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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, a municipal corporation and political subdivision of the State of Arizona and HEADWATERS RESOURCES, INC., a Utah corporation,

Plaintiffs,

v.

REYNOLD R. LEE, CASEY WATCHMAN, WOODY LEE, PETERSON YAZZIE, EVELYN MEADOWS, HONORABLE HERB YAZZIE, HONORABLE LOUISE G. GRANT, HONORABLE ELEANOR SHIRLEY, LEONARD THINN and SARAH GONNIE,

Defendants.

No. CV 08-8028-PCT-JAT

DEFENDANTS LEE, WATCHMAN, LEE, YAZZIE, MEADOWS, YAZZIE, GRANT AND SHIRLEY'S RULE 19(b) MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF

Defendants Reynold R. Lee, Casey Watchman, Woody Lee, Peterson Yazzie, Evelyn Meadows, the Honorable Herb Yazzie, the Honorable Louise G. Grant, and the Honorable Eleanor Shirley ("the Navajo Official Defendants") hereby move to dismiss Plaintiffs' Verified Complaint for failure to join indispensable parties pursuant to Federal Rule of Civil Procedure 19(b).[1]

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

Plaintiffs brought suit on February 29, 2008 seeking declaratory judgment that the Navajo Official Defendants may not enforce the Navajo Preference in Employment Act ("NPEA") against the owners and operators of the Navajo Generating Station ("NGS"). [Verified Compl. at ¶¶ 12, 63 (Docket ("Dkt.") 1)] Plaintiffs also sought injunctive relief prohibiting the Navajo Official Defendants from applying the NPEA, regulating employment relations at NGS, or maintaining tribal proceedings related to employment relations at NGS. [*Id.* at ¶¶ 13-15, 63] Plaintiffs' allegations are based on asserted violations of a 1969 lease between Plaintiff Salt River Project Agricultural Improvement and Power District ("SRP") and the Navajo Nation (the "1969 Lease"). [Pls.' Mot. for Prelim. Inj., Decl. of Robert T. Anderson ("PI Mot., Anderson Decl."), Ex. 1 (Dkt. 5)] Plaintiffs have additionally asserted entitlement to relief pursuant to a grant of easement given by the Secretary to SRP in 1969 pursuant to 25 U.S.C. § 323 (the "§ 323 Grant").

Pursuant to the dispute resolution procedure specified in the 1969 Lease, SRP also sent a letter to the Secretary of the Interior (the "Secretary") asking him to declare that the

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[1] The Navajo Official Defendants believe their Motion to Dismiss based on the Ninth Circuit's decision should be addressed first and is dispositive. Because SRP jumped the gun and filed its summary judgment motion while the Motion to Dismiss is pending, the Navajo Official Defendants have also filed this second Motion to Dismiss based on the failure and inability to join indispensable parties. This motion should also be addressed before this Court gets to the merits of the case as raised by SRP's summary judgment motion and the Navajo Official Defendants' Cross Motion for Summary Judgment.

Navajo Nation's assertion of jurisdiction over Plaintiffs' employment practices at NGS breached the 1969 Lease and to order the Navajo Nation to cease its efforts to enforce the NPEA. [*Id.*, Ex. 12]

On May 10, 2008, Carl J. Artman, Assistant Secretary – Indian Affairs, responded to SRP and concluded that there was no clear showing that the Navajo Nation waived its right to regulate employment practices at NGS and enforce the NPEA. [Pl. SRP's Statement of Facts in Supp. of its Mot. for Summ. J., Decl. of Robert T. Anderson, Ex. 1 (Dkt. 120)] On June 24, 2008, SRP asked the Secretary to reconsider that decision. [*Id.*, Ex. 2] In a letter dated October 2, 2008, Acting Deputy Assistant Secretary George T. Skibine declined to reconsider the Secretary's position based on the fact that this litigation was pending. [Decl. of Philip R. Higdon, Ex. 4]

This Court dismissed Plaintiffs' Complaint on January 13, 2009 based on the dispute resolution provisions in the 1969 Lease. [Order (Dkt. 89)] The dispute resolution provisions provide for adjudication by the Secretary and judicial review subject to the Administrative Procedure Act ("APA"). [PI Mot., Anderson Decl., Ex. 1 § 25 (Dkt. 5)] On appeal, the Ninth Circuit Court of Appeals concluded that Plaintiffs have already submitted the dispute to the Secretary under both § 25 of the 1969 Lease and § 10 of the § 323 Grant and decided that Plaintiffs have no further obligation to submit the dispute to the Secretary because the Secretary has already addressed the dispute. [Mem. Disposition, No. 09-15306, Mar. 29, 2010]

II. PLAINTIFFS' CASE MUST BE DISMISSED BECAUSE THE UNITED STATES AND THE NAVAJO NATION ARE INDISPENSABLE PARTIES AND THEY CANNOT BE JOINED BECAUSE THEY ARE IMMUNE FROM SUIT BASED ON SOVEREIGN IMMUNITY

The issue of whether a plaintiff has failed to join indispensable parties may be raised at any stage of the proceedings, even *sua sponte*. *McCowen v. Jamieson*, 724 F.2d 1421, 1424 (9th Cir. 1984) (holding that the Secretary of Agriculture was a necessary and indispensable party in an action to make the Arizona Department of Economic Security

provide replacement food stamps).

"Whether an action should be dismissed under Rule 19 involves a two-part analysis. First, the district court must determine whether the absent party is a 'necessary' party. If the absent party is necessary and cannot be joined, the court next must determine whether the party is 'indispensable.'" *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996) (internal citations omitted).

A. The Navajo Nation and the United States are Required to be Joined Under Rule 19(a)

A party is required to be joined under Rule 19(a) if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
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> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

Under Rule 19(a)(1)(A), judgment in the Navajo Nation's absence would not afford complete relief because complete relief is not possible without resolving issues regarding the Navajo Nation's governing authority to regulate employment practices and enforce the NPEA. *See Dawavendewa v. SRP,* 276 F.3d 1150, 1153 (9th Cir. 2002) (holding that complete relief cannot be afforded where the Navajo Nation would not be bound by a judgment enjoining employment preference policy); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458 (9th Cir. 1994) (concluding that complete relief would implicate the tribe's governing status); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) (noting that judgment would

not be binding on tribe, which could continue to assert sovereign powers over the reservation).

Under Rule 19(a)(B), the Navajo Nation and the Secretary have an interest in the subject of this action because they are parties to the 1969 Lease, and the Navajo Nation has an additional interest in enforcing the NPEA. *See Dawavendewa*, 276 F.3d at 1156 (noting that "the Nation claims a legally protected interest in its contract rights with SRP"). SRP's Motion for Summary Judgment asks this Court to consider whether the Navajo Nation has the inherent or treaty-based authority to regulate employment practices at NGS. [Mot. for Summ. J. at 5-12 (Dkt. 119)] Disposing of this action in the Navajo Nation's absence may as a practical matter impair or impede the Nation's ability to protect its interest in enforcing the NPEA and in exercising its inherent sovereign authority to regulate employment practices at NGS. The Ninth Circuit has often concluded that Indian tribes are necessary parties to actions affecting their legal interests. *See, e.g., EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 778-80 (9th Cir. 2005) (holding that the Navajo Nation is a necessary party in a suit by EEOC challenging employment preference provisions in lease);[2] *Dawavendewa*, 276 F.3d at 1157 (concluding that judgment rendered in the Nation's absence will impair its sovereign capacity to govern the reservation and dismissing case); *Quileute Indian Tribe*, 18 F.3d at 1459 (finding that tribe has a claim of legal interest in the litigation and complete relief would implicate the tribe's governing status and dismissing case); *Confederated Tribes*, 928 F.2d at 1499 (dismissing case and noting that judgment would implicate tribe's status as governing authority of the reservation); *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir.

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[2] The court in *Peabody* held that it was feasible to join the Navajo Nation in that case because the plaintiff, EEOC, is an agency of the United States and tribal sovereign immunity does not shield the Navajo Nation against suits involving the United States. *See Peabody*, 400 F.3d at 781. However, that result does not apply to this case because SRP is not an agency of the United States.

1989) (holding that tribe is a necessary party in an action seeking to enforce a lease agreement to which the tribe is a party and dismissing case).

Aside from its general interests regarding sovereignty, the Navajo Nation has a specific interest in this case as a party to the 1969 Lease Plaintiffs ask this Court to interpret.

The United States also has an interest in the subject of this action because the tribal land at issue in the 1969 Lease and the § 323 Grant is held in trust by the United States, and this action implicates the Secretary's responsibilities under the 1969 Lease and the § 323 Grant. As a party with an interest in and obligations under the 1969 Lease and the § 323 Grant, the United States is a necessary party to this action construing the terms of those agreements.

Additionally, allowing this action to continue could result in inconsistent obligations for the Navajo Official Defendants here. The Secretary, in resolving a dispute between SRP and the Navajo Nation, has decided that there was no waiver in the 1969 Lease of the Navajo Nation's jurisdiction over employment matters at NGS. Plaintiffs seek the opposite result here. As officials of the Navajo Nation, inconsistent results in the two proceedings could place the Navajo Official Defendants in a serious quandary.

B. The Action Must be Dismissed Pursuant to Rule 19(b)

Indian tribes "are sovereign entities and are therefore immune from nonconsensual actions in state or federal court." *Confederated Tribes*, 928 F.2d at 1499; *see also Kescoli*, 101 F.3d at 1310; *Masayesva v. Zah*, 792 F. Supp. 1178, 1182 (D. Ariz. 1992) ("It is clear that federally recognized Indian tribes are entitled to sovereign immunity absent Congressional waiver or tribal consent to suit."). Any waiver of sovereign immunity must be "'expressed unequivocally' and cannot be implied." *Quileute Indian Tribe*, 18 F.3d at 1459 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). A plaintiff cannot "circumvent the barrier of sovereign immunity by merely substituting

tribal officials in lieu of the Indian Tribe." *Dawavendewa*, 276 F.3d at 1160. The Navajo Official Defendants cannot replace the Nation itself. "[T]ribal officials cannot be joined to replace the immune Nation; rather, the Nation itself is indispensable to this suit." *Id.* at 1153 (holding that the Navajo Nation is an indispensable party in suit alleging that SRP's employment preference policy at NGS violated Title VII of the Civil Rights Act of 1964). The Navajo Nation has not waived sovereign immunity and cannot feasibly be joined in this action.

The United States also enjoys sovereign immunity and cannot feasibly be joined in this action. *See Carlson v. Tulalip Tribes of Wash.*, 510 F.2d 1337, 1339 (9th Cir. 1975) (where making the government a party to the action is not feasible, the United States may be regarded as an indispensable party under Rule 19(b) and the action dismissed); *but cf. EEOC v. Peabody W. Coal Co.*, No. 06-17261 at 9224-27 (9th Cir. June 23, 2010) (holding that third-party complaint seeking prospective relief would not be barred by sovereign immunity of the United States).[3]

Rule 19(b) provides that where a person who is required to be joined but cannot be joined, "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). The factors for the court to consider include:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;

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[3] Even if a claim for prospective relief against the United States is not barred by sovereign immunity, the Navajo Nation is still an indispensable party, which requires dismissal under Rule 19(b).

> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

Id. The application of these factors will vary depending on the case. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 128 S. Ct. 2180, 2189 (2008).

With respect to the first factor, the Navajo Nation and the Secretary have an interest in the litigation based on the 1969 Lease, and the Navajo Nation has an additional interest in enforcing the NPEA, and thus both would be prejudiced should this Court proceed in their absence. *See Dawavendewa*, 276 F.3d at 1162 (judgment would prejudice the Navajo Nation's sovereign interests in negotiating contractual obligations and governing the reservation); *Kescoli*, 101 F.3d at 1311 (Navajo Tribe has an interest in the litigation by virtue of lease and settlement agreements); *Confederated Tribes*, 928 F.2d at 1499 (tribe would be prejudiced by judgment in favor of plaintiffs because it would alter the tribe's existing authority to govern the reservation); *Quileute Indian Tribe*, 18 F.3d at 1460 (prejudice stems from the same legal interests that make the tribe a necessary party); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975) (tribe is indispensable party in action to set aside a lease of tribal land). In considering this factor, the Court must give sufficient weight to the Navajo Nation's sovereign status. *See Pimentel*, 553 U.S. 851, 128 S. Ct. at 2189. The United States also has an interest in the dispute and would be prejudiced by judgment in its absence based on the Secretary's interest in and responsibilities under the 1969 Lease and the § 323 Grant. Therefore, the first factor weighs in favor of dismissal.

The second and third factors also weigh in favor of dismissal. Prejudice to the Navajo Nation and the United States could not be effectively minimized because relief for SRP could not be effectively shaped, in their absence, to avoid prejudice to their interests. *See Kescoli*, 101 F.3d at 1311; *Confederated Tribes*, 928 F.2d at 1499. Further, judgment

rendered in the absence of the Navajo Nation and the Secretary would be inadequate because, although it would bind the Navajo Official Defendants, it would not bind the Navajo Nation itself or the Secretary.

With respect to the fourth factor, the alternative dispute resolution provisions of the 1969 Lease to which SRP voluntarily entered provide an adequate remedy if the action were dismissed for non-joinder. Indeed, SRP has already availed itself of this alternative remedy, and the Secretary has addressed the dispute.

However, even if there were no alternative forum, the "lack of an alternative forum does not automatically prevent dismissal of a suit." *Quileute Indian Tribe*, 18 F.3d at 1460 (quoting *Confederated Tribes*, 928 F.2d at 1500). Even where the third and fourth factors may favor allowing the action to proceed, the Ninth Circuit has recognized that "a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity." *Kescoli*, 101 F.3d at 1311 (quoting *Confederated Tribes*, 928 F.2d at 1500). "If the necessary party is immune from suit, there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" *Id*. (quoting *Confederated Tribes*, 928 F.2d at 1499). In this case, the sovereign immunity of the Navajo Nation and the United States is the compelling factor and the action should be dismissed under Rule 19(b).

Conclusion

Plaintiffs' claims should be dismissed pursuant to Federal Rule of Civil Procedure 19 for failure to join the Navajo Nation and the United States as necessary and indispensable parties.

Dated: July 12, 2010

PERKINS COIE BROWN & BAIN P.A.

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CERTIFICATE OF SERVICE

☒ I hereby certify that on July 12, 2010, I electronically transmitted the attached documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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☒ I hereby certify that on July 12, 2010, I served the attached document by **[first class mail/hand delivery]** on Judge James A. Teilborg, United States District Court of Arizona, 401 West Washington Street, Phoenix, Arizona 85003-2118.

s/ Beckie Remley

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