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 NAVAJO NATION,

Defendant - Intervenors.[1]

BHP NAVAJO COAL COMPANY'S MEMORANDUM BRIEF IN SUPPORT OF NAVAJO NATION'S MOTION TO DISMISS

BHP Navajo Coal Company ("BNCC") supports the Navajo Nation's ("Nation") Amended Motion to Dismiss, June 14, 2011, ECF No. 47. The Nation's Motion to Dismiss presents a compelling rationale for the dismissal of this action based on existing Tenth Circuit precedent and the United States Supreme Court's opinion in *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008). BNCC supplements the Nation's argument with the following points, each of which supports dismissal of the

[1] While the Navajo Nation is designated as a Defendant-Intervenor in this caption, the Navajo Nation has been granted intervention only for the limited purpose of advancing its position that it is a required party that cannot be joined and without whom this action should not proceed.

present action. Application of Rule 19 of the Federal Rules of Civil Procedure ("Rule 19") to the Nation's Motion to Dismiss leads ineluctably to the conclusion that the Nation's Motion to Dismiss should be granted.

I. THE NATION CLAIMS AN INTEREST IN THE SUBJECT OF THIS ACTION THAT WOULD BE IMPAIRED WITHOUT JOINDER

The Nation's Motion to Dismiss demonstrates that it is a person required to be joined if feasible pursuant to Rule 19(a). The Nation has an interest in the subject of this action, and that interest would be significantly impaired if it is not joined. Fed. R. Civ. P. 19(a). The relevant portion of Rule 19 that addresses whether entities are required to be joined provides:

> **Rule 19 (a). Persons Required to Be Joined if Feasible.**
>
> **(1) Required Party**. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> **(A)** in that person's absence, the court cannot accord complete relief among existing parties; or
> **(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.
> **(2) Joinder by Court Order.** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.
> **(3) Venue.** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

As noted by the Nation, Rule 19(a) and Rule 24(a)(2) are intended to mirror each other. *See Oneida Indian Nation v. Madison Cnty.*, 605 F.3d 149, 162 (2d Cir. 2010)

(citing Fed. R. Civ. P. 24, 1966 Amendment Note) *vacated on other grounds by Madison County, N.Y. v. Oneida Indian Nation of New York*, ___ U.S. ___, 131 S. Ct. 704 (Jan. 10, 2011); *see also Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 134 n.3 (1967). As demonstrated in the Nation's Limited Motion to Intervene, Doc. No. 46, the Nation meets the requisite prongs of Rule 24 entitling it to limited intervention. That showing similarly warrants a determination by this Court that the Navajo Nation is a required party under Rule 19(a). *Oneida Indian Nation*, 605 F.3d at 162.

Furthermore, as the Ninth Circuit recognized in *Kescoli v. Babbitt*, 101 F.3d 1304, 1310-11 (9th Cir. 1996), an Indian tribe's economic interests in ongoing mining operations and the resulting royalty revenue establish the requisite Rule 19(a) interests in the subject matter of an action challenging federal Office of Surface Mining Reclamation and Enforcement ("OSM") permitting decisions for those ongoing mining operations. According to the Ninth Circuit, the action:

> could affect Peabody's mining operations under the lease agreements [between Peabody and the Nation and the Hopi Tribe]. In turn, this could affect the amount of royalties received by the Navajo Nation and the Hopi Tribe and employment opportunities for their members.
>
> Further, the Navajo Nation and the Hopi Tribe, by virtue of their sovereign capacity, have an interest in determining what is in their best interests by striking an appropriate balance between receiving royalties from the mining and the protection of their sacred sites. *See Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1099, 1101 (9th Cir.1994).

Kescoli, 101 F.3d at 1309-10. In evaluating Rule 19(a), the Ninth Circuit rejected the plaintiff's contention that the tribes were not required parties because the plaintiff did not

challenge the validity of the coal leases themselves, but rather sought to enforce OSM's regulatory obligation to bar mining from within 100 feet of cemeteries. *Id.* at 1310. The Ninth Circuit stated:

> Kescoli's action could affect the Navajo Nation's and the Hopi Tribe's interests in their lease agreements and the ability to obtain the bargained-for royalties and jobs. Kescoli's action would directly affect the parties' settlement agreement and indirectly affect the parties' lease agreements by challenging the conditions under which Peabody may mine at the Kayenta complex. Her action is not limited to merely requiring the OSM to comply with procedural obligations in the future.

Id. As the Nation's Motion to Dismiss, Limited Motion to Intervene and supporting affidavits demonstrate, the Nation has the same interests here as the Navajo Nation and Hopi Tribe had in *Kescoli*. *See* Motion to Dismiss, 1, 2, 3, and 5; *see also* Limited Motion to Intervene, 2, 4, 7, and 8. Royalty and tax streams and employment conditions and multiplier effects would be disrupted, and the Nation would be deprived of the benefits of its leasehold bargain with BNCC in the event this Court were to grant the relief requested.[2] The Tenth Circuit has found similar interests in oil leases sufficient under the Rule 19(a) analysis. *See Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539-40 (10th Cir. 1987). Consequently, the Court should hold that the Nation has an interest in the subject of this action that requires joinder if feasible.

[2] As the Ninth Circuit also noted in *Kescoli*, this is not an action in which the relief sought is limited to prospective relief only. *See* 101 F.3d at 1310. Rather, Plaintiffs here seek injunctive relief to stop ongoing operations. *See* Amended Complaint, ¶ 11, Prayer for Relief, ¶ 4.

II. JOINDER OF THE NAVAJO NATION IS NOT FEASIBLE BECAUSE OF THE NATION'S IMMUNITY FROM SUIT

As demonstrated by the Nation, the Navajo Nation is a required party that may not be joined because of the Nation's immunity from suit. The Tenth Circuit has held that

> Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories . . .. As an aspect of this sovereign immunity, suits against tribes are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress.

Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir. 1997). The Nation has not expressly waived its sovereign immunity. Nor has Congress abrogated the Nation's sovereign immunity. Consequently, the Nation cannot be joined in this lawsuit.

III. TENTH CIRCUIT PRECEDENT AND THE SUPREME COURT'S OPINION IN *REPUBLIC OF THE PHILIPPINES V. PIMENTEL* MANDATE DISMISSAL BECAUSE OF THE NATION'S IMMUNITY FROM SUIT

Existing Tenth Circuit precedent and the opinion of the Supreme Court in *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008), demonstrate that dismissal of this action is necessary under Rule 19(b), which provides:

> **Rule 19(b). When Joinder Is Not Feasible.** If a person who is required to be joined if feasible 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. 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;

> **(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 nonjoinder.

In *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999), the Tenth Circuit recognized a "strong policy that has favored dismissal when a court cannot join a tribe because of sovereign immunity." Although it acknowledged this strong policy, the court in *Davis* refrained from holding that sovereign immunity abrogated the application of the Rule 19(b) factors. *Id*. But eight years later, the Supreme Court in *Pimentel* clarified Rule 19(b) jurisprudence and fundamentally increased the weight to be given to sovereign immunity in the context of deciding whether a case may proceed in the absence of a sovereign entity whose presence is required under Rule 19(a). *Pimentel* and *Davis* together counsel that this Court's consideration of the factors under Rule 19(b) should be extremely limited. *See Northern Arapahoe Tribe v. Harnsberger*, 660 F. Supp. 2d 1264, 1280 (D.Wyo. 2009) (holding that "the discretion otherwise afforded this Court in balancing the equities under Rule 19(b) is to a great degree circumscribed, and the scale is already heavily tipped in favor of dismissal").

Pimentel presented the question of whether the action should proceed in the absence of two sovereign entities, the Republic of the Philippines (the "Republic") and Philippine Presidential Commission on Good Governance (the "Commission") neither of which could be sued due to their immunity from suit. In an opinion by Justice Kennedy, the Supreme Court analyzed all facets of Rule 19 and reversed the Court of Appeals' determination that dismissal of the action was not necessary. 553 U.S. at 854, 873.

After determining that the Republic and the Commission had an interest in the subject matter of the case under Rule 19(a), property stolen from the Republic by Ferdinand Marcos, 553 U.S. at 864, the Court proceeded to analyze the non-exclusive factors in Rule 19(b) to determine whether the case should proceed.

According to the Court, "the considerations set forth in subdivision (b) are nonexclusive." 553 U.S. at 862. The "general direction" in the Rule is to invoke "equity and good conscience" to determine the appropriate result. *Id.* "The design of the Rule, then, indicates that the determination whether to proceed will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations." *Id.* at 862-63. According to Justice Kennedy, the "decision 'must be based on factors varying with the different cases, some such factors being substantive, some procedural, *some compelling by themselves*, and some subject to balancing against opposing interests.'" *Id.* at 863 (emphasis added) (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U. S. 102, 119 (1968)).

At the outset of the Rule 19(b) analysis, Justice Kennedy stated that the "Court of Appeals erred in not giving the necessary weight to the absent entities' assertion of sovereign immunity." 553 U.S. at 864. Next, because there had been no precedent involving joinder and foreign sovereigns, Justice Kennedy considered the Court's precedent regarding the "intersection of joinder and the governmental immunity of the United States," including *Minnesota v. United States*, 305 U.S. 382 (1939). *See Pimentel*, 553. U.S. at 866-67. Although Justice Kennedy observed that the analysis was somewhat cursory in those cases, "the holdings were clear: A case may not

proceed when a required-entity sovereign is not amenable to suit. These cases instruct us that *where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.*" *Id.* at 867 (emphasis added). Thus, while there may be some factors where the Court suggests some balancing of interests is appropriate, consideration of sovereign immunity is not one of them. *Pimentel* indicates that sovereign immunity is "compelling" by itself, 553 U.S. at 863, to require dismissal "where [as here] there is a potential for injury" to non-frivolous sovereign interests.

While the sovereigns involved in *Pimentel* were foreign sovereigns, the Court's analysis should apply with equal force to Native American sovereign entities. Just as the doctrine of sovereign immunity has been recognized to apply to foreign entities since the early days of the United States, *see id.* at 865, tribal governments also have been long recognized to maintain sovereign immunity as one of their attributes of sovereignty.

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978), the Court stated:

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 -513 (1940); *Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, 172-73 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." *United States v. United States Fidelity & Guaranty Co.*, *supra*, at 512.
>
> It is settled that a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *United States v. Testan*, 424 U.S. 392, 399 (1976), *quoting, United States v. King*, 395 U.S. 1, 4 (1969).

Here, there has been no unequivocal waiver of immunity, either by the Nation or by Congress. *See Fletcher*, 116 F.3d at 1324 (identifying mechanisms for effective waivers of immunity). Thus, the same reasoning the Court embraced in *Pimentel* applies with equal force in this action.

As the Nation correctly explained, *Pimentel*, rather than *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977), controls the Court's analysis. However, even if this Court were to conclude that *Manygoats* is controlling, the factual and procedural posture of the instant case are distinguishable from *Manygoats*. Thus, *Manygoat*'s rationale does not apply here and the Nation's Motion to Dismiss should be granted.

In *Manygoats*, the Court concluded that the case could proceed without the presence of the Navajo Nation as a party. *Id*. at 559. The Court's analysis focused on the Rule 19(b)(1) factor and determined that "[a] holding that the EIS is inadequate does not necessarily result in prejudice to the Tribe….The requested relief does not call for any action by or against the Tribe." *Id.* at 558-59. The agency action at issue in *Manygoats* was approval of a new exploration and mining agreement – mining operations had not yet started and remand of the EIS would only delay initiation of such operations. *Id*. at 558. In contrast, the agency action at issue here is renewal of an existing mining permit– a mining permit in place for over 20 years. As a result, remand of the federal agency's decision–and any injunction associated with that remand–would significantly prejudice the Nation's existing and future economic interests in the ongoing operations at Navajo Mine. Doc. No. 47 at 11. The Nation's demonstrated and

significant *existing* interest and prejudice that will result to the Nation distinguishes this case from *Manygoats* and compels dismissal here.

IV. APPLICATION OF THE RULE 19(B) FACTORS COUNSEL FOR DISMISSAL OF THIS ACTION

Regardless of this Court's reading of the breadth of *Pimentel*, as the Nation demonstrated in its Motion to Dismiss, analysis of the Rule 19(b) factors do in fact counsel for dismissal of this action. BNCC does not reiterate the Nation's arguments with respect to each of these factors; instead, BNCC briefly touches on the analysis of the four factors with special emphasis on the question of whether relief in this action could be shaped to eliminate any prejudice to the absent Navajo Nation under Rule 19(b)(2)(B).[3]

A. Rule 19(b)(1):

The Nation's Motion to Dismiss establishes that the Nation meets the first factor of the Rule 19 analysis. As the Nation explained, and discussed above, the Nation has asserted sovereign immunity, the Nation's claims are not frivolous, and the Nation will be prejudiced if Plaintiffs are awarded the relief they seek. This factor weighs heavily in favor of dismissal, and in fact, is compelling by itself. *Pimentel*, 553 U.S. at 863.

B. Rule 19(b)(2):

While this Court could shape any relief for the Plaintiffs in such a manner that there would be no risk that BNCC's mining operations could be enjoined either by the Court or by OSM, it is far from clear that doing so would eliminate completely the

[3] To be clear, BNCC submits that no relief, including injunctive relief, is justified for the Plaintiffs in this action.

prejudice to the Nation. Even a declaratory determination in this action regarding whether and how OSM must comply (even prospectively) with the Endangered Species Act ("ESA") for permit renewals could have substantial impacts on the Nation and its ability to enjoy the benefit of the tax and royalty streams, and its members' employment opportunities and benefits. Depending on the specifics, or interpretation of Plaintiffs' claims and prayer for relief, the compliance requirements sought by Plaintiffs could delay future permitting actions not only in the context of BNCC's Navajo Mine operations, but also for other economic development projects throughout the Nation. Consequently, this Court cannot shape relief that would adequately protect the Nation from prejudice.

C. Rule 19b(3):

A judgment in the Nation's absence will not be adequate. Here, the Nation will not be bound by any judgment in this case. If this Court orders relief that either vacates (even temporarily) the permit or determines the requisite extent of ESA analysis (both of which would harm the Nation's economic and other interests) such a judgment would place the Nation in the position of having to attempt to re-litigate the issues decided in this case in order to protect its interests. Accordingly, a judgment rendered in this case in the absence of the Nation will not be adequate.

To the extent that this Court concludes that a judgment rendered in the Nation's absence would be adequate, the prejudice to the Nation's sovereign immunity, when balanced against this third factor, heavily tips the scale in favor of dismissal. *See Northern Arapahoe Tribe*, 660 F. Supp.2d at 1280 (holding that "the discretion otherwise

afforded this Court in balancing the equities under Rule 19(b) is to a great degree circumscribed, and the scale is already heavily tipped in favor of dismissal").

D. Rule 19(b)(4):

Plaintiffs may no longer have an adequate forum in which to pursue their claims if this case is dismissed for non-joinder, based largely on Plaintiffs' failure to appeal OSM's decision in a timely fashion in other administrative forums. However, as the Supreme Court noted, "[d]ismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims." *Pimentel*, 553 U.S. at 872. Such a result is contemplated under the doctrine of sovereign immunity. *Id.*; *see also Northern Arapaho Tribe*, 660 F. Supp. 2d at 1283 ("In the context of tribal sovereignty, the Tenth Circuit has held that 'the plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit.'" (quoting *Davis*, 343 F.3d at 1293-94)). Here, as in *Pimentel*, the Nation's sovereign immunity weighs in favor of dismissal, despite the fact that an alternate forum may no longer be available to Plaintiffs.

In sum, as the Nation's Motion to Dismiss establishes, appropriate application of Rule 19(b) mandates dismissal of this action. As the Court held in *Pimentel*, even though there may be no available forum available to the Plaintiffs, that is an insufficient justification to allow this action to proceed in the absence of the Nation.

V. THE NATION'S AMENDED LIMITED MOTION TO INTERVENE: A CLARIFICATION CONCERNING SCOPE OF BNCC'S OPERATIONS

Though the Court has granted the Nation's Amended Limited Motion to Intervene, BNCC utilizes this opportunity to clarify certain points contained in the Nation's Amended Limited Motion to Intervene. BNCC agrees that the company is not in a position to advance and protect the sovereign interests of the Nation, either the direct interest of the Nation or the interests in the nature of *parens patriae* asserted on behalf of the Nation's members. In Point II.D of its Amended Limited Motion to Intervene, the Nation contrasts its interests with BNCC's by stating in part:

> Moreover, the BNCC could—hypothetically—operate elsewhere if the Permit is adversely impacted by this action's disposition. The Nation does not have the option to leave, and cannot instantaneously re-employ its members nor magically improve its anemic economy if the Permit is adversely impacted. Accordingly, because the BNCC's financial interests are not congruent—in character or degree—with the Nation's profound interests, the Nation's interests cannot be adequately represented by the BNCC.

Navajo Nation's Amended Limited Motion to Intervene, Doc. No. 46, at 9.

From BNCC's perspective, the operative word, "hypothetically", is important. As stated in the Affidavit of Mr. Pat Risner, BNCC's Mine Manager, attached as Exhibit A, ("Risner Aff."), BNCC owns and operates only one coal mining property: Navajo Mine, located on its Navajo Mine Lease. Risner Aff., ¶ 2. Further, BNCC holds only one permit under the Surface Mining Control and Reclamation Act—the permit at issue in this action. Risner Aff., ¶3. Consequently, BNCC cannot "instantaneously" initiate coal mining operations elsewhere. Rather, if any injunctive or other relief is entered by this

Court related to the permit at issue in this action, such relief would foreclose BNCC's ongoing mining activities and effectively put BNCC out of business.

CONCLUSION

For the foregoing reasons, BNCC respectfully joins the Navajo Nation in requesting that this Court grant the Navajo Nation's Motion to Dismiss.

Respectfully submitted this 5th day of August, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2011, I electronically filed the foregoing **BHP NAVAJO COAL COMPANY'S MEMORANDUM BRIEF IN SUPPORT OF NAVAJO NATION'S MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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s/ Deana M. Bennett

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CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,

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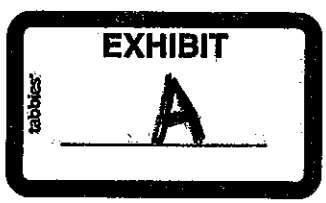
AFFIDAVIT OF PAT D. RISNER ACCOMPANYING BHP NAVAJO COAL COMPANY'S MEMORANDUM BRIEF IN SUPPORT OF NAVAJO NATION'S MOTION TO DISMISS

Pat D. Risner, being first duly sworn state under oath:

My name is Pat D. Risner. I presently serve as a Vice President of BHP Navajo Coal Company ("BNCC") and General Manager of Navajo Mine owned and operated by BNCC. The statements in this affidavit are based on my personal knowledge.

1. As General Manager for Navajo Mine, my responsibilities include overseeing the management and operations of Navajo Mine.

2. BNCC is a mining company, that is its only business activity. BNCC owns and operates only one mining property: the Navajo Mine, located on the Navajo Mine Lease, issued by the Navajo Nation in 1957, and approved by the Bureau of Indian Affairs.



3. BNCC holds only one permit issued by any regulatory authority authorized to issue permits under the Surface Mining Control and Reclamation Act, and that permit is the very permit that is at issue in this action.

4. BNCC does not own any other coal leases, whether issued by private parties, the United States or any Indian Nation. BNCC does not own any other properties which could be developed for coal production.

5. If any injunctive or other relief is entered by this Court that would foreclose ongoing mining activities, such relief would effectively put BNCC out of the business.

Pat D. Risner

PAT D. RISNER, General Manager, Navajo Mine

STATE OF NEW MEXICO)
) ss.
COUNTY OF SAN JUAN)

SUBSCRIBED and SWORN TO before me this 5 day of August, 2011 by Pat D. Risner.

JULIE M. FUNU NOTARY PUBLIC STATE OF NEW MEXICO Seal

Julie M. Funu

Notary Public

My commission expires: 08/14/13

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