NO. 10-17895

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Salt River Project Agricultural Improvement and Power District, a municipal corporation and political subdivision of the State of Arizona, Headwaters Resources, Inc., a Utah corporation,

Plaintiffs - Appellants,

v.

Reynold R. Lee, Casey Watchman, Woody Lee, Peterson Yazzie, Evelyn Meadows, Honorable Herb Yazzie, Honorable Louise G. Grant, Honorable Eleanor Shirley, Leonard Thinn and Sarah Gonnie,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Docket No.: 3:08-CV-08028-JAT

APPELLANTS' REPLY BRIEF

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INTRODUCTION

As demonstrated in Plaintiffs' Opening Brief, other than the district court's erroneous ruling in this case, every federal case that has addressed Rule 19, Fed. R. Civ. P., in the context of *Ex parte Young* claims has refused to dismiss the claims against a governmental entity's officials based on the absence of the governmental entity itself. (OB at 26-32). That is not surprising because such a dismissal would effectively undo the very same delicate balancing of constitutional principles which the *Ex parte Young* doctrine is intended to accomplish. *Ex parte Young*, 209 U.S. 123 (1908).

The Navajo Official Defendants do not argue otherwise. They do not even attempt to rebut Plaintiffs' argument that dismissal of *Ex parte Young* claims under Rule 19 is fundamentally inconsistent with the constitutional principles underlying the *Ex parte Young* doctrine, and they cannot cite to a single case in which *Ex parte Young* claims were dismissed under Rule 19. Thus, unable to meet head on this remarkably uniform body of authority, the Navajo Official Defendants instead try to evade it. They boldly and repeatedly – but nevertheless incorrectly – proclaim that Plaintiffs' claims in this case are not *Ex parte Young* claims at all. Their position is baseless.

The Navajo Official Defendants assert that Plaintiffs' claims are nothing more than breach of contract claims, even though the actual language of Plaintiffs' complaint expressly says otherwise. And, in an effort to support their mischaracterization of Plaintiffs' claims, they resort to distorting the underlying facts, most notably by ignoring the critical role the § 323 Grant plays in this case. They do so because the § 323 Grant cannot be made to fit within their erroneous assertion that this case is nothing but a breach of contract action; their only option is simply to pretend that the § 323 Grant does not exist.

The Navajo Official Defendants mischaracterize Plaintiffs' claims and distort the facts in this case in order to create the false impression that the absence of the Navajo Nation required the dismissal of Plaintiffs' claims under Rule 19. The truth is that Plaintiffs have asserted *Ex parte Young* claims against tribal officials who are violating federal law, and the erroneous dismissal of those claims under Rule 19 effectively abrogates the *Ex parte Young* doctrine. Accordingly, the district court's dismissal must be reversed.

ARGUMENT

I. PLAINTIFFS ASSERT *EX PARTE YOUNG* CLAIMS.

Throughout their Response Brief ("RB"), the Navajo Official Defendants argue that Plaintiffs' claims are not *Ex parte Young* claims at all. (*See, e.g.,* RB 31). Their argument is unfounded.

To determine whether the *Ex parte Young* doctrine 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 Maryland Inc. v. Public Service Comm'n*, 535 U.S. 635, 645 (2002); *see also Burlington Northern & Santa Fe Railway Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007) (emphasizing that a plaintiff need only "*allege*[] an ongoing violation of federal law" to state an *Ex parte Young* claim) (emphasis in original).

In this case, it is undisputed that Plaintiffs seek only prospective (declaratory and injunctive) relief against Navajo Nation officials. (RB 31). And it is also beyond dispute that Plaintiffs' complaint repeatedly alleges ongoing violations of "federal law." (*See, e.g.,* ER 201 ¶ 8 (Defendants are acting "in violation of federal law"; ER 211 ¶ 56 (same)). Therefore, under the applicable "straightforward inquiry," Plaintiffs' claims are quintessential *Ex parte Young* claims.

A. The *Ex parte Young* Doctrine May Include Claims that Governmental Officials Are Violating Federal Common Law.

The Navajo Official Defendants nevertheless contend that Plaintiffs' claims do not arise under the *Ex parte Young* doctrine because that doctrine "applies only when tribal officials are 'acting pursuant to an unconstitutional statute' or are otherwise acting in contravention of a federal statute or regulation." (RB 32). The Navajo Official Defendants are clearly wrong as a matter of law.

First, the Navajo Official Defendants do not cite a single case that holds that "federal law" for purposes of the *Ex parte Young* doctrine cannot include federal common law. Indeed, no case so holds.

Second, this Court has held on more than one occasion that *Ex parte Young* **does apply** when tribal or other governmental officials are alleged to be acting in violation of federal common law principles. For example, this Court has held that the allegation "that certain Navajo officials violated federal law by acting beyond the scope of their authority" as defined in *Montana v. United States*, 450 U.S. 544 (1981), and its progeny – the identical allegation Plaintiffs make in this case – gave rise to proper *Ex parte Young* claims. *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1133-34 (9th Cir. 1995); *see also Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041 (9th Cir. 2000) (tribe's allegation that state officials were violating the federal common law which limits state taxation on reservation land was a proper *Ex parte Young* claim); *accord National Farmers*

Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850 (1985) ("Federal common law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in [28 U.S.C.] § 1331.").

Other circuits agree. For example, the claim against the tribal officials in *South Dakota v. Bourland*, 949 F.2d 984 (8th Cir. 1991), *rev'd on other grounds*, 508 U.S. 679 (1993), was not based on a federal statute or constitutional provision. Instead, as in the present case, the plaintiff claimed that tribal officials' attempts to regulate non-Indians violated the federal common law established in *Montana*. The Eighth Circuit not only held that such a claim could be asserted under the *Ex parte Young* doctrine, but it also consequently rejected the tribal officials' Rule 19 motion based on the absence of the tribe itself. *Id*. at 989.

Most recently, the Tenth Circuit expressly rejected the same argument the Navajo Official Defendants make here. *Crowe & Dunlevy, P.C. v. Stidham*, __ F.3d __, 2011 WL 2084203 *12 (10th Cir. 5/27/11). The court thoroughly analyzed the issue and held that "*Ex parte Young* may be applied to enjoin a violation of federal common law." *Id*. Accordingly, Plaintiffs' claims in this case fit squarely within the *Ex parte Young* doctrine.[1]

[1] The district court acknowledged that "[t]he *Ex Parte Young* doctrine . . . permits lawsuits **like the one here**, where the Nation's officials allegedly have violated federal law and the Plaintiffs seek only prospective relief, no damages." (ER 13 (emphasis added)). Thus, the Navajo Official Defendants' claim that the district court found that "*Ex Parte Young* is inapplicable" (RB 35) is incorrect. Indeed, the

B. *Ex parte Young* Claims Do Not Require Citation of Cases in the Complaint.

The Navajo Official Defendants next erroneously argue that Plaintiffs do not assert *Ex parte Young* claims because Plaintiffs did not cite *Montana* in their complaint. (RB at 8, 33-34). However, a party is not required to plead specific legal theories, statutes or case law in its complaint; just "the facts required to state a claim." *Bowers v. Campbell*, 505 F.2d 1155, 1157 n.2 (9th Cir. 1974); *see also* Rule 84, Fed. R. Civ. P. ("The forms in the Appendix [which include no citations to cases or statutes in the exemplar complaints] suffice under these rules[.]"). Plaintiffs' complaint repeatedly alleges that the Navajo Official Defendants are violating federal law, and Plaintiffs' motion for summary judgment cited and analyzed the *Montana* framework as part of their primary argument in the district court. (ER 25-30). Thus, the absence of a reference to *Montana* in Plaintiffs' complaint does not mean that Plaintiffs' claims are not based on *Ex parte Young*.

Despite the Navajo Official Defendants' suggestion to the contrary (RB at 33), *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150 (9th Cir. 2002), does not hold otherwise. There were several reasons why this Court held that *Dawavendewa* was not an *Ex parte Young* case, but the absence of citations to case authority in the complaint was not one of

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district court expressly stated that it "must determine how to resolve the interplay between the *Ex Parte Young* doctrine and the strictures of Rule 19." (ER 13).

them. Instead, this Court held that the complaint in *Dawavendewa* did not state a claim under *Ex parte Young* because the complaint "never mentions tribal officials," "does not allege that tribal officials acted in contravention" of federal law, and did not even name "any tribal officials as parties." *Id*. at 1160. Indeed, Dawavendewa admitted that he "could not even specify which tribal officials he would join, if permitted to do so." *Id*. None of these factors in *Dawavendewa* applies to this case. Accordingly, *Dawavendewa* clearly was not an *Ex parte Young* case; this case clearly is.

C. The *Ex parte Young* Doctrine May Include Claims that Involve Contract Interpretation.

Finally, the Navajo Official Defendants erroneously suggest that any claim that may involve the interpretation of a contract cannot be an *Ex parte Young* claim. (RB 35). However, they do not cite a single case that reaches that conclusion. On the other hand, there are a number of *Ex parte Young* cases that involve contract interpretation, including cases decided by this Court.

For example, in *Aspaas*, the plaintiff ("APS") alleged that Navajo Nation officials were violating federal law by attempting to regulate the employment relationships of APS (a non-Indian entity), and APS sought declaratory and injunctive relief. In support of its claims, APS argued that the Nation's officials lack inherent sovereign authority under *Montana* and its progeny, and alternatively argued that even if such inherent authority existed, the terms of the lease between

APS and the Navajo Nation included a non-regulation provision which unmistakably waived any such authority. *Id*. at 1134. In other words, *Aspaas* involved the identical claims which Plaintiffs assert in this case.[2]

Although *Aspaas* involved a lease agreement to which the Navajo Nation was a party, this Court held that APS's claims were proper *Ex parte Young* claims. *Id*. at 1133-34. Indeed, this Court ultimately construed the lease to be an unmistakable waiver of authority to regulate APS's employment relations. *Id*. at 1134-35 ("Assuming arguendo, such authority exists, . . . the Navajo Nation has agreed to a valid waiver of such a right.").

The Navajo Official Defendants erroneously contend that *Aspaas* is unpersuasive because the Navajo officials in that case did not raise, and therefore this Court did not consider, Rule 19 concerns. (RB 28, n.9). However, the law is well settled that "a court of appeals should, **on its own initiative**, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below." *Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968) (emphasis added); *UOP v. United States*, 99 F.3d 344, 347 (9th Cir. 1996) (even though Rule 19 was not raised in the district court, "we must consider the claim"; citing *Provident Tradesmen*); *Enterprise Management Consultants, Inc. v. United States*, 883 F.2d 890, 892-93 (10th Cir. 1989) ("[C]ourts

[2] The district court agreed that *Aspaas* is "very similar" to this case. (ER 14), and the Navajo Department of Justice took the same position. (Dkt. 5, Ex. 8).

and commentators generally agree that this issue [Rule 19] is not waivable, and that a reviewing court has an independent duty to raise it *sua sponte*."). Thus, if APS's *Ex parte Young* claims should not have proceeded in the absence of the Navajo Nation, this Court would have said so, even though the Navajo officials did not file a Rule 19 motion.

Moreover, Plaintiffs cited to several *Ex parte Young* cases in their Opening Brief which involve interpretation of a contract and expressly address – and reject – Rule 19 arguments. For example, the *Ex parte Young* claims against tribal officials in both *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), and *South Dakota v. Bourland*, 949 F.2d 984 (8th Cir. 1991), involved the interpretation of treaties to which the absent tribes were parties. Yet, these courts held that the actions could proceed in the tribes' absence. *Kansas*, 249 F.3d at 1226-27;[3] *Bourland*, 949 F.2d at 989. Similarly, the *Ex parte Young* claims against tribal officials in *Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes*, 78 F. Supp. 2d 589 (E.D. Tex. 1999), *aff'd in part, rev'd in part on other grounds*, 261 F.3d 567 (5th Cir. 2001), sought a declaration upholding lease agreements to

[3] The Navajo Official Defendants' suggestion that this case is more like *Enterprise Management* than *Kansas* (RB 36-37) is incorrect. *Enterprise Management* was not an *Ex parte Young* suit against tribal officials; instead, it sought "judicial review of [an] administrative action." 883 F.3d at 892. Thus, *Enterprise Management* has almost nothing in common with this case.

which the absent tribe was a party. Yet, *Comstock* rejected the tribal officials' Rule 19 motion and allowed the suit to proceed in the tribe's absence.

Accordingly, Plaintiffs' claims (alleging that the Navajo Official Defendants are violating federal law, and seeking only prospective relief) fit squarely within the *Ex parte Young* doctrine.

II. DEFENDANTS IMPROPERLY MISCHARACTERIZE PLAINTIFFS' CLAIMS AND DISTORT THE FACTS.

The Navajo Official Defendants mischaracterize Plaintiffs' claims as merely breach of contract claims. However, Plaintiffs' complaint does not allege that the Navajo Official Defendants are breaching any contract and does not seek any contractual damages. Indeed, the term "breach of contract" (or even the word "breach") does not exist anywhere in Plaintiffs' complaint. (ER 199-216). Instead, Plaintiffs' complaint alleges that the Navajo Official Defendants are violating federal law by improperly asserting jurisdiction over non-Indians, and seeks a declaration and an injunction preventing them from doing so.

The Navajo Official Defendants are not permitted to recharacterize Plaintiffs' claims. To the contrary, when addressing motions to dismiss under Rule 12(b)(7), courts must "accept as true the allegations in Plaintiff's complaint and draw all reasonable inferences in Plaintiff's favor." *Paiute-Shoshone Indians v. City of Los Angeles*, 637 F.3d 993, 996 n.1 (9th Cir. 2011). In this case, Plaintiffs'

repeated allegations that Navajo officials are violating federal law and that Plaintiffs are seeking only prospective relief must be accepted as true.

Plaintiffs described in detail the legal theories underlying their *Ex parte Young* claims in their motion for summary judgment. (ER 19-33). They argued primarily that *Montana* and its progeny prohibit the Navajo Official Defendants from regulating Plaintiffs' employment relations at NGS (except to the limited extent provided in the 1969 Lease). They alternatively argued that, even if there was inherent sovereign authority at some point, the Navajo Nation unmistakably waived such authority when it entered the 1969 Lease. Plaintiffs made it clear that the *Montana* argument was their primary focus in the district court. (ER 25 at n.2 ("the Supreme Court's cases addressing the limited scope of a tribe's authority over non-Indians – particularly those decided since *Aspaas* – demonstrate that the Navajo Nation has no authority in the first place, so that this Court need not reach the waiver issue at all")). Accordingly, the Navajo Official Defendants' mischaracterization of Plaintiffs' *Ex parte Young* claims as mere breach of contract claims is unfounded.

Significantly, Navajo officials attempted the same mischaracterization of claims in the nearly-identical *Aspaas* litigation. There (as in this case), the Navajo officials "contend[ed] that this is simply a contractual dispute," and "this dispute

raises no federal question." 77 F.3d at 1133. This Court rejected these mis-characterizations in *Aspaas*, *id*. at 1132-34, and should do the same in this case.

Notwithstanding the actual language of Plaintiffs' complaint, the Navajo Official Defendants seek to create the illusion that this is a breach of contract action by distorting the facts that underlie Plaintiffs' claims. Specifically, they intentionally ignore[4] the § 323 Grant and its critical role in this case. They do so because the § 323 Grant cannot be made to fit within their erroneous assertion that this case is nothing but a breach of contract action under the 1969 Lease; they apparently believe their best option is simply to pretend that the § 323 Grant does not exist.

Thus, for example, when the Navajo Official Defendants assert that "SRP operates NGS on Navajo Reservation land pursuant to a lease with the Navajo Nation," they are telling this Court only a half-truth. NGS is located on Navajo reservation land pursuant to **both** the 1969 Lease with the Navajo Nation and the § 323 Grant from Secretary of the Interior on behalf of the United States. (ER 204-06, ¶¶ 19-25). Indeed, the 1969 Lease and the § 323 Grant are intentionally interdependent parts of a whole, and by design became effective simultaneously, conditioned on each other. (ER 101 at § 34(a); ER 135 at § 16.1). Thus, without

[4] The Navajo Official Defendants mentioned the § 323 Grant only once in their entire Response Brief (at 9), and did so then only for the proposition that the rights granted the Participants under the 1969 Lease are separate and independent from the rights granted in the § 323 Grant.

the § 323 Grant, there would have been no lease, and NGS would have never been built.

By improperly ignoring the § 323 Grant, the Navajo Official Defendants falsely contend that Plaintiffs' claims arise exclusively under the 1969 Lease; that the dispute resolution procedure with the Secretary of the Interior, included in the 1969 Lease, provides another forum for "this dispute;" and that Plaintiffs already submitted these claims to the Secretary. (RB at 4, 31). The truth is that the § 323 Grant explicitly precludes Plaintiffs from seeking the Secretary's assistance with the kinds of claims asserted in this litigation (i.e., claims against individuals acting "under color of Navajo tribal authority," who interfere with "the possession or quiet enjoyment of the granted lands or other rights" under the § 323 Grant) until Plaintiff have first "taken all legal action available to them in State or Federal courts to redress the interference." (ER 205, ¶ 23(a)). Thus, Plaintiffs' claims in **this** litigation were never referred to the Secretary, and could not have been even if Plaintiffs had tried.[5]

The Navajo Official Defendants' false contentions are nearly identical to the arguments they unsuccessfully asserted in an earlier appeal in this action. *See* Brief for Appellees at 7-8, *Salt River Project Agricultural Improvements and*

[5] Under § 25(b) of the Lease, disputes may be presented to the Secretary, but are limited to disputes with the "Tribe" itself (not tribal officials), and may involve disputes under the 1969 Lease only (and not under the § 323 Grant).

Power District v. Lee, No. 09-15306 (filed 7/31/09).[6] This Court already rejected Defendants' contentions and held that the claims Plaintiffs are pursuing against the Navajo Official Defendants in this litigation "are thus properly before the district court." (Dkt. 109-1 at 3).

The Navajo Official Defendants' argument necessarily depends on their mischaracterizing Plaintiffs' claims and distorting the facts. When Plaintiffs' claims are properly analyzed as based on *Ex parte Young*, it becomes apparent that the district court erred in dismissing Plaintiffs' claims under Rule 19.

III. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' *EX PARTE YOUNG* CLAIMS UNDER RULE 19.

The Navajo Official Defendants do not dispute that dismissal of *Ex parte Young* claims under Rule 19 is fundamentally inconsistent with the constitutional principles underlying the *Ex parte Young* doctrine. That doctrine simultaneously "promote[s] the vindication of federal rights" and respects the immunity of governmental entities, by allowing suits against the governmental entities' officials who are alleged to be violating federal law, but for prospective relief only. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 105 (1984). This

[6] This Court may take judicial notice of prior appellate briefs, and Plaintiffs hereby request that it do so. *See McConnell v. United States*, 478 F.3d 1092, 1096 n.4 (9th Cir. 2007) (taking judicial notice of government's appellate brief in prior action).

delicate balance is destroyed when Rule 19 is construed to require dismissal of *Ex parte Young* claims when the governmental entities themselves cannot be joined.

The Navajo Official Defendants also do not dispute that, from the time *Ex parte Young* was decided more than one hundred years ago until the district court's decision below, no case has ever dismissed *Ex parte Young* claims under Rule 19, based on the absence of the governmental entity itself.[7] In fact, every case that has addressed Rule 19 in the context of *Ex parte Young* claims against a governmental entity's officials has – without exception – refused to dismiss the claims based on the absence of the governmental entity. The district court's ruling below is contrary to a uniform, well-established body of law, and must be reversed.

The Navajo Official Defendants' response to all the cases which reject Rule 19 arguments in the context of *Ex parte Young* claims is that this is not an *Ex parte Young* case. As demonstrated above, that contention is patently incorrect. Plaintiffs' claims are unquestionably *Ex parte Young* claims, and when the Navajo Official Defendants' Rule 19 motion is analyzed in the *Ex parte Young* context, it

[7] The Navajo Official Defendants point to *Dawavendewa* as an example of a case dismissed under Rule 19 "despite an *Ex parte Young* **argument**." (RB at 34). However, as the Navajo Official Defendants themselves acknowledge (*id.*), this Court rejected that "argument," holding that Dawavendewa's suit was not based on *Ex parte Young*. *Dawavendewa*, 276 F.3d at 1160-61 (noting that the complaint did not name any tribal officials and did not allege that any tribal official was violating federal law).

is clear that the district court erred in dismissing Plaintiffs' claims based on the absence of the Navajo Nation.

A. The Navajo Nation Has No Legally Protected Interests in this Action and Its Officials Would Adequately Protect Any Such Interests.

The Navajo Official Defendants do not dispute that the fundamental premise of the *Ex parte Young* doctrine is that the state or tribe has no legally protected interest at all in violating federal law. Thus, when a government official is alleged to be violating federal law, he is "stripped of his official or representative character and . . . subjected in his person to the consequences of his individual conduct," but only for prospective, non-monetary relief. *Ex parte Young*, 209 U.S. at 159-60. Thus, the Navajo Official Defendants' contention that the Navajo Nation has an interest in Plaintiffs' *Ex parte Young* claims is antithetical to the *Ex parte Young* doctrine.

Indeed, if the Navajo Official Defendants' argument were accepted in the context of *Ex parte Young* claims, it would abrogate the doctrine and allow tribal officials to violate federal law with impunity. For example, if the Eight Circuit in *Bourland* had accepted the tribal officials' argument that the *Ex parte Young* claims against them could not proceed in the tribe's absence, the Supreme Court could not have rendered its important holding that tribal officials may not regulate the hunting and fishing activities of non-Indians on non-Indian lands within the

reservation, *see South Dakota v. Bourland*, 508 U.S. 679 (1993), and the tribal officials would have been allowed to continue violating federal law.

Not surprisingly, none of the cases on which the Navajo Official Defendants rely to argue that the Navajo Nation has a legally protected interest in this litigation is an *Ex parte Young* case. Yet, they contend that *Dawavendewa* – in which this Court expressly held that the asserted claims were **not** *Ex parte Young* claims, 276 F.3d at 1160 – "should [nevertheless] control the outcome here." (RB 16). Their suggestion to ignore the critical role of the *Ex parte Young* doctrine in this case is an invitation to commit error.

Moreover, the cases which the Navajo Official Defendants cite would not support their argument even if this were not an *Ex parte Young* case. The principle for which *Dawavendewa* and the other cited cases stand is that "in an action to set aside a lease or a contract," all the parties to the agreement must be joined. 276 F.3d at 1156. That principle does not apply here because this "is not 'an action to set aside a contract,' an 'attack on the terms of a negotiated agreement,' or 'litigation seeking to decimate a contract.'" *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 881 (9th Cir. 2005). If Plaintiffs are successful in this action, neither the 1969 Lease nor any of its provisions would be "invalidated or 'set aside,' but would remain legally binding." *Id.*

To create the appearance of a conflict with the 1969 Lease terms, the Navajo Official Defendants once again resort to mischaracterizing Plaintiffs' claims. They assert that Plaintiffs' "interpretation is that the Nation has waived its sovereign authority to regulate employment at NGS – despite the fact that the Nation specifically bargained for the employment of Navajos at NGS in that same lease." (RB 16). They further assert that Plaintiffs are "claiming that the operation clause subsumes the employment preference provision." (RB 25). However, Plaintiffs claim no such thing.

Plaintiffs' complaint acknowledges the 1969 Lease's requirement to give employment preference to Navajos (ER 204, ¶ 18(b)), and that the Navajo Nation's promise not to regulate the lessees in the operation of NGS was limited by the phrase "**other than as expressly set out in this Lease.**" (ER 203, ¶ 18(a)). Thus, the relief Plaintiffs seek in their complaint is expressly limited to preventing Defendants from regulating Plaintiffs' employment relations "except as provided in the 1969 Lease." (ER 210, ¶ 54). Therefore, contrary to the Navajo Official Defendants' unsupported assertions, granting Plaintiffs the relief they seek will not invalidate any provision of the 1969 Lease.[8]

[8] The employment preference requirement of the 1969 Lease is not at issue in this case. Plaintiffs have fully complied with all their obligations under the Lease. (ER 206, ¶ 26). Instead, Defendants Thinn and Gonnie alleged that Plaintiffs violated a "just cause" requirement in a Navajo ordinance which was enacted more than fifteen years after the 1969 Lease went into effect. (ER 208, ¶¶ 27, 32, 38).

Unable to meet the requirement in their own cases that the claims seek to "set aside" all or part of an agreement, the Navajo Official Defendants recharacterize the requirement as simply all "parties to a contract are required to be joined," (RB 37), irrespective of whether the contract is attacked, interpreted or merely mentioned. They also mischaracterize *Dawavendewa* as requiring joinder of all the parties to a contract whenever the contract is merely "construed" (RB 17); but *Dawavendewa* actually reaffirmed the principle that parties to a contract are required to be joined when the litigation seeks "to decimate that contract," not merely construe it. 276 F.3d at 1157.

At the same time the Navajo Official Defendants are remaking the standard to their liking, they accuse Plaintiffs of making a "strained distinction" between "setting aside" and merely "interpreting" a contract. (RB 18). However, that distinction was made by this Court, not Plaintiffs. *See Disabled Rights Action Committee*, 375 F.3d at 881. Indeed, this Court stated that whether or not "the judgment will necessarily 'set aside' the contract" is not merely a relevant inquiry, but is "the determinative distinction." *Id*.

Nothing in the 1969 Lease requires that terminations be for "just cause." And, despite the Navajo Nation's promise not to regulate the operations of NGS "other than as expressly set out in the Lease," the Navajo Official Defendants have nevertheless sought to impose the "just cause" requirement on Plaintiffs. (ER 209, ¶¶ 45-48).

Alternatively, even if the Navajo Nation had a legally protected interest in Plaintiffs' *Ex parte Young* claims, the Navajo Official Defendants do not dispute that such an interest is insufficient. Instead, the Navajo Nation must also be "so situated that disposing of the action in [its] absence may . . . as a practical matter impair or impede [its] ability to protect the interest." Rule 19(a)(1)(B)(i). In the context of *Ex parte Young* claims such as in this case, the presence of a governmental entity's officers adequately protects the absent entity's alleged interests. *Kansas*, 249 F.3d at 1227.

The Navajo Official Defendants' only response to the argument that they adequately represent the alleged interests of the Navajo Nation is that Plaintiffs' cases do not support that proposition. (RB 26). Again, they are wrong. In *Kansas*, the court rejected a Rule 19 argument because, in part, "the potential for prejudice to the [tribe] is largely nonexistent due to the presence in this suit of . . . the tribal officials," and "[t]hese Defendants' interests, considered together, are substantially similar, if not identical, to the Tribe's interests." 249 F.3d at 1227; *see also Comstock Oil & Gas,* 78 F. Supp. 2d at 601 (rejecting Rule 19 argument in *Ex parte Young* case because "the likelihood of prejudice to the Tribe is minimized by the presence of the members of the Tribal Council"). If the Navajo Official Defendants' erroneous argument that government officials cannot adequately

represent the government entity in *Ex parte Young* cases were accepted as true, then the *Ex parte Young* doctrine would be effectively abrogated.

Significantly, the Navajo Official Defendants cannot cite a single case in which a tribe's interests in *Ex parte Young* claims were not held to be adequately protected by the presence of the tribal officials. Accordingly, their argument that the Navajo Nation has an interest in Plaintiffs' *Ex parte Young* claims that cannot adequately be protected by the presence of the Navajo Official Defendants has no merit.

B. The Navajo Nation's Joinder Is Not Required to Accord Complete Relief to Plaintiffs.

In their Opening Brief, Plaintiffs demonstrated the error in the district court's conclusion that Plaintiffs cannot obtain complete relief without the joinder of the Navajo Nation because "some future or other tribal authority" could attempt to regulate employment relations at NGS. (OB 44-48). The Navajo Official Defendants make no effort to defend the district court's conclusion; instead, they rely on *Dawavendewa* to argue that Plaintiffs will not enjoy complete relief because the Navajo Nation itself could still attempt to regulate Plaintiff employment relations at NGS. (RB 14-15). That argument has no merit.

Dawavendewa was not an *Ex parte Young* case, and does not support the Navajo Official Defendants' argument. In *Dawavendewa*, SRP was sued by a Hopi Indian who claimed that SRP's providing employment preference to Navajos,

as required by the 1969 Lease, violated the non-discrimination provisions of Title VII of the Civil Rights Act of 1964. No claims were asserted against either the Navajo Nation or any of its officials. Thus, this Court properly noted that "only SRP and Dawavendewa – and not the Nation – would be bound" by the judgment in that case, and "[t]he Nation could still attempt to enforce the lease provision." *Id*. 1155.

Unlike *Dawavendewa*, this case involves claims directly against Navajo Nation officials; the very officials who have the responsibility for enforcing the Navajo Preference in Employment Act. Because these officials would be bound by an injunction resulting from this litigation, Plaintiffs would obtain the complete relief they seek. The Navajo Nation will not be able to continue to regulate Plaintiffs' employment relations at NGS (beyond what the 1969 Lease provides) because the Nation's officials charged with those responsibilities will be bound by a federal court injunction. Just as the plaintiffs in *Ex parte Young* obtained an effective injunction against Edward Young, the state Attorney General, without the joinder of the State of Minnesota, and just as APS obtained an effective injunction against the Navajo Nation officials in *Aspaas* without the joinder of the Nation, Plaintiffs' *Ex parte Young* claims in this case will afford them the complete relief they seek.

C. The Navajo Nation's Absence Does Not Subject SRP to a Risk of Inconsistent Obligations.

Next, the Navajo Official Defendants go beyond the district court's decision by contending that the Navajo Nation is required to be joined under Rule 19(a)(1)(B)(ii) because otherwise Plaintiffs would be subject to a risk of incurring inconsistent obligations. (RB 21-22). The district court rejected this baseless argument, and this Court should reject it as well.

Rule 19's concern for a "substantial risk of incurring . . . inconsistent obligations" was a central focus in *Dawavendewa*. That was because Mr. Dawavendewa sought a judgment preventing SRP from complying with the Navajo preference provision in the 1969 Lease, and at the same time the Navajo Nation and its officials were free to seek to enforce that same preference provision against SRP (because neither the Nation nor its officials would be bound by the judgment Dawavendewa sought). Thus, this Court recognized that "SRP would be between the proverbial rock and a hard place." *Id*. at 1156.

In this case, there is neither a "rock" nor a "hard place" for SRP. The judgment resulting from this *Ex parte Young* litigation would be against the Navajo Official Defendants, not SRP. Moreover, because the Navajo officials who are charged with enforcing the Nation's employment ordinances are (unlike in *Dawavendewa*) defendants in this action and therefore will be bound by any resulting judgment, the risk that the Navajo Nation will nevertheless seek to

enforce those ordinances despite such a judgment is far from "substantial." Thus, this litigation does not leave Plaintiffs exposed to a substantial risk of inconsistent obligations.

D. The Absence of the Navajo Nation Does Not Require Dismissal Under Rule 19(b).

Because the Navajo Nation is not required to be joined in Plaintiffs' *Ex parte Young* claims under Rule 19(a), this Court need not consider the Rule 19(b) analysis. But even if this Court were to apply the Rule 19(b) factors, it is clear that Plaintiffs' *Ex parte Young* claims cannot be dismissed due to the absence of the Navajo Nation.

The very purpose of the *Ex parte Young* doctrine is to provide a mechanism for requiring governmental entities' compliance with federal law despite their sovereign immunity. This is accomplished by allowing suit against the governmental entity's officials without joining the entity itself, but only for prospective relief. Requiring the dismissal of such claims under Rule 19 because the governmental entity cannot be joined effectively undoes exactly what the *Ex parte Young* doctrine is designed to accomplish. Accordingly, the Navajo Official Defendants' Rule 19 argument in the context of Plaintiffs' *Ex parte Young* claims makes no sense at all.

Stated another way, all the relevant interests of Plaintiffs, the Navajo Nation, the courts and the general public that are reflected in the Rule 19(b) factors have

already been weighed and carefully balanced in the *Ex parte Young* doctrine. The Supreme Court has already concluded – more than one hundred years ago – that the need to require government entities' compliance with federal law is sufficiently important to allow suits to proceed against the entities' officials in the absence of the entity itself (again, provided the relief sought is limited to prospective relief only).

The Navajo Official Defendants' reliance on *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008), is misplaced. *Pimentel* emphasized that it addressed Rule 19's operation "in the context of foreign sovereign immunity" and that while "[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[,] . . . that result is contemplated under the doctrine of foreign sovereign immunity." *Id.* at 854, 872. However, that result is **not** contemplated under the *Ex parte Young* doctrine. Unlike foreign sovereigns, states and Indian tribes are constitutionally required to comply with federal law as the supreme law of the land. U.S. Const. art. VI, cl.2. Far from contemplating that states and Indian tribes may hide behind sovereign immunity to violate federal law, the *Ex parte Young* doctrine specifically ensures that they may not do so, by allowing claims to be asserted against their officials.

Thus, the Navajo Official Defendants' assertion that the Nation's immunity requires dismissal of Plaintiffs' *Ex parte Young* claims is simply wrong. That is why not a single case has ever before relied on Rule 19 to dismiss *Ex parte Young* claims against government officials because the government entity itself could not be joined. And that is why the Navajo Official Defendants devote so much of their brief to what should be a "straightforward inquiry" as to whether Plaintiffs' claims are based on *Ex parte Young*, *Verizon*, 535 U.S. at 645, and resort to mischaracterizations and distortions in an effort to make it appear that Plaintiffs' claims are not *Ex parte Young* claims. In short, because Plaintiffs' complaint alleges *Ex parte Young* claims against the Navajo Nation's officials, Rule 19 does not require the joinder of the Nation.

Finally, the Navajo Official Defendants' application of the individual Rule 19(b) factors is also unfounded. For example, they erroneously assert that the 1969 Lease's dispute resolution procedure before the Secretary of the Interior provides an alternative forum for Plaintiffs' claims, which SRP has already pursued.[9] (RB 31). As demonstrated above, Plaintiffs' claims against Navajo officials which they assert in this litigation could not have been presented to, or decided by, the

[9] The Navajo Official Defendants' assertion that the Secretary has already made a final determination of the waiver issue is also erroneous. (RB 6). The Secretary did not decide the issue, but instead declined to decide. *See* Appellants' Additional Excerpts 1 (Dkt 120 at Ex. 1 to Ex. B). As the district court said, "the Secretary declined to decide the jurisdictional dispute and instead deferred to the Court's determination of this litigation." (Dkt 89 at 3).

Secretary, even if Plaintiffs had tried. This Court has already appropriately held that Plaintiffs' claims in this litigation are "properly before the district court." (Dkt. 109-1 at 3). Accordingly, even if the Rule 19(b) factors are considered, they do not weigh in favor of dismissal.

IV. ALTERNATIVELY, THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' *MONTANA* BASED CLAIMS.

In support of their *Ex parte Young* claims that the Navajo Official Defendants are violating federal law by attempting to regulate Plaintiffs' employment relations at NGS, Plaintiffs argued that the Navajo Nation had no inherent authority to regulate Plaintiffs under the *Montana* analytical framework,[10] and alternatively that it had waived any such authority when it agreed to the non-regulation provision of the 1969 Lease. (ER 19-33). The district court concluded that the *Montana* argument fit squarely within the *Ex parte Young* doctrine, but "[i]t is the contractual waiver argument that sets this case apart from the traditional *Ex Parte Young* case." (ER 13-14).

In response to Plaintiffs' alternative argument that, at most, the district court's dismissal should have been limited to the waiver argument, the Navajo

[10] *See Montana,* 450 U.S. at 565 (stating the general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe," and two narrow exceptions); *Strate v. A-1 Contractors*, 520 U.S. 438, 454-56 (1997) (holding that land that is subject to a grant under 25 U.S.C. § 323 — like the land at issue in this case — is "equivalent . . . to alienated, non-Indian land" under *Montana*'s analysis).

Official Defendants only[11] contention is that even the *Montana* argument potentially involves the 1969 Lease and therefore it too was required to be dismissed. (RB 27-28). That contention has no merit.

Contrary to the Navajo Official Defendants' contention, Plaintiffs' *Montana* argument does not necessarily involve interpretation of the 1969 Lease. Instead, the 1969 Lease would come into play if, and only if, the Navajo Official Defendants themselves choose to contend that this case fits within *Montana*'s narrow consensual relationship exception because the 1969 Lease reflects Plaintiffs' consent to being regulated by tribal employment ordinances. Because "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid,' . . . [t]he burden rests on the tribe" to demonstrate that one of *Montana*'s exceptions applies. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008).

Defendants cannot control whether a claim may or may not be pursued at the outset of litigation simply by electing which defenses to assert. Otherwise, tribal officials would be able to always defeat *Montana* arguments simply by asserting an unmeritorious defense based on the consensual relationship exception. For example, in *Strate*, A-1 and its employee who was involved in a vehicle accident

[11] Even though this appeal is from the grant of a motion to dismiss and the district court did not reach the merits of Plaintiffs' claims, the Navajo Official Defendants improperly – and incorrectly – assert that the *Montana* analysis does not even apply to this case.

within a reservation sought to enjoin a tribal court judge from asserting jurisdiction over them. The Supreme Court rejected the application of *Montana*'s consensual relationship exception, even though "A-1 was engaged in subcontract work on the [reservation]," and went on to hold that "tribal courts may not entertain [such] claims against nonmembers." 520 U.S. at 442, 457.

Similarly, in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), the non-Indian owner of a hotel doing business within the Navajo reservation brought suit in federal court to prevent Navajo officials from imposing a tax on its guests. The Navajo officials asserted that the consensual relationship applied because the plaintiff had become an "Indian trader." *Id*. at 656. The Supreme Court rejected that defense and held that, under *Montana*, the Navajo Nation lacked authority to impose the tax. *Id*. at 659.

Under the Navajo Official Defendants' erroneous contention, neither *Strate* nor *Atkinson* could have been decided on the merits. Thus, although the dismissal of any of Plaintiffs' action based on Rule 19 was error, the dismissal of Plaintiffs' claims based on the *Montana* analysis was error even under the district court's mistaken logic.

CONCLUSION

The district court dismissal based on Rule 19 must be reversed in full. Alternatively, the district court dismissal must be reversed to the extent Plaintiffs' claims are based on the *Montana* analysis.

DATED this 20th day of June, 2011.

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number(s): **No. 10-17895**

I hereby certify that on the 20th day of June, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 20th day of June, 2011.

s/John J. Egbert
John J. Egbert

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Rule 32(a)(7)(C), F.R.A.P. and Ninth Circuit Rule 32-1, this Reply Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,969 words.

Dated this 20th day of June, 2011.

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Re: *SRP, et al. v. Lee, et al.*
9th Circuit Court of Appeals No.: 10-17895

Dear Sirs/Madam:

I contacted the Ninth Circuit today and obtained a two-week extension for filing Appellants' reply brief. The new deadline for the reply brief is now June 20, 2011.

Please call me if you have any questions.

Very truly yours,

JENNINGS, STROUSS & SALMON, P.L.C.

By John J. Egbert

JJE/mtan

cc: Clerk of the Court
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