IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:11-cv-00243-REB-CBS

CENTER FOR BIOLOGICAL DIVERSITY, *et al*.,

Plaintiffs,

v.

JOSEPH PIZARCHIK, *et al*.,

Defendants, and

BHP NAVAJO COAL COMPANY and THE NAVAJO NATION,

Defendants – Intervenors.[1]

THE NAVAJO NATION'S REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO THE NAVAJO NATION'S AMENDED MOTION TO DISMISS

The Navajo Nation ("Nation") submitted an Amended Motion to Dismiss, Doc. No. 47, which Joseph Pizarchik, *et al*. ("Federal Defendants"), the BHP Navajo Coal Company ("BNCC"), and Center for Biological Diversity, *et al*. ("Plaintiffs") have responded to as Doc. Nos. 65, 66, 67, respectively. This Reply addresses Plaintiffs' Response in Opposition ("Response"). Doc. No. 67.

Plaintiffs' Response makes three primary assertions: 1) the Nation's interests in the subject matter of this action are not legally protectable nor sufficient to be a required party; 2) because Federal Defendants' interests are identical to the Nation's, the Nation is not a required party; and 3) the controlling Rule 19(b) analysis from *Republic of the*

[1] Although designated a Defendant—Intervenor in this caption, this Court granted the Navajo Nation's intervention in this action only for the limited purpose of submitting a Motion to Dismiss. Doc. No. 58 at 1.

Philippines v. Pimentel, 553 U.S. 851 (2008), prior and subsequent case analyses consistent with *Pimentel*, and Tenth Circuit analyses beyond *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977), and *Dine' C.A.R.E., et al. v. Klein*, 676 F.Supp.2d 1198 (D. Colo. 2009), are not applicable here. These assertions are defective and fail to refute or diminish the Nation's prior demonstration that this action must be dismissed.

I. The Nation's protectable interests and evidence satisfy Rules 19(a) and (b).

Plaintiffs assert "[t]he [Nation] fails to produce evidence that it has a legally protected interest in the subject matter of the litigation." (Pls.' Resp. 6). However, the case-law governing this issue overwhelmingly supports the Nation;[2] and the Nation's pleadings and papers in this action ubiquitously discuss and reference the Nation's many interests in its several capacities as a sovereign government, party to the lease agreement, lessor, third-party beneficiary, and *parens patriae*. *E.g*., (Am. Mot. Dismiss 2-15; Am. Mot. Intervene 2-10; Shelly Aff. ¶¶ 3-8; Cicchetti Aff. ¶¶ 7-38). The Nation's interests here as a sovereign include collecting tens-of-millions of dollars annually in royalties and taxes from the BNCC's mining operations conducted pursuant to a lease agreement with the Nation and Federal Permit No. NM-0003F ("Permit"). The Nation uses these monies to perform necessary governmental functions, including providing emergency and social services, and exercising its regulatory and adjudicatory authorities throughout its vast territory. Furthermore, commensurate with other sovereigns' interests, the Nation seeks to improve and promote its residents' general

[2] *E.g.*, *Pimentel*, 553 U.S. at 863-69; *Davis ex rel. Davis v. U.S.,* 343 F.3d 1282, 1291 (10th Cir. 2003); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998-1000 (10th Cir. 2001); *Davis v. U.S*., 192 F.3d 951, 957-59 (10th Cir. 1999); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539-40 (10th Cir. 1987); *Manygoats*, 558 F.2d at 557-58; *Klein*, 676 F.Supp.2d at 1216; *Kescoli v. Babbitt*, 101 F.3d 1304, 1309-11 (9th Cir. 1996); *U.S. ex rel. Hall v. Tribal Dev. Corp*., 100 F.3d 476, 478-79 (7th Cir. 1996).

welfare—whether members or not—through improvement of its anemic economic conditions and amelioration of its destitute poverty.

The Nation's interests as a party to the lease agreement and lessor are also at the heart of this controversy. The Nation's interests include enforcing bargained-for terms, and realizing the maximum value associated with the lease agreement (*e.g*., receiving value from coal harvested and sold), preventing waste, protecting its property's future value for post-lease purposes, and assuring proper concurrent administration and regulation of its property by the federal government and its own administrative agencies. *See, e.g*., (Shelly Aff. ¶ 2) (addressing the Nation's Divisions, Departments, and Agencies).

The Nation's interests as sovereign and beneficiary include compelling the United States to fulfill its fiduciary duties. For instance, if the Nation's own Surface Mining Program ("SMP")[3] thought Federal Defendants violated the law, the Nation would have challenged Federal Defendants' determination. However, the Nation's SMP, which actively assists Federal Defendants' SMCRA[4] functions, does not dispute Federal Defendants' determination. Furthermore, the Nation's interests as *parens patriae* include creating conditions that promote economic development and growth, and promoting its members' employment. Although certainly not exhaustive, these illustrative interests further demonstrate that the Nation has myriad interests here that may be impaired in its absence by this action's disposition.

[3] Since 1996, the SMP's technical experts and staff have performed SMCRA-related functions such as conducting mine inspections, reviewing reclamation plans, and comprehensively monitoring coal mining reclamation activities at the coal mines located on Navajo Nation lands.

[4] The Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. §§ 1201-1328 (2011); 30 C.F.R. Part 750 (2011).

These interests are not merely speculative as Plaintiffs contend. (Pls.' Resp. 6-8). The Nation collects tens-of-millions of dollars annually from royalties, taxes, and other revenues associated with the lease and Permit. (Am. Mot. Intervene 2; Cicchetti Aff. ¶¶ 20-38; Shelly Aff. ¶ 3). From prior years' figures, the Nation has relatively predictable projections of its future revenues, which are produced by its Divisions, Departments, and Agencies, and professionals like Charles Cicchetti. The Nation's financial forecasting relies upon the relative certainty it will continue to collect monies from coal mining operations occurring on the Nation's leased lands operating pursuant to SMCRA permits and renewals. Moreover, the Nation and its members have been located here since time-immemorial. The Nation has performed governmental functions with monies collected from lease agreements, and its members have made livings from mining operations—including those here—for approximately one-half century now.

Given the requirements of applicable regulations,[5] the U.S. Office of Surface Mining-issued SMCRA Permit enables the BNCC to operate on the lands leased here, which in-turn yields the benefits to the Nation. However, without the Permit, which covers all currently existing coal mining operations at the BNCC's Navajo Mine, the lease agreement and the value associated with it are essentially rendered impotent. Plaintiffs have requested that this Court vacate and remand the Permit's renewal, and enjoin mining operations. (Am. Compl. 18, ¶¶ 3-4). If granted, this would drastically undermine the BNCC's operations, which would severely undermine royalty, tax, and salary payments made to the Nation and its members from the harvesting of coal. The

[5] *See* 25 C.F.R. § 221.5 (2011) (Bureau of Indian Affairs mineral leasing regulation providing that U.S. Office of Surface Mining's SMCRA regulations apply to coal mining operations on leased Indian lands).

Nation and its members would indefinitely lose the value associated with the lease agreement. This would be the epitome of impairment of the Nation's interests by this action's disposition in Plaintiffs' favor. (Am. Mot. Dismiss 2-4, 10-12; Am. Mot. Intervene 7-10; Shelly Aff. ¶¶ 6-8; Cicchetti Aff. ¶¶ 11, 20-21, 24-26, 29-38). Importantly, these impairments and injuries would be inflicted on the Nation in its absence.

This is the crux of the Nation's position here. The Nation's numerous interests are not patently frivolous, a judgment for Plaintiffs may entirely enjoin all mining operations, and very well "may . . . impair [the Nation's interests] . . . ." Fed. R. Civ. P. 19(a)(1)(B).[6] Thus, the Nation is a required party pursuant to Rule 19(a)(1)(B)(1), and the controlling and instructive Rule 19(b) analyses require this action's dismissal. (Am. Mot. Dismiss 5-15) (applying case-law to Nation's interests and evidence).

II. Federal Defendants' interests are not identical to the Nation's.

Plaintiffs assert that the Nation's and Federal Defendants' interests are identical, and therefore, the Nation is not a required party here. (Pls.' Resp. 8-10). However, the bars for establishing that representations are identical to deny required party status within Rules 19(a) and 19(b) are extremely high. *E.g*., *Citizen Potawatomi Nation,* 248 F.3d at 998-1000*; Enterprise Mgmt. Consultants, Inc. v. U.S.*, 883 F.2d 890, 894 (10th Cir. 1989); (Am. Mot. Dismiss 4-5, 11; Am. Mot. Intervene 9-10).[7] Furthermore, unlike

[6] The Nation specifically stated that it is a required party pursuant to Rule 19(a)(1)(B)(i). (Am. Mot. Dismiss 1, 4-5). The Nation never asserted required party status pursuant to Rule 19(a)(1)(A). Accordingly, Plaintiffs' Response concerning Rule 19(a)(1)(A), (Pls.' Resp. 4-6), is superfluous.

[7] *See also Kescoli*, 101 F.3d at 1310-12; *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325-26 (9th Cir. 1975); *Northern Arapaho Tribe v. Harnsberger*, 660 F.Supp.2d 1264, 1273-81 (D. Wyo. 2009) (providing in-depth discussion of standards; making tribe required party); *United Keetoowah Band of Cherokee Indians in Oklahoma v. Kempthorne*, 630 F.Supp.2d 1296, 1301-04 (E.D. Okla. 2009) (providing standards; making tribe required party).

Plaintiffs' preferred but inapposite authorities, *e.g., Manygoats*, *Klein*, *Sac and Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258-60 (10th Cir. 2001), *Southwest Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998) (per curiam), the Nation is asserting and representing interests beyond those in the case-law above; NEPA[8] is not at issue here; the Nation has historically been receiving value as a contracting party and lessor; collecting taxes from the lease and Permit's operations for decades; and its members have been making livings here for the same period. Thus, Plaintiffs' application of their preferred authorities is not supported by this action's facts.

The Nation's pleadings and papers, as well as the discussion above plainly demonstrate the Nation's and Federal Defendants' incongruent interests. Federal Defendants are a federal Department and Office charged with implementing and enforcing SMCRA and its Regulations. However, Federal Defendants' relationship to the land and people here—historically and presently—are radically different from the Nation's; they are not the beneficial owner of the land and lease agreement; they are not actual beneficiaries of functions and operations here; they do not pursue *parens patriae* rights and interests for the Nation's members; and they have numerous other interests that compete with the Nation's own interests and representation thereof. Furthermore, their pursuit and representation of purportedly congruent interests is at times ineffective or actually contrary to the Nation's interests. *See, e.g., U.S. v. Jicarilla Apache Nation*, 564 U.S. __, 131 S.Ct. 2313, 2011 WL 2297786 (2011) (demonstrating

[8] The National Environmental Protection Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. (2011). Even if NEPA claims were asserted in this action, the Nation's interests at stake in this case would justify dismissal.

divergent interests and representations, despite purported congruence); *U.S. v. Navajo Nation*, 537 U.S. 488 (2003) (demonstrating divergence).

Federal Defendants' interests and the Nation's interests here are not identical. Thus, Federal Defendants are not certain to be willing to make, or actually make, the Nation's necessary arguments. Nor will they offer every necessary element in this action to best promote the Nation's interests. These divergent interests and representations are well-illustrated by the contrast between the Nation's Motion to Dismiss and Federal Defendants' Response here. *Compare* (Am. Mot. Dismiss 2-4, 10-13) (moving this Court to dismiss; arguing Nation's unique interests), *and* (Fed. Defs.' Resp. 2-3) (describing, but not supporting, or opposing, the Nation's arguments or motion).

III. The Nation's Amended Motion to Dismiss demonstrates that *Pimentel* and case-law consistent therewith direct this Court to dismiss this action.

Plaintiffs assert that *Klein*, which relied on *Manygoats*, controls this action, and therefore, that this action should proceed in the Nation's absence. (Pls.' Resp. 10-15). However, the Nation's Amended Motion to Dismiss thoroughly demonstrates that the Supreme Court's contemporary, mandatory analysis from *Pimentel* directs this action's dismissal pursuant to Rules 19(b) and 12(b)(7). (Am. Mot. Dismiss 6-15).

Pimentel's Rule 19(b) analysis—as subsequently applied in *Northern Arapaho Tribe* and *United Keetoowah Band*—provides clear requirements that render *Manygoats*' analysis—which *Klein* relied on—obsolete. *Id*. at 7-8. Furthermore, this action is very different from *Klein*, where Federal Defendants—and not the Nation—presented "no evidence" and "scant evidence" to the Court on this issue. 676 F.Supp.2d at 1215. Here, unlike *Klein*, the Nation has produced considerable and detailed

evidence with its pleadings and papers, as well as its presentation herein. Accordingly, *Klein* and *Manygoats* are inapposite here. Therefore, this Court is bound to apply *Pimentel*'s Rule 19(b) analysis, and *Pimentel*'s analysis directs this action's dismissal.

Plaintiffs misread *Pimentel* to narrowly stand "for the proposition that sovereign immunity is to be given greater weight on balance where courts are adjudicating 'substantive claims' [by or against a sovereign] . . . ." (Pls.' Resp. 12); *see also Id*. at 14 (stating same). Contrary to Plaintiffs' reading, there were no claims against the Republic of the Philippines ("Republic") when the Republic moved for dismissal pursuant to Rule 19. The Republic had already successfully asserted its sovereign immunity and been dismissed from the action. *In re Republic of the Phil*., 309 F.3d 1143, 1149-52 (9th Cir. 2002). Accordingly, *Pimentel*'s application does not turn on claims against the sovereign.

Perhaps more importantly, contrary to Plaintiffs' reading, the Republic did not have claims against any party in that action when the Supreme Court granted dismissal pursuant to Rule 19. *Pimentel*, 553 U.S. at 861; *In re Republic of the Phil*., 309 F.3d at 1152. Nor must claimed interests necessarily arise from an agreement with a party in the action as Plaintiffs suggest. (Pls.' Resp. 13-14). Claimed interests suffice when they may be impaired by an action's disposition, regardless of what they arise from. For instance, the interests in *Pimentel* arose from allegedly wrongfully taken funds in an account. 553 U.S. at 855, 859-61, 871, and the interests in *Northern Arapaho Tribe* arose from a statute. 660 F.Supp.2d at 1280.

Moreover, *Pimentel* was an interpleader action, which by definition did not involve claims by the Republic against the parties; but rather, concerned claims against funds. *Pimentel*, 553 U.S. at 855, 859-61, 871; *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Arelma, Inc., et al*., No. CV00-595-R, 2004 WL 5326929, at *5 (D. Haw. Jul. 12, 2004) ("Pursuant to 28 U.S.C. § 2361 interpleader is a hybrid civil action in which there is no defendant upon whom liability can be claimed. There are only claimants invited, not summoned, to make a claim against the interpleaded fund") *rev'd on other grounds by* 553 U.S. 851. Plaintiffs, therefore, incorrectly read *Pimentel* to turn on claims by or against parties. Accordingly, *Pimentel*'s application is not confined to actions in which an absent sovereign is subject to claims as a party or has claims against a party to an action.

Here, like *Pimentel* and several other cases, the Nation's interests are most-certainly not patently frivolous. *E.g., Davis ex rel. Davis,* 343 F.3d at 1289; *Citizen Potawatomi Nation*, 248 F.3d at 998; *Jicarilla Apache Tribe*, 821 F.2d at 540; *Kescoli*, 101 F.3d at 1310. The Nation's interests arise from, and are contingent upon, the lease agreement—and by necessity, the Permit as they relate to the subject matter of this action. Accordingly, *Pimentel's* analysis, which makes sovereign immunity the dominant factor in the analysis, controls this action's Rule 19(b) analysis and directs dismissal.

Lastly, Plaintiffs incorrectly assert the public interest exception and lack of an alternative remedy as justifications for this action proceeding. (Pls.' Resp. 15). The public interest here for Rule 19(b) is with the Nation and its people; and destruction of their rights and livelihoods cannot be seen to be in the "public interest" here. (Am. Mot.

Dismiss 12); *see also Kescoli*, 101 F.3d at 1311-12 (holding exception not appropriate in SMCRA action). Importantly, although an alternate remedy existed here, Plaintiffs brought this action after they failed to timely exercise this available remedy.[9] Plaintiffs cannot now validly assert this failure to justify this action current proceeding.

CONCLUSION

The Nation's pleadings and papers, and the reasons set forth herein demonstrate the appropriateness of this action's dismissal pursuant to Rules 19 and 12(b)(7).

Respectfully submitted this 26th day of August, 2011.

NAVAJO NATION DEPARTMENT OF JUSTICE

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[9] *Dine' C.A.R.E., et al. v. Office of Surface Mining Reclamation and Enforcement, No. DV 2011-2-PR, Permit No. NM-0003, OSM Project No. NM-0003-N-F-01* at 1-2 (U.S. Dep't of the Interior OHA Jul. 25, 2011) (affirming OHA's Dec. 13, 2010 decision); *Dine' C.A.R.E., et al. v. Office of Surface Mining Reclamation and Enforcement, No. DV 2011-2-PR, Permit No. NM-0003, OSM Project No. NM-0003-N-F-01* at 1-2, 5 (U.S. Dep't of the Interior OHA Dec. 13, 2010) (ordering dismissal and denying review pursuant to 43 C.F.R. § 4.1362(b) due to Plaintiffs' untimely request).

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2011, I electronically filed the foregoing **THE NAVAJO NATION'S REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO THE NAVAJO NATION'S AMENDED MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys' E-mail addresses:

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