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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

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

Plaintiffs,

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.

No. CV 08-8028-PCT-JAT

NAVAJO OFFICIAL DEFENDANTS' REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

I. THE NAVAJO NATION HAS THE AUTHORITY TO ENACT NPEA AND ENFORCE IT AGAINST PLAINTIFFS

Without legal foundation, Plaintiffs claim (at 3) that under *Montana v. United States*, 450 U.S. 544 (1981), the Navajo Nation does not have the inherent sovereignty to regulate employment matters at NGS. Moreover, Plaintiffs attempt to characterize *Montana's* first exception so narrowly as to almost preclude it from ever applying, a

reading they can only support with dicta and paraphrasing because no court has ever reduced the first *Montana* exception so severely.

A. The Navajo Nation Has Inherent Sovereignty on Tribal Lands and *Montana* Supplies No Authority to the Contrary

The Navajo Nation has inherent sovereignty to regulate employment, including that of nonmembers on tribal lands. The Navajo Nation therefore has inherent authority to regulate employment at NGS. Plaintiffs' arguments to the contrary attempt to shoehorn this case into several clearly distinguishable authorities.

Plaintiffs mistakenly contend that the *Montana* framework is controlling here, but *Montana* is inapplicable to this case because *Montana* applies only to non-Indian fee land within a reservation. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-31 (1983) (finding that *Montana* does not resolve jurisdictional questions where the land is owned by the tribe);[1] *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1134 (9th Cir. 1996) (noting that *Montana* dealt with a non-Indian fee holder rather than a lessee like SRP). Plaintiffs fail to recognize that "tribes retain considerable control over nonmember conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997).

Further, Plaintiffs mischaracterize the Supreme Court's statement in *Atkinson Trading Co. v. Shirley*, that the "imposition of a tax upon nonmembers on non-Indian fee land within the reservation" was presumptively invalid. 532 U.S. 645, 659 (2001). Plaintiffs claim (at 3) that this means that every one of "a tribe's efforts to regulate nonmembers [is] 'presumptively invalid.'" This simply overstates the Supreme Court's holding. The *Atkinson* Court held that the hotel occupancy tax at issue there was invalid because there was no consensual relationship between the tribe and the nonmembers staying at the hotel, which, unlike NGS, was located on non-Indian fee land within the

[1] Plaintiffs attempt to characterize this case as "old" law (at 5-6), but *New Mexico* is still viable. The mere fact that this case was decided twenty years ago is irrelevant. Federal Indian Law jurisprudence is still dominated by cases decided long ago. Plaintiffs' attempt to distinguish *New Mexico* because it involved a state rather than nonmembers fails. The Supreme Court's own statement in *Plains Commerce Bank* provides a list of cases in which it has held that *Montana's* first exception applies, a list which includes cases involving States and nonmembers alike. 554 U.S. at 333.

reservation. *Id*. Here, there is no lack of a consensual relationship between the Nation and Plaintiffs, and NGS is located on Indian land.

Next, citing to dicta in *Nevada v. Hicks*, 533 U.S. 353, 359 (2001), Plaintiffs argue that the Supreme Court rejected the proposition that *Montana* is inapplicable to tribally owned lands, but it did not. At issue in *Hicks* was the tribe's ability to regulate state wardens executing a search warrant on tribal land. *Id*. at 358. Holding that the tribe could not regulate this conduct, the Court acknowledged "that tribal ownership [of land] is a factor in the *Montana* analysis, and a factor significant enough that it 'may sometimes be dispositive.'" *Id*. at 370. The Court then noted that "[w]e simply do not find [tribal ownership of land] dispositive in the present case, when weighed against the State's interest in pursuing off-reservation violations of its laws." *Id*. Thus, *Hicks* merely determined that the status of the land was not dispositive in *that* (very different) instance. *Cf. Strate*, 520 U.S. at 454 (discussing the "considerable control" tribes retain over nonmember conduct on tribal land). Here, there is no state interest or off-reservation activity involved, and this Court should determine that the Navajo Nation's ownership of the land provides the ample (if not dispositive) authority to regulate nonmember conduct on that land.

Plaintiffs also place heavy reliance on *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316 (2008), claiming it extends *Montana* to any nonmember activity on the reservation regardless of the status of the land on which the conduct takes place. This was not the holding in *Plains Commerce Bank*. Rather, the Court held that the tribe had no authority to regulate sales of fee lands owned by nonmembers. *Id*. at 332. Further, in *Plains Commerce Bank*, the Supreme Court acknowledged that its cases "permit tribal regulation of nonmember conduct inside the reservation that implicates the tribe's sovereign interests." *Id*. (emphasis omitted). Here, the Navajo Nation has a sovereign interest in employment at NGS because it is located on tribal lands, triggering the exact tribal sovereignty that the *Plains Commerce Bank* Court said "centers on the land held by the tribe." *Id*. at 327.

In a further attempt to claim that the Navajo Nation cannot regulate employment at NGS, Plaintiffs (at 8) ask this Court to find that the land on which NGS is located is not tribally owned. Plaintiffs urge that *Strate* is authoritative here because the plant is located on land leased to SRP by the Navajo Nation. *Strate*, however, dealt with a public highway maintained by the state, a portion of which was on a right-of-way crossing Indian land. 520 U.S. at 442. The Court stated that the tribe could not assert a landowner's right to occupy and exclude "[s]o long as the stretch is maintained as part of the State's highway." *Id*. at 456. Here, the land is leased to a private entity and is not open to the public for travel or otherwise. Thus, there is no authority for treating the land on which NGS is located as non-Indian for purposes of governance.

Finally, Plaintiffs insist that the grant of right-of-way pursuant to 25 U.S.C. § 323 is the controlling factor here simply because it is present in this case as it was in *Strate*, and *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). The land grant in this case came about after the 1969 Lease was signed, and the 1969 Lease should take precedent. The 1969 Lease does not give Plaintiffs the control necessary to treat the land as non-Indian for purposes of determining whether the Navajo Nation has the authority to regulate employment at NGS. More importantly, *Strate* concerned an auto accident between two nonmembers occurring on the right-of-way, 520 U.S. at 442, and *Big Horn* concerned a tribe's right to tax the lessee for its distribution of utilities over the right-of-way, 219 F.3d at 947. Here, the regulation concerns employment at NGS, and unlike in *Strate* and *Big Horn,* the right-of-way is not central to the dispute. It is undisputed that NGS is located on tribal trust land that is merely leased to Plaintiffs, and accordingly the land is tribally owned and should be treated as such.

B. A Consensual Relationship Exists Between the Navajo Nation and Plaintiffs

Even if this Court were to find that the *Montana* analysis applies to the leased land at issue here (which it does not), the 1969 Lease is exactly the type of consensual relationship that the first exception to *Montana* contemplated. *See Montana*, 450 U.S. at

565 (finding that a tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe through leases). Plaintiffs mistakenly argue that the 1969 Lease is not a consensual relationship for purposes of tribal regulation.

Plaintiffs' argue (at 10) that for *Montana's* first exception to apply, the non-member party must consent "to the specific regulation at issue." The *Montana* Court's articulation of the first exception, however, provides no support for this. The *Montana* Court specifically contemplated contracts as being markers of a consensual relationship. 450 U.S. at 565. Plaintiffs have attempted to characterize as settled law a proposition they themselves crafted and to support that proposition with pieced together quotations from cases interpreting *Montana*.[2] Plaintiffs quote (at 11) *Plains Commerce Bank*, 554 U.S. at 337 to say that the consensual relationship exists "'only if the nonmember has consented, either expressly or by his actions'" and then add on the phrase "to the specific regulation at issue" outside of quotation marks. Neither *Plains Commerce Bank* nor any of the other cases Plaintiffs cite supports their contention that the nonmember must specifically consent to every regulation to which he or she would be subject.

As has been shown, Plaintiffs' argument (at 12-16)—premised on the assumption that if the land on which NGS is built is the equivalent of non-Indian fee land—fails because NGS is not located on non-Indian fee land. Even if it were, that would simply trigger application of the exceptions set forth in *Montana*, including the applicable consent exception.

Plaintiffs also repeat their argument that the non-regulation clause of the 1969 Lease precludes finding that a consensual relationship exists between SRP and the Navajo Nation. For the reasons set forth above, the Navajo Nation's agreement in the 1969 Lease to refrain from regulating construction, maintenance, or operation at NGS does not amount to a waiver of its regulatory authority. The 1969 Lease does, however, provide a direct consensual relationship between SRP and the Navajo Nation, and while *Montana*

[2] Plaintiffs cannot use the fact that *Montana's* progeny have each focused on a specific regulation to suggest that a *Montana* "consensual relationship" *only* exists where the nonmember explicitly consented to the specific regulation at issue.

requires the regulation to have a nexus to the consensual relationship, it does not, as Plaintiffs imply, require explicit consent. *See Atkinson*, 532 U.S. at 656 ("*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.").

In *Atkinson*, the Supreme Court found that the consensual relationship between the Navajo Nation and Atkinson, whereby Atkinson obtained status as an "Indian trader," did not provide the requisite nexus to sustain a hotel occupancy tax imposed by the Navajo Nation on nonmember visitors to Atkinson's hotel. *Id.* at 656-59. *Atkinson* is factually dissimilar to this case because, as discussed above, here there is a consensual relationship based on more than status. There is the 1969 Lease that SRP entered into with the Navajo Nation, and there is a clear nexus between the employment provision in the 1969 Lease and what the Navajo Nation's regulation seeks to enforce—both require preference in hiring for members of the Navajo Nation. Thus, Plaintiffs' attempt to characterize the 1969 Lease as anything other than a consensual relationship fails, and the first exception to *Montana* applies here.[3]

II. CLAIMS ARISING OUT OF THE 1969 LEASE ARE NOT PROPERLY BEFORE THIS COURT

A. The Absence of the Navajo Nation Makes Any Interpretation of Specific Provisions of the 1969 Lease Inappropriate

Plaintiffs' reading of the Ninth Circuit's second opinion in this case ignores a large and well-established body of law not rejected or even addressed in the Ninth Circuit's opinion, requiring that parties to a contract be parties to litigation involving that contract. *See* cases cited in Navajo Official Defendants' Response at 9-11. The logical implications of Plaintiffs' assertions are rather shocking. Under Plaintiffs' reading, the Ninth Circuit's opinion would mandate that where a party to a contract is "adequately represented" in *Ex*

[3] Plaintiffs assert (at 10) that Defendants "do not dispute that *Montana's* second exception has no application to this case. Accordingly, they have waived that argument." This implies that the second exception had relevance to the case and that Defendants chose not to pursue the argument. *Montana's* second exception has no relevance here and thus it would have been inappropriate for Defendants to attempt to rely on it.

Parte Young litigation by someone other than itself, the litigation of unrelated contract issues could proceed in its absence. This assertion simply has no basis in law, and nowhere in the Ninth Circuit's opinion does the Court even imply an intent to overturn or create an exception to this body of law.

The fact remains that the Navajo Nation, not these defendants, was a party to the 1969 Lease and is not a party to this litigation. Without the Nation's involvement as a party, interpretation and enforcement of the 1969 Lease is inappropriate. The Ninth Circuit held that Plaintiffs may proceed with their *Ex Parte Young* claims against these defendants in the absence of the Navajo Nation. This does not give Plaintiffs license to litigate the terms of a contract to which the Nation, but not these defendants, is a party.

B. The 1969 Lease Contains No Waiver of the Navajo Nation's Authority to Regulate Employment at NGS

If this Court determines it has the jurisdiction to interpret terms of the 1969 Lease, a careful examination of the express terms set forth in the 1969 Lease reveal there is no waiver of the Navajo Nation's authority to regulate employment. The Navajo Nation did agree in § 16 of the 1969 Lease that "it will not directly or indirectly regulate or attempt to regulate the Lessees in the construction, maintenance or operation of the Navajo Generating Station," but none of those waivers mentions or implies a waiver of regulatory authority over employment at NGS. Plaintiffs' attempt to read "employment" into the waiver of "operation" is unsupported. To the contrary, in a separate section of the 1969 Lease, SRP agreed to give employment preference to local Navajos. *See id.* at § 18. That this employment preference was separately considered and negotiated confirms that employment was not included in the operations waiver.

Plaintiffs further contend (at 21) that *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1996), requires this Court to conclude that the operations waiver is an "unmistakable waiver" of the Navajo Nation's authority to regulate employment at NGS. However, *Aspaas* is easily distinguished and is not controlling. The similarities of this case to the *Aspaas* case are few and are not dispositive of whether the 1969 Lease between

Plaintiffs and the Navajo Nation waived the Navajo Nation's authority to regulate employment at NGS. *Aspaas*, like this case, did involve a utility company's challenge to the Navajo Nation's authority to regulate employment at the utility's plant. 77 F.3d at 1134. That utility company and the Navajo Nation also had a lease agreement, and the utility company alleged that the Navajo Nation had expressly waived its right to regulate employment policies at that plant. *Id*. at 1130. This is where the similarities end. More important are the distinguishing features of this case.

First, the lease at issue in *Aspaas* contained a waiver of the Navajo Nation's authority to regulate "construction, maintenance or operation of the power plant . . . or *other policies or practices*." *Id*. (emphasis added). The 1969 Lease at issue here contains no such language. Further, in *Aspaas*, the lease was amended by a Letter Agreement that dealt with hiring preferences and detailed a dispute resolution process for issues arising out of the Letter Agreement's hiring clauses. *Id*. at 1130-31. The *Aspaas* court found the Letter Agreement and its dispute resolution process for employment issues to be "[o]f particular significance" and refused to disturb the district court's injunction. *Id*. at 1135.

Here, there is no Letter Agreement amending the 1969 Lease with regard to employment issues, no separate dispute resolution process for employment issues, and no language in the waiver having anything to do with employment, *i.e.*, no waiver of authority over the plant's "policies and practices." *Aspaas* is not controlling. The differences in the waivers in these cases are dispositive. The 1969 Lease does not unmistakably waive the Navajo Nation's authority to regulate employment at NGS, and therefore, Plaintiffs' argument that there was a waiver of that authority fails. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (stating "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms").

III. A PERMANENT INJUNCTION IS NOT INDICATED AND IS INAPPROPRIATE

Plaintiffs are not entitled to a permanent injunction because the Navajo Official Defendants acted within their regulatory authority in applying and enforcing NPEA at NGS. Plaintiffs fail to meet the thresholds necessary to obtain a permanent injunction.

First, Plaintiffs fail to demonstrate adequately that they will suffer harm without a permanent injunction. Plaintiffs offer no concrete specifics as to how enforcement of NPEA and the employment preference provision in the 1969 Lease would cause harm. While Plaintiffs contend that enforcement of NPEA would jeopardize safety and efficiency at NGS, that contention is based on nothing more than the fear that Navajo preference might require tribal members be selected for supervisory roles or other critical positions. [PSOF ¶ 77] However, SRP is already required to give this preference under the terms of the 1969 Lease. Thus, the harm they contemplate exists only in the abstract and is insufficient to support the grant of a permanent injunction.

Second, the balance of the hardships most certainly does not favor Plaintiffs. Rather, it tips decidedly in favor of Navajo Official Defendants because Plaintiffs' request for a permanent injunction directly attacks tribal sovereignty and the Navajo Official Defendants' authority to define, implement, enforce, and interpret Navajo law. The parties to the 1969 Lease bargained for the provisions contained therein, including the waiver of Navajo authority to regulate the *operation* of NGS and protection for Navajo employees at NGS. Plaintiffs attempt to argue that the operation provision subsumes the separate employment preference provisions undermines Navajo authority and self-determination, and effectively negates the employment provision.

Plaintiffs sum up their argument in favor of a permanent injunction (at 28) in part with this amazing quotation: "[O]ne would think that the best way to make Indians *more responsible* citizens would be *to require* them to live up to their contractual obligations." (emphasis added). Plaintiffs' demeaning remark implies that tribal members are not

already responsible citizens and that to achieve that end, the federal government, or in this case federal courts, must intervene and require them to be responsible. Such a position is insulting and inconsistent with the federal policy of protecting and enhancing tribal rights and self-government. *See* Cohen's Handbook of Federal Indian Law § 1.07 ("Cohen"). Were this Court to grant a permanent injunction, the Navajo Nation's integrity, sovereignty, and self-determination would be substantially undermined. In addition, such an assertion flies in the face of settled jurisprudence requiring that ambiguities between non-tribal members and tribes "will be resolved from the standpoint of the Indians." *Winters v. United States*, 207 U.S. 564, 576 (1908). *See also Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943); Cohen § 2.02[1].

Conclusion

For the reasons stated above, and in conjunction with their previous pleadings, Navajo Official Defendants request that the Court grant their Cross Motion for Summary Judgment.

Dated: September 28, 2012

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CERTIFICATE OF SERVICE

☒ I hereby certify that on September 28, 2012, I electronically transmitted the attached documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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☒ I hereby certify that on September 28, 2012, I served the attached document by First Class Mail on Judge James A. Teilborg, United States District Court of Arizona, 401 West Washington Street, Phoenix, Arizona 85003-2118.

/s/ Susana M. Frietz