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. CV 08-8028-PCT-JAT

SRP'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

AND

RESPONSE TO NAVAJO OFFICIAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

(Oral Argument Requested)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Pursuant to Rule 56, Fed. R. Civ. P., and this Court's order dated August 23, 2012 (Doc. 171), Plaintiff Salt River Project Agricultural Improvement and Power District ("SRP") submits the following reply in support of its motion for summary judgment and responds in opposition to the cross-motion for summary judgment by the Navajo Official Defendants ("Defendants"). SRP is entitled to summary judgment because Defendants are violating federal law by attempting to regulate SRP's employment relations beyond the narrow employment preference requirement in the 1969 Lease.

I. INTRODUCTION.

The central issue in this litigation is whether Defendants are violating federal law by attempting to regulate SRP's employment relations beyond the narrow employment preference requirement in the 1969 Lease. SRP relies on two distinct arguments, either of which is independently sufficient to grant summary judgment for SRP. First, SRP is entitled to summary judgment because the Navajo Nation has no inherent sovereign authority to regulate SRP's employment practices at the Navajo Generating Station ("NGS") (beyond the narrow preference requirement in the 1969 Lease). Second, SRP is entitled to summary judgment because, even if such inherent sovereign authority existed before, the Navajo Nation unmistakably waived it when it entered into the 1969 Lease.

These same two arguments were presented to the Ninth Circuit, under nearly identical circumstances, in *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1996). In *Aspaas*, the Ninth Circuit upheld Judge Broomfield's judgment which enjoined Navajo officials from enforcing the Navajo Preference in Employment Act ("NPEA") against APS at the Four Corners Power Plant. *Aspaas* did not reach the first argument. *Id.* 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, *Aspaas* "[a]ssumed arguendo, such authority exists," and held that the non-regulation provision of APS's lease had unmistakably waived any such authority. *Id.*

Since *Aspaas*, the United States Supreme Court has addressed the very limited scope of tribal authority over non-Indians in several cases. Because these more recent cases so clearly demonstrate that Defendants have no inherent sovereign authority in this case, this Court need not reach the alternative argument that such authority was waived. However, regardless of whether this Court concludes that no inherent sovereign authority over SRP ever existed or that such authority was unmistakably waived, SRP is entitled to summary judgment.

II. THE NAVAJO NATION DOES NOT HAVE INHERENT SOVEREIGN AUTHORITY OVER EMPLOYMENT RELATIONS AT NGS.

The United States Supreme Court's "case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). "For powers not expressly conferred upon them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 649-50 (2001). In this case, Defendants do not point to or rely on any conferral of jurisdiction by either federal statute or treaty. Consequently, the jurisdictional issue in this case necessarily turns solely on "inherent sovereignty."

With respect to tribal inherent sovereignty, the Supreme Court has "noted that 'through their original incorporation into the United States as well as through specific treaties and statutes, Indian tribes have lost many of the attributes of sovereignty.'" *Atkinson*, 532 U.S. at 650 (quoting *Montana v. United States*, 450 U.S. 544, 563 (1981)). Thus, "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564. Thus, in the context of criminal law, the Supreme Court unequivocally held

that Indian tribes have no criminal jurisdiction over non-Indians – even if the non-Indian's crime is committed against tribal members and on the tribe's reservation. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). There are no exceptions.

As to civil jurisdiction, it is now clear that *Montana* "is the pathmarking case concerning tribal civil authority over nonmembers." *Strate*, 520 U.S. at 445. The general rule 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.*, 554 U.S. 316, 328 (2008) ("the tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing persons within their limits except themselves'"). This general rule is "particularly strong when the nonmember's activity occurs on . . . non-Indian fee land." *Plains Commerce Bank*, 554 U.S. at 328. And the Supreme Court has unanimously held that lands subject to a 25 U.S.C. § 323 grant – like the land on which NGS is located – is the "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Strate*, 520 U.S. at 454; *see also South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (a tribe's loss of the "right of absolute and exclusive use and occupation . . . implies the loss of regulatory jurisdiction over the use of the land by others").

There are just two narrow exceptions (set forth in *Montana*) to this general rule of no tribal civil jurisdiction over nonmembers. *Plains Commerce Bank*, 554 U.S. at 329-30. "These exceptions are 'limited' ones, and cannot be construed in a manner that would 'swallow the rule,' or 'severely shrink' it." *Id.* at 330 (citations omitted). Moreover, a tribe's efforts to regulate nonmembers are "presumptively invalid."[1] *Atkinson*, 532 U.S. at

[1] Defendants erroneously rely on *Strate* for the exact opposite proposition: that jurisdiction over non-Indians on reservation lands "presumptively lies in the tribal courts." (Response at 9). However, far from supporting Defendants' assertion, *Strate* expressly rejects it. The tribal officials in *Strate* had "fasten[ed] upon" the quoted language from *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987), but *Strate*

659. Therefore, "[t]he burden rests on [Defendants] to establish one of the exceptions" applies. *Plains Commerce Bank*, 554 U.S. at 330.

In an effort to withstand SRP's motion for summary judgment with respect to the argument that they lack inherent sovereign authority to regulate SRP's employment relationships, Defendants make three arguments: (1) *Montana*'s analytical framework does not apply at all to this case; (2) *Strate*'s holding that lands subject to a § 323 grant are the equivalent of non-Indian fee lands should be distinguished; and (3) *Montana*'s consensual relationship exception applies to this case. None of Defendants' arguments has merit.

A. *Montana*'s Analytical Framework Governs the Inherent Sovereignty Issue.

Attempting to evade altogether this heavy burden of proving that one of *Montana*'s narrow exceptions applies, Defendants first erroneously contend that *Montana*'s "pathmarking" framework does not apply here. They contend *Montana* applies only "when the land in question is non-Indian fee land surrounded by tribal land," and "NGS was built on tribal land." (Response at 6). That argument is clearly wrong for at least two reasons.

First, the Supreme Court's recent decisions have expressly rejected that argument. For example, in *Nevada v. Hicks*, 533 U.S. 353 (2001), a case undisputedly arising on "tribe-owned land within the reservation," *id.* at 359, all nine of the Justices agreed that *Montana*'s analytical framework nevertheless governed. The majority opinion, in which six Justices joined, states:

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concluded that, "read in context, . . . this language scarcely supports" their assertion, but rather "stands for nothing more than the unremarkable proposition that, **where tribes possess authority to regulate the activities of nonmembers**, 'civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." 520 U.S. at 451-53 (emphasis added). Thus, when determining whether a tribe possesses authority to regulate nonmembers in the first place, *Montana*'s general rule – and the presumption it creates against such authority – controls.

> While it is certainly true that the non-Indian ownership status of the land was central to the analysis in both *Montana* and *Strate*, the reason that was so was *not* that Indian ownership suspends the 'general proposition' derived from *Oliphant* that 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe' . . . . *Oliphant* itself drew no distinctions based on the status of land. And *Montana*, after announcing the general rule of no jurisdiction over nonmembers cautioned [referring to the two narrow *Montana* exceptions] that "to be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," – clearly implying that **the general rule of *Montana* applies to both Indian and non-Indian land**.

Id. at 359-60 (bolded emphasis added; citations omitted). Even the remaining three Justices agreed that "the majority is quite right that *Montana* should govern the analysis of a tribe's civil jurisdiction over nonmembers both on and off tribal land." *Id.* at 388 (O'Connor, J., concurring in part); *see also Smith v. Salish Kootenai College*, 434 F.3d 1127, 1135 (9th Cir. 2006) (en banc) ("In *Hicks*, the Court emphasized that '*Montana* applies to both Indian and non-Indian land.'"). More recently, after the Court again stated that *Montana*'s general rule applies to nonmembers' activities anywhere "on the reservation," the Court emphasized that the general rule is just "particularly strong" when the non-member's activities occur on non-Indian fee land. *Plains Commerce Bank*, 554 U.S. at 328.

Completely ignoring this clear and controlling authority to the contrary, Defendants rely instead on *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). However, not only was *New Mexico* decided nearly twenty years before *Hicks* and *Plains Commerce Bank* removed all doubt that the *Montana* framework applies to tribe-owned lands, but *New Mexico* is completely inapposite; it does not address at all the extent to which an Indian tribe may regulate nonmembers. Instead, the issue in *New Mexico* was "whether a State

may restrict an Indian Tribe's regulation of hunting and fishing on its reservation." *Id*. at 325. No nonmembers were challenging tribal authority in that case; instead, the tribe was challenging (in federal court) New Mexico's attempts to regulate on-reservation hunting and fishing by members and nonmembers alike. Thus, *New Mexico*'s characterization of *Montana* is, at most, *dicta*, not to mention plainly out of date.

Defendants also erroneously rely on the Ninth Circuit's decision in *Aspaas, supra,* to support their contention that *Montana* does not apply to tribe-owned land. However, *Aspaas* did not reach that issue. It concluded instead that it "need not determine . . . the precise limits of the Navajo Nation's inherent power to regulate employment relations of a non-Indian employer" because it held that even if the Navajo Nation had such inherent power at some point in time, the Navajo Nation had unmistakably waived that authority when it agreed to the non-regulation provision in the lease with APS. 77 F.3d at 1134-35.

Second, even if it were true that the *Montana* analysis applies only to non-Indian fee land, Defendants' argument that the *Montana* framework does not apply here would still fail because the land on which NGS is located is – as a matter of law – the equivalent of non-Indian fee land for nonmember governance purposes. Like the land on which NGS is built, the tribal land at issue in *Strate* was subject to an easement which the United States had granted to North Dakota, pursuant to 25 U.S.C. § 323 *et seq*. *See Strate*, 520 U.S. at 454-55. The purpose of the easement was to build a state highway, and, other than the right to construct crossings over the State's right-of-way, the tribes had "expressly reserved no right to exercise dominion or control over the right-of-way." *Id*. at 455. The Court held that because "the Tribes cannot assert a landowner's right to occupy and exclude," the land subject to the State's easement was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Id*. at 454-56.

Thus, under the Court's reasoning in *Strate*, the land on which NGS is built is equivalent to alienated, non-Indian fee land. That not only requires the conclusion that the *Montana* analytical framework applies to this case, but it also demonstrates that Defendants' improper efforts to regulate SRP's employment relationships do not fit within *Montana*'s limited exceptions. *See Atkinson*, 532 U.S. at 559-60 ("the status of territory within the reservation's boundaries as tribal or fee land may have much to do (as it does here) with the likelihood (or not) that facts will exist that are relevant under the exceptions to *Montana*'s 'general proposition' that 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe") (Souter, J., concurring); *see also Hicks*, 533 U.S. at 360 ("Hitherto, the absence of tribal ownership has been **virtually conclusive** of the absence of tribal civil jurisdiction . . . .") (emphasis added); *Bourland*, 508 U.S. at 689 (a 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"). Accordingly, Defendants' assertion that *Montana* does not control this case is baseless.

B. Defendants' Efforts to Distinguish or Evade *Strate* Have No Merit.

Because *Strate*'s holding so powerfully negates Defendants' claimed authority to regulate Plaintiffs' employment relations at NGS, Defendants make several attempts to distinguish *Strate*. None of Defendants' arguments has any merit.

First, without citing any supporting authority, Defendants argue that *Strate* should not apply here because the right-of-way in this case is "for a private entity . . . to operate a generating station." (Response at 6). However, that argument has no merit because nothing in *Strate* suggests that distinctions such as public vs. private or highway vs. generating station are material to deciding whether lands subject to a § 323 grant are the equivalent of non-Indian fee land. Indeed, non-Indian fee land within a reservation may be owned by both private and public entities, and the uses to which such fee lands may be put

are innumerable. Instead, the critical factor in *Strate* was whether the tribe retained sufficient sticks in the bundle of property rights to occupy the land and exclude others from it. Here, it is beyond dispute that the Navajo Nation does not currently possess such rights. To the contrary, the § 323 Grant expressly gave SRP the right of "exclusive possession" of the lands on which NGS is located, and also "extinguished and prohibited" "[a]ll present existing Indian uses" of the granted lands. (PSOF ¶¶ 19, 23-24; DSOF (amended) at p. 2).

Moreover, the Ninth Circuit has already rejected the very distinctions on which Defendants rely. In *Big Horn County Electrical Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), the Secretary of the Interior had, pursuant to 25 U.S.C. § 323, granted rights-of-way across tribal land to an electrical cooperative, Big Horn, for the purpose of building transmission and distribution facilities. Sometime later, the tribe sought to tax the full market value of all "utility property" located on tribal land within the reservation, including Big Horn's facilities. Big Horn challenged the tribe's jurisdiction to impose the tax and (after exhausting the tribal court process) filed suit for injunctive and declaratory relief against several tribal officials in federal court.

As Defendants do here, the tribal officials in *Big Horn* argued that the rights-of-way in *Strate* were distinguishable "because [the lands granted to Big Horn] are not open to the public or under state control." *Id*. at 950. Acknowledging that these distinctions did in fact exist, the Ninth Circuit nevertheless held they were "immaterial," and that the land on which Big Horn's facilities were built "are the equivalent of non-Indian fee land for the purpose of considering the limits of the Tribe's regulatory jurisdiction." *Id*.; *see also Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 1999) (finding "no principled distinction" between the public highway right-of-way in *Strate* and a right-of-way for the "construction, operation and maintenance" of a private railroad).

Defendants also erroneously contend that, "[u]nlike in *Strate*, the right-of-way is not central to the dispute" in this case. (Response at 6). The grant of rights-of-way at issue in *Strate* had no causal connection or direct relationship to the automobile accident which gave rise to *Strate*. Instead, the right-of-way simply applied to the land on which the accident occurred. As a result of the right-of-way, the tribe no longer had a right to occupy the subject land or to exclude others from it. Consequently, the Supreme Court held that the subject land was the equivalent of non-Indian fee land for purposes of determining whether the tribe had regulatory or adjudicatory authority over the accident. The § 323 Grant plays precisely the same role in this case; it applies to the land on which NGS is built. As a result of the § 323 Grant, the Navajo Nation no longer has a right to exclude others from using the land, and all Navajo rights to use the land have been extinguished. Therefore, just as in *Strate*, the § 323 Grant makes the land on which NGS is built the equivalent of non-Indian fee land for purposes of the issues before this Court.

Next, Defendants contend that the land on which NGS is built "is merely leased to Plaintiffs" and therefore "should not be considered alienated for *Montana* purposes." (Response at 6). Defendants' contention is incorrect. By the § 323 Grant, the United States granted to the SRP and the other Participants "rights-of-way and easements in, on, over, along and across the lands," and the "quiet enjoyment and peaceful and **exclusive possession**" thereof. (PSOF ¶¶ 19, 24 (emphasis added)). The § 323 Grant also, with certain limited exceptions not applicable here, "extinguished and prohibited" "[a]ll present existing Indian uses" of the granted lands. (PSOF ¶ 23). Furthermore, these rights granted 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 Grant rights "are not subject or subordinate to any provision of the [1969] Lease." (PSOF ¶ 28). The Navajo Nation expressly consented to the § 323

Grant (PSOF ¶¶ 11-12 and 1969 Lease at § 2), and the Secretary expressly noted and relied on that consent in the § 323 Grant itself. (PSOF ¶ 22). Defendants admit all of these facts. (DSOF (amended) at 2 and ¶ 22).

Accordingly, as in *Strate*, the Navajo Nation cannot assert a landowner's right to occupy the lands or to exclude all others from those lands. Therefore, just as in *Strate*, those lands are as a matter of law "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Strate*, 520 U.S. at 454. Thus, there is no question that *Montana*'s analytical framework governs here, and that under the law established in *Strate*, the Defendants in this case have no inherent sovereign authority to regulate SRP's employment relationships beyond the limited preference requirement in the 1969 Lease. Defendants' arguments to the contrary have no merit.

C. *Montana*'s Consensual Relationship Exception Does Not Apply Here.

Defendants alternatively argue that, if *Montana*'s analytical framework does apply, their attempt to regulate SRP's employment relations fits within *Montana*'s first exception.[2] They base their argument solely on the 1969 Lease, contending that the 1969 Lease is a consensual relationship between SRP and the Navajo Nation, and therefore SRP is subject to any and all of the Navajo Nation's regulations. (Response at 7). This argument has no merit because the consensual relationship exception requires that the consensual relationship evidence the nonmember's consent to the specific regulation at issue. Here, far from evidencing SRP's consent to Defendants' regulation of SRP's employment relations at NGS, the 1969 Lease contains an express covenant that the Navajo Nation will **not** regulate or attempt to regulate SRP's operation of NGS beyond what is provided in the 1969 Lease itself.

[2] Defendants do not dispute that *Montana*'s second exception has no application to this case. Accordingly, they have waived that argument, and SRP will not address that exception here.

The law is clear that *Montana*'s consensual relationship exception applies when nonmembers have "subjected themselves" to tribal civil jurisdiction. *Atkinson*, 532 U.S. at 651. The mere existence of a "consensual relationship" by itself, is not enough; this exception applies "only if the nonmember has consented, either expressly or by his actions" to the specific regulation at issue. *Plains Commerce Bank*, 554 U.S. at 337; *see also Atkinson*, 532 U.S. at 657 (the central issue is whether the nonmember "can[] be said to have consented" to the specific tax or regulation at issue); *id.* at 656 ("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.'").

The 1969 Lease does not evidence SRP's consent to the Navajo Nation's enforcement of the NPEA. To the contrary, the 1969 Lease expressly prohibits the Navajo Nation from regulating SRP's operation of NGS, except to the extent expressly provided in the 1969 Lease:

> The [Navajo Nation] 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] . . . . This covenant shall not be deemed a waiver of whatever rights the [Navajo Nation] may have to regulate retail distribution of electricity on the Reservation Lands.

(PSOF ¶ 30). The only discussion of employment relations "expressly set out" in the 1969 Lease merely requires SRP and the other Participants "to give preference in employment to qualified local Navajos." (PSOF ¶ 29). No one disputes that SRP has fully complied with the employment preference requirement of the 1969 Lease.[3] Furthermore, it is undisputed

[3] Navajo employment at NGS has steadily increased over the more than 40 years since SRP entered the 1969 Lease. Indeed, during just the pendency of this litigation, the percentage of NGS employees who are Navajo has increased from 77% in 2008 (Doc. 55 at ¶ 66), to 81% in 2010 (Doc. 120 at ¶ 76), and is currently 84%. (PSOF ¶ 74).

that the claims asserted by Defendants Thinn and Gonnie which underlie this litigation are not based on the preference requirement of the 1969 Lease, but are based instead on the allegation that they were fired "without just cause in violation of the NPEA." (Response at 3). A just-cause requirement does not exist in the 1969 Lease.

Thus, Defendants' attempted enforcement of the NPEA against SRP is prohibited by the express language of the 1969 Lease. The 1969 Lease does not support Defendants' argument that SRP consented to the enforcement of the NPEA. At most, SRP consented to Navajo regulation of employment matters only to the limited extent expressly set out in the 1969 Lease**.** Beyond that limited extent, SRP not only did **not** consent to Navajo regulation, but it affirmatively obtained the Navajo Nation's covenant that the Nation would **not** regulate or even attempt to regulate. As discussed in more detail below, the onerous requirements of the NPEA go well beyond the narrow employment preference to which SRP agreed in the 1969 Lease. Therefore *Montana*'s first exception cannot apply.

Defendants argue against this obvious conclusion by contending that this Court should ignore what the 1969 Lease says. They suggest that it is enough that the 1969 Lease constitutes a consensual relationship between SRP and the Navajo Nation, and if the 1969 Lease purports to limit the scope of regulatory authority, that involves the issue of whether there was a valid waiver of sovereign authority which (they contend) is an entirely separate analysis from the *Montana* framework. (Response at 8). The case law applying *Montana*'s narrow consensual relationship exception uniformly rejects these contentions.

The central issue to be decided in *Montana*'s consensual relationship exception is whether the nonmember "can[] be said to have consented" to the specific tax or regulation at issue. *Atkinson*, 532 U.S. at 657. Thus, the issue is not merely whether there is any consensual relationship, but whether the consensual relationship includes consent to the specific exercise of tribal jurisdiction. For example, in *Atkinson*, it was undisputed that

Atkinson Trading had a consensual relationship with the Navajo Nation by virtue of its status as an "Indian trader." The Court held, however, that "it is clear" that consenting to trade with the tribe is not consent to be taxed in the rental of rooms to third parties. *Id*. at 656. Similarly, in *Strate*, although A-1 Contractors was on the reservation pursuant to a consensual relationship to perform landscaping work for the tribes, that did not mean the tribes had adjudicatory authority over A-1 Contractors related to a vehicle accident that occurred on a right-of-way within the reservation. 520 U.S. at 457; *see also Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 941-42 (9th Cir. 2009) ("The mere fact that a nonmember has some consensual commercial contacts with a tribe does not mean that the tribe has jurisdiction over all suits involving that nonmember").

Applying these principles in a case with many similarities to the present action, *Atkinson Trading Co. v. Manygoats*, 2004 WL 5215491 (D. Ariz. 2004), this Court (Judge McNamee) rejected the same arguments Defendants make here. At issue was whether Navajo tribal officials had exceeded their jurisdiction by attempting to enforce the NPEA against an employer operating a business on non-Indian fee land within the reservation. The tribal officials argued they had jurisdiction under *Montana*'s consensual relationship exception because the employer had entered into consensual employment relationships with Navajo employees. Rejecting that argument, this Court stated:

> An employment relationship is a consensual relationship in the sense that the employer consents to the employee working at the establishment, and the employee consents to working at the establishment. The consent required to trigger the first *Montana* exception, however, requires much more. ***Montana* requires consent to jurisdiction, either expressed, or implied by the parties' behavior**.

Id. at *9 (emphasis added). This Court further explained: "If an employer contracts with an employee about jurisdiction at the time of hiring, that employer might be entering into a

consensual relationship in the sense contemplated by *Montana*." *Id.* Accordingly, the court held the tribal officials exceeded their jurisdiction as a matter of federal law, and granted summary judgment for the employer. *Id.* at *12.

The lack of jurisdiction is even clearer in this case than it was in *Atkinson*, *Strate* and *Manygoats*. Far from expressly or impliedly consenting in the 1969 Lease to the Navajo Nation's enforcement of the NPEA or other employment regulations, SRP obtained the Nation's explicit covenant that "other than as expressly set out in this Lease, [the Navajo Nation] will not directly or indirectly regulate or attempt to regulate" SRP in the operation of NGS. Thus, Defendants cannot rely on the 1969 Lease as the consensual relationship between SRP and the Navajo Nation, and at the same time ignore the limitation on the Navajo Nation's regulatory authority expressly stated in that Lease.

For this same reason Defendants completely miss the mark when they contend that the required nexus exists between the 1969 Lease and the NPEA because both the NPEA and the 1969 Lease address the topic of employment. This contention again ignores the fact that the 1969 Lease expressly prohibits the Navajo Nation from regulating or attempting to regulate SRP in the operation of NGS, except as provided in the 1969 Lease.

In an effort to evade this express limitation on Defendants' regulatory authority in the 1969 Lease, Defendants erroneously assert that the NPEA merely "fleshes out what it means to give preference in employment to Navajos." (Response at 12; *see also id.* at 3, n.4). However, the 1969 Lease does not require SRP to comply with the NPEA. Indeed, the NPEA was not even enacted until 1985 – more than fifteen years after SRP entered into the 1969 Lease. Moreover, notwithstanding Defendants' mischaracterizations to the contrary, the NPEA goes far beyond the 1969 Lease's simple requirement "to give preference in employment to qualified local Navajos." (PSOF ¶ 29). For example, among many other things, the NPEA purports to require employers to pay the "prevailing wage"

established by the Navajo Office of Labor Relations and to terminate employment relationships only for "just cause." (PSOF ¶ 33). According to the Navajo Nation Supreme Court's own description, the NPEA includes "employment procedures, just cause employment tenure, health and safety guarantees and training requirements." *Arizona Public Service Co. v. Office of Navajo Labor Relations*, No. A-CV-08-87 (Navajo Sup. Ct. 1990). None of these are mandated by the simple Navajo preference provision in the 1969 Lease. Thus, SRP never consented to these additional requirements contained in the NPEA; in fact, the Navajo Nation expressly covenanted that it would not attempt to impose such additional requirements on SRP (and its contractors).

Therefore, Defendants are simply wrong when they mistakenly argue that this Court should ignore the non-regulation provision of the 1969 Lease when analyzing *Montana*'s first exception and consider it only when determining whether the non-regulation provision effectively waived the Navajo Nation's existing sovereign powers. The fundamental purpose of the *Montana* exceptions is to determine whether, despite the general rule of no jurisdiction over nonmembers, the tribe nevertheless has some inherent sovereign authority to regulate those who are not members of the tribe. The Navajo Nation's covenant not to regulate beyond what was expressly provided in the 1969 Lease speaks directly to that issue, and is therefore highly relevant to Defendants' attempt to rely on *Montana*'s first exception.

In this case, the consensual relationship between the Navajo Nation and SRP (i.e., the 1969 Lease) expressly provided that the Navajo Nation would have no power to regulate SRP's operations at NGS beyond what was expressly stated in the 1969 Lease. The NPEA unquestionably goes well beyond what the 1969 Lease provides. It simply makes no sense to argue that SRP, by entering into the 1969 Lease, has consented to the

very kind of regulation by Defendants' which the 1969 Lease itself forbids. Thus, SRP is entitled to summary judgment.[4]

III. THE NAVAJO NATION UNMISTAKABLY WAIVED ANY AUTHORITY TO REGULATE THAT MIGHT OTHERWISE EXIST.

Even if Defendants were able to overcome the presumption against tribal authority over nonmembers and demonstrate that *Montana*'s first exception applies here, SRP would still be entitled to summary judgment because the Navajo Nation unmistakably waived any regulatory authority it may have had over SRP, beyond what is "expressly set out" in the 1969 Lease, when it entered into the 1969 Lease. That waiver is contained in the non-regulation provision which states, in relevant part:

> 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] . . . . 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.

[4] Even if it could be argued that Defendants have regulatory jurisdiction to make the NPEA applicable to NGS, that would not mean that the Navajo Nation also has adjudicatory authority to enforce the NPEA against SRP in tribal courts or administrative agencies. While the Supreme Court has made it clear that, "[a]s to nonmember a tribe's adjudicatory jurisdiction does not exceed its legislative jurisdiction," it remains an open question "whether a tribe's adjudicative jurisdiction *equals* its legislative jurisdiction." *Hicks*, 533 U.S. at 357-58 (emphasis in original); s*ee also id*. at 358, n.2 (noting "we have never held that a tribal court had jurisdiction over a nonmember defendant"); *Plains Commerce Bank*, 554 U.S. at 337 (noting several reasons that tribal court jurisdiction over nonmembers is appropriately limited, including: "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.") (quoting *Hicks*, 533 U.S. at 383 (Souter, J., concurring)).

(PSOF ¶ 30). When interpreting a substantially similar non-regulation provision, the Ninth Circuit in *Aspaas* held the Navajo Nation had unmistakably waived any regulatory authority that otherwise would have existed. 77 F.3d at 1134. The same conclusion applies here, and SRP is therefore also entitled to summary judgment on this alternative basis.

In an effort to withstand Plaintiffs' motion for summary judgment with respect to the waiver argument, Defendants contend: (1) this Court cannot address this issue because the Navajo Nation is an indispensable party; (2) the waiver in the non-regulation provision does not extend to employment relations; and (3) *Aspaas* is distinguishable from this case. None of these arguments has merit.

A. The Ninth Circuit Has Already Held in this Case that the Waiver Argument May Be Decided Despite the Navajo Nation's Absence.

Defendants argue that this Court cannot address Plaintiffs' waiver argument because that argument involves the interpretation of the 1969 Lease to which the Navajo Nation is a party, and therefore the Nation is an indispensable party under Rule 19. (Response at 1, 9-11). However, that argument is baseless because Defendants have already made that argument in the Ninth Circuit, and that Court has already rejected it.

Defendants made the very same argument (and cited the very same cases in support) in the Ninth Circuit, in both their answering brief (*see* excerpts attached hereto at Exhibit A to counsel's declaration) and their unsuccessful petitions for rehearing and rehearing en banc (*see* excerpts attached hereto as Exhibit B to counsel's declaration).[5] The Ninth Circuit understood that Defendants were arguing (as they are again arguing now) "that the tribe automatically is a necessary party to any action challenging a lease to which the tribe is a signatory." *Salt River Project Agricultural Improvement and Power*

[5] This Court may take judicial notice of the briefs and petitions filed in the Ninth Circuit. *See Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007); Rule 201, Fed. R. Evid.

District v. Lee, 672 F.3d 1176, 1181 (9th Cir. 2012). The Ninth Circuit rejected that argument, holding that "the Navajo official defendants can be expected to adequately represent the Navajo Nation's interests," and therefore "[t]his lawsuit . . . may proceed against the officials under a routine application of *Ex parte Young*." *Id.* at 1177, 1180. The Ninth Circuit's rejection of that argument is the law of the case, and precludes this Court's reconsideration of the issue. *See Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) ("Under the law of the case doctrine, a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case.").

Attempting to evade the Ninth Circuit's binding decision, Defendants erroneously contend that "[t]he Ninth Circuit held that the Navajo Nation was not an indispensable party [under Rule 19(b)] for the purposes of an *Ex Parte Young* suit . . . [but] it did not explicitly hold that the Navajo Nation was not an indispensable party in a suit seeking to interpret the terms of the 1969 Lease, to which the Nation . . . was a signatory." (Response at 1, 5, 10). To begin with, the Ninth Circuit did not base its decision on Rule 19(b) at all; it did not have to reach Rule 19(b) because it held that the Navajo Nation was not even a "necessary party" under Rule 19(a). *Lee*, 672 F.3d at 1181. Moreover, the Ninth Circuit **did** explicitly reject the argument that SRP's claims could not proceed because the Navajo Nation was a signatory to the 1969 Lease; it held that Defendants "adequately represent the tribe's interests" and that "[t]his lawsuit for prospective injunctive relief may proceed." *Id.* at 1177, 1181. Contrary to Defendants' assertion, nothing in the Ninth Circuit's opinion suggests that only Plaintiffs' argument based on the *Montana* analytical framework "may proceed," and Plaintiffs' waiver argument may not. Both arguments are based on the assertion that Defendants are violating federal law,

and therefore they both are "a routine application of *Ex parte Young*" which the Ninth Circuit held "may proceed." *Id*. at 1177.[6]

B. The Navajo Nation Unmistakably Waived Any Right to Enforce the NPEA Against SRP.

Defendants concede that the non-regulation provision in the 1969 Lease is a valid waiver of the right to regulate construction, maintenance or operation at NGS. (Response at 11 ("There is no dispute that regulation of 'construction, maintenance or operation' was waived in the lease.")). They nevertheless argue that the waiver does not apply to regulation of employment relations. Their argument has no merit.

The only "evidence" Defendants cite in support of their argument is the fact that the 1969 Lease also includes a separate provision regarding SRP's obligation to give preference in employment to Navajos at NGS. From this fact, Defendants leap to the illogical conclusion that the parties intended that the Navajo Nation would retain its full authority to regulate employment; otherwise (they assert) the 1969 Lease would have expressly carved out an exception to the waiver for the Navajo preference requirement, like the express carve-out made for regulation of retail distribution of electricity. (Response at 12). Defendants' analysis could not be more wrong.

[6] Unfortunately, this is not the only instance of Defendants mischaracterizing the Ninth Circuit's prior decisions in this litigation. They also erroneously assert that the Ninth Circuit concluded in the first appeal that Plaintiffs had no further obligation to submit their dispute with the Navajo Nation to the Secretary of the Interior "because the Secretary had already addressed the dispute." (Response at 5; *see also id*. at 14 (asserting that SRP "has refused to abide by the Secretary's determination")). This Court has already rejected Defendants' mischaracterization when it stated: "Obviously, given the Court's earlier ruling on the [first] motion to dismiss, the undersigned believed that the Secretary had **not** reached a final decision on the merits and instead was deferring to this Court to finally decide the issues," and "[t]he Ninth Circuit did **not** definitively state whether it concluded that the Secretary had reached a final decision of the merits." (Doc. 150 at 5 (emphasis added)).

Defendants' argument fails to recognize that the non-regulation provision does, in fact, already contain a carve-out that applies to SRP's obligation under the 1969 Lease to give employment preference to Navajos. The non-regulation provision waives the Navajo Nation's regulatory authority over **all** operations at NGS "other than as expressly set out in this Lease." Because the narrow obligation under the 1969 Lease to give employment preference to local Navajos is expressly stated elsewhere in the Lease, that "other than" language applies, and there is no need also to state a specific carve-out for that obligation. By contrast, a specific carve-out for regulation of retail distribution of electricity on the reservation was necessary to preserve the tribe's regulatory rights on that subject because the 1969 Lease does not otherwise expressly address it.

Accordingly, the only proper interpretation of the non-regulation provision is that the Navajo Nation waived any rights it otherwise may have had to regulate SRP's employment relations at NGS, beyond the narrow Navajo preference obligation expressly set out elsewhere in the 1969 Lease. If the parties had intended to create an exception to the non-regulation covenant to allow the Navajo Nation to enforce future tribal employment ordinances such as the NPEA, they would have expressly so stated (as they did with respect to retail distribution of electricity). Therefore, SRP is also entitled to summary judgment based on the waiver argument.

C. *Aspaas* Compels the Conclusion that an Unmistakable Waiver Exists in this Case.

As previously mentioned, the Ninth Circuit already accepted and applied the waiver argument in *Aspaas* – a case that arose out of circumstances nearly identical to this case. Like this case, *Aspaas* involved the Navajo Nation's attempt to enforce the NPEA against Arizona Public Service Co. ("APS") at a power plant. Like this case, the power plant was built on the Navajo reservation pursuant to a lease agreement with the Nation and a § 323

grant from the United States. When interpreting a non-regulation provision in APS's lease (which provision is substantially similar[7] to the one at issue here), *Aspaas* held that "the record evidences the requisite unmistakable waiver" of the right to regulate APS's employment relations. 77 F.3d at 1135.

Defendants' efforts to distinguish *Aspaas* from this case fail. For example, they assert that the 1985 amendment to the APS lease restricted the preference obligation to "Indian" preference until such time as the tribe secured a judgment authorizing "Navajo" preference. (Response at 13-14). While it is true that there is nothing comparable in the 1969 Lease at issue here, Defendants offer no explanation as to why that difference matters. The truth is that it does not; it is immaterial.

Defendants also note that APS and the tribe had agreed to a dispute resolution provision specific to employment issues (which does not exist in the 1969 Lease) and which *Aspaas* found to be "[o]f particular significance." (Response at 14; *see also Aspaas* at 1135). However, that provision was significant because it corroborated the unambiguously clear language of the non-regulation provision itself. The absence of such additional evidence in the 1969 Lease does not in any way lessen the clarity of the waiver contained in the substantially similar non-regulation provision at issue here.

Next, Defendants note that, unlike the 1969 Lease, the non-regulation provision in the APS lease specifically mentions "policies or practices," and they argue that the district court in *Aspaas* found this to be "dispositive," based on the fact that the injunction which

[7] Defendants contend that it "is simply not the case" that the non-regulation provisions in the 1969 Lease and APS's lease are substantially similar. However, that contention is disingenuous because the Navajo Nation itself (through the Navajo Department of Justice) acknowledged that the non-regulation provisions are "similar," and even warned the Justices of the Navajo Nation Supreme Court 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).

the district court ultimately issued against the tribal officials prohibited them from attempting to regulate "employment relations policies or practices." (Response at 13). However, the mention of "policies or practices" in the non-regulation provision clearly was not dispositive. The non-regulation provision in the APS lease does not specifically mention "employment relations," but yet that phrase was also included in the court's permanent injunction order. Thus, the non-regulation provision does not need to list every possible kind or category of "operation" in order to be unambiguous. Defendants' argument that the term "operation" is ambiguous because it may or may not include employment relations, is akin to arguing that "no dogs allowed" is ambiguous because it does not specifically mention beagles.

Finally, Defendants make one last attempt to distinguish this case from *Aspaas*. They contend that the Navajo Nation Supreme Court held in this case that, as a matter of Navajo law, the Navajo Nation Council (acting through its Advisory Committee) had no power to waive tribal authority to regulate employment relations.[8] They further contend that the Ninth Circuit did not have the benefit of this Navajo law determination when deciding *Aspaas*, hinting that the result would have different in *Aspaas* if the concept of deferring to tribal courts on issues of tribal law had been argued in *Aspaas*. (Response at 14-15). Defendants are wrong on all counts.

First, they are wrong that these issues were not argued and addressed in *Aspaas*. In response to APS's motion for summary judgment, the Navajo tribal officials in *Aspaas* argued: "The Navajo Supreme Court determined as a matter of Navajo law, the Navajo Tribal Council was without authority in 1960 to convey to APS an enforceable covenant to waive all future exercises of Navajo Nation police power at the Four Corners Power Plant."

[8] Defendants do not offer any explanation as to why the Council had the power to validly waive the authority to regulate construction, maintenance and operation of NGS (which they admit), but not the power to waive the authority to regulate employment relations.

(PSOF ¶ 64). They further argued that the federal courts are "without authority to overrule the Navajo Nation Supreme Court on this matter of Navajo law." (PSOF ¶ 65). Thus, *Aspaas* was decided with these precise concepts at the forefront.

Not only were these arguments expressly raised in *Aspaas*, but neither the district court nor the Ninth Circuit had any problem promptly disposing of them. The district court held: "The court finds that this issue [whether the Navajo Nation Council can waive sovereign authority] is not a matter of Navajo law and thus need not defer to the Navajo Supreme Court." (PSOF ¶ 66). Similarly, the Ninth Circuit held:

> The appellants further contend that the Navajo Tribal Council, which approved the operative documents here (and later enacted the NPEA), lacked authority to waive sovereign police power in lease arrangements. This position is untenable.

Aspaas, 77 F.3d at 1135.

Even if *Aspaas* had not addressed and rejected the very arguments Defendants now assert, Defendants would still be wrong in their assertion that this Court must defer to the Navajo Nation Supreme Court's determination that the Council was powerless to waive the tribe's regulatory authority over employment relations, directly or through a subcommittee. It is beyond dispute that the extent to which a tribe has jurisdiction over nonmembers is not a matter of self-proclaimed tribal law, but an issue of federal law. *See, e.g., Plains Commerce Bank*, 554 U.S. at 324 ("We begin by noting that whether a tribal court has adjudicative authority over nonmembers is a federal question."); *Big Horn*, 219 F.3d at 949 ("Questions about tribal jurisdiction over non-Indians is an issue of federal law reviewed de novo.").

The cases on which Defendants rely (Response at 15) are perfectly consistent with the conclusion that the issues in this case are federal, not tribal. *LaPlante* clarified that the requirement of exhausting tribal court remedies before challenging a tribe's jurisdiction in federal court was merely a matter of comity. 480 U.S. at 16 n.8. The exhaustion

requirement "did not deprive the federal courts of subject-matter jurisdiction," or otherwise convert the jurisdictional issue into one of tribal law. *Id*. Similarly, *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004), did not involve the federal law issue of the extent of tribal jurisdiction over nonmembers. Instead, the issue was whether certain employee benefit plans had been formally adopted under the corporate laws of the tribe. The court of appeals held that the district court had erred in not giving proper deference to the tribal court on that non-jurisdictional issue. Thus, these cases do not alter in the least the fact that "whether an Indian tribe retains power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985). If, as Defendants suggest, the Navajo Nation Supreme Court decided the jurisdictional issue based on Navajo law, that merely means that the Navajo court applied the wrong law; it does not convert an issue that "must be answered by reference to federal law" into a purely tribal-law issue.

Even if it were possible to characterize the extent of the Council's power to waive tribal authority over nonmembers as implicating Navajo law, the Navajo Nation Supreme Court's determination is, at most, intertwined with the larger federal jurisdictional issue and cannot be used to usurp or frustrate federal law and policy. Numerous analogous attempts by state courts to affect federal rights and policy make it clear that federal courts have ultimate authority to reexamine and override state court interpretation of "state law," and the same must be true regarding tribal law. This principle is as old as *Martin v. Hunter's Lessee*, 1 Wheat. 304, 4 L. Ed. 97 (1816), which held "that if a ruling of state law serves as an antecedent for determining whether or not a federal right has been violated, some review of the 'adequacy' of the state court's determination of the state-law question is essential if the federal right is to be protected from evasion and discrimination." *See also*

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 278 & n.4 (1959) (the interpretation of an interstate compact "presents a federal question . . . on which this Court has the final say . . . even though the matter in dispute [whether the states had effectively waived their immunity under the 11th Amendment] is a question of state law on which the courts or other agencies of the State have spoken"); *Broad River Power Co. v. State*, 281 U.S. 537, 540 (1930) ("Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be evaded."). Thus, the Navajo Nation Supreme Court cannot convert the federal question of tribal jurisdiction over nonmembers into one of Navajo law merely by making references to Navajo fundamental laws or traditions.

D. Conclusion.

Thus, contrary to Defendants' assertions, the underlying facts, the arguments made and even the relevant non-regulation provision in the lease which the Ninth Circuit considered in *Aspaas* are nearly identical to those in this case. Accordingly, *Aspaas* applies and compels the same conclusion in this case: the Navajo Nation unmistakably waived whatever authority it might have otherwise had over SRP's employment relations at NGS (other than as expressly set out in the limited preference provision of the 1969 Lease). Thus, Defendants have exceeded (and are threatening to continue to exceed) their jurisdiction in violation of federal law, and Plaintiffs are entitled to summary judgment as a matter of law.

IV. NO GENUINE ISSUE OF FACT PRECLUDES SUMMARY JUDGMENT FOR PLAINTIFFS.

Although they assert several additional facts about how the Navajo Nation viewed SRP's employment practices at NGS more than two decades ago, [9] Defendants do not

[9] In the more than two decades since SRP voluntarily implemented its Navajo Preference Plan in 1987, only four Navajo employees have filed complaints with the Navajo Nation

contend that there are any genuine issues of material fact that would preclude the grant of summary judgment for Plaintiffs. Instead, like Plaintiffs, Defendants contend that the extent of tribal jurisdiction over employment relations at NGS can be decided as a matter of law; Defendants simply are wrong on the law. Accordingly, the extent of Defendants' authority to regulate employment relations at NGS is purely an issue of law which this Court may decide in Plaintiffs' favor by summary judgment.

V. PLAINTIFFS ARE ENTITLED TO A PERMANENT INJUNCTION.

Defendants contend that this Court should not grant permanent injunctive relief to SRP because they had authority to enforce NPEA at NGS. (Response at 16). However, as demonstrated above, Plaintiffs should prevail on the merits in this action. Accordingly, the injunctive relief Plaintiffs request is appropriate.

Next, Defendants contend that injunctive relief is unwarranted because SRP is already obligated under the terms of the 1969 Lease to give Navajo preference in employment. (Response at 16). That contention has no merit because the NPEA's requirements are substantially broader and more onerous than the simple employment preference to which SRP agreed in the 1969 Lease. *See supra* at 14-15; *see also* PSOF ¶¶ 32-33. It is these additional requirements of the NPEA that the 1969 Lease does not impose on SRP and which cause serious safety and efficiency concerns. (PSOF ¶¶ 67-73, 75-78).

Defendants accuse SRP of not wanting to be bound by the employment preference provision of the 1969 Lease. Nothing SRP has said in this litigation or in the declaratory

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Labor Commission ("NNLC") against SRP. SRP consistently challenged the Navajo Nation's jurisdiction as to each of these complaints, and the NNLC was able to avoid directly deciding the jurisdictional issue as to the first three complaints because the parties settled, the employee voluntarily dismissed or the NNLC dismissed the complaint because the employee was also pursuing federal court litigation. Finally, with respect to the complaint, filed by Thinn, the NNLC addressed the jurisdictional issue head on and determined that it lacked jurisdiction to enforce the NPEA against SRP. (PSOF ¶¶ 43-46).

and injunctive relief SRP seeks supports that accusation. To the contrary, SRP seeks only to prevent Defendants from imposing the additional kinds of requirements in the NPEA to which SRP did not agree – and which the Navajo Nation explicitly covenanted it would not attempt to enforce at NGS. Furthermore, Defendants have no evidence (nor do they even allege) that SRP is not in full compliance with the limited Navajo preference requirement of the 1969 Lease.

The balance-of-hardships favors Plaintiffs.[10] In the event that the Court finds for the Plaintiffs on the fundamental jurisdictional issue discussed above, Plaintiffs should have the right to be free from additional employment regulation under the NPEA, and should be entitled to a permanent injunction to keep Defendants from attempting to enforce the NPEA (or other employment regulations) at NGS in the future. SRP bargained for and obtained the right in the 1969 Lease to be free of such regulation. Such regulation would have a serious negative effect on the operations and safety of NGS. (PSOF ¶¶ 67-73, 75-78). The Plaintiffs should not have to expend time, money and resources defending actions under the NPEA if the Court finds that regulations beyond the limited requirements of the 1969 Lease (including the NPEA) do not apply at NGS.

Defendants also assert that there may be a problem with "SRP's choice of defendants" because some of the Navajo officials no longer hold their offices on the Navajo Nation Supreme Court and the NNLC. (Response at 1, n.1). That assertion is baseless because an "officer's successor is automatically substituted as a party" when "a party in an official capacity . . . ceases to hold office while the action is pending." Rule 25(d), Fed. R. Civ. P. Furthermore, "[a]n injunction against a public officer in his official

[10] In their balance-of-hardships argument, Defendants continue to argue the merits. Such argument is improper; Plaintiffs will have had to prevail on the merits to be eligible for a permanent injunction in the first place.

capacity – which is what the plaintiffs seek here – remains in force against the officer's successors." *Lee*, 672 F.3d at 1180 (citing Rule 65(d), Fed. R. Civ. P.).

Finally, regarding the public interest aspect, Defendants agree that "the public has an interest in the sanctity of contract and in the efficient operation of NGS," but contend that the federal policy of "tribal self-government" outweighs that interest. (Response at 17). SRP respectfully disagrees. As one court stated:

> It is difficult to understand, however, how encouraging the Indians not to live up to their contractual obligations, which they entered into freely and with the Secretary's approval, could be said to encourage self-determination. To the contrary, one would think that the best way to make the Indians more responsible citizens would be to require them to live up to their contractual obligations.

United Nuclear Corp. v. United States, 912 F.2d 1432, 1437 (Fed. Cir. 1990). Thus, if Plaintiffs prevail on the merits, this Court should grant Plaintiffs permanent injunctive relief as prayed for in the Complaint.

VI. CONCLUSION.

For the reasons discussed above, this Court should grant summary judgment for Plaintiffs and deny Defendants' cross-motion for summary judgment.

DATED this 14th day of September, 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

COPY of the foregoing filed electronically with the Court's CM/ECF system on this 14th day of September, 2012:

Clerk of the United States District Court
Sandra Day O'Connor U.S. Courthouse
401 West Washington Street
Phoenix, AZ 85003-2156

COPY of the foregoing mailed this 14th day of September, 2012 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 of the foregoing served on the following through the Court's CM/ECF system on this 11th day of September, 2012:

Philip R. Higdon
Kirstin T. Eidenbach
Perkins, Coie LLP
2901 North Central Avenue, Suite 2000
Phoenix, AZ 85012
Attorneys for Navajo Official 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