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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE HOPI TRIBE Plaintiff, v. NAVAJO NATION Defendant.	CASE NO. CV-13-8172-GMS **RESPONSE TO NAVAJO NATION'S MOTION TO DISMISS THE HOPI TRIBE'S SECOND AND THIRD CLAIMS FOR RELIEF** **And** **REPLY TO NAVAJO NATION'S RESPONSE TO THE HOPI TRIBE'S MOTION TO VACATE ARBITRATION DECISION**

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INTRODUCTION

The crux of the Navajo Nation's argument is that the Joint Commission's Order dismissing the Hopi Demand constitutes a ruling on the meaning of the Compact, and that the Joint Commission could make such a ruling without considering any evidence relating to the intent of the parties. The Navajo are wrong on both counts.

The unequivocal decision of the Commission proves that the Commission was not entering a decision on the merits. The Navajo fail to acknowledge the actual language of the Commission's decision or the fact that the Commission dismissed the Hopi Tribe's Demand for Arbitration *without prejudice*. *See* Ex. 9[1] (Order dated Apr. 17, 2013) at 3. A dismissal without prejudice is *per se* not a ruling on the merits. To support its argument that the Joint Commission's Order resolved the parties' dispute, the Navajo instead rely on mischaracterizations of the record from the arbitration proceedings and the relief that the Hopi Tribe seeks.

In addition, the Navajo's interpretation of the Compact is in conflict with the plain language of the agreement and the substantial evidence, including testimony from key Navajo officials, showing that the parties did not intend to prevent Hopi eagle gathering on allotments within the Exhibit B areas. In asking the Court to dismiss the Hopi Tribe's case and deprive the Hopi of any forum that will decide the merits of the dispute, the Navajo Nation does not respond to any of this evidence. Under the Federal Arbitration Act, the Commission was required to consider this evidence when determining the meaning of the Compact. *See, e .g., Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local* 901, 763 F.2d 34, 40 (1st Cir. 1985); *Int'l Union,United Mine Workers of Am. v. Marrowbone Dev. Co*., 232 F.3d 383, 389-90 (4th Cir. 2000). Because the Commission did not consider any evidence in dismissing the Hopi Demand, its decision cannot stand unless this Court hears the case. *Id.*

[1] All citations to Exhibits 1-11 refer to the exhibits cited in the Hopi Tribe's Motion to Vacate Arbitration Decision (Dkt. #3).

The Navajo Nation has not identified a forum where it agrees the Hopi Tribe can have its claims resolved, and its efforts to recast the Commission's dismissal into an order on the merits show that it wants to avoid having to publicly defend the arguments against tribal sovereignty that it uses to justify its actions. However, the Compact, federal law, and the United States Constitution require that the Hopi Tribe receive a fair hearing to present evidence in support of the continuation of its centuries-old religious practices, which was the Hopi Tribe's principal objective in entering the Compact.

The Hopi position is that this Court can and should resolve the parties' dispute about the meaning of the Compact as set forth in Count I of the Complaint. If, however, the Court decides that it will not hear this case, the Hopi Tribe requests that the Court vacate the Commission's decision and order the Commission to hold an evidentiary hearing and make a decision on the merits. The fact that the dispute involved allotments does not deprive the Commission of jurisdiction to interpret the meaning of the Compact, a point the Navajo do not even dispute. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 20 (1983). If the Court were to rule otherwise, the Navajo would continue to arrest Hopi practitioners on religious pilgrimages without ever affording the Hopi Tribe an opportunity to prove that both parties intended to preserve the Hopi's ability to engage in their sacred religious practices.

ARGUMENT

I. THE COMMISSION DID NOT RULE ON THE MERITS OF THE DISPUTE OR THE MEANING OF THE COMPACT.

The Commission's dismissal of the Hopi Tribe's Demand was without prejudice, and, therefore, the Commission's Order is not a decision on the merits of the Hopi Tribe's claims. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) ("'[D]ismissal ... without prejudice' is a dismissal that does not 'operat[e] as an adjudication upon the merits'") (citation omitted); *Vincze v. Robinson*, 103 F. App'x. 152, 153 (9th Cir. 2004) (same); *Scholastic Entertmt., Inc. v. Fox Entertmt. Group, Inc.*, 336 F.3d 982, 989 n.4 (9th Cir. 2003) (same). Because a party dismissed without

prejudice is free to assert its claims again in the future, an order dismissing a case without prejudice cannot constitute an adjudication of the merits of the case.

The fact that the Commission concluded that jurisdiction lies with this Court, stated that it would accept jurisdiction over the case in future if this Court were to find that it has jurisdiction, and admitted that it did not "consider the dispute" (which is a necessary predicate to resolving the dispute), underscores that the Commission did not determine the meaning of the disputed provisions of the Compact or the authority of the Navajo Nation to fulfill its obligations under the Compact. *See* Ex. 9 at 2.

The Navajo Nation never addresses, or even mentions, that the Commission's Order dismissing the Hopi Demand was without prejudice. Instead, the Navajo simply assert that the Commission made an interpretation of the disputed Compact provisions even though the written decision says no such thing. To provide support for its position, the Navajo attempt to construe statements made by the Chairman of the Commission during the arbitration proceedings. For example, the Navajo cite the following statement from Commissioner Fields:

> CHAIRMAN FIELDS: All right. Well, I think I understand. I think we all understand both sides of the position. I mean, if a Federal judge, in a later hearing, says, "Oh, no, Commission, you do have jurisdiction," well, that's a different story. But, at this point, we're granting it based -- We're granting the Motion on the basis that was set forth in the Motion to Dismiss: that we don't have jurisdiction under Federal law and it is not given to us, and it can't be given to us in the agreement. And that will come out in the record, and all of us will sign it, so it'll be clear. Ex. 6 (April 9, 2013 Tr.) at 90.

Without any explanation, the Navajo assert that this statement stands for the proposition that "the Commission determined that the Compact did not extend to allotments by way of the plain language of Section 2.4 and the use of its defined terms." Nav. Resp. at 9 (Dkt. #16).

Far from entering a ruling on the meaning of the Compact Section 2.4, however, the statement indicates that the Commission decided that it did not have jurisdiction to reach the merits of the case, but would resolve the parties' dispute in the future if this Court were to find that the Commission has jurisdiction. The statement also indicated

that the written ruling would be clear as to what the Commission's ruling was. The Commission's April 17, 2013 Order confirms that it was not making a ruling on the merits of the dispute, but was operating under the belief that federal court was the proper venue to resolve the dispute.

In arguing that the Commission decided the case on the merits, the Navajo also misrepresent the scope of the relief that the Hopi Tribe seeks. The Navajo allege that the "Commission, taking into account the limits of federal law, determined that what the Hopi Tribe asked of it—to grant a property right over allotments to the Hopi Tribe—was impossible under its reading of federal law, and accordingly dismissed the Hopi Tribe's demand." Nav. Resp. at 14 & n.7. The Commission, however, did not rule that the Hopi's requested relief was barred by federal law, and the Navajo cannot cite a single indication that this is what the Commission held.

Moreover, the Hopi Tribe requested several types of relief, including asking the Commission to order the Navajo Nation government to refrain from arresting or otherwise interfering with Hopi religious practitioners in the Exhibit B areas, an action which the Navajo agreed to take in the Compact. *See, e.g,* Ex. 10 (Hopi Pretrial Brief) at 25-26; Ex. 1 (Compact) at §§2.8, 2.9. This would not be the grant of a property right but a legitimate exercise of tribal sovereignty. Navajo officials have confirmed that the Navajo Nation has the sovereign authority to enact legislation that would eliminate Navajo permit requirements and Navajo trespass laws within its territorial jurisdiction. *See* Tr. March 28, 2013 Dep. L. Denetsosie at 108 (attached as Ex. 12). The Commission never ruled that this type of relief was barred by federal law, nor could it have.

Further, the federal regulation that the Navajo Nation cites has no bearing on the Navajo Nation's sovereign authority to make and enforce its own laws. *See, e.g.*, Nav. Resp. at 13 (relying on 5 C.F.R. Part 169, which describes regulations for "rights-of-way for railroads, oil and gas pipelines, telephone and telegraph lines and other communications facilities, power projects, and public highways"). The regulation also is not on point because the Hopi Tribe is not seeking a "right-of-way." The Navajo's

semantic argument that the relief the Hopi Tribe seeks is a "property right," which the Navajo could not convey, is a red herring. By whatever name, what the Hopi Tribe seeks is an order that the Navajo Nation will not interfere with Hopi religious pilgrims' ability to conduct their sacred eagle gathering pilgrimages in the Exhibit B areas, as agreed in the Compact.

Ordering the Navajo to refrain from arresting Hopi practitioners would not result in a "lawless frontier" as the Navajo allege. Nav. Resp. at 16 n.9. As they do today, Navajo law enforcement personnel would continue to enforce Navajo public health and safety laws to prevent public disturbances. Accordingly, members of the Navajo Nation could not exercise self-help against Hopi practitioners, and Hopi practitioners would have to act appropriately and comply with other Navajo laws during their pilgrimages. Ex. 1 (Compact) at §2.8. The only difference would be that eagle gathering on allotments in accordance with the terms of the Compact would not constitute a crime under Navajo law, and thus Hopi practitioners could conduct their pilgrimages without fear of prosecution from the Navajo government.

In the end, however, the Commission dismissed the Hopi Demand without prejudice and thus never considered the possible effects of granting the relief the Hopi Tribe seeks or the merits of the Hopi Tribe's claims. The Navajo seem to recognize that, if the Commission's ruling was not a decision on the merits, it cannot stand. Given this, the Hopi Tribe is asking this Court to hear and decide the case or vacate the Commission's ruling with instructions to hear the evidence and rule on the merits.

II. THE COMMISSION DID NOT DECIDE AND RESOLVE THE DISPUTE.

Under Section 8.4, the parties obligated the Commission to "decide and resolve" disputes about the meaning of the Compact. In dismissing the Hopi Tribe's case, the Commission did not fulfill this responsibility in violation of the Arbitration Act. *See W. Employers Ins. Co. v. Jeffries & Co.*, 958 F.2d 258, 262 (9th Cir. 1992) (arbitrators exceed their powers if they "fail to meet their obligations, as specified in a given contract"). The meaning of the Compact and the parties' respective rights and

obligations have yet to be determined. The Navajo argue that "[t]he Commission made clear that if the Hopi Tribe wanted to gather eagles on allotments, it needed to seek that relief from the allotment owners and the federal government−but not the Navajo Nation." Nav. Resp. at 16. As shown above, however, the Commission entered no such ruling.

Under Arizona law and the Federal Arbitration Act, the Commission was required to consider the evidence relating to the parties' intent in entering into the Compact, including the language and circumstances of Section 2.4. *See, e.g., Taylor v. State Farm Mutual Auto Ins. Co.*, 854 P.2d 1134, 1140 (Ariz. 1993) ("A contract should be read in light of the parties' intentions as reflected by their language and in view of all the circumstances.") (internal citations omitted); *Marrowbone Dev. Co.*, 232 F.3d at 389-90; *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2nd Cir. 1997) (vacating arbitrators' decision because the arbitrators failed to hear "pertinent or material" evidence).

When the terms of the Compact and the surrounding circumstances are examined, they prove that the parties intended that members of the Hopi Tribe would be able to continue to collect golden eagles from their designated sacred shrines without interference from the Navajo Nation and with no exclusion for allotments. *See, e.g.*, Testimony of D. Tsinigine, 2009 Hrg. Tr. at 636-37, 643 (attached as Ex. 13). The Commission, however, did not consider any evidence in dismissing the Hopi Tribe's case because it determined that it did not have jurisdiction over the dispute. As explained in the Hopi Tribe's Motion, however, the fact that the dispute involved allotments is not a legitimate basis to decline to resolve the dispute regarding the meaning of the Compact. While the Navajo's Response argues about the meaning of the Compact, it does not address any of the evidence refuting the Navajo position.

The plain language of Section 2.4 shows that the parties intended that members of the Hopi Tribe could gather golden eagles in the areas depicted on the Exhibit B map. In fact, it was the Navajo who required the Hopi to identify their sacred eagle gathering places on the Exhibit B map where the Hopi could gather eagles. *See* Exhibit B Map & Exhibit B-1 Map reformed to correct scrivener's error as part of prior arbitration

(attached as Ex. 14). Section 2.4 provides that the Navajo granted the Hopi an easement, profit, license, and permit to "gather and remove fledgling Golden Eagles and hawks within the areas depicted on Exhibit B." This explicit grant, which is not limited to an easement, also is not limited to "Navajo Lands." Instead, it is limited to the areas depicted on the Exhibit B map, which was specifically created to delineate the sacred Hopi gathering areas. The entire point of the Compact from the Hopi perspective was to insure that its religious practitioners could continue to visit their sacred shrines, and that is why the areas were designated on a map. There is no evidence that the areas on the Exhibit B map were secretly riddled with carve-outs where the Navajo would be free to deny access.

Moreover, the Navajo argument that the term "Navajo Lands" excludes allotments is not apparent anywhere in the language of the Compact. The definition of "Navajo Lands" does not say anything about allotments. The Navajo's own people understood the definition to include allotments because allotments benefit the Navajo Nation and the Navajo people as a whole by, for example, increasing the size of the Navajo territory. *See Bennett v. Shirley* Appellants' Reply Br. at 7 n.7 (attached as Ex. 15).

Furthermore, had the parties intended to limit religious eagle gathering to Navajo Lands, they could have indicated their intention by adding the term "Navajo Lands" to the end of the eagle gathering clause in Section 2.4, which is exactly what they did when they defined the scope of Hopi rights to gather and remove minerals and plant materials. In addition, the Navajo are wrong as a matter of grammar that this reading of Section 2.4 means that the prohibition on gathering or selling things for commercial purposes would only apply to minerals and plant materials. Nav. Resp. at 8-9. A semicolon separates the restriction on commercial uses from the previous clauses and thus indicates that the restriction applies to each of the foregoing clauses.

The evidence reflecting the parties' intent in entering the Compact confirms that the definition of "Navajo Lands" did not limit Hopi eagle gathering in the Exhibit B areas. The Navajo Nation does not address any of this evidence in its Response, asserting

only that its position on Section 2.4 is "plausible." Nav. Resp. at 9. The unequivocal testimony of the Navajo's own witnesses, including Britt Clapham, a key member of the Navajo negotiating team, is to the contrary -- a point the Navajo do not address:

> Q: …You weren't trying to carve out doughnut holes out of Exhibit B.
> A: I didn't know that there were any doughnut holes to be carved out, you know, so I -- you know, no, we weren't trying to do that.

Clapham Dep. at 103 (attached as Ex. 16). *See also id.* at 98-102.

Other Navajo officials have testified similarly. For example, Duane Tsinigine, the Navajo Nation Council Delegate who was the lead sponsor of the legislation seeking approval of the Compact, made multiple presentations to the Navajo Tribal Council and Navajo Chapters to provide information about the Compact. During those presentations, Mr. Tsinigine and other Navajo officials used a confidential map that showed the shrines where members of the Hopi Tribe would be permitted to collect eagles under the Compact. The map included each of the shrines at issue in this case located on allotments. The map was marked as Exhibit 62 in the arbitration. Mr. Tsinigine testified as follows:

> Q. [I]s it your understanding that the nests shown on Exhibit 62 are the nests where the Hopis said, "These are the nests in our traditional gathering areas"?
> A. Yes.
>
> Q. And you didn't intend to exclude any of those nests from gathering?
> A. No.
>
> ***
>
> Q. [T]he the red dots [on Exhibit 62] showed the eagle sites where the Hopis would be able to gather?
> A. Exactly.

2009 Hrg. Tr. at 636-37, 643 (attached as Ex. 13).

Terry Fenzl, the lead negotiator for the Navajo Nation, explained to Navajo Council members that the Compact would "turn back the clock 200 years to a time when this wasn't land that was governed by Anglo law and that we wanted people to respect

their neighbors and to allow them to practice their traditional religions as they had 200 years ago." *Id.* at 919 (attached as Ex. 17). Similarly, Louis Denetsosie, former Navajo Nation Attorney General and one of the lead promoters of the Compact, told Navajo Council delegates who were voting on the Compact that the "whole concept, the agreement" of the Compact was to restore religious rights as they existed "[b]efore [the] white man came, make relations the same as before government intervention." (Budget & Finance Committee Hrg. at 3) (Aug. 1, 2006) (attached as Ex. 18).

The Navajo government's position -- that the Compact allowed it to prevent access to sacred shrines on allotments and arrest Hopi practitioners for carrying out their religious traditions -- is contradicted by the testimony of its own witnesses.

As even the cases cited in the Navajo Response show, the Commission was required to consider this and other evidence relating to the parties' intent to determine the meaning of the Compact. *See, e.g.*, *Taylor*, 854 P.2d at 1140, 1141 n.2 (stating that courts must "first consider[] the offered evidence" of the parties' intent, including "the factual context surrounding the making of the agreement"); *Malad, Inc. v. Miller*, 199 P.3d 623, 626 (Az. Ct. App. 2008) (courts must "consider the surrounding circumstances of the agreement" when interpreting contracts); *Town of Marana v. Pima County*, 281 P.3d 1010, 1024-26 (Ariz. App. 2012) (same). *See also AGA Shareholders, LLC v. CSK Auto, Inc.*, 589 F. Supp. 2d 1175, 1181 (D. Ariz. 2008).

Section 15.1 of the Compact, which provides that the Compact constitutes the complete understanding between the parties, does not change the Commission's obligation to consider evidence of the parties' intent. Section 214 of the Restatement (Second) of Contracts provides that "[a]greements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish … the meaning of the writing, *whether or not integrated* . . . ." (emphasis added).

The Commission also had to consider the evidence relating to the parties' intent under the Federal Arbitration Act. *See* 9 U.S.C. § 10(a)(3). *Tempo*, 120 F.3d at 20. The cases the Navajo cite as holding otherwise are not on point here.

In *Spungin v. GenSpring Family Offices, LLC*, 883 F. Supp. 2d 1193, 1195 (S.D. Fla. 2012), the court, based on Florida law, upheld an arbitrator's decision to dismiss claims against the defendant because the plaintiff had previously entered into a settlement agreement that included a broad release of claims against the defendant. The general release in the settlement extended to "all causes of action … from the beginning of the world to the day of these presents … in connection with all claims … that have been or could have been raised in the Lawsuit." Unlike here, the arbitrator in *Spungin* specifically resolved the case on the merits based on the language of the release and dismissed the case with prejudice. Furthermore, unlike Arizona law, which applies to interpretations of the Compact, Ex. 1 at § 13.1, Florida law takes a more restrictive view of extrinsic evidence. Finally, the broad release at issue in *Spungin* is a far cry from the language of the Compact that does not restrict Hopi eagle gathering in the areas designated on the Exhibit B map.

In *Hudson v. ConAgra Poultry Co.*, 484 F.3d 496 (8th Cir. 2007), an arbitration panel entered a decision on the merits against the plaintiff on breach of contract claims after hearing the evidence. *Id.* at 499. The parties proceeded to a second arbitration of tort claims that arose out of the same business relationship as the contract claims. The second arbitration panel granted the defendant's motion for summary disposition on the basis of res judicata, and the court upheld the arbitration panel's decision. *Id.* at 503-504. Accordingly, the plaintiff in *Hudson*, unlike the Hopi Tribe, received an opportunity to present its case to an arbitration panel and obtain a ruling on the merits.

Excel Corp. v. United Food & Commercial Workers International Union, Local 431, 102 F.3d 1464 (8th Cir. 1996), actually undermines the Navajo position. There, the Eighth Circuit upheld the vacatur of an arbitrator's decision where the arbitrator ignored the plain language of the contract at issue and issued an award that did not "draw its essence from the agreement." *Id.* at 1470. Likewise, here, the Commission's decision did not "decide and resolve" the disputes between the parties, as required by the

Compact, and should be vacated unless this Court will hear the evidence and rule on the dispute.

The Navajo also argue that the Commission's decision should be confirmed because the Hopi Tribe had "numerous opportunities to proffer its parol evidence and explain its interpretation of the Compact." Nav. Resp. at 11. While the Hopi Tribe was able to describe some of its evidence in briefing, the vast majority of the relevant evidence had not yet been provided to the Commission when the case was dismissed. Moreover, the Navajo admit that the Commission did not *consider* any of the evidence in making its ruling *See Hoteles*, 763 F.2d at 40 (vacating an arbitration decision where the arbitrator allowed a party to introduce evidence but refused to ascribe it any weight).

CONCLUSION

The Navajo Nation cannot rewrite the Commission's Order dismissing the Hopi Tribe's Demand. The Commission did not rule on the merits of the Hopi Tribe's claims. If this Court does not decide the meaning of the Compact, the Hopi Tribe requests that the Court vacate the Commission's decision and send the case back to the Commission for an evidentiary hearing and a ruling on the merits. Otherwise, the Hopi Tribe will be without a forum for having the meaning of the Compact settled, and the Navajo Nation will continue to exercise self-help to prevent Hopi religious practices in violation of the Hopi Tribe's rights under the Compact, federal law and the United States Constitution.

Dated this 29th day of July, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2013, I electronically transmitted the attached **RESPONSE TO NAVAJO NATION'S MOTION TO DISMISS THE HOPI TRIBE'S SECOND AND THIRD CLAIMS FOR RELIEF AND REPLY TO NAVAJO NATION'S RESPONSE TO THE HOPI TRIBE'S MOTION TO VACATE ARBITRATION DECISION** using the CM-ECF system for filing and service to the following CM-ECF registrants:

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