John J. Egbert - 011469
johnegbert@jsslaw.com
Paul G. Johnson – 010309
pjohnson@jsslaw.com
JENNINGS, STROUSS & SALMON, P.L.C.
A Professional Limited Liability Company
One East Washington Street, Suite 1900
Phoenix, Arizona 85004-2554
Telephone: (602) 262-5911

Attorneys for Plaintiff Salt River Project Agricultural Improvement and Power District

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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, vs. 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. 3:08-cv-8028-JAT **PLAINTIFF SRP'S MOTION FOR SUMMARY JUDGMENT** **(Oral Argument Requested)**

TABLE OF CONTENTS

TABLE OF CASES

Cases

Pursuant to Rule 56, Fed. R. Civ. P., Plaintiff Salt River Project Agricultural Improvement and Power District ("SRP") moves for summary judgment on its claims for declaratory and injunctive relief, on the ground that the Defendants are violating federal law and acting in excess of their lawful jurisdiction by attempting to regulate Plaintiffs' employment practices at the Navajo Generating Station ("NGS"). This motion is supported by the attached memorandum of points and authorities and statement of facts filed herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

SRP and Headwaters seek declaratory and injunctive relief against certain tribal officials of the Navajo Nation ("Navajo Official Defendants"). Specifically, SRP and Headwaters ask this Court to bar these tribal officials from proceeding in excess of their jurisdiction and contrary to federal law by attempting to regulate SRP and Headwater's employment practices at NGS through enforcement of a tribal ordinance (the Navajo Preference in Employment Act ("the NPEA")).

This Court addressed a nearly identical issue almost twenty years ago. Arizona Public Service Co. ("APS") operates the Four Corners Power Plant, built on the Navajo reservation pursuant to both a lease with the Navajo Nation and grants from the federal government, pursuant to 25 U.S.C. § 323. Despite a covenant in APS's lease by which the Navajo Nation promised that "other than as expressly set out in this agreement, it will not directly or indirectly regulate or attempt to regulate the Company or the construction, maintenance or operation of the power plant," tribal officials were attempting to regulate APS' employment practices at the plant. Judge Broomfield held that the tribal officials could not lawfully enforce the NPEA against APS at the power plant, and permanently

enjoined them from doing so. The Ninth Circuit affirmed. *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1996). The same conclusion applies to this case.

II. UNDISPUTED FACTS.

SRP, a municipal corporation and political subdivision of the State of Arizona, operates NGS, an electrical power plant located near Page, Arizona. Plaintiffs' Statement of Facts ("PSOF") ¶¶ 1-2. Headwaters is a contractor employed by SRP at NGS. PSOF ¶ 3. Both SRP and Headwaters are non-Navajo and non-Indian entities. PSOF ¶ 5.

NGS is owned by SRP and several other utilities (collectively referred to as "the Participants"). PSOF ¶ 6. It is located on the Navajo Indian reservation pursuant to a lease which the Navajo Nation and the Participants entered into in 1969 ("the 1969 Lease"), and pursuant to rights which the United States of America (through the Secretary of the Interior) granted, pursuant to 25 U.S.C. § 323 ("the § 323 Grant"). PSOF ¶ 10. The Participants have invested in excess of $1.1 billion in the construction of NGS. PSOF ¶ 8.

By the § 323 Grant, the federal government granted to the Participants the rights of "exclusive possession" and "quiet enjoyment" in the lands on which NGS is built and operates, as well as "rights-of-way and easements in, on, over, along and across the lands." PSOF ¶¶ 19, 24.[1] The § 323 Grant also, with certain limited exceptions, "extinguished and prohibited" "[a]ll present existing Indian uses" of the granted lands. PSOF ¶ 23. These rights granted to the Participants by the § 323 Grant "are, and shall be deemed for all purposes to be, additional and supplementary to, and separate and independent from, any leasehold rights acquired" under the 1969 Lease, and the § 323

[1] These § 323 Grant rights are not limited to protecting the Participants solely from physical interference with access to the granted lands. The § 323 Grant itself expressly provides different remedies to the Participants, depending on whether their rights are "physically interfered with" or violated in a non-physical way. PSOF ¶ 27.

Grant rights "are not subject or subordinate to any provision of the [1969] Lease." PSOF ¶ 28.

The Secretary of the Interior expressly "determined that the construction, operation and maintenance of [NGS] will benefit the Navajo Tribe of Indians and will foster the development of resources of the Navajo Reservation," and issued the § 323 Grant "in part to induce the [Participants] to proceed with the development of [NGS]." PSOF ¶ 21. The Secretary acted "under legislative authorization of Congress, in the exercise of the paramount rights and powers of the United States of America." PSOF ¶ 20.

Pursuant to the 1969 Lease, the Participants agreed, among other things, to pay rent to the Navajo Nation and "to give preference in employment to qualified local Navajos." PSOF ¶ 29. For its part, the Navajo Nation agreed, among other things,

> that, other than as expressly set out in this Lease, it will not directly or indirectly regulate or attempt to regulate the [Participants] in the construction, maintenance or operation of [NGS] . . . . This covenant shall not be deemed a waiver of whatever rights the Tribe may have to regulate retail distribution of electricity on the Reservation Lands.

PSOF ¶ 30. The Participants' rights under the 1969 Lease also expressly extend to the Participants' contractors, such as Headwaters. PSOF ¶ 31.

More than 15 years after the § 323 Grant and the 1969 Lease went into effect, the Navajo Nation enacted the NPEA. PSOF ¶ 32. If the NPEA could be enforced against SRP, it would require SRP to do many things which federal and state law and the 1969 Lease do not otherwise require SRP to do, including pay a "prevailing wage" set by the Navajo Nation and not terminate employment relationships "without just cause." PSOF ¶¶ 33-35. For many years after the enactment of the NPEA, SRP and the Navajo Nation successfully avoided confronting the issue of whether the Navajo Nation has jurisdiction

to enforce the NPEA at NGS, by SRP's voluntary implementation of a preference plan. PSOF ¶¶ 36-38.

In 2004 and 2005, Defendants Leonard Thinn and Sarah Gonnie, former Navajo employees of SRP and Headwaters, respectively, filed charges with the Office of Navajo Labor Relations ("the ONLR"), a tribal agency responsible for investigating alleged violations of the NPEA. They claimed the termination of their employment was without "just cause," in violation of the NPEA. PSOF ¶¶ 34, 47, 53.

After the ONLR concluded its investigations, Thinn and Gonnie filed complaints with the Navajo Nation Labor Commission ("the NNLC"), another tribal agency responsible for enforcing the NPEA. PSOF ¶¶ 35, 49, 55. The NNLC granted SRP and Headwaters' motions to dismiss for lack of jurisdiction, and Thinn and Gonnie appealed to the Navajo Nation Supreme Court. PSOF ¶¶ 50-52, 56-58.

The Navajo Nation Supreme Court consolidated the Thinn and Gonnie appeals. PSOF ¶ 59. The Navajo Nation (through the Navajo Nation Department of Justice) filed an amicus brief in which it: (1) acknowledged that the non-regulation provision of the 1969 Lease is "similar" to the lease language at issue in *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1996) (concluding that Navajo Nation tribal officials could not enforce NPEA against APS with respect to its operation of the Four Corners Power Plant); (2) characterized *Aspaas* as holding "that the Navajo Nation had indeed made an 'unmistakable waiver' of regulatory jurisdiction;" and (3) warned that "the Ninth Circuit appears likely to hold that the waiver [in the 1969 Lease] is a specific, or unmistakable waiver, as it did in *Aspaas*." PSOF ¶ 60.

In the face of these warnings, the Navajo Nation Supreme Court nevertheless held that the NPEA applies to SRP and Headwaters, and the NNLC has jurisdiction to enforce the NPEA against SRP and Headwaters. The Navajo Nation Supreme Court therefore

reversed the NNLC's decisions and remanded to the NNLC for further proceedings on the merits of Thinn's and Gonnie's claims. PSOF ¶ 61.

As the Navajo Nation Supreme Court required, the NNLC issued notices of hearing on Thinn's and Gonnie's claims, but those proceedings have been temporarily stayed. PSOF ¶¶ 62-63. However, the ONLR has continued its efforts to regulate employment relationships at NGS, pursuant to the NPEA. PSOF ¶¶ 39-41, 43-46. Plaintiffs commenced this action on February 29, 2008, seeking to enjoin the Navajo Official Defendants from regulating employment relationships at NGS beyond what the 1969 Lease allows.[2]

III. THE NAVAJO NATION HAS NO INHERENT SOVEREIGN AUTHORITY TO REGULATE EMPLOYMENT PRACTICES AT NGS.

Plaintiffs are entitled to summary judgment because the Navajo Nation has no inherent sovereign authority to regulate employment practices at NGS.[3] By their

[2] Defendants have filed three separate unsuccessful motions to dismiss. First, they argued that Plaintiffs claims could be decided only by the Secretary of the Interior. The Ninth Circuit rejected that argument, stating that "Plaintiffs' claims 'are thus properly before the district court.'" Doc. 150 at 4 (quoting Doc. 109-1 at 3). Second, Defendants argued that Plaintiffs claims had to be dismissed because they were not brought under the Administrative Procedure Act. Relying on the Ninth Circuit's mandate, this Court rejected that argument, and Defendants did not appeal. Doc. 150 at 4-5. Third, Defendants argued that the case had to be dismissed because the Navajo Nation is a necessary party that cannot be joined due to sovereign immunity. The Ninth Circuit also rejected that argument, holding that "[t]his lawsuit for prospective injunctive relief may proceed against the [Navajo Nation] officials under a routine application of *Ex parte Young*." Doc. 157-1 at 4, 14.

[3] The Ninth Circuit's decision in *Aspaas* did not address whether the Navajo Nation had inherent authority to regulate APS's employment practices at the Four Corners Power Plant. 77 F.3d at 1134 ("We need not determine . . . the precise limits on the Navajo Nation's inherent power to regulate employment relations of a non-Indian employer and Indian employees."). Instead, the Ninth Circuit "[a]ssum[ed] arguendo, such authority exists," *id*., and held that the non-regulation provision of APS's lease had unmistakably

"original incorporation into the United States as well as through specific treaties and statutes, Indian tribes have lost many of the attributes of sovereignty." *Montana v. United States*, 450 U.S. 544, 563 (1981). Thus, for example, Indian tribes unequivocally have no criminal jurisdiction at all over non-Indians. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

As to civil jurisdiction, it is now clear that *Montana* "is the pathmarking case concerning tribal civil authority over non-members," both on Indian and non-Indian land. *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).*; Nevada v. Hicks*, 533 U.S. 353, 359-60 (2001) ("the general rule of *Montana* applies to both Indian and non-Indian land"); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1135 (9th Cir. 2006) (*en banc*). The starting point in *Montana*'s analytical framework is that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana,* 450 U.S. at 565; *see also Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2719 (2008) ("the tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing persons within their limits except themselves'").[4] *Montana* recognized two limited exceptions to this general

---

waived any such authority. However, 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.

[4] Justifying the different treatment of tribal sovereignty, the Supreme Court explained: "Tribal sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the Constitution.' The Bill of Rights does not apply to Indian tribes. Indian courts 'differ from traditional American courts in a number of significant respects.' And nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers **only if the nonmember has consented, either expressly or by his actions**. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control

principal of no jurisdiction over nonmembers, but 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 the exceptions applies. *Plains Commerce Bank.*, 128 S. Ct. at 2720 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)).

The first *Montana* exception recognizes that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. This "consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. . . . A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not 'in for a penny, in for a Pound.'" *Atkinson*, 532 U.S. at 656. Accordingly, under the first *Montana* exception, an Indian tribe may impose a tribal law or regulation on a nonmember "only if the nonmember has consented, either expressly or by his actions." *Plains Commerce Bank*, 128 S. Ct. at 2724; *see also Atkinson*, 532 U.S. at 656 (the central issue is whether the nonmember "can[] be said to have consented" to the specific tax or regulation at issue).

This narrow exception does not apply to this case. Far from demonstrating that SRP consented to the Navajo Nation's regulation of employment relationships at NGS, the 1969 Lease expressly states the exact opposite: "other than as expressly set out in this Lease, [the Navajo Nation] will not directly or indirectly regulate or attempt to regulate the [Participants] in the construction, maintenance or operation of [NGS]." PSOF ¶ 30.

---

internal relations." *Plains Commerce Bank*, 128 S. Ct. at 2724 (emphasis added and citations omitted). A portion of the Navajo Nation Supreme Court's decision in the Thinn and Gonnie appeals was written in Navajo – yet another difference from traditional American courts. *See* Exhibit 9 to Motion for Preliminary Injunction (Dkt. No. 5) at p. 9.

Thus, the 1969 Lease is a "consensual relationship" only in the limited sense that SRP and the Navajo Nation voluntarily entered into it; the 1969 Lease does not come close to meeting the requirement of *Montana*'s first exception that SRP actually consent, expressly or impliedly, to the Navajo Nation's regulation.[5] Indeed, it is apparent from the face of the 1969 Lease that the Navajo Nation's promise **not** to regulate SRP and the other Participants was part of the consideration for the Participants to enter into the 1969 Lease in the first place. Thus, it makes no sense to argue that, by entering into the 1969 Lease, SRP impliedly consented to the very regulation which the 1969 Lease expressly forbids.

The second *Montana* exception allows a tribe to exercise "civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. "Read in isolation, [this exception] can be mis-perceived. . . . But a tribe's inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 459. The nonmember conduct which a tribe seeks to regulate "must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community," *Plains Commerce Bank*, 128 S. Ct. at 2726; the tribal regulation "'must be necessary to avert catastrophic consequences.'" *Id*. (quoting F. Cohen, *Handbook of Federal Indian Law* § 4.02[3][c], at 232, n.220 (2005)).

[5] *Atkinson*'s statement that the regulation at issue must "have a nexus to the consensual relationship itself," 532 U.S. at 656, is just a different characterization of this same consent requirement. Because the 1969 Lease expressly includes the Navajo Nation's promise **not** to regulate SRP's operation of NGS, the alleged right to regulate cannot possibly have a "nexus" to the consensual relationship created by the 1969 Lease.

Montana's second exception similarly does not support the Navajo Official Defendants' position. The Navajo Nation's existence is not "imperil[ed]" by the fact that employment relations at NGS are fully protected by federal and Arizona employment laws, but not also tribal employment law. *See Plains Commerce Bank*, 128 S. Ct. at 2726; *see also MacArthur v. San Juan County*, 497 F.3d 1057, 1075 (10th Cir. 2007) ("While the Navajo Nation undoubtedly has an interest in regulating employment relationships between its members and non-Indian employers on the reservation, that interest is not so substantial in this case as to affect the Nation's right to make its own laws and be governed by them. . . . The right at issue in this case is the Navajo Nation's claimed right to make its own laws and have *others* be governed by them, not the right to self-government.") (emphasis in original).

In this case, because the land on which NGS operates is the equivalent of non-Indian fee land, the absence of tribal civil jurisdiction is clear. *See Hicks*, 533 U.S. at 360 ("the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction"). In *Strate*, the unanimous Court recognized that when the United States grants rights-of-way like the § 323 Grant in this case, the granted lands are the equivalent of non-Indian fee land – without any tribal ownership rights. 520 U.S. at 454. In *Strate*, a vehicle accident occurred on a stretch of highway located on land for which the United States had granted rights-of-way pursuant to 25 U.S.C. § 323. Consequently, the Court held that the highway was "equivalent, for nonmember governance purposes, to alienated, non-Indian land," and the tribe could exercise no authority over the non-Indians involved in the accident. 520 U.S. at 454; *see also South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (tribe's loss of "right of absolute and exclusive use and occupation . . . implies the loss of regulatory jurisdiction over the use of the land by others"); *Bressi v. Ford*, 575 F.3d 891, 895-96 (9th Cir. 2009) (grant under § 323 converts

granted land into the equivalent of non-Indian fee land); *Big Horn County Electrical Cooperative, Inc. v. Adams*, 219 F.3d 944, 950 (9th Cir. 2000) (same); *Burlington Northern R.R. Co. v. Red Wolf,* 196 F.3d 1059, 1063 (9th Cir. 1999) (same).

Here it is beyond dispute that the Navajo Nation no longer has the right of exclusive use and occupation of the lands on which NGS operates. To the contrary, independent of any rights SRP obtained in the 1969 Lease, the United States granted to SRP and the other Participants rights-of-way for those lands, including the rights of "quiet enjoyment and peaceful and exclusive possession," and extinguished "[a]ll present existing Indian uses" of the granted lands. PSOF ¶¶ 19, 23-24. Accordingly, during the term of the § 323 Grant, the Navajo Nation does not have a landowner's right to occupy and exclude with respect to the land on which NGS operates, and it therefore has no inherent authority to regulate employment relationships at NGS as a matter of law.

IV. THE NAVAJO NATION HAS NO AUTHORITY BY TREATY OR STATUTE TO REGULATE EMPLOYMENT RELATIONSHIPS AT NGS.

The Navajo Nation also has no treaty or statutory authority to regulate employment relationships at NGS. The Navajo Official Defendants have never contended to the contrary.

The Navajo Nation Supreme Court, however, did assert in its decision against SRP and Headwaters that the Navajo Nation has authority under the Navajo Treaty of 1868, 15 Stat. 667:

> Under the Treaty of 1868 the Nation has authority to regulate non-Indian activity on trust lands. *Dale Nicholson Trust v. Chavez*, No. SC-CV-69-00, slip op. at 11-12 (Nav. Sup. Ct. January 6, 2004). This power is absolute, and does not require the Nation to fulfill the exceptions announced by the United States Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981) . . . .

PSOF ¶ 61 and Exhibit 9 to Motion for Preliminary Injunction Appendix (Dkt. No. 5) at p. 4. In *Dale Nicholson Trust*, the Navajo Nation Supreme Court specifically relied on the portion of Article 2 of the Treaty of 1868 which states that the United States set aside land "for the use and occupation of the Navajo tribe of Indians," and that "no persons except those herein so authorized to do, . . . shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." Construing that language, the Navajo Nation Supreme Court stated: "Under the Treaty our courts have broad authority over non-Indians on land **where the Navajo Nation has the absolute right to exclude them**." *Dale Nicholson Trust*, slip op. at 11 (emphasis added).

Even under this, the Navajo Nation Supreme Court's own standard (with which Plaintiffs do not agree), the Navajo Official Defendants cannot look to the Navajo Treaty of 1868 as a source for authority to regulate employment relations at NGS. SRP and the other Participants – **not** the Navajo Nation – have the rights of "quiet enjoyment and peaceful and exclusive possession" in the lands on which NGS operates. Thus, the Navajo Nation does not have the absolute right to exclude anyone from the lands granted to SRP and the other Participants.

Montana itself supports this conclusion. In addition to analyzing a tribe's inherent sovereign authority, *Montana* also addressed whether the Crow Tribe's rights under the 1868 Fort Laramie Treaty (with language similar to the Navajo Treaty of 1868, quoted above) authorized the tribe to regulate hunting and fishing on land owned by non-Indians within the tribe's reservation. 450 U.S. at 557-63. The court rejected the treaty argument because "that authority could only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation.'" *Id.* at 559. Explaining further, the Court stated that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Id.* at 561.

The Court reached the same conclusion in *Bourland*, stating:

> [W]hen an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right . . . implies the loss of regulatory jurisdiction over the use of the land by others. In taking tribal trust lands and other reservation lands for the Oahe Dam and Reservoir Project . . . Congress . . . eliminated the Tribe's power to exclude non-Indians from those lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe.

Id. at 689.

In this case, the Navajo Nation no longer has the right to occupy and exclude others from the lands on which NGS operates. PSOF ¶¶ 23-24. The federal government transferred those rights to SRP and the other Participants pursuant to the § 323 Grant. Thus, the Navajo Nation's treaty rights "must be read in light of the subsequent alienation" of those land ownership rights. *See Montana*, 450 U.S. at 561. Accordingly, the Navajo Official Defendants' attempts to regulate employment relationships at NGS are not authorized by any statute or by the Navajo Treaty of 1868.

V. THE NAVAJO NATION UNMISTAKEABLY WAIVED ANY AUTHORITY TO REGULATE THAT MIGHT OTHERWISE HAVE EXISTED.

Even if it were possible to argue that the Navajo Nation had authority to regulate employment relationships at NGS by virtue of either inherent sovereignty or treaty rights, it is clear that the Navajo Nation unmistakably waived such authority when it entered into the 1969 Lease. The non-regulation covenant of the 1969 Lease states: "The Tribe covenants that, other than as expressly set out in this Lease, it will not directly or indirectly regulate or attempt to regulate the Lessees in the construction, maintenance or

operation of [NGS]. . . ." As the Navajo Nation Supreme Court acknowledged, this waiver language is "substantially similar" to the waiver language at issue in *Aspaas.*

In *Aspaas,* the Ninth Circuit did not reach the issue of whether the Navajo Nation had inherent authority to regulate employment relations at the Four Corners Power Plant. Instead, the Ninth Circuit "[a]ssum[ed] arguendo, such authority exists," and decided instead whether the non-regulation provision was "a valid waiver of such a right." *Aspaas*, 77 F.3d at 1134. Relying on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982), which held that tribal sovereign authority could be waived only in "unmistakable terms," *Aspaas* held that there was such a waiver in that case. 77 F.3d at 1135.

The "substantially similar" language in the 1969 Lease yields the same conclusion. The waiver in the non-regulation provision of the 1969 Lease is also "unmistakable." The Navajo Nation agreed that, except as specifically provided in the 1969 Lease, it would not attempt to regulate SRP's operation of NGS. Attempting to regulate employment relations at NGS is as plainly violative of this non-regulation provision as was the case in *Aspaas*. Furthermore, it is also plain that the parties intended the non-regulation provision to be a waiver because they were careful to identify those rights that were not waived. PSOF ¶ 30 ("This covenant shall not be deemed a waiver of whatever rights the Tribe may have to regulate retail distribution of electricity on the Reservation Lands."). It obviously was intended to be a waiver of the tribe's rights in all the other areas of SRP's "operations" at NGS.

VI. PLAINTIFFS ARE ENTITLED TO PERMANENT INJUNCTIVE RELIEF.

In addition to granting summary judgment on Plaintiffs' declaratory judgment claim, the Court should also grant the permanent injunction Plaintiffs request in their Verified Complaint. *See NLRB v. Express Pub. Co.*, 312 U.S. 426, 435 (1941) ("A

federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past."). Plaintiffs meet all of the requirements for permanent injunctive relief because irreparable harm is present and they have no adequate remedy at law, the balance of hardships favors Plaintiffs and the public interest would be served by a permanent injunction. *See EBay, Inc. v. Mercexchange, LLC*, 547 U.S. 388, 391 (2006).

A. Irreparable Harm and Lack of Adequate Remedy at Law

Plaintiffs have already suffered irreparable harm, and may be subjected to the same kind of harm in the future if Navajo authorities are not enjoined from enforcing the NPEA with respect to employment relations at NGS. After all, the Ninth Circuit's clear holding in *Aspaas* did not prevent Defendants from acting in excess of their jurisdiction in this case. Moreover, the Navajo Nation Supreme Court ruling remains, and may be used at any point in the future by Navajo tribal authorities. Indeed, they may feel compelled to follow the directives of the Tribe's highest court, unless this Court enjoins such future actions beyond the parameters of this particular case.

SRP and the other Participants bargained for the right to be free of such regulation, it was granted to them in the 1969 Lease and § 323 Grant, and they have relied on it in constructing and operating NGS since the early 1970s. PSOF ¶¶ 8, 10, 67. If proceedings before tribal administrative agencies and courts, like those concerning the Thinn and Gonnie claims, are allowed to proceed in the future, or if Navajo authorities otherwise attempt to regulate employment matters at NGS, it will negate Plaintiffs' right to be free from such attempted regulation. PSOF ¶¶ 33-35. The threat of Navajo regulation, as well as the results of such regulation, would undermine the operations and

safety of NGS. PSOF ¶¶ 70-77. This threat of harm is both significant and unquantifiable. PSOF ¶¶ 70-78.

Absent permanent injunctive relief, SRP has and will also spend considerable time and resources in defending such actions. Plaintiffs should not have to come back to Court to obtain relief each time in the future that Navajo tribal authorities exceed their authority and jurisdiction with regard to employment matters. This is particularly true in cases like this, involving unauthorized assertions of tribal jurisdiction, because the principle of comity requires exhaustion of tribal court remedies before Plaintiffs can request relief in federal court. *See National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (while the extent to which an Indian tribe may exercise jurisdiction over nonmembers is a federal law question, it is one that should be addressed in the first instance in tribal courts).

There is no adequate remedy at law for the harm Plaintiffs have suffered, and likely will suffer, because the Navajo Nation (and even the Navajo Official Defendants) enjoy sovereign immunity from suit for monetary damages. *Prairie Bank of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1251 (10th Cir. 2001) (affirming finding of irreparable harm to tribe because of state sovereign immunity); *Wisconsin v. Stockbridge-Munsee Community*, 67 F. Supp. 2d 990, 1019-20 (E.D. Wis. 1999) (finding irreparable harm because of tribal sovereign immunity). When a government official is proceeding in an arbitrary manner, the proper remedy is an injunction. *See U.S. v. Central Eureka Mining Co.*, 357 U.S. 155, 166 n.12 (1958); *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (fact that "… [plaintiffs] would also be forced to expend time and effort on litigation in a court that does not have jurisdiction over them," supports issuance of injunction).

B. Balance of Hardships

The balance of hardships tips heavily in favor of the Plaintiffs here because of the disruption of the operations of NGS if Navajo tribal officials are permitted to regulate employment relations at NGS, in clear violation of Plaintiffs' rights under the 1969 Lease and § 323 Grant. PSOF ¶¶ 70-78. On the other hand, because Plaintiffs' Navajo employees at NGS enjoy all of the federal and state employment rights that any non-Navajo employee has, there is no hardship to them or to the Navajo Official Defendants if the bargained-away right of the Navajo authorities to regulate employment relations at NGS is not available. The multiple layers of regulation and protections already afforded by federal and state employment law simply foreclose any suggestion of hardship by defendants.

C. Public Interest

Granting a permanent injunction to Plaintiffs in this matter would serve the public interest. The public has an interest in the sanctity of contract, and in the efficient operation of NGS as provided in the § 323 Grant and under the terms and conditions agreed to by SRP and the Navajo Nation as set forth in the 1969 Lease, and approved by the Secretary of the Interior. Navajo employees at NGS are not without a remedy; the federal and state law remedies available to non-Navajo employees are also available to them. [NGS has been operating successfully for decades and has provided many benefits to the public and to the Navajo Nation and its people.] PSOF ¶¶ 7, 69, 74. The public interest would suffer if the efficient operations of NGS were undermined by threatened or actual regulation by Navajo authorities.

VII. CONCLUSION.

For the reasons discussed above, Plaintiffs are entitled to summary judgment on their claims for declaratory and injunctive relief.

DATED this 23rd day of July, 2012.

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

By s/ John J. Egbert
John J. Egbert
Paul G. Johnson
One East Washington Street, Suite 1900
Phoenix, Arizona 85004-2554
Attorneys for Plaintiff SRP

Original filed electronically this 23rd day of July, 2012, and copy hand-delivered to:

The Honorable James A. Teilborg
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 523
401 West Washington Street, SPC 51
Phoenix, AZ 85003-2156

Copy served through the Court's CM/ECF system this 23rd day of July, 2012, to:

Philip R. Higdon
Kirsten T. Eidenbach
Perkins Coie LLP
2901 North Central Avenue, Suite 2000
Phoenix, AZ 85012-2788
Attorneys for Navajo Officials Defendants

David R. Jordan
The Law Offices of David R. Jordan, P.C.
309 E. Nizhoni Blvd.
P.O. Box 840
Gallup, NM 87305-0840
Attorneys for Defendants Leonard Thinn and Sarah Gonnie

Lisa M. Coulter
SNELL & WILMER, LLP
One Arizona Center
400 E. Van Buren
Phoenix, Arizona 85004-2202
Attorneys for Plaintiff Headwaters Resources, Inc.

By: s/Meeling Tan