No. 09-8098

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NORTHERN ARAPAHO TRIBE,

Plaintiff-Appellant,

v.

SCOTT HARNSBERGER, Treasurer, Fremont County, Wyoming; EDMUND SCHMIDT, Director, Wyoming Department of Revenue and Taxation; DANIEL NOBLE, Administrator, Excise Tax Division, Wyoming Department of Revenue and Taxation, in their individual and official capacities,

Defendants-Appellees,

v.

UNITED STATES OF AMERICA; EASTERN SHOSHONE TRIBE,

Third Party Defendants-Appellees.

On Appeal from the United States District Court for the District of Wyoming, Civil Action No. 08-CV-215-B, The Honorable Clarence A. Brimmer, District Judge

THIRD-PARTY DEFENDANT APPELLEE EASTERN SHOSHONE TRIBE'S RESPONSE BRIEF

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STATEMENT OF THE ISSUES

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2. WHETHER DISMISSAL OF THE EASTERN SHOSHONE TRIBE AND THE UNITED STATES REQUIRED DISMISSAL OF THE CASE UNDER FED. R. CIV. P. RULE 19 BECAUSE THE CASE COULD NOT IN EQUITY AND GOOD CONSCIENCE PROCEED AMONG THE EXISTING PARTIES?

3. WHETHER THE DISTRICT COURT ERRED IN RESOLVING THE PLAINTIFF'S PRIMARY CLAIM THAT *BIG HORN I* HELD THAT THE 1905 ACT AREA WAS PART OF THE WIND RIVER RESERVATION?

STATEMENT OF THE CASE

The EST accepts the Statement of the Case provided with the following exceptions. The Nature of the Case is whether the area opened for settlement by the Act of March 3, 1905 (1905 Act area) retains its Indian Country Status. The "critical aspect of Plaintiff's allegations is its interpretation of . . . the Act of March 3, 1905, ch. 1452, 33 Stat. 1016 ("1905 Act")." Aplt. App. at 4211. In the Course of the Proceedings the District Court dismissed the EST and the US based on sovereign immunity which deprived the Court of subject-matter jurisdiction over them as parties. Aplt. App. at 4223, 4235. The October 6, 2009 Order granted the State Parties' motions to dismiss the case pursuant to Fed. R. Civ. P. Rule 19(b)

because the District Court could not in equity and good conscience proceed absent required parties, the EST and United States. Aplt. App. at 4256, 4236-4259.

STATEMENT OF THE FACTS

The EST is a sovereign government recognized by the United States. 75 Fed. Reg. 60810-10 (Oct. 1, 2010). The EST reserved the Wind River Reservation for its exclusive use by the Treaty of July 3, 1868, 15 Stat. 673. *United States v. Shoshone Tribe of Indians of the Wind River Reservation In Wyoming*, 299 U.S. 476, 485-486 (1937). The United States placed the Northern Arapaho Tribe on the Wind River Reservation in 1878 without the EST's consent. *Id*. at 487. By this action, the United States took from the EST and gave to the Northern Arapaho Tribe a one-half undivided interest in the Reservation. *Id*. at 484; *see* Aplt. App. at 0391.

The 1905 Act ratifies and approves, with amendments, the Agreement between the United States and the Shoshone Tribe and Arapahoe Tribe of April 21, 1904, 33 Stat. 1016. Aplt. App. at 4211. The 1905 Act opened the portion of the Reservation north and east of the Big Wind River and Popo Agie River to settlement by non-Indians. Whether as a matter of law the 1905 Act merely opened those lands for settlement or diminished the boundaries of the Reservation has significant implications for the sovereign authority of the EST and the rights of its members. Aplt. App. at 0344-0345; Aplt. App. at 4241. The Defendants are all

state governmental entities or officials. Aplt. App. at 399, 407. The Defendants collect state taxes within a portion of the Wind River Reservation opened to settlement by the 1905 Act, and it is that assertion of jurisdiction that the NAT seeks to contest.

SUMMARY OF ARGUMENTS

The EST has sovereign immunity from suit and cannot be involuntarily joined. The EST is a required party pursuant to Fed. R. Civ. P. 19(a) because it has an interest in the subject of the action and disposition of the action in its absence will as a practical matter impair or impede its ability to protect that interest; the court cannot accord complete relief among the existing parties; and existing parties are left with the substantial risk of incurring double, multiple, or otherwise inconsistent obligations. Since the EST is a required party that cannot be joined, the court below correctly conducted an analysis of whether in equity and good conscience the suit could go forward among the existing parties, or had to be dismissed. The court, after conducting its analysis pursuant to Fed. R. Civ. P. 19(b) properly dismissed the suit.

The District Court erred in ruling on Plaintiff's primary claim – *viz*, whether the *Big Horn I* held that the 1905 act area was part of the Wind River Reservation – after the Court had determined that the case must be dismissed pursuant to its Rule 19 analysis. Once the District Court concluded that the case could not in

equity and good conscience go forward dismissal of all claims in the case was required, and no further analysis of argument, including *Big Horn I* could proceed.

STANDARD OF REVIEW

The District Court's granting of a motion to dismiss a party based on sovereign immunity pursuant to Fed. R. Civ. P. Rule 12(b)(1) is reviewed *de novo* by this Court. *Lucero v. Bureau of Collections Recovery, Inc.*, 639 F.3d 1239, 1241 (10th Cir. 2011).

A district court's Fed. R. Civ. P. Rule 19 decision that a case cannot proceed in equity and good conscience without a necessary party will only be reversed for abuse of discretion. *Davis ex rel Davis v. U.S.* 343 F.3d 1282, 1289 (10th Cir. 2003) ("A district court's indispensability determination under Rule 19 will not be disturbed absent an abuse of discretion.") (citing *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1410- 1411 (10th Cir.1996) ("We review a district court's decision as to whether a party is indispensable for an abuse of discretion." . . . [W]e "must consider 'whether the decision maker failed to consider a relevant factor, whether he [or she] relied on an improper factor, and whether the reasons given reasonably support the conclusion.' ") (Citations omitted.) Evaluation of indispensability "depends to a large degree on the careful exercise of discretion by the district court," *Glenny v. American Metal Climax, Inc.*, 494 F.2d 651, 653 (10th Cir.1974). When the district court's decision reflects

a clear understanding that Fed. R. Civ. P. Rule 19 calls for a practically-oriented consideration of the competing interests at stake, a court of appeals should not balance the equities anew; instead it should affirm the district court's evaluation if no abuse of discretion is discerned. *Cloverleaf Standardbred Owners Ass'n, Inc. v. National Bank of Washington*, 699 F.2d 1274, 1277 (D.C. Cir. 1983).

ARGUMENT

This appeal involves review of the District Court's decision that the EST is a necessary party to the pending action, that it cannot be joined because of sovereign immunity from suit, and that the suit cannot in equity and good conscience proceed in its absence. The District Court, after initially determining that the EST was a required party under Fed. R. Civ. P. Rule 19(a) and ordering EST's joinder as a Third-Party Defendant, then properly dismissed the EST as a party based on sovereign immunity and properly dismissed the case because it could not proceed in equity and good conscience under Fed. R. Civ. P. Rule 19 without the EST which could not be joined as a required party. Because the case had to be dismissed, the District Court had no basis to further analyze and rule on whether the *Big Horn I* case held the 1905 Act area to be part of the Reservation. For ease of review, the relevant portions of the Rule are set forth in their entirety.

Rule 19. Required Joinder of Parties

(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.

* * *

(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.

I. The Eastern Shoshone Tribe is a required party under Fed. R. Civ. P. Rule 19(a)(1) and was properly dismissed based on sovereign immunity.

A. The Tribe is a required party under Fed. R. Civ. P. Rule 19(a)(1)

The EST and US qualify as required parties under both the Fed. R. Civ. P.

Rule 19(a)(1)(A) and (B) criteria, although they need only meet one of the criterion. *See, Klamath Tribe Claims Committee v. United States*, 97 Fed. Cl. 203, 210 (Fed. Cl. 2011) (structure of rule requires person to meet one of criteria under Rule 19(a)(1)). The District Court held, in its January 27, 2009 Order, that the EST and the US were required parties under Fed. R. Civ. P. Rule 19(a)(1). Aplt. App. at 0344-0345. The district court found that :

> The Northern Arapaho Tribe, the Federal Government, and the Eastern Shoshone Tribe were parties to the 1905 Act that is disputed in this case. By determining the substance of that Act, this Court would be determining the rights and responsibilities of not only the Northern Arapaho Tribe, but also the Federal Government and the Eastern Shoshone Tribe. Before this case can move forward, therefore, both the Federal Government and the Eastern Shoshone Tribe must be made parties to this action. Fed. R. Civ. P. 19(a).

Aplt. App. at 0344-0345.

i. EST Is A Required Party Under Fed. R. Civ. P. 19(a)(1)(A).

The EST is a required party to the litigation. Absent the EST the court cannot accord complete relief among existing parties. Fed. R. Civ. P. 19(a)(1)(A). As the District Court noted, "To decide the merits, this Court must make a boundary determination based on interpretation of the 1905 Act, a proposition that is not subject to partial resolution." Aplt. App. at 4245. If the State Parties were successful on the merits, they would have incomplete relief because the judgment would not be binding on the EST which would be free to litigate the underlying issues separately. Without a decision binding on all sovereigns, the practical

problems created would be extensive and complicated.

Confederated Tribes of the Chehalis v. Lujan, 928 F.2d 1496, 1498 (9th Cir.1991) (*Lujan)* is instructive. Tribes and individual Indians brought suit against officials of the United States to enjoin them from recognizing the Quinault Nation as the sole governing authority of the Quinault Reservation. The Court dismissed the case for want of a required party, the Quinault Nation. "First, success by the plaintiffs in this action would not afford complete relief to them. Judgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over the reservation." *Lujan,* 928 F.2d at 1498.

As in *Lujan*, it is clear here that judgment with respect to the existing parties in this case would not bind the EST which would continue to exercise sovereign powers over the 1905 Act area. The EST is a required party under Fed. R. Civ. P. Rule 19(a)(1)(A).

ii. EST Is A Required Party Under Fed. R. Civ. P. 19(a)(1)(B).

The EST also meets the requirements of Fed. R. Civ. P. Rule 19(a)(1)(B)(i) and (ii) which provides that EST is a required party if it establishes an interest in the litigation and in its absence its ability to protect that interest is impaired, or it would leave an existing party subject to multiple or inconsistent obligations. The governments in this litigation all act on behalf of their citizens. Once again the

Lujan case is instructive in commenting on why the Quinault Nation was a required party.

> *Second, the Quinault Nation undoubtedly has a legal interest in the litigation*. Plaintiffs seek a complete rejection of the Quinault Nation's current status as the exclusive governing authority of the reservation. Even partial success by the plaintiffs could subject both the Quinault Nation and the federal government to substantial risk of multiple or inconsistent legal obligations.

Lujan, 928 F.2d at 1498. (Emphasis added.)

The EST has an interest in the litigation that could be impaired. As a sovereign Tribe of the Wind River Reservation, EST has a direct and compelling interest in the underlying issues in this case: 1) the interpretation of the 1905 Act, and 2) whether the decision in the *Big Horn I* case is *res judicata* on the issue of whether the 1905 Act diminished the boundary of the Reservation. A court decision on any claim will impede the EST's ability to protect the Reservation status of its land from diminishment. Fed. R. Civ. P. Rule 19(a)(1)(B)(i).

The unique history of the Wind River Reservation is unlike any other reservation under federal supervision. The sovereign interests of the EST existed prior to and are recognized by the Treaty of 1868 reserving the Reservation for the EST's exclusive use and occupancy. Treaty of July 3, 1868, art. 2, 15 Stat. 673 (1868). In contravention of the Treaty, the United States settled the Northern Arapaho Tribe on the Shoshone Reservation in 1878. When the EST brought suit for the loss of its exclusive occupancy of the Reservation the United States

Supreme Court held that settlement of the NAT on the Reservation ripened into the United States giving the NAT an undivided one-half interest in the Reservation lands and resources, and the shared sovereign interests of the Reservation. *United States v. Shoshone Tribe of Indians of the Wind River Reservation In Wyoming*, 299 U.S. 476 (1937). The Reservation is composed of members of each tribe who are intermarried with members of the other Tribe. Eligibility for various federal programs is based, in part, on whether the activity occurs in Indian country. Each Tribe has an interest in, without limitation, their shared fish & game, water, mineral development, and land use. Clearly the EST has an interest in the claims brought by the NAT.

The NAT Complaint asked the District Court to hold that the State parties cannot apply their taxes within the area of the Wind River Reservation opened for settlement by the 1905 Act. Aplt. App. at 21, ¶ 1. The State parties challenge this position. The 1905 Act ratifies and approves with amendments the Agreement between the United States and the Shoshone Tribe and Arapahoe Tribe of April 21, 1904 – to which Agreement the Arapaho Tribe now disclaims being a party. It is undisputed that the United States and the EST are parties to the Agreement which was amended and ratified by the 1905 Act. The District Court in its 19(a)(1) Order found the EST has an interest in the proceedings: "By determining the substance of [the 1905] Act, this Court would be determining the rights and responsibilities of

not only the Northern Arapaho Tribe, but also the Federal Government and the Eastern Shoshone Tribe." Rule 19(a)(1) Order, Aplt. App. at 0345 (emphasis added). The Court reiterated the point in its October 6, 2009 Order dismissing the EST and the case, noting that "[i]n the circumstances of this case, where the real and direct issue before the court is the jurisdictional status of the 1905 Act area, the EST and the United States must be parties before the Court can address the question without concern for prejudice to their sovereign interests." Aplt. App. at 4259.

The NAT seeks to unilaterally pursue a determination of jurisdiction that has a direct impact on the interests of the EST and its members. Although retaining their separate sovereign identity for some purposes, the EST and NAT share undivided sovereign rights and responsibilities in the Wind River Reservation as a whole. *Northern Arapaho Tribe v. Hodel*, 808 F.2d 741, 744 (10th Cir. 1987). A Joint Business Council made up of the elected members of the Eastern Shoshone Business Council and the Northern Arapaho Business Council meet to decide matters where undivided property or sovereign rights are at issue. *Id*. *Hodel* dealt with regulation of a common property right - hunting. This Court held in that case that "[t]he right to hunt on the reservation is held in common by both tribes, and one tribe cannot claim that right to a point of endangering the resource in derogation of the other tribe's rights." *Hodel*, 808 F.2d at 750. Allowing this case

proceed without the EST similarly endangers its sovereign rights. This protectable interest makes the EST a required party in all matters challenging such rights.

No case cited by the NAT in its Rule 19 analysis deals with the unique arrangement on the Wind River Reservation. The NAT assertion that "[t]he fact that neighbor tribes may have a similar interest that might be affected does not create an insurmountable Rule 19 barrier," (NAT Brief at 38) may be true in other factual contexts, but is a misapplication of the law to the facts of this case. The EST is not a neighbor who has interests in lands adjoining or adjacent to NAT lands – EST holds a one-half, undivided interest in the *same* NAT lands, which makes EST a required and necessary party in all joint-land activity, and in all activity requiring a land/jurisdictional base, such as taxation.

The NAT argues that the "interest" of the EST is not one that is cognizable under Rule 19(a)(1)(B) citing *Potawatomi v. Collier*, 17 F.3d 1292, 1294 (10th Cir. 1994), in which a tribe was held to not be a required party. (NAT Brief at 35-36) In *Potawatomi*, the Court considered the interest of individual members of the Absentee Shawnee in obtaining allotments on the Potawatomi Reservation pursuant to legislation granting the Secretary of the Interior specific power to grant such allotments. The Court held that the Act in question did

> not create any undivided trust or restricted interest of the Absentee–Shawnee tribe in the Potawatomi tribe's land . . . It merely grants the Secretary of the Interior the power to allot land to *individual*

> Absentee–Shawnee tribesmen. The Act does not mention any power to allot lands to the Absentee–Shawnee collectively as a *tribe.*

17 F.3d at 1294. (Emphasis in original, internal quotations omitted.) Unlike the facts in the *Potawatomi* case, the EST has an undivided and legally recognized interest in the jurisdiction of the Reservation.

Proceeding without the EST will leave the existing parties subject to inconsistent obligations. Fed. R. Civ. P. Rule 19(a)(1)(B)(ii). Whatever the outcome of the case, absent the presence of the EST or the US, there is a substantial likelihood that the matter will be re-litigated with the absent parties in some other context. The EST and the US are parties to the 1905 Act and the 1904 Agreement which it implements. The US owns title legal title and the EST has beneficial use and occupancy to the lands at issue in the litigation. The US has legal obligations to the Tribes under the 1905 Act which could be implicated by a determination of the merits. Neither the EST nor the United States would be bound by a decision of the District Court, thus, leaving the remaining parties subject to potential inconsistent judicial or administrative decisions.

The District Court properly determined that the EST was a required party. Fed. R. Civ. P. Rule 19(a)(2); Aplt. App. at 0343; Aplt. App. at 0391.

B. The EST Could Not Be Joined Because of Sovereign Immunity.

Once the EST was made a Third-Party Defendant, it filed a motion to dismiss asserting that "that this Court lacks subject-matter jurisdiction over the

EST due to sovereign immunity." Aplt. App. at 3811. The Court agreed and ruled that "The Court . . . finds that EST's assertion of sovereign immunity compels dismissal of EST as a party." Aplt. App. at 4223.

i. As A Sovereign Tribe, the EST Is Immune From Suit Absent Its Consent.

It is well settled that the EST, as a federally-recognized tribe, enjoys sovereign immunity from suit absent an unequivocally expressed waiver of immunity by the tribe, or abrogation of immunity by Congress. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir.1997). The EST did not waive its immunity in this action and sovereign immunity required its dismissal. *E.F.W. et al. v. St. Stephens Indian High School*, 264 F.3d 1297, 1302-1303 (10th Cir. 2001), citing *Fletcher v. United States*, 116 F.3d 1315, 1323-24 (10th Cir.1997) and *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir.1995). The NAT in its Opening Brief does not contest dismissal of the EST based on sovereign immunity. The District Court should be affirmed on this point.

ii. EST Tribal Officials Are Immune From Suit Unless the Conduct Is Outside Their Authority Or There Is An Allegation That Their Action Is An Ongoing Violation of Federal Law.

Having conceded the EST has sovereign immunity, the NAT argues that the "EST may be joined by naming its officials." NAT Brief at 42. The NAT bases its position on an incorrect application of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). NAT Brief at 15.

The doctrine of *Ex parte Young* requires specific conditions precedent be met before tribal officials made be sued – conditions not present here. *Ex parte Young* principles were explained by this Court in *Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002).

> Federal courts generally deem a suit for specific relief, *e.g.*, injunctive or declaratory relief, against a named officer of the United States to be a suit against the sovereign. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687–88, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949).
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> * * *
>
> Two narrow exceptions to the general bar against suits seeking specific relief from the United States exist. A court may regard a government officer's conduct as so "illegal" as to permit a suit for specific relief against the officer as an individual if (1) the conduct is not within the officer's statutory powers or, (2) those powers, or their exercise in the particular case, are unconstitutional. *Id.* at 702, 69 S.Ct. 1457. Absent these exceptions, sovereign immunity would unjustifiably protect the Government in the exercise of powers it does not possess.

Wyoming v. United States, 279 F.3d at 1225. Most recently in *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154-55 (10th Cir. 2011) (*Stidham*), this Court provided a further explication when *Ex parte Young* is applicable.

> The Supreme Court has explained that, in determining whether the doctrine of *Ex parte Young* applies, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002).

Stidham, 640 F.3d at 1155.

None of the pleadings or filings in this case allege that EST officials have

engaged in any violation of federal law. There are no allegations that officials of the EST have engaged in any conduct which is outside their authorized powers, nor that there has been an exercise of their powers that is unconstitutional. *Santa Clara Pueblo v.* Martinez, 436 U.S. 49, 55-58 (1978); *Talton v.* Mayes, 163 U.S. 376 (1986) (federal constitution does not apply to powers or actions of Indian tribes). No prospective relief against the EST is sought in this proceeding. The NAT "Statement of the Case," NAT Brief at 3, makes no mention of the EST, expressly providing that the relief sought by the NAT in this case is against officials of the State of Wyoming and Fremont County. There is no basis for the application of the doctrine of *Ex parte Young*.

C. The Case In Equity And Good Conscience Cannot Proceed Without The EST

Having determined that the EST and US were immune from suit, the District Court recognized that "the Court must conduct a Rule 19(b) analysis to determine whether the case may proceed without them." Aplt. App. at 4214. *Republic of Philippines v. Pimentel,* 553 U.S. 851, 852 (2008) (*Pimentel*) (The court was required to "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.") (quoting from *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968) (*Provident Bank).*)

Multiple factors bear on whether a case can proceed without a required party,

and the weight given these factors varies with different cases, "some substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Provident Bank,* 390 U.S. at 119. This Circuit explained the proper analysis in *Davis ex rel Davis* v. *United States,* 343 F.3d 1282, 1293 (10th Cir. 2003). That case involved a suit by two bands of the Seminole Nation against the United States to force equitable distribution of a judgment secured against the US by the Seminole Tribe. The Court dismissed the claim because of failure to join the Tribe.

> The Tribe's sovereign immunity prevented its joinder as a party. Thus, the district court's task on remand was to determine whether the Tribe was indispensable to this litigation or whether the case could proceed without it. In making this determination, the court was to consider, "in a practical and equitable manner," the following factors:
>
> > [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; [and] fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Fed. R. Civ. P. 19(b).

Davis ex rel Davis, 343 F.3d at 1289. Like the Seminole Tribe, the EST is a required party to the NAT claim that the Court interpret the 1905 Act and/or decide whether *Big Horn I* decided that the Reservation was not diminished by the 1905 Act and is therefore *res judicata* as to the officials of the State and County defendants. Based on its Fed. R. Civ. P. Rule 19(b) analysis, the District Court

correctly decided the case could not proceed. Aplt. App. at 4236-4259.

i. Judgment Rendered In the Absence of the EST Would Be Prejudicial To The EST.

(a) The EST's Sovereign Immunity Is A Compelling Factor Establishing Prejudice To EST.

The EST's sovereign immunity is a compelling factor under Fed. R. Civ. P. Rule 19(b). The District Court properly focused on sovereign immunity as a critical element in the analysis.

> Central to the Rule 19(b) analysis here is the fact that both of the [required] parties cannot be joined due to their sovereign immunity. Sovereign immunity is a compelling factor that weighs strongly in favor of dismissal. *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999) (holding that there is a strong policy favoring dismissal for nonjoinder due to tribal sovereign immunity, but that Rule 19(b) factors must still be considered) (citing dicta in *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) ("When, as here, a [required] party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." (internal quotations omitted.)). Although not a compelling factor by itself, that the EST and the United States are absent due to sovereign immunity is a significant consideration. Thus, 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. *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995).

Aplt. App. at 4240-4241. The District Court specifically analyzed the potential for prejudice to the sovereign interests of the EST.

> The question of prejudice must be determined with sufficient consideration given to an absent party's sovereign status. *See*

> *Pimentel*, 128 S.Ct. at 2189–92. Attendance to the merits of Plaintiff's claims necessarily affects nonfrivolous claims belonging to the EST and the United States. As the *Pimentel* Court recently stated, "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 2191. Certainly, the EST has a claim with respect to the effect of the 1905 Act, just as the NAT does. It has an equal interest in the Reservation and was a party to the agreement central to this case.

Aplt. App. at 4241. Contrary the NAT's claim that the District Court failed to justify its finding of prejudice,[1] the District Court discussion shows a clear understanding of the dangers of prejudice to sovereign interests here.

The United States Supreme Court has made clear 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." *Pimentel*, 553 U.S. at 866. In this case, a ruling determining the effect of the 1905 Act on the boundary of the Reservation has the potential to injure and prejudice the EST's interests regarding jurisdiction of its homelands. Additionally, the ruling that the Wyoming Supreme Court decision in *Big Horn I* is prejudicial to the EST. The District Court properly dismissed the action, but improperly decided the preclusion claim.

(b) The "Public Rights" Exception Is Inapplicable To The Facts Of This Case.

[1] "The Court decided that the EST . . . [was] a required party under Rule 19(a)(1), but expressed little rationale for its decision. . .." NAT Brief at 35.

The NAT seeks to invoke the "public rights" exception to the requirement for joinder, asserting that a "public rights" exception to traditional joinder requirements exists where a Tribe seeks declaratory and injunctive relief to enforce treaty rights. In *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1986) (*Conner*), the court explained the application of the exception.

> The Supreme Court enunciated the public rights exception in *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799 (1940), declaring, "In a proceeding ... narrowly restricted to the protection and enforcement of *public rights*, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Id.* at 363, 60 S.Ct. at 577.

Conner v. Burford, 848 F.2d at 1459. (Emphasis in original.) In *National Licorice* the Court carefully distinguished the larger public right goals of the NLRB from the rights of individual employees, noting that the individual rights were severable. As explained in *Conner*:

> the NLRB issued an order "directed solely to the employer" which was "ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal...." *Id*. at 366, 60 S.Ct. at 578. Because the third parties' interest in the litigation was thus severable from the particular public rights at issue, the Supreme Court refused to burden the NLRB as the party seeking to enforce public policy with the requirement of joining the individual employees, even though their interests might be affected by the judgment.

Conner at 1459.

While the NAT claim treaty rights from two treaties to which they are signatories,[2] they are not here seeking enforcement of either of their treaties. Rather, NAT seeks to enforce the Treaty with the Shoshonee (Eastern Band) and Bannack Tribes of Indians, July 3, 1868, at Fort Bridger, Utah Territory (15 Stat. 655) to which NAT is not a party. The NAT's Complaint does not assert a "public right" which it seeks to vindicate interests separate from the EST and its members. In this case, NAT does not urge this Court to address joinder of individuals, but joinder of a sovereign with equal rights and standing.

The NAT relies on *Makah v. Verity*, 910 F.2d 555, 559 n. 6 (9th Cir. 1990), in attempt to have the "public rights" exception applied to this case. *Makah* held that the challenge by the Tribe to certain fishing regulations was a "public right" that was severable from the cause of action seeking a reapportionment of the fishery among the Makah and other tribes. *Makah* at 559-560. There are important distinctions between that case and this that require a different result.

The relief sought by the Makah Tribe to reform the unlawful regulations was severable from the part of the lawsuit that would clearly implicate the interests of the other tribes – reapportionment of the fishery. *Makah*, 910 F.2d 555, 559-560 n.6. The claim by the NAT that "neighbor tribes may have a similar interest that

[2] "NAT is party to two treaties with the United States: the September 17, 1851, Treaty of Fort Laramie and the Treaty of May 10, 1868. 11 Stat. 749 (1851) and 15 Stat. 635 (1868)." Aplt. App. at 0181.

might be affected does not create an insurmountable Rule 19 barrier," misses the point on two counts. NAT Brief at 38. Again, the EST and NAT are not merely "neighboring tribes." Unlike any other tribes in the United States they are separate sovereigns sharing the same reservation, each holding an undivided one-half interest. Next, there is no practical way to sever from the interests of the EST from the claim brought by the NAT which requires a determination of the effect of Act of March 3, 1905. Finally, the "public rights", if there were any, the NAT seek to enforce derive from the Treaty of the Eastern Shoshone Tribe.

ii. Protective Provisions In A Judgment Or Other Measures Cannot Lessen Or Avoid Prejudice To EST.

The District Court held "Prejudice cannot be mitigated here." Aplt. App. at 4245. The NAT Brief concedes that there is no mitigation available, but rather that the Court should focus on whether *Big Horn I* should be given preclusive effect. NAT Brief at 51. "The Court's concern about "partial resolution" flows from errors in evaluating the preclusive effect of BHI." *Id*. Again, that argument presumes a court will agree with the NAT on all aspects of its legal theory, and instead of identifying the lack of the mitigating factors from Rule 19(b)(2), argues that the Court should never have ruled the EST and US were required parties. Rule 19(b) analysis cannot take place in the context of a predetermined result. The fundamental issue is whether the 1905 Act altered the jurisdiction of the opened area. There is no relief that can be provided on that question that would not affect

the interests of the EST, and the NAT offers no alternative remedies or forms of relief. *Davis ex rel Davis*, 343 F.3d at 1292 ("Plaintiffs argue that the factor is irrelevant because any prejudice to the Tribe is not legally cognizable. As previously discussed, this argument goes to the merits of their claim, rather than the potential harm to the Tribe if Defendants lose.")

iii. A Judgment Rendered In The Absence Of The EST And The United States Would Be Inadequate

Adequacy under 19(b)(3) refers to the "public stake in settling disputes by wholes, whenever possible." *Pimentel,* 553 U.S. at 870 (quoting from *Provident Tradesmens Bank*, 390 U.S. at 111, 88 S.Ct. 733). In *Davis ex rel. Davis*, 343 F.3d at 1293, this Circuit explained more fully:

> [T]he [19(b)(3)] factor is intended to address the adequacy of the dispute's resolution. *See* [*Provident Tradesmen Bank and Trust v. Patterson*, 390 U.S. at 111]. The concern underlying this factor is not the plaintiff's interest "but that of the courts and the public in complete, consistent, and efficient settlement of controversies," that is, the "public stake in settling disputes by wholes, whenever possible." *Id.* As previously discussed, a judgment rendered in the Tribe's absence could well lead to further litigation and possible inconsistent judgments. That judgment, therefore, would be "inadequate."

The goal of adequacy cannot be met absent the presence of the EST and the US. The NAT complains that the District Court's interpretation of the law in this Court amounts to a position "that the public interest is served by keeping questions of federal law unanswered." NAT Brief at 53. This is a repetition of the argument

that the NAT should be provided a forum if possible, not whether the factor of "adequacy" is met. The argument concerning the right to a forum is addressed in the next section. In addition, if the Court below was, as it ruled, compelled in equity and good conscience to dismiss the NAT claim as to the effect of the 1905 Act area because it would potentially be prejudicial to the EST, the Court was also compelled to dismiss as to whether *Big Horn I* was preclusive on the same issue. The prejudice is the same.

iv. NAT's Interest In Litigating Its Case Does Not Overcome The Other Factors To Be Weighed Under Fed. R. Civ. P. Rule 19(b).

The decisional policy of this Court is clearly set forth in *Davis ex rel Davis,* 343 F.3d at 1293, and was cited and relied upon by the District Court.

> The issue here, then, is not whether an adequate remedy can be found elsewhere, but only the weight to be given this factor.
>
> Plaintiffs assert that the fourth Rule 19(b) factor is so important that after having found that it weighed against a finding of indispensability, the district court should have retained the case despite its findings with respect to factors one through three. We have described the fourth factor as "perhaps [the] most important," *Sac & Fox [v. Norton*], 240 F.3d [1250] at 1260[(10th Cir. 2001)], and have stated that "[t]he absence of an alternative forum ... weigh[s] heavily, if not conclusively against dismissal," *Rishell,* 94 F.3d at 1413 (internal quotation marks omitted).
>
> On the other hand, we have also recognized a "strong policy ... favor[ing] dismissal when a court cannot join a tribe because of sovereign immunity." *Davis I,* 192 F.3d at 960. In fact, we have stated that "[w]hen ... a necessary party ... is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling

> by themselves." *Enter. Mgmt.*, 883 F.2d at 894 (internal quotation marks omitted).
>
> The D.C. Circuit has explained:
>
> > Although we are sensitive to the problem of dismissing an action where there is no alternative forum, we think the result is less troublesome in this case than in some others.... This is not a case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.

Davis ex rel Davis, 343 F.3d at 1293. *Accord Wichita & Affiliated Tribes of Oklahoma*, 788 F.2d at 765, 777 (10th Cir. 1986).

> While a court should be extra cautious in dismissing a case for nonjoinder where the plaintiff "will not have an adequate remedy elsewhere," *Park v. Didden*, 695 F.2d 626, 631 n. 13 (D.C. Cir. 1982), it is also important to realize that "[t]his does not mean that an action should proceed solely because the plaintiff otherwise would not have an adequate remedy, as this would be a misconstruction of the rule and would contravene the established doctrine of indispensability." 3A Moore's Federal Practice ¶ 19.07-2[4], at 19-153 (1984).

When the competing elements of lack of a forum and respect for tribal sovereign immunity are weighed, the balance, as the District Court correctly held, tips in favor of respect for sovereignty and dismissal. Aplt. App. at 4249. *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991) (Courts have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity); *see*, *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 552 (4th Cir. 2006).

Importantly, it is not that there is no forum, [3] but that it is not the forum chosen solely by the NAT. NAT Brief at 16; NAT Brief at 56, fn. 49.

III. The District Court Had No Basis To Rule On Whether *Big Horn I* Case Held That the 1905 Act Area Was Part of the Wind River Reservation

The EST filed a Rule 59(e) Motion to Alter or Amend The Court's October 6, 2009 Order granting Motions to Dismiss asking the Court to amend its Order to remove those portions that opine on the preclusive effect of *Big Horn I.* That Motion was based on that the premise that the ruling was unnecessary to decide the Rule 19 joinder issue. Aplt. App. at 4269. The District Court's denial of the motion incorrectly asserts that the discussion was necessary to resolve the NAT's primary preclusion argument. "The *Big Horn I* discussion was necessary to resolve the primary claim of Plaintiff, Northern Arapaho Tribe, ("NAT"); namely, whether *Big Horn I* held the 1905 Act area to be part of the Reservation." Aplt. App. 4316.

Whether the Wyoming Supreme Court in *Big Horn I* decided the boundary issue is not properly a matter that the Court below could decide. The District Court made clear that there was no possibility of imputing a waiver of sovereign

[3] For example, the same underlying issue is before the Environmental Protection Agency as part of both Tribes' "Treatment in the Same Manner As A State" proceedings. www.epa.gov/region8/tribes/ (Wind River Treatment in the Same Manner as a State public notice documents. The State Parties are also active participants in that process. *See, id.* (State of Wyoming Comments and City, County, Elected Officials' Comments).

immunity by the EST from the *Big Horn I* case to the present case. "Plaintiff provides no supporting authority for this proposition." Aplt. App. at 4223. "The Court . . . finds that that EST's assertion if sovereign immunity compels dismissal of EST as a party." *Id.* Having determined that there was no waiver of immunity and that the Court could not join the EST, the question before the Court was then the same as for the rest of the NAT claims – whether the Court in equity and good conscience should dismiss the case. The District Court ruled in its Order of Dismissal that "in the circumstances of this case, where the real and direct issue before the court is the jurisdictional status of the 1905 Act area, the EST and the United States must be parties before the Court can address the question without concern for prejudice to their sovereign interests." Aplt. App. at 4259.

The Court discussed the *res judicata* effect of *Big Horn I* without jurisdiction over EST or the US. The EST is no less prejudiced by the resolution, without its presence, of the "primary claim of the Plaintiff . . . whether *Big Horn I* held the 1905 Act area to be part of the Reservation," Aplt. App. at 4316, than it is by resolution of the "real and direct issue before the court [that] is the jurisdictional status of the 1905 Act area". Aplt. App. at 4259. The Court's conclusion that "the EST and the United States must be parties before the Court can address the question without concern for prejudice to their sovereign interests" *Id.*, is as applicable to the one issue as it is the other. It was improper for the District Court

to decide the preclusion claim. Resolution of NAT's "primary claim" is no less prejudicial than resolution of other issues that required dismissal pursuant to Rule 19(b).

The Court also asserted that "Moreover, the *Big Horn I* discussion was important to resolving the issue of joining indispensable parties," in order to respond to the "Plaintiff's claim that EST and the United States had waived sovereign immunity by their involvement in that (*Big Horn I*) case." Aplt. App. at 4316. The District Court provides no explanation for this assertion. Resolution of the preclusion issue is, therefore, unnecessary and irrelevant to whether the EST's waiver of immunity in *Big Horn I* can be imputed as a waiver in the instant case. The Court needed go no further than to conclude as all the case law supports that waivers of immunity cannot be imputed. To do more was error. *See Republic of the Philippines v. Pimentel*, 553 U.S. 851, 865 ("the District Court and the Court of Appeals failed to give full effect to sovereign immunity when they held the action could proceed without the Republic and the Commission.").

CONCLUSION AND RELIEF SOUGHT

The Eastern Shoshone Tribe and the United States were properly dismissed as parties based on their respective sovereign immunity. The EST is a required party to the resolution of the claims brought by the Complaint filed by the NAT. Because the EST cannot be joined without divesting the Court of subject-matter

jurisdiction over the Tribe as a party, the Court had to determine whether equity and good conscience required dismissal of the case under Fed. R. Civ. P. Rule 19. The case could not go forward without prejudicing the rights of the EST and the existing parties in the case it was necessary to dismiss the case. The prejudice to the EST and other parties could not be lessened or avoided by protective provisions, by shaping the relief, nor other measure. Any judgment entered absent the EST would not be adequate and, although dismissal leaves the Plaintiff no adequate remedy, where the reason for dismissal is the sovereign immunity of a party, that factor outweighs the concern for providing a forum.

Finally, the District Court erred in resolving Plaintiff's "primary claim" – *viz.* whether *Big Horn I* held that the 1905 Act area was part of the Wind River Reservation in the context of the requirement under Rule 19(b) that the case be dismissed if in equity and good conscience it cannot be decided without prejudicing a party that cannot be joined.

The NAT do not support any basis for review of this matter because NAT fails to demonstrate that the lower court abused its discretion in performing a Rule 19(a)&(b) analysis. Because NAT fails to identify any abuse the Circuit Court should affirm the District Court's:

1. Dismissal of the EST and the United States based on sovereign immunity;

2. Ruling that the EST is a required party pursuant to Fed. R. Civ. P. 19(a);
3. Ruling that the EST and United States cannot be joined under the doctrine of *Ex parte Young;* and
4. Ruling that the case must be dismissed because in equity and good conscience the case cannot go forward without prejudicing the rights of the EST.

The Court should vacate the District Court's ruling that the Wyoming Supreme Court did not decide in *Big Horn I* whether the Act of March 3, 1905 (33 Stat. 1016) diminished the Reservation.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Appellee Eastern Shoshone Tribe has no objection to Appellant's request for oral argument.

Respectfully submitted,

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Certificate of Compliance with Fed. R. App. P. Rule 32(a)

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced 14 point Times New Roman and contains 8,145 words. I relied on my word processor to obtain the count. It is a Microsoft Office Word 2010. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonably inquiry.

By: /s/ Donald R. Wharton
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CERTIFICATE OF DIGITAL SUBMISSION

With the exception of all privacy redactions required by the 10th Circuit General Order of March 18, 2009, regarding electronic filing, every document submitted in electronic form is an exact copy of the written document filed with the Clerk, and it has been scanned for viruses with the most recent version of a commercial virus scanning program Microsoft Security Essentials updated on a daily basis whenever updates are available, and, according to the program, is free of viruses.

s/_Donald R Wharton

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2011, a true and correct copy of the foregoing **THIRD-PARTY DEFENDANT APPELLE EASTERN SHOSHONE TRIBE'S ANSWER BRIEF** was sent to the persons listed below by digital submission via the 10th Circuit Court's ECF program.

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