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 - Appellants,

UNITED STATES OF AMERICA; EASTERN SHOSHONE TRIBE,

Third-Party-Defendants - Appellees.

On Appeal from the U.S. District Court for the District of Wyoming (Hon. Clarence A. Brimmer)

BRIEF OF THE UNITED STATES OF AMERICA

IGNACIA S. MORENO
Assistant Attorney General

PATRICIA MILLER
ELIZABETH A. PETERSON
KATHERINE J. BARTON
U.S. Department of Justice
Environment & Natural Resources
Division, Appellate Section
P.O. Box 23795 L'Enfant Plaza Sta.
Washington, DC 20026
(202) 353-7712
katherine.barton@usdoj.gov

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STATEMENT OF RELATED CASES

Counsel for the United States is unaware of any case that is related to this appeal within the meaning of 10th Circuit Rule 28.2(C).

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1362 (jurisdiction over actions brought by tribes). After initially joining the United States and the Eastern Shoshone Tribe as required parties under Federal Rule of Civil Procedure 19(a), the district court subsequently held it did not have jurisdiction over them because they had not waived their sovereign immunity to suit and dismissed them as parties. The district court further determined that the United States and the EST were indispensable parties under Rule 19(b) and dismissed the complaint on that ground.[1/]

The district court entered final judgment on October 9, 2009, and denied the Eastern Shoshone Tribe's motion for reconsideration on November 16, 2009. Appellant's Appendix (APP) 4262, 4312-4317. The Northern Arapaho Tribe filed a timely notice of appeal on November 17, 2009. APP 4318; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

[1/] Plaintiff-Appellant Northern Arapaho Tribe contends (Opening Brief (Br.) 59-61) that the district court erroneously dismissed the case for lack of subject matter jurisdiction. The district court's order, however, did not characterize the dismissal of the complaint as jurisdictional.

STATEMENT OF THE ISSUES

This case presents the unique circumstance where two tribes – each an independent sovereign – share an undivided interest in the same Indian reservation and each exercise tribal jurisdiction over it. The tribes are Plaintiff-Appellant the Northern Arapaho Tribe (the NAT) and Third-Party-Defendant-Appellee the Eastern Shoshone Tribe (the EST), and they share the Wind River Indian Reservation in Wyoming. In this case, the NAT alone has brought suit challenging the assertion of certain taxation jurisdiction by State and County officials within a portion of the Reservation that was opened to settlement by Congress in 1905. The NAT contends that the 1905 Act left the Reservation boundaries intact and that the disputed area, generally referred to as the 1905 Act area, is subject to tribal and federal jurisdiction, such that the tribes and their members therein are not subject to state and county taxation. The issues on appeal are:

1. Whether the district court, after joining the United States and the Eastern Shoshone Tribe as parties to this action, correctly dismissed them because they are immune to this suit.

2. Whether, in the unique situation in which two tribes share an undivided interest in and exercise co-extensive jurisdiction over the entire reservation, the district court correctly dismissed the Northern Arapaho Tribe's complaint under

Federal Rule of Civil Procedure 19 due to its inability to join the Eastern Shoshone Tribe as a party.

The NAT's opening brief (p. 2) lists as an issue presented whether a prior state court water rights adjudication – *In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, 753 P.2d 76 (Wyo. 1988) (*Big Horn I*), *aff'd sub nom, Wyoming v. United States*, 492 U.S. 406 (1989) – preclusively determined that the 1905 Act did not diminish the Reservation and thus bars the defendants from denying the 1905 Act area is Indian country. As discussed *infra*, Part I.C, the district court's analysis of that question was unnecessary to the judgment. This Court need not and should not reach the merits of the question of the preclusive effect of *Big Horn I.*

STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. The Wind River Reservation

The NAT and the EST both reside on and share an undivided interest in the Wind River Indian Reservation in Wyoming. *Northern Arapaho Tribe v. Hodel*, 808 F.2d 741, 743 (10th Cir. 1987). The Reservation was established by the Treaty of July 3, 1868, 15 Stat. 673, for the EST, which relinquished to the United States more than 44 million acres in Colorado, Utah, Idaho, and Wyoming, and accepted

in exchange a reservation of slightly more than 3 million acres. In the late 1870s, over the objections of the EST, the United States settled the NAT, one of the EST's ancestral foes, on the same Reservation. *See Shoshone Tribe of Indians of the Wind River Reservation v. United States*, 299 U.S. 476 (1937).

After the Reservation was established, several subsequent agreements with the United States, codified by statute, provided for the sale or cession of certain lands therein. At issue in this case is the agreement of April 21, 1904, which opened 1,480,000 acres of the Reservation to non-Indian settlement.[2/] The 1904 agreement was amended and codified by the Act of March 3, 1905, c. 1452, 33 Stat. 1016, and the area encompassed therein is generally referred to in these proceedings as the 1905 Act area.[3/] The NAT and the EST contend that the 1905 Act area remains within the boundaries of the Reservation. In the early 1980s, in the *Big Horn* water rights adjudication, the United States and the tribes took the position that the 1905 Act did not diminish the Wind River Reservation and were confirmed Indian reserved water rights in the 1905 Act area in that proceeding.

[2/] The NAT contends that it did not agree to the 1904 treaty. *See* APP 3893, 4211.

[3/] Portions of the 1905 Act area also are the subject of the Act of July 27, 1939, 53 Stat. 1128, and the Act of August 15, 1953, 67 Stat. 592.

The NAT and the EST generally share co-extensive jurisdiction over the Reservation. While each tribe governs itself separately by vote of the tribal membership at general council meetings or by vote of its elected business council, a Joint Business Council, comprising representatives from both tribes, deals with certain matters of common interest. *Hodel*, 808 F.2d at 744. The general tribal law jointly governing the reservation – the Law and Order Code of the Shoshone and Arapaho Tribes of the Wind River Indian Reservation – encompasses matters including regulation of natural resources, land, and fish and game; housing and building codes, criminal and civil procedure, probate, traffic, tribal offenses, domestic relations, and tribal employment.[4/] The code is implemented by a variety of joint tribal entities including, for example, the Wind River Tax Commission, the Minerals Development Department, and the Wind River Environmental Quality Commission, which has programs pertaining to water and air quality, hazardous materials, and other environmental protection issues. *Id*.[5/]

The 1905 Act area includes land in both Indian and non-Indian ownerships. The Indian lands include land held in trust by the United States for both tribes, land

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[4/] The Code is available at http://narf.org/nill/Codes/shoshonearapaho/ (last visited November 21, 2011).

[5/] The programs of the Environmental Quality Commission are described generally at http://www.wreqc.com/ (last visited Nov. 21, 2011).

held in trust by the United States for the benefit of one tribe or the other, and allotments held in trust for individual Indians. While each tribe exercises exclusive possession and control of the lands held in trust for that particular tribe, all of the trust lands are subject to the joint tribal laws of the Reservation. *See* 25 U.S.C. § 574a. Both tribes also share the right to exercise certain rights of tribal jurisdiction, particularly with respect to Indians, on non-Indian lands within the Reservation as well.

1. The Complaint

On September 30, 2008, the NAT filed a complaint seeking declaratory and injunctive relief against Scott Harnsberger, the treasurer of Fremont County, Wyoming; Edmund Schmidt, the director of the Wyoming Department of Revenue and Taxation; and Daniel Noble, the administrator of the Excise Tax Division of the Wyoming Department of Revenue and Taxation (collectively, the State and County Officials).[6] APP 21-31. The complaint alleged that the State and County Officials unlawfully levied vehicle registration fees and excise taxes on the NAT and individual Indians within the 1905 Act area, which the NAT contends is within the exterior boundaries of the Reservation and is Indian country under 18 U.S.C. § 1151 and other federal law. *Id.*

[6] The City of Riverton intervened as a defendant but was voluntarily dismissed during this appeal. APP 316; Court of Appeals Order of October 21, 2010.

2. Joinder of the United States and the Eastern Shoshone Tribe

The State and County Officials moved to dismiss the complaint on the ground that the EST, which shares an undivided interest in the Reservation with the NAT, and the United States, which has certain federal jurisdiction within the Reservation boundaries, were indispensable parties to the action who could not be joined due to their sovereign immunity to the suit. DN23, 24, 26, 27; APP 84-153. On January 27, 2009, the district court denied the motion to dismiss and joined the United States and the EST as required parties under Federal Rule of Civil Procedure 19(a). The court reasoned that the suit would require the court to determine the status of the 1905 Act area and implicate rights and responsibilities of the EST and the United States. DN60; APP 343-346.

3. Dismissal of the Joined Parties and of the Complaint

The United States and the EST each filed a motion to dismiss itself from the case on sovereign immunity grounds. DN 90, 93; APP 3811-3826, 3834-3847. The State and County Officials renewed their motions to dismiss on indispensable party grounds. DN96, 97, 100; APP 3848-3869. The NAT opposed the dismissal motions, arguing that neither the United States nor the EST was a required party under Rule 19(a); that even if they were required parties, they had each waived their immunity to suit; and that even if the United States and the EST could not be joined, they

were not indispensable parties and the suit could proceed in their absence. DN 105, 106, 107; APP 3882-3935. In contending that the United States and the EST could be joined to the suit, the NAT relied in part on its assertion that the 1905 Act area was held to be within the Reservation boundaries in the water rights adjudication in *Big Horn*. Specifically, the NAT argued that the EST had waived its immunity to suit on the question of the status of the 1905 Act area by intervening in *Big Horn*, and that the *Big Horn* judgment obliged the United States, under its trust responsibility, to protect the tribe from unlawful taxation within the 1905 area. Op. 9; APP 4216.

On October 6, 2009, the district court granted each of the dismissal motions. DN130. The district court first held that the United States and the EST were immune to suit. The district court rejected the NAT's argument that the EST and the United States could be joined as a result of their prior participation in *Big Horn*, concluding that *Big Horn* did not rule on the status of the 1905 Act area. Op. 7-14; APP 4214-4221. The court also rejected the NAT's contention that the Administrative Procedure Act (APA) waived the United States' immunity to this suit. The court concluded that the APA waived immunity only with respect to claims seeking relief on the ground that an agency or officer of the United States "improperly acted or failed to act," and that the NAT had not alleged any unlawful

act or failure to act on the part of the United States. Op. 20-24; APP 4227-4231. The district court also held that the United States' trust responsibility did not require it to participate in this suit because no statute or treaty unambiguously circumscribes the United States' discretion whether to pursue this case. Op. 24-27; APP 4231-4234. As to the EST, the NAT identified no waiver of its immunity other than its participation in *Big Horn*. The district court thus held that it could not compel either the EST or the United States to participate in the action and dismissed them as parties. Op. 16, 28, 54; APP 4223, 4235, 4261.

The district court then considered, under Rule 19(b), whether "in equity and good conscience," the case could proceed in the absence of the EST and/or the United States. Op. 31; APP 4238. Addressing the first of the four factors identified in Rule 19(b), the district court found that the United States and the EST each have interests that could be prejudiced by a ruling on the status of the 1905 Act area and that those interests were not adequately represented by the NAT. The court reasoned that the two tribes are not aligned in this litigation and do not share identical interests and that, as a result, the United States, which is a trustee for both tribes, has conflicting interests as well. Op. 34-37, 42-48; APP 4241-4244, 4249-4255. The court found that the State and County Officials also would be prejudiced if the case proceeded because the United States and the EST would not be bound by

a judgment against the NAT. The court thus found it was "highly likely" that the State and County Officials would be subject to inconsistent obligations regarding the 1905 Act area. Op. 37-38; APP 4244-4245.

As to the second factor, the court found that the prejudice to the parties could not be mitigated, noting that the NAT itself had asserted that the EST could be estopped by a judgment in this case. Op. 38-39; APP 4246-4247. Third, the court found that the judgment would not be adequate in the absence of the United States and the EST because such a judgment would not settle the jurisdictional dispute as a whole. Op. 39-40; APP 4247-4248. Fourth, the court reasoned that, assuming the NAT does not have an adequate alternative forum for litigating the Reservation boundary question, the interests in protecting tribal and federal sovereignty outweigh the interest of the NAT in continuing with this suit. The court concluded that "in this context where sovereign immunity prevents joinder and where the first three factors favor dismissal, this final factor of an alternative forum is outweighed, despite the prejudice it may work on" the NAT. Op. 41; APP 4248.

4. Motion for Reconsideration

The EST filed a motion for reconsideration, asking the district court to vacate the portions of its opinion addressing the preclusive effect of the *Big Horn* water rights adjudication. DN 132, APP 4264. The district court held that the EST lacked

standing to make such a motion and, in any event, that "the *Big Horn I* discussion was necessary to resolve the primary claim of Plaintiff, Northern Arapaho Tribe; namely, whether *Big Horn I* held the 1905 Act area to be part of the Reservation." DN 136; APP 4312, 4317. The district court further concluded that "the discussion was important in resolving the issue of joining indispensable parties." *Id*. The court thus denied the motion.

SUMMARY OF THE ARGUMENT

1. The district court correctly held that it lacked subject matter jurisdiction over the United States and the EST due to their immunity to suit. Both the United States and federally recognized Indian tribes are immune to suit absent a congressional waiver of that immunity or, in the case of the tribe, an express waiver by the tribe itself. No such waiver is operative in this case. The NAT argues that officials of the United States and the EST can be sued under the APA and *Ex parte Young*, respectively, but those arguments fail because the NAT does not seek relief from the United States or the EST for violations of federal law. The NAT argued in the district court that the United States' and the EST's participation was compelled by their involvement in the *Big Horn* adjudication – which the NAT contends preclusively held that the 1905 Act area is part of the Reservation – but the NAT provided no legal authority for that argument, which is clearly incorrect. The NAT

does not renew that argument on appeal, and this Court need not address it.

2. The district court's dismissal of the complaint under Rule 19 should be affirmed on the ground that the EST is an indispensable party. This case involves the unique circumstance where two tribes share an undivided interest in the same Indian reservation. As a result, the NAT and the EST share co-extensive tribal jurisdiction over the Wind River Reservation. The tribes, in a jurisdictional sense, are akin to tenants in common on the Reservation and jointly exercise sovereign regulatory jurisdiction over it. Because the two tribes' administration of the Reservation is inextricably intertwined, a judgment in this suit to determine the status of the 1905 Act area and delineate tribal versus State and County jurisdiction in the absence of the EST cannot accord complete relief among the parties, may impair the interests of the EST, and could lead to additional litigation and inconsistent obligations. Thus, the EST is a required party to this action that cannot be joined, and the equities weigh in favor of dismissal in its absence.

This Court can and should dismiss the case solely on the basis of the inability to join the EST. As to the United States, the NAT correctly argues that courts have decided numerous cases by tribes addressing reservation boundaries without the participation of the United States. To counsel's knowledge, the United States has never argued in such cases that it is necessary or indispensable and does not do so

here. Whether the United States may be an indispensable party in reservation boundary cases can and should be left for a case in which it is determinative. Here, the NAT and EST co-habit the Reservation in a unique manner, and the EST is plainly an indispensable party. The district court's judgment should be affirmed on that basis alone.

STANDARD OF REVIEW

Whether a potential party is immune to suit is a legal question that this Court reviews *de novo*. *FTC v. Kuykendall*, 466 F.3d 1149, 1154 (10th Cir. 2011); *Iowa Tribe of Nebraska and Kansas v. Salazar*, 607 F.3d 1225, 1232 (10th Cir. 2010). This Court reviews for abuse of discretion both a district court's determination as to whether a party is required under Rule 19(a) and whether a suit should be dismissed under Rule 19(b). *See Davis v. United States*, 192 F.3d 951, 957 & n.3 (10th Cir. 1999) (*Davis I*). The district court's underlying legal conclusions, however, are reviewed *de novo*. *Id.* The district court abuses its discretion in making an indispensability determination when it fails to consider a relevant factor, relies on an improper factor, or relies on grounds that do not reasonably support its conclusion. *See Rishell v. Jane Phillips Episcopal Memorial Medical Center,* 94 F.3d 1407, 1411 (10th Cir. 1996); *cf. Thunder Basin Coal Co. v. Southwestern Public Service Co.*, 104 F.3d 1205, 1211 (10th Cir.1997) (weight to be accorded each factor is matter for district court's discretion).

ARGUMENT

I. The district court correctly dismissed the United States and the EST as parties because they are immune to this suit.

After *sua sponte* joining the United States and the EST as parties under Rule 19(a), the district court correctly held that it lacked subject matter jurisdiction over the United States and the EST because they had not waived their immunity to suit. The only arguments that the NAT raises on appeal to dispute this ruling – that the APA provides the United States' consent to this suit and that the EST may be joined under *Ex parte Young* – are plainly incorrect, because the NAT alleges no violation of federal law by either.

A. The United States is immune to this suit.

It has long been established that the United States, as sovereign, is immune from suit save as it consents to be sued. *United States v. Navajo Nation*, 537 U.S. 488, 502 (2003); *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Murdock Machine & Engineering Co. of Utah*, 81 F.3d 922, 929 (10th Cir. 1996). The waiver must be expressed in unequivocal statutory text and cannot be implied. *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255, 264 (1999); *Lane v. Pena*, 518 U.S. 187, 192 (1996). Without such clear congressional consent, courts lack jurisdiction to hear suits against the United States. *United States v. Mitchell*, 445

U.S. 535, 538 (1980); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jacks*, 960 F.2d 911, 913 (10th Cir. 1992). Officers of the United States do not have the power to waive sovereign immunity through their actions. *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 660 (1947); *Murdock Machine*, 81 F.3d at 931. Nor can there by a waiver of the United States' immunity based on "policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case.'" *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (quoting *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998)).

There is no statute that waives the United States' immunity in this case. The NAT's reliance (Br. 42-43) on Section 702 of the APA is incorrect. Section 702, as relevant here, provides that "[a]n action in a court of the United States seeking relief other than money damages and *stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority* shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U.S.C. § 702 (emphasis added). This Court has held that this waiver is not limited to suits under the APA. *See Simmat v. Bureau of Prisons*, 413 F.3d 1225, 1233

(10th Cir. 2005). The United States disagrees with that holding.[7] But even under this Court's view, the waiver is limited by its terms, which allow suits only for claims alleging that an agency "acted or failed to act" in an unlawful manner. As the district court correctly held, Op. 19-24, APP 4226-4231, because this suit does not assert a claim or seek relief from a federal agency or official for an unlawful action or failure to act, the APA provides no waiver of the United States' immunity here.

The NAT also asserts (Br. 41) that the district court erred in joining the United States as a third-party defendant. It is immaterial how the district court joined the United States, because absent a statutory waiver of sovereign immunity, it cannot be joined in any manner. *See Murdock Machine*, 81 F.3d at 931. The NAT additionally argued in district court that the United States had a trust responsibility to protect the NAT's interests in the Reservation. *See* Op. 24-27; APP 4231-4234.The NAT has waived that argument by not maintaining it on appeal, *see Rhine v. Boone*, 182 F.3d 1153, 1154 (10th Cir. 1999), and it is wrong in any event. The United States' general trust responsibility toward federally recognized Indian tribes

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[7] It is the United States' view that the APA waives sovereign immunity only for actions brought under the APA. *See Bowen v. Massachusetts*, 487 U.S. 879, 892 (1988); *see also Blue Fox,* 525 U.S. at 260-263 (holding that waiver of sovereign immunity for non-monetary claims is limited to claims seeking specific relief). Thus, the waiver is limited to suits in which there is "final agency action" to review. 5 U.S.C. § 704.

does not operate to waive federal sovereign immunity or create an obligation for the United States to participate in every case to which an Indian tribe is a party. *See Mitchell*, 445 U.S. at 542. A tribe claiming a violation of the federal trust responsibility must point to a specific statutory duty and make a claim for money damages. *See Navajo Nation*, 537 U.S. at 506. Here, the NAT has brought no claim at all against the United States. Nor may a tribe force the United States to participate in litigation as trustee alongside the tribe unless a specific law or other restriction creates an obligation for the United States to do so. *See Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995). The NAT identified no law or restriction that created such an obligation, and there is none. The district court thus correctly dismissed the suit as to the United States.

B. The Eastern Shoshone Tribe is immune to this suit.

The district court also correctly dismissed the EST from this suit. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1998); *see also Ute Distribution Corp.,* 149 F.3d at 1263 (quoting same). A tribe's sovereign immunity is waived only where a tribe unequivocally expresses a waiver or where Congress specifically authorizes the suit. *Santa Clara*, 436 U.S. at 58-59, 63; *Native American Distributing*, 546 F.3d at 1293.

The NAT does not contend on appeal that either the tribe or Congress has waived the sovereign immunity of the EST. Indeed, in district court, the NAT initially declared it had no objection to the EST's motion to dismiss itself as a party. DN 106 at 4. Now, the NAT argues only (Br. 42) that tribal officials can be joined under the exception to sovereign immunity set forth in *Ex parte Young*. That argument fails for two reasons.

First, the NAT did not raise this argument in district court, and it is thus waived. *See Rhine*, 182 F.3d at 1154. The NAT may argue in reply that this Court's recent decision in *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), which applied the *Ex parte Young* exception to a tribal official, represents a change in intervening law that justifies its raising this issue for the first time on appeal. That is incorrect. *Crowe* itself states that this Court had previously "applied *Ex parte Young*, albeit implicitly, in the tribal context." 640 F.3d at 1154. This argument was available in district court but the NAT did not raise it.

Second, *Crowe* and *Ex parte Young* do not apply here. In *Crowe*, a non-Indian law firm represented an Indian tribe in tribal court litigation to which the firm was not a party. The law firm brought suit in federal district court against a tribal court judge who had ordered the firm to return fees paid to it by the tribe. This Court rejected the tribal court judge's claim to tribal sovereign immunity on the

theory that *Ex parte Young* provides an exception to tribal as well as state sovereign immunity. *Crowe*, 640 F.3d at 1154. The Court held that the district court properly applied *Ex parte Young* in *Crowe* because the law firm's complaint brought suit against a tribal official for a violation of federal law and sought prospective declaratory and injunctive relief. *Id.* at 1155-1156. Here, in contrast, *Ex parte Young* does not provide an exception to the EST's sovereign immunity because the NAT did not bring suit against the EST or any EST official, does not allege the EST or any of its officials violated any law, and does not seek declaratory or injunctive relief against the EST. Thus, the EST is immune to suit.

C. The *Big Horn* adjudication is irrelevant to the question of the United States' and the EST's immunity to suit.

In its opposition to the United States' motion to dismiss itself as a party, the NAT argued in part that the *Big Horn* judgment and decree triggered the United States' fiduciary trust obligation to protect the NAT from unlawful encroachment. DN 107 at 7. The NAT argued that "the nexus with *Big Horn I* and the McCarran Amendment precedent," which the NAT contended imposes an affirmative duty to defend Indian tribes' water rights in state-based water right adjudications, required the United States to join this suit to defend the NAT's interest in this case. *Id.* at 8. Similarly, in its opposition to the EST's motion to dismiss itself as a party, the NAT

contended that the EST waived its sovereign immunity by intervening in the *Big Horn* adjudication and, because this case is concerned with the *res judicata* effect of *Big Horn I*, the EST sovereign immunity waiver carried through and was imputed to these proceedings. DN 115 at 8.

In addressing these arguments, the district court reached the merits of the NAT's summary judgment motion, which contended that *Big Horn I* preclusively barred the State and County Officials from arguing that the 1905 Act area is outside the Reservation boundaries. Op. 7-14; APP 4214-4221. It was, however, wholly unnecessary for the district court to do so. The NAT cited no legal support for its theory that the United States has a fiduciary duty stemming from its participation in the *Big Horn* adjudication, and there is none. The Indian reserved water rights in the 1905 Act area that were adjudicated in *Big Horn* are not at issue or at risk in this proceeding; indeed, they are set forth in the *Big Horn* state court judgment and decree and the state court is the proper forum for addressing post-judgment matters pertaining to those water rights.

In any event, the NAT's theory that the United States had a fiduciary duty to defend the Reservation boundaries, even assuming it was correct, at most would support a separate suit by the NAT against the United States, and would not provide a basis for the district court to join the United States as a party to this suit.

Similarly, the NAT cited no legal support for its argument that the EST's prior intervention in *Big Horn* effected a waiver of sovereign immunity here. The NAT did not explain how the terms of the EST's waiver in *Big Horn* would have "unequivocally expressed" its waiver here. The proposition that the EST's *Big Horn* waiver impliedly extends to other cases in other courts addressing different claims is wrong. "[A] tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts." *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989).

Thus, the district court had no need to address whether *Big Horn I* determined that the 1905 Act area was within the Reservation boundaries, and this Court should not rule on that question. *See Republic of the Phillippines v.Pimentel*, 553 U.S. 851, 865 (2008) (court of appeals erred in addressing merits of claims in Rule 19 analysis where absent parties had sovereign immunity from suit).

II. The district court's dismissal of this action under Rule 19 should be affirmed on the ground that the Eastern Shoshone Tribe is a required party in whose absence the case should not proceed.

Although the United States, immune to this suit, is not a party for purposes other than defending the district court's dismissal, to assist the Court we briefly

address the district court's dismissal of the complaint under Rule 19. It is our view that, in this unique circumstance where the NAT and the EST share an undivided interest in the Reservation, the EST is an indispensable party to this suit challenging the State and County Officials' exercise of jurisdiction over an area that both tribes claim is part of the Reservation subject to their co-extensive and joint jurisdiction. Because the district court's dismissal of this action can be affirmed on this basis alone, this Court need not and should not address the question whether the United States is a necessary and indispensable party as well.

The district court held that the EST and the United States are indispensable parties requiring dismissal of this case. The NAT argued in response, as it continues to argue on appeal, that numerous reservation boundary cases brought by tribes have been decided in the absence of the United States. That is correct, and – although none of those cases addressed the indispensable party question – it may well be that in a typical case in which the disputed boundary is relevant to only one tribe, the jurisdictional rights and duties of the United States that could be implicated by a determination of those boundaries are so correlated with the tribe's own jurisdictional interests that the concerns underlying Rule 19, as to complete resolution of controversies and fairness to absent parties, are not implicated.

The Court, however, need not and should not address that question. This case, in contrast to the typical case, involves the unique circumstance where two tribes share an undivided interest in and exercise co-extensive and often joint jurisdiction over the same reservation. Each tribe is a sovereign entity in its own right, but both exercise sovereignty over the same territory. Thus, while the NAT and the EST have independent, sovereign interests in the Reservation, those interests (with limited exception) are overlapping and inextricably intertwined. Tribal jurisdiction within a reservation affects matters concerning taxation, regulatory authority, and civil and criminal adjudicatory authority. On the Wind River Reservation, these authorities are implemented jointly through the tribes' Joint Business Committee and the Law and Order Code of the Shoshone and Arapaho Tribes, and various entities created thereunder, such as the Mineral Development Department, the Wind River Tax Commission, and the Wind River Environmental Quality Commission. *See* discussion and citations *supra* p. 5. This means that, although the question of property ownership is not at issue in this litigation, the tribes, with respect to jurisdiction on the Reservation, have a relationship akin to tenants in common, so that their jurisdictional rights are effectively indivisible.

Under these unique circumstances, the EST is a necessary and indispensable party to this litigation. Complete relief regarding the allocation of jurisdictional rights between the NAT and the State and County Officials cannot be accorded here, given the dual tribal jurisdiction, because the EST would not be bound by a judgment as to the status of the 1905 Act area in its absence. And even though the EST would not be bound, its claimed sovereign interest in the 1905 Act area nevertheless could be prejudiced by a judgment in favor of the State and County Officials, as attempts by those officials to exercise jurisdictional authority confirmed to them as against the NAT, their actions could impinge on the EST's unlitigated jurisdictional power. Such a circumstance could lead to considerable confusion and further litigation. Thus all three prongs of the Rule 19(a) analysis are implicated by the EST's absence from this suit, clearly making it a required party to the action.

Turning to the Rule 19(b) analysis, the EST is also an indispensable party – that is, a required party in whose absence the suit must be dismissed. As the district court correctly recognized, the potential prejudice to the interests of the existing and absent parties, the State and County Officials and the EST, as well as the inadequacy of a judgment in this case to fully and efficiently resolve the jurisdictional disputes that inhere in this action, all weigh against proceeding with

the suit.[8/] And even assuming the NAT does not have an alternative forum for resolving the status of the 1905 Act area, at least until the NAT and the EST jointly agree on such a forum, that consideration is outweighed not only by the other three factors but also, most significantly, by the "strong policy * * * favor[ing] dismissal when a court cannot join a tribe because of sovereign immunity." *Davis I*, 192 F.3d at 960. *See also Davis v. ex rel. Davis v. United States*, 343 F.3d 1282, 1293 (10th Cir. 2003) (*Davis II*) (noting under Rule 19(b) immunity to suit may be viewed as "one of those interests compelling by themselves"); *Pimentel*, 553 U.S. at 867 (under Rule 19(b), "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"). The district court, accordingly, did not abuse its discretion in concluding that, in the absence of the

[8/] The question in Rule 19(b)(3) as to whether the judgment would be "adequate" "refers to the public stake in settling disputes by wholes, whenever possible," in light of the "social interest in the efficient administration of justice and the avoidance of multiple litigation." *Pimentel*, 553 U.S. at 870 (internal quotation marks omitted).

EST, this suit should be dismissed.[9/]

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for the United States believes that oral argument would assist the Court in resolving the questions presented in this appeal.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

PATRICIA MILLER
ELIZABETH A. PETERSON
s/ KATHERINE J. BARTON

U.S. Department of Justice
Environment & Natural Resources
Division, Appellate Section
P.O. Box 23795 L'Enfant Plaza Sta.
Washington, DC 20026
(202) 353-7712
katherine.barton@usdoj.gov

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[9/] This Court should not reach the district court's other basis for dismissal, that the United States is an indispensable party. Counsel is unaware of a case in which the United States has argued that a tribe cannot sue to defend its reservation boundaries in the absence of the United States, and we do not do so here.

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