ Past or Current Mining Activity, Which Is Conducted *Closer* to the Rancheria Than the Proposed Future Operations..... 9

    B. The Tribe Speculates That It Will Suffer Future Harm If Amador County Grants the Application..... 12

    C. The Tribe Admits That the Application Is Subject to the Authority of Various Regulatory Agencies and, Therefore, the PCBP Entities Cannot Even Undertake the Project Yet..... 14

III. LEGAL STANDARDS ..... 17

    A. Motion to Dismiss Under Rule 12(b)(1) ..... 17

    B. Request for Judicial Notice ..... 17

IV. THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(B)(1) FOR LACK OF SUBJECT MATTER JURISDICTION. .... 18

    A. The Tribe Has Not Alleged a Credible Threat of Imminent Harm Given That the PCBP Entities Plan to Move Their Current Mining Operation Farther Away From the Rancheria. .... 18

    B. The Tribe’s Remaining Claims Regarding the Potential Impacts of Relocation Do Not Provide a Basis to Invoke Federal Common Law..... 19

        1. The Tribe’s Claims Regarding Potential Damage to Its Wetlands Are Displaced by the Clean Water Act. .... 20

        2. Speculation Regarding the Existence of “Objects of Cultural Patrimony” Underneath the PCBP Property Do Not Implicate a Federally-Protected Interest. .... 21

    C. The Tribe’s Claims Regarding the PCBP Entities’ Pending Application Are Not Ripe for Review..... 22

        1. Further Factual Development Is Necessary to Evaluate the Tribe’s Claims. .... 22

        2. The Tribe Will Not Suffer Hardship If the Court Withholds Review..... 24

V. CONCLUSION..... 25

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3  
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 No. 20-cv-01800-AJB-RBM, 2021 U.S. Dist. LEXIS 241804 (S.D. Cal. Dec. 17, 2021) ..... 18

*Ass’n of Am. Med. Colls. v. United States*  
 217 F.3d 770 (9th Cir. 2000)..... 23, 24

*Bird v. Lewis & Clark Coll.*  
 303 F.3d 1015 (9th Cir. 2002)..... 18

*Calvert v. Cty. of Yuba*  
 145 Cal. App. 4th 613 (2006) ..... 12

*Chilkat Indian Vill. v. Johnson*  
 870 F.2d 1469 (9th Cir. 1989)..... 21

*Congregation Etz Chaim v. City of L.A.*  
 No. CV 97-5042 CAS (Ex), 2009 U.S. Dist. LEXIS 42345 (C.D. Cal. May 5, 2009) ..... 23, 24

*Dalfio v. Orlansky-Wax, Ltd. Liab. Co.*  
 No. 21-56339, 2022 U.S. App. LEXIS 21470 (9th Cir. Aug. 3, 2022) ..... 17

*Del Puerto Water Dist. v. United States Bureau of Reclamation*  
 271 F. Supp. 2d 1224 (E.D. Cal. 2003)..... 22

*Fortyune v. Am. Multi-Cinema, Inc.*  
 364 F.3d 1075 (9th Cir. 2004)..... 18

*Hill v. Rincon Band of Luiseno Indians*  
 No. 06CV2544 JAH(POR), 2007 U.S. Dist. LEXIS 61691 (S.D. Cal. Aug. 22, 2007) ..... 17

*Intervention911 v. City of Palm Springs*  
 No. CV 13-01117 MMM, 2014 U.S. Dist. LEXIS 201279 (C.D. Cal. July 7, 2014) ..... 22

*Lee v. City of Los Angeles*  
 250 F.3d 668 (9th Cir. 2001)..... 18

*Mack v. S. Bay Beer Distribs.*  
 798 F.2d 1279 (9th Cir. 1986)..... 17

1 *McCarthy v. United States*  
 2 850 F.2d 558 (9th Cir. 1988)..... 17

3 *McGee v. S-L Snacks Nat’l*  
 4 982 F.3d 700 (9th Cir. 2020)..... 18

5 *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Constr. Co.*  
 6 607 F.3d 1268 (11th Cir. 2010)..... 21

7 *Milwaukee v. Illinois*  
 8 451 U.S. 304 (1981)..... 20

9 *Riva v. Pepsico, Inc.*  
 10 82 F. Supp. 3d 1045 (N.D. Cal. 2015) ..... 18

11 *Sierra Club v. Nuclear Regulatory Comm’n*  
 12 825 F.2d 1356 (9th Cir. 1987)..... 23

13 *Southern Pac. Transp. Co. v. City of Los Angeles*  
 14 922 F.2d 498 (9th Cir. 1990)..... 22

15 *Stock W., Inc. v. Confederated Tribes of Colville Reservation*  
 16 873 F.2d 1221 (9th Cir. 1989)..... 17, 20

17 *Stop the Casino 101 Coal. v. Salazar*  
 18 No. C 08-02846 SI, 2009 U.S. Dist. LEXIS 38144 (N.D. Cal. Apr. 21, 2009),  
 19 *aff’d* 384 Fed. Appx. 546 (9th Cir. June 3, 2010)..... 18

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 21 523 U.S. 296 (1998)..... 22

22 *Underwood v. Mackay*  
 23 614 F. App’x 871 (9th Cir. 2015) ..... 22

24 *United States v. Braren*  
 25 338 F.3d 971 (9th Cir. 2003)..... 22

26 Codes/Statutes

27 28 U.S.C. § 1331..... 21

28 28 U.S.C. § 1362..... 21

Cal. Pub. Res. Code § 2772 ..... 12

Cal. Pub. Res. Code § 2775 ..... 16

Cal. Pub. Res. Code § 2776 ..... 12

1 California’s Surface Mining and Reclamation Act, Cal. Pub. Resources Code §§  
2 2710, *et seq.*.....12  
3 Clean Water Act, 33 U.S.C. § 404..... 9, 16, 20  
4 Clean Water Act, 33 U.S.C. §§ 1251, *et. seq.* ..... 20  
5 Other Authorities  
6 Fed. R. Civ. P. 12(b)(1) ..... 17  
7 Fed. R. Evid. 201(b) ..... 18  
8  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 When determining whether the court has subject matter jurisdiction to hear a case,  
4 the court is not limited to the allegations in the complaint. As set forth in this motion to  
5 dismiss (“Motion”), the Buena Vista Rancheria of Me-Wuk Indians (the “Tribe”) lacks  
6 standing to bring this case, and the Complaint should be dismissed in its entirety on that  
7 basis.

8 Defendant PCBP Properties, Inc.<sup>1</sup> owns 114.27 acres of surface clay mining  
9 property in Amador County, California, known as the “Berry Mine”. The Tribe alleges  
10 that it occupies a 67.5 acre parcel of land known as the “Rancheria”, which is located  
11 directly to the west of the Berry Mine. (Compl. ¶¶ 9, 13.) On March 8, 2023, the PCBP  
12 Entities filed an application for a vested rights determination and reclamation plan  
13 amendment (“Application”) with Amador County, wherein the PCBP Entities propose  
14 removing 41.3 acres from the Berry Mine and adding an adjoining 9.9 acre area on a  
15 company-owned property to the east—*farther away* from the Rancheria than the current  
16 mining operation. (See Request for Judicial Notice (“RJN”), Exh. 2 (Application).)

17 The Tribe alleges that, if Amador County approves the Application, the Tribe will  
18 suffer harm, including dust, noise, shaking, run off, increased machinery on the shared  
19 road, and a decreased number of guests visiting its casino. (Compl. ¶¶ 47–72.) However,  
20 the PCBP Entities *currently* mine portions of the Berry Mine that are *closer* to the  
21 Rancheria than the proposed site, and production at the proposed site will continue at the  
22 same or lower rates than the present operations. Yet, the Tribe does not allege that it has  
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24 \_\_\_\_\_  
25 <sup>1</sup> Defendant PCBP Properties, Inc. is a wholly-owned subsidiary of Defendant Pacific  
26 Coast Building Products, Inc. Defendant PABCO Clay Products, LLC, d/b/a H.C.  
27 Muddox, which performs the mining work at Berry Mine, is a wholly-owned subsidiary of  
28 Basalite Building Products, Inc., which in turn is a wholly-owned subsidiary of Pacific  
Coast Building Products, Inc. (See Declaration of Gregory Stevenson “Stevenson Decl.”,  
¶¶ 1–3.) For ease of reference, Pacific Coast Building Products, Inc. and its subsidiaries  
are referred to herein collectively as the “PCBP Entities”.



1 suffered any harm in connection with the PCBP Entities’ past or current mining operations.  
 2 Therefore, it is pure speculation to assume that the Tribe will suffer harm in the future  
 3 when the PCBP Entities relocate their mining activity *farther away* from the Rancheria. In  
 4 addition, to the extent certain harms could *only* be triggered by the PCBP Entities’  
 5 relocation farther away from the Rancheria, such as potential impact to Waters of the  
 6 United States and disturbance to “objects of cultural patrimony” that *could possibly* be  
 7 buried under the neighboring property (Compl. ¶¶ 54–55), such harms cannot form the  
 8 basis for federal common law claims, because they do not implicate federal common law  
 9 protection.

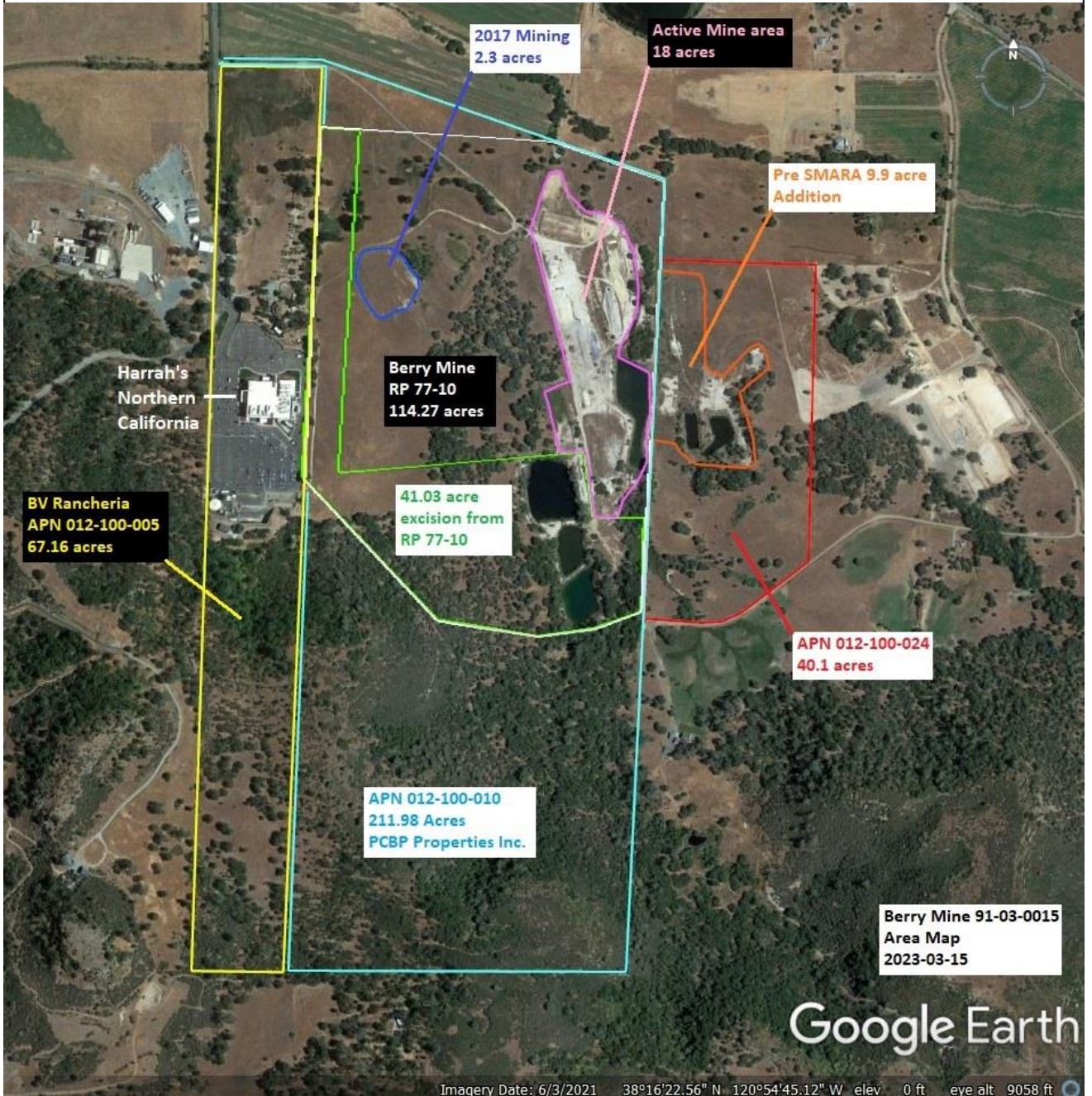
10 Moreover, Amador County has not yet approved the Application. As part of the  
 11 review process, the Application will be circulated to various state agencies to determine  
 12 whether the PCBP Entities are required to obtain any permits. The Application will also  
 13 be circulated to interested members of the public, including neighboring property owners  
 14 like the Tribe, for review and comment. In addition, the PCBP Entities are currently  
 15 working with the U.S. Army Corps of Engineers (“Corps of Engineers”) to ensure that the  
 16 new mining activity will comply with Section 404 of the Clean Water Act. Because there  
 17 are numerous regulatory hurdles the PCBP Entities must clear to obtain final approval of  
 18 the Application, this case is not prudentially ripe for review.

## 19 **II. SUMMARY OF ALLEGATIONS AND STATEMENT OF FACTS**

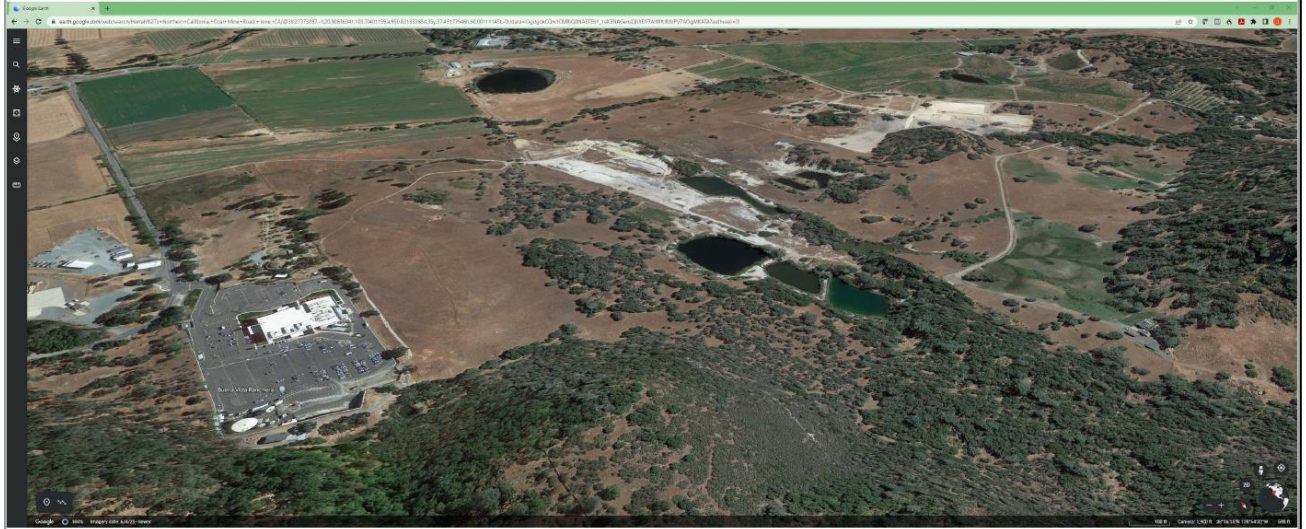
### 20 **A. The Tribe Does Not Allege That It Has Been Harmed by the PCBP Entities’** 21 **Past or Current Mining Activity, Which Is Conducted *Closer* to the Rancheria** 22 **Than the Proposed Future Operations.**

23 The Berry Mine consists of 114.27 acres of land to the east of the Rancheria. (RJN,  
 24 Exh. 2 (Application); Stevenson Decl. ¶¶ 3–4.) The PCBP Entities have been mining  
 25 portions of the property since the 1960s. (*Id.*) To protect the underground and surface  
 26 environment of the Berry Mine and surrounding land, the PCBP Entities perform surface  
 27 mining—a method by which excavated topsoil is stored during mining, and later reapplied  
 28 after mining to effectively “reclaim” the land. (Stevenson Decl. ¶ 5.) Due to the low

1 impact nature of surface clay mining and the specific topography of the area, the PCBP  
2 Entities have never received any complaints from neighbors. (Stevenson Decl. ¶ 6.)  
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25 (Stevenson Decl. ¶ 7, Exh. 7 (Berry Mine Area Map); *see also* RJN, Exh. 3 (Application).)  
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10 (RJN, Exh. 5 (Satellite Image of the Rancheria and Surrounding Properties).) The PCBP  
11 Entities currently mine approximately 18 acres of the Berry Mine, which is outlined in the  
12 Berry Mine Area Map above in pink (the “Active Area”). (Stevenson Decl. ¶¶ 6–7,  
13 Exh. 7 (Berry Mine Area Map).) The Rancheria is outlined in yellow; Harrah’s Northern  
14 California (“Casino”) is the large white building visible within the Rancheria. (*Id.*; RJN,  
15 Exh. 5 (Satellite Image of the Rancheria and Surrounding Properties).) The western half of  
16 the Berry Mine consists of a terrace that gradually rises 80 feet in elevation, and is covered  
17 by oak woodland forest which provides a visual barrier between the Casino and the Berry  
18 Mine. (*Id.*) There is approximately 1,500 feet between the Active Area and the Casino.  
19 (*Id.*)

20 To transport machinery and materials, the PCBP Entities utilize Coal Mine Road, a  
21 shared access road to the north that also leads to the Casino. (*Id.*) Currently, the Berry  
22 Mine’s annual production totals approximately 1,800 tons of clay. (*Id.*) As recently as  
23 2017, the PCBP Entities mined approximately 11,000 tons of clay approximately 200 feet  
24 from the Rancheria—outlined in purple on the map above—without any complaints.  
25 (RJN, Exh. 2 (Application); Stevenson Decl. ¶ 7, Exh. 7 (Berry Mine Area Map).) Yet, the  
26 Tribe does not allege nuisance or trespass in connection with the PCBP Entities’ current or  
27 past mining operations (Compl. ¶ 38), despite the fact that those operations are located  
28 closer to the Rancheria’s property line than any proposed future operations. (*See* Compl. ¶

1 36 (alleging new clay mining operation will be conducted 1,200 feet east of the  
2 Rancheria); *cf.* Stevenson Decl. ¶¶ 6–9 (mining previously conducted 200 feet away  
3 without complaint; currently conducted approximately 1,500 feet away without complaint;  
4 proposal is to expand even further away than current operations).)

5 **B. The Tribe Speculates That It Will Suffer Future Harm If Amador County**  
6 **Grants the Application.**

7 A “vested rights determination” is a determination made under California’s Surface  
8 Mining and Reclamation Act, Cal. Pub. Resources Code §§ 2710, *et seq.* (“SMARA”), as  
9 to whether someone has a vested right to conduct mining operations, which is required  
10 before a person can conduct those operations. A right is vested where the applicant can  
11 demonstrate that “prior to January 1, 1976, the person has, in good faith and in reliance  
12 upon a permit or other authorization . . . diligently commenced surface mining operations  
13 and incurred substantial liabilities for work and materials necessary for the surface mining  
14 operations.” Cal. Pub. Res. Code § 2776. “Notwithstanding a vested right to conduct  
15 surface mining operations, the two other basic requirements of SMARA—a reclamation  
16 plan and financial assurances—apply to operations conducted after January 1, 1976.”  
17 *Calvert v. Cty. of Yuba*, 145 Cal. App. 4th 613, 617 (2006). A reclamation plan details the  
18 project’s scope, impact, and mitigation measures. Cal. Pub. Res. Code § 2772.

19 Here, the PCBP Entities seek a vested rights determination for 9.9 acres to the east  
20 of the Berry Mine (i.e., *farther away* from the Rancheria), which is outlined in orange in  
21 the map in the preceding section. (RJN, Exh. 3 (Application); Stevenson Decl. ¶¶ 7–9,  
22 Exh. 7 (Berry Mine Area Map).) That area has been mined for clay since the early 1960s.  
23 (RJN, Exh. 2 (Application); Stevenson Decl. ¶ 4.)

24 To expand to the east, the PCBP Entities propose *removing* 41.03 acres closest to  
25 the Rancheria—as outlined in green in the map above—from current Reclamation Plan RP  
26 77-10. (RJN, Exh. 3 (Application); Stevenson Decl. ¶¶ 7–9, Exh. 7 (Berry Mine Area  
27 Map).) That acreage is located along the border of the Berry Mine and the Rancheria, and  
28 is alleged in the Complaint to constitute “Initial Cultural Resources Sensitive Area”.

1 (Compl. ¶ 24.) If the County approves the Application, no mining can occur within that  
2 area. (Stevenson Decl. ¶ 9.) Thus, the proposed plan is to *reduce* the Reclamation Plan by  
3 30 acres, even including the additional acreage to the east, and to remove the alleged Initial  
4 Cultural Resources Sensitive Area from the Reclamation Plan. (RJN, Exh. 3  
5 (Application).)



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16 (Compl. ¶ 24 (showing alleged “Initial Cultural Resources Sensitive Area” in red oval).) If  
17 the Application is approved, the Berry Mine’s operations and production output will  
18 continue at or below the current pace. (RJN, Exh. 2 (Application); Stevenson Decl. ¶ 9.)  
19 In other words, the PCBP Entities seek simply to relocate their current mining operation  
20 farther away from the Rancheria. (*Id.*) Accordingly, there will be no increased impact to  
21 the road that the PCBP Entities share with the Rancheria. (*Id.*)

22 Despite the fact that the Active Mine is closer to the Rancheria and its production  
23 will not increase under the revised reclamation plan, the Tribe alleges that it could suffer a  
24 number of harms when mining relocates farther away from the Rancheria. These supposed  
25 potential harms alleged by the Tribe include:

- 26 • Air and noise pollution (Compl. ¶¶ 47, 49, 51, 53);
- 27 • Ground disturbance and shaking (Compl. ¶¶ 47, 51);

28

- 1 • Alteration of a natural landscape and “ecological balance of an area” (Compl. ¶¶  
2 48, 49);
- 3 • Soil erosion and fertility reduction (Compl. ¶ 49);
- 4 • Water pollution and drainage of underground preserves (Compl. ¶ 49, 54);
- 5 • Impact to groundwater and federally-protected wetlands (Compl. ¶¶ 29, 54);
- 6 • Road and structure damage (Compl. ¶ 49);
- 7 • Reduction in the number of guests coming to the Tribe’s Casino (Compl. ¶ 51);
- 8 • Health risks to the Tribe from dust and avoiding large machinery on the shared  
9 road into the Rancheria (Compl. ¶ 52);
- 10 • Damage to the “likely presence of grave-like structures and other objects of  
11 cultural patrimony of the Tribe under the surface of the PCBP property”  
12 (Compl. ¶ 55);
- 13 • “[D]irt, debris, water run-off and other materials to enter and physically invade  
14 the Tribe’s Rancheria” (Compl. ¶ 72).

15 These are all speculative and specious in light of the fact that the Tribe has not  
16 alleged that any of PCBP’s current operations closer to the Rancheria cause *any* of these  
17 alleged harms.

18 **C. The Tribe Admits That the Application Is Subject to the Authority of Various**  
19 **Regulatory Agencies and, Therefore, the PCBP Entities Cannot Even**  
20 **Undertake the Project Yet.**

21 The Tribe alleges PCBP may be required to obtain the approval of various  
22 regulatory agencies (Compl. ¶¶ 29, 39, 53–54), but misrepresents the application  
23 procedure, timeline, and scope. Surface mining is heavily regulated by local and state  
24 authorities, and local and state law provide a number of opportunities for interested or  
25 aggrieved parties to participate in the administrative approval process and file appeals.

1 Amador County Code<sup>2</sup> Chapter 19.56 sets forth the general requirements for  
2 granting the Application, which are incorporated into Chapter 7.36—Surface Mining and  
3 Reclamation. Section 19.56.040 states:

4 In order to grant any use permit, the findings of the planning commission shall  
5 be that the establishment, maintenance or operation of the use or building  
6 applied for will not under the circumstances of the particular case be  
7 detrimental to the health, safety, peace, morals, comfort and general welfare  
8 of persons residing or working in the neighborhood of such proposed use or  
9 be detrimental or injurious to property and improvements in the neighborhood  
10 or to the general welfare of the county; provided, that if any proposed building  
11 or use is necessary for the public health, safety and general welfare, the  
finding shall be to that effect. The planning commission may designate such  
conditions in connection with the use permit as it deems necessary to secure  
the purposes of this title, and may require such guarantees and evidences that  
such conditions are being or will be complied with.

12 (RJN, Exhs. 4–5 (Sections 7.36.150 and 19.56.040).) As part of its review, the Amador  
13 County planning commission must circulate the Application to state agencies for comment  
14 and “[a]ny changes or amendments required as a result of the comments from the various  
15 state agencies must be either completed prior to approval by the county or, the applicant  
16 must have exhausted any available administrative remedies with the state agencies.” (RJN  
17 Exh. 4 (Section 7.36.140).) To the extent PCBP may be required to obtain additional  
18 permits, approval of the Application will be conditioned upon PCBP obtaining said  
19 permits. (RJN Exh. 1 (Application).)

20 Notice of the Application will be given to all interested parties, including  
21 neighboring landowners, and at least one public hearing will be held. (RJN Exh. 5  
22 (Section 19.56.030).) Any interested party who is not satisfied with the action of the  
23 planning commission may, within ten days of said action, appeal in writing to the board of  
24 supervisors. (RJN Exh. 5 (Section 19.56.050).) In addition, “any person who is aggrieved  
25 by the granting of a permit to conduct surface mining operations in an area of statewide or  
26 regional significance, may, within 15 days of exhausting his rights to appeal in accordance

27  
28 <sup>2</sup> Hereafter, undesignated section references are to the Amador County Code.

1 with the procedures of the lead agency, appeal to the board.” Cal. Pub. Res. Code § 2775.  
2 This may trigger another public hearing conducted by the County, or a hearing by the state  
3 board. *Id.*

4 In addition to local authorities, the PCBP Entities have been communicating with  
5 the U.S. Army Corps of Engineers to ensure that the project complies with Section 404 of  
6 the Clean Water Act, 33 U.S.C. §§ 1251, *et. seq.* (Stevenson Decl. ¶ 11, Exh. 9.) The  
7 PCBP Entities must submit an aquatic resources delineation to the Corps of Engineers,  
8 who will then determine whether waters of the United States will be impacted by the  
9 project. (*Id.*) If the Corps of Engineers determines that Waters of the United States will be  
10 impacted, the National Environmental Policy Act, the National Historic Preservation Act  
11 of 1966 (as amended), and the Federal Endangered Species Act will be implicated, and the  
12 PCBP Entities may be required to create reports on those subjects in order for the Corps of  
13 Engineers to process PCBP’s permit request. (*Id.*) The PCBP Entities anticipate that the  
14 entire review and approval process will take anywhere from six months to one year.  
15 (Stevenson Decl. ¶ 12.) Once the Application is approved, there will likely be an  
16 additional delay before any mining commences at the new project site. (*Id.*)

17 The Tribe filed the instant Complaint for Declaratory and Injunctive Relief  
18 (“Complaint”) on January 27, 2023, alleging claims for federal common law nuisance  
19 (Compl. ¶¶ 64–69) and federal common law trespass (Compl. ¶¶ 70–74). The Tribe did so  
20 after expressing interest in buying the property; in response, the PCBP Entities amended  
21 their original plan, and proposed moving their mining operations farther away from the  
22 Rancheria to make the property available for potential sale. (Stevenson Decl. ¶ 13; *see*  
23 *also* Compl. ¶¶ 41–43 (Tribe’s allegations based on preliminary communications between  
24 the Tribe and PCBP regarding PCBP’s preliminary relocation plan).) Specifically, PCBP  
25 modified its plan, narrowing the proposed relocation from 40.1 acres to 9.9 acres. (RJN,  
26 Exh. 3 (Application).) As a result, references to PCBP’s preliminary plan are now moot.  
27 (*See* Compl. ¶ 35.)

28



1 PCBP filed the Application with Amador County on March 8, 2023, and the  
2 Application is currently pending review. (RJN, Exhs. 1–3 (Application); Stevenson Decl.  
3 ¶ 9.)

### 4 **III. LEGAL STANDARDS**

#### 5 **A. Motion to Dismiss Under Rule 12(b)(1)**

6 “It is a fundamental principle that federal courts are courts of limited jurisdiction.”  
7 *Stock W., Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th  
8 Cir. 1989) (internal quotation marks and citation omitted). “Because Plaintiff bears  
9 the burden of establishing subject matter jurisdiction, no presumption of truthfulness  
10 attaches to the allegations of plaintiff’s [] complaint and the Court must presume it lacks  
11 jurisdiction until plaintiff establishes jurisdiction.” *Hill v. Rincon Band of Luiseno*  
12 *Indians*, No. 06CV2544 JAH(POR), 2007 U.S. Dist. LEXIS 61691, at \*5–6 (S.D. Cal.  
13 Aug. 22, 2007).

14 “To contest a plaintiff’s showing of subject matter jurisdiction, a defendant may file  
15 two types of Rule 12(b)(1) motions: a facial attack, which challenges jurisdiction  
16 ‘facially,’ by arguing that the allegations contained in the complaint are insufficient on  
17 their face to invoke federal jurisdiction, or a “factual” attack, which presents extrinsic  
18 evidence (affidavits, etc.) disputing the truth of the allegations of the complaint that would  
19 otherwise invoke federal jurisdiction.” *Dalfio v. Orlansky-Wax, Ltd. Liab. Co.*, No. 21-  
20 56339, 2022 U.S. App. LEXIS 21470, at \*2 (9th Cir. Aug. 3, 2022). When the attack is  
21 factual, “the district court is not restricted to the face of the pleadings, but may review any  
22 evidence, such as affidavits and testimony, to resolve factual disputes concerning the  
23 existence of jurisdiction.” *See McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.  
24 1988).

#### 25 **B. Request for Judicial Notice**

26 In addition to testimonial evidence, “a court may take judicial notice of facts outside  
27 the pleadings” and consider such facts on a motion to dismiss. *See Mack v. S. Bay Beer*  
28 *Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986). These facts include material that is

1 referenced in the complaint or relied upon by the complaint, matters of public record, and  
2 local laws, including county codes. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688–69  
3 (9th Cir. 2001); *Araujo v. Coachella Valley Water Dist.*, No. 20-cv-01800-AJB-RBM,  
4 2021 U.S. Dist. LEXIS 241804, at \*6 (S.D. Cal. Dec. 17, 2021); *see also* Fed. R. Evid.  
5 201(b).

6 **IV. THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO**  
7 **RULE 12(B)(1) FOR LACK OF SUBJECT MATTER JURISDICTION.**

8 **A. The Tribe Has Not Alleged a Credible Threat of Imminent Harm Given That**  
9 **the PCBP Entities Plan to Move Their Current Mining Operation Farther**  
10 **Away From the Rancheria.**

11 “[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the  
12 threshold requirement imposed by Article III of the Constitution by alleging an actual case  
13 or controversy.” *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir.  
14 2004). The plaintiff must demonstrate “that [it] has suffered an injury in fact, that the  
15 injury is traceable to the challenged action of [defendant], and that the injury can be  
16 redressed by a favorable decision.” *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015, 1019 (9th  
17 Cir. 2002). “In the context of declaratory and injunctive relief, [plaintiff]  
18 must demonstrate that [plaintiff] has suffered or is threatened with a concrete and  
19 particularized legal harm . . . coupled with a sufficient likelihood that [plaintiff] will  
20 again be wronged in a similar way.” *Id.* (internal quotation marks and citation omitted).

21 “[T]here must be a *credible* threat of harm sufficient to constitute actual injury.”  
22 *Riva v. Pepsico, Inc.*, 82 F. Supp. 3d 1045, 1052 (N.D. Cal. 2015) (internal quotation  
23 marks and citation omitted). Speculative harm will not suffice. *See McGee v. S-L Snacks*  
24 *Nat’l*, 982 F.3d 700, 710 (9th Cir. 2020) (where plaintiff cited no evidence that her limited  
25 current consumption of product placed her at *substantial* risk of disease, she had not  
26 sufficiently alleged injury in fact based on her risk of *future* physical injury); *Stop the*  
27 *Casino 101 Coal. v. Salazar*, No. C 08-02846 SI, 2009 U.S. Dist. LEXIS 38144, at \*9  
28 (N.D. Cal. Apr. 21, 2009), *aff’d* 384 Fed. Appx. 546 (9th Cir. June 3, 2010) (granting  
motion to dismiss where a tribe intended to build casino, but had not yet received federal

1 and state approval, because “alleged injury through environmental degradation is []  
2 ‘too speculative’ to invoke this Court’s jurisdiction.”).

3 Here, the Tribe claims that it will potentially suffer a number of intrusions if the  
4 Application is approved, including dust, noise, shaking, run off, increased machinery on  
5 the shared road, and a decreased number of guests visiting its casino. Yet, the PCBP  
6 Entities *currently mine* portions of the Berry Mine that are located *closer* to the Rancheria  
7 than the proposed new area, and have done so for decades, using the same shared access  
8 road. The Tribe does not allege that it has suffered any of these harms in the past, nor can  
9 it credibly claim that it will suffer them if mining commences farther away from the  
10 Rancheria, where overall production output will not increase. Absent any reference to or  
11 metric regarding how the Berry Mine previously or currently impacts the Rancheria, the  
12 Tribe’s allegations that these future harms will occur simply are not credible.

13 **B. The Tribe’s Remaining Claims Regarding the Potential Impacts of Relocation**  
14 **Do Not Provide a Basis to Invoke Federal Common Law.**

15 The Tribe alleges only two potential harms that could hypothetically be triggered if  
16 mining relocates farther away from the Rancheria. These allegations are based on the  
17 specific topography of the Berry Mine and neighboring parcel, as opposed to the risk of  
18 ambient noise, dust, and debris reaching the Rancheria or concerns regarding overall  
19 production levels at the mine.

20 First, the Tribe alleges its federally-protected wetlands *may be* jeopardized by  
21 relocation. (Compl. ¶ 31–32.) Second, the Tribe alleges that future mining activity *could*  
22 disturb or destroy “grave-like structures and other objects of cultural patrimony of the  
23 Tribe under the surface of the PCBP property.” (Compl. ¶ 54.) While these allegations are  
24 equally speculative as those detailed in the preceding section, they are also foreclosed on  
25 other grounds because, even if they were true, they could not form the basis for the Tribe’s  
26 federal common law claims.

1           1.       *The Tribe's Claims Regarding Potential Damage to Its Wetlands Are*  
2                               *Displaced by the Clean Water Act.*

3           “[F]ederal question jurisdiction does not exist merely because an Indian tribe is a  
4 party.” *Stock W., Inc.*, 873 F.2d at 1225. Where Congress “has occupied the field through  
5 the establishment of a comprehensive regulatory program supervised by an expert  
6 administrative agency,” plaintiffs are barred from bringing federal common law claims  
7 challenging the regulated conduct. *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

8           In *Milwaukee*, the Supreme Court considered whether the Clean Water Act, 33  
9 U.S.C. §§ 1251, *et. seq.*, displaced plaintiff’s federal common law nuisance claim in  
10 connection with defendants’ discharge of pollutants into Lake Michigan. The court  
11 concluded that it did because point source discharges were expressly contemplated by the  
12 Act, which set forth specific permitting standards and delegated authority to agencies to  
13 enforce the discharge permits. *Id.* at 320.

14           Here, the question of whether the PCBP Entities’ proposal will impact Waters of the  
15 United States has *already* been referred to the appropriate federal regulatory agency, the  
16 Corps of Engineers. (Stevenson Decl. ¶ 12, Exh. 9 (Letter).) As set forth in its letter,  
17 “[t]he Corps of Engineers’ jurisdiction within the study area is under the authority of  
18 Section 404 of the Clean Water Act for the discharge of dredged or fill material into waters  
19 of the United States.” (*Id.*) To ensure the project will not impact the federally-protected  
20 wetlands, the PCBP Entities have been directed to prepare and submit an aquatic resources  
21 delineation to the Corps of Engineers. (*Id.*) If the Corps of Engineers determines that the  
22 wetlands may be impacted, the PCBP Entities will then be required to comply with the  
23 Corp of Engineers’ regulatory process, as delegated by Congress, to obtain a permit. (*Id.*)  
24 Therefore, as in *Milwaukee*, any federal common law claims in connection with the  
25 wetlands have been expressly displaced by the Clean Water Act.

1           2.       *Speculation Regarding the Existence of “Objects of Cultural Patrimony”*  
2                    *Underneath the PCBP Property Do Not Implicate a Federally-Protected*  
3                    *Interest.*

4           A tribe invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1362 must  
5 specify “a Constitutional provision, a federal statute, or a *recognized theory of common*  
6 *law* as the basis for the allegation that the Tribe’s cause of action arises under federal law.”  
7 *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Constr. Co.*, 607 F.3d 1268, 1276  
8 (11th Cir. 2010) (emphasis added); *see also Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469,  
9 1470 n.2 (9th Cir. 1989) (Section 1362 “does not relieve the tribe of the necessity of  
10 establishing the existence of a federal question”). The Ninth Circuit has expressly held  
11 that a “proprietary interest” in “artifacts is a creature of tribal law or tradition wholly  
12 unconnected with federal law.” *Chilkat*, 870 F.2d at 1473 (affirming district court’s  
13 holding that it lacked subject matter jurisdiction over tribe’s common law claim against art  
14 dealers who allegedly converted tribal artifacts, because “no federal foundation underlies  
15 the Village’s conversion claims.”).

16           Here, the Tribe does not and cannot allege that its interest in “[o]bjects of Cultural  
17 Patrimony” are sufficient to invoke federal jurisdiction. On the contrary, the Tribe admits  
18 that California law would govern this contention. (Compl. ¶ 55.) Accordingly, the Tribe’s  
19 attempt to invoke federal jurisdiction based on its interest in these objects is insufficient as  
20 a matter of law.

21           Given that the Tribe has not credibly alleged that the PCBP Entities’ new mining  
22 operation will result in future harm, and has not identified actionable interests arising from  
23 the relocation of current operations, the Tribe has not met its burden to prove standing.  
24 Accordingly, this court does not have jurisdiction to hear the Tribe’s federal common law  
25 claims, and the complaint should be dismissed.

1 **C. The Tribe’s Claims Regarding the PCBP Entities’ Pending Application Are**  
2 **Not Ripe for Review.**

3 Even if the court were to conclude that the Tribe has alleged credible claims under  
4 Article III, this case is not yet ripe for review and the complaint should be dismissed for  
5 lack of jurisdiction on that basis.

6 “A claim is not ripe for adjudication if it rests upon contingent future events that  
7 may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523  
8 U.S. 296, 300 (1998) (internal quotation marks and citation omitted). The ripeness  
9 requirement “is designed ‘to prevent the courts, through avoidance of premature  
10 adjudication, from entangling themselves in abstract disagreements over administrative  
11 policies, and also to protect the agencies from judicial interference until an administrative  
12 decision has been formalized and its effects felt in a concrete way by the challenging  
13 parties.’” *Del Puerto Water Dist. v. United States Bureau of Reclamation*, 271 F. Supp. 2d  
14 1224, 1237 (E.D. Cal. 2003). “If a claim is unripe, federal courts lack subject matter  
15 jurisdiction and the complaint must be dismissed.” *Southern Pac. Transp. Co. v. City of*  
16 *Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990).

17 “Prudential ripeness . . . involves ‘two overarching considerations: the fitness of  
18 the issues for judicial review and the hardship to the parties of withholding court  
19 consideration.’” *Underwood v. Mackay*, 614 F. App’x 871, 872 (9th Cir. 2015) (quoting  
20 *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir.  
21 2007)). The Tribe’s claims fail under both criteria.

22 1. *Further Factual Development Is Necessary to Evaluate the Tribe’s Claims.*

23 The fitness prong of the prudential ripeness inquiry asks whether “judicial  
24 resolution of the question presented . . . should await a concrete dispute.” *See United*  
25 *States v. Braren*, 338 F.3d 971, 975–76 (9th Cir. 2003) (where water department’s  
26 adjudicator announced a preliminary evaluation regarding a tribe’s water rights, the tribe’s  
27 challenge to that evaluation was not ripe for review); *see also Intervention911 v. City of*  
28 *Palm Springs*, No. CV 13-01117 MMM (OPx), 2014 U.S. Dist. LEXIS 201279, at \*33

1 (C.D. Cal. July 7, 2014) (where claim was based “only on a contingent future event — i.e.,  
2 the possibility that the Planning Commission would have denied [plaintiff’s] application  
3 based on the Planning Department’s negative recommendation, or that a revised  
4 application for a [] permit would have been unsuccessful — the claim is not ripe for  
5 review.”); *Ass’n of Am. Med. Colls. v. United States*, 217 F.3d 770, 782 (9th Cir. 2000)  
6 (claim was not ripe where pending state audits were “not final and their outcomes turn on  
7 contingencies which the court is ill-equipped to predict”). “[A]t the heart of the ripeness  
8 doctrine is whether [the court] would benefit from deferring initial review until the claims  
9 . . . have arisen in a more concrete and final form.” *Congregation Etz Chaim v. City of*  
10 *L.A.*, No. CV 97-5042 CAS (Ex), 2009 U.S. Dist. LEXIS 42345, at \*25 (C.D. Cal. May 5,  
11 2009).

12       Where a plaintiff’s claims arise out of conduct that is regulated by an administrative  
13 agency, “[t]he core question is whether the agency has completed its decisionmaking  
14 process, and whether the result of that process is one that will directly affect the parties.”  
15 *Ass’n of Am. Med. Colls.*, 217 F.3d at 780. Factors to consider include “whether the  
16 administrative action is a definitive statement of an agency’s position; whether the action  
17 has a direct and immediate effect on the complaining parties; whether the action has the  
18 status of law; and whether the action requires immediate compliance with its terms.” *Id.*;  
19 *see also Sierra Club v. Nuclear Regulatory Comm’n*, 825 F.2d 1356, 1362 (9th Cir. 1987)  
20 (“We will not entertain a petition where pending administrative proceedings or further  
21 agency action might render the case moot and judicial review completely unnecessary.”)  
22 (citation omitted).

23       In this case, the Application is still in its infancy. As demonstrated by the Tribe’s  
24 incorrect allegation that the PCBP Entities are applying for a 40.1 acre expansion, rather  
25 than the 9.9 acre relocation and thirty acre reduction they actually seek, the contours of the  
26 Tribe’s claim cannot be defined at this juncture. Moreover, now that the Application has  
27 been submitted, it will undergo a comprehensive review process by local and state  
28 officials, in addition to evaluation by the Corps of Engineers. Given that the Tribe’s

1 claims are based on the contingent event of approval, and the Application has not yet been  
2 reviewed by the relevant agencies, this dispute remains abstract and judicial review at this  
3 juncture would be highly impractical in light of the undeveloped factual record.

4 2. *The Tribe Will Not Suffer Hardship If the Court Withholds Review.*

5 The significant uncertainty surrounding the Application approval process, as well as  
6 the availability of remedies pursuant to that process, demonstrate that the Tribe will not  
7 suffer “immediate harm” if this court withholds review. *See Congregation*, 2009 U.S.  
8 Dist. LEXIS 42345 at \*31 (finding no hardship where city was considering an application  
9 and “threat of hardship to the Congregation remain[ed] speculative”); *Ass’n of Am. Med.*  
10 *Colls.*, 217 F.3d at 784 (finding no hardship where a regulation would not be “felt  
11 immediately by those subject to it in conducting their day-to-day affairs.”) (internal  
12 quotation marks and citation omitted).

13 The PCBP Entities estimate that the Application approval process will take  
14 anywhere from six months to one year. Notice of the Application will be given to  
15 neighboring landowners, including the Tribe, and at least one public hearing will be held  
16 where the Tribe may air its grievances. If the Application is granted, the Tribe may file an  
17 appeal to the board of supervisors. If that appeal is denied, the Tribe may then appeal to  
18 the California State Mining and Geology Board.

19 Concurrent with county review, the PCBP Entities must also submit an aquatic  
20 resources delineation to the Corps of Engineers. If the Corps of Engineers determines that  
21 Waters of the United States will be impacted, numerous federal laws may be triggered and  
22 the PCBP Entities may be required to create reports on those subjects in order for the  
23 Corps of Engineers to process their permit request. These additional administrative steps  
24 may significantly delay the project and could partially or wholly moot the Tribe’s claims.

25 Because the Tribe will have the opportunity to participate in the Application review  
26 process, and may challenge its outcomes through various channels before the Application  
27 is approved in final form, the supposed effects alleged by the Tribe are purely speculative.

28



1 Therefore, the balance of hardships weighs firmly in Defendants' favor. Accordingly, this  
2 case is not yet ripe for review.

3 **V. CONCLUSION**

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

6  
7 Dated: March 15, 2023

8 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

9  
10 By

  
11 \_\_\_\_\_

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