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9 UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF ARIZONA

11 THE HOPI TRIBE

12 Plaintiff,

13 v.

14 NAVAJO NATION

15 Defendant.

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**MOTION TO VACATE
ARBITRATION DECISION
AND MEMORANDUM IN
SUPPORT THEREOF**

**ORAL ARGUMENT
REQUESTED**

INTRODUCTION

The Hopi Tribe is seeking to enforce its right pursuant to an Intergovernmental Compact ("Compact") with the Navajo Nation to access a small number of sacred religious shrines located on allotments within the Navajo Reservation without interference from the Navajo Nation government. The Hopi and Navajo dispute the meaning of the Compact's grant of religious access to the Hopi Tribe, and the Navajo Nation has prevented Hopi practitioners from exercising their religious rights under the Compact at these sacred sites on allotments. The Hopi Tribe is not seeking an order against the United States or the specific allotment holders. Instead, the Hopi Tribe seeks to bind the Navajo Nation government, a party to the historic Compact, which was intended to preserve the rights of both tribes' members to engage in their sacred religious traditions on land now held by the other.

Concurrently with this Motion to Vacate Arbitration Decision, the Hopi Tribe has filed a Complaint with this Court seeking a declaratory judgment that the Navajo agreed in the Compact not to interfere with Hopi religious practitioners at these sacred sites, and an injunction prohibiting the Navajo from arresting, citing or otherwise preventing Hopi religious practices allowed under the Compact. The Navajo Nation has attempted to disavow its authority to regulate and exercise sovereign powers over allotments in the manner provided in the Compact. The Hopi Tribe respectfully requests that the Court take evidence regarding these issues and resolve the parties' dispute about the meaning of the Compact.

The Hopi Tribe brings this Motion to Vacate Arbitration Decision as alternative relief, in the event that the Court determines that it cannot resolve the Hopi Tribe's claim against the Navajo Nation for violating the Compact. The Hopi Tribe seeks alternative relief under the Federal Arbitration Act to ensure that there is a forum in which to decide the parties' dispute about the intent and meaning of the Compact. The Compact created a Joint Commission ("Commission") to resolve disputes that arise under the Compact, at least in the first instance, through arbitration. In October 2012, the Hopi Tribe filed a

1 Demand for Arbitration with the Commission pursuant to the Compact in order to resolve
2 these important issues. The Commission had 180 days to decide and resolve the dispute,
3 after which the parties are authorized to seek relief in this Court. The Commission,
4 however, did not consider the evidence relating to the Hopi Tribe's claims and did not
5 decide and resolve the parties' dispute because the Commission concluded that it did not
6 have jurisdiction over the dispute because neither the allotment holders nor the United
7 States could be parties to the arbitration before the Commission. Instead, the
8 Commission concluded that jurisdiction lies with this Court to resolve the dispute.

9 As set forth in the Hopi Tribe's Complaint filed contemporaneously with this
10 Motion, the Hopi Tribe believes that this Court does have jurisdiction to decide the
11 dispute as between the Hopi Tribe and the Navajo Nation. Whatever rights the United
12 States or the allottees may have and may subsequently assert, if any, can be decided in a
13 separate proceeding at the appropriate time with the appropriate parties. But the Hopi
14 Tribe is entitled to obtain a ruling on the meaning of the Compact as against the party that
15 signed the Compact, the Navajo Nation.

16 Unless this Court takes evidence and resolves the Hopi Tribe's claims, or,
17 alternatively, vacates the decision of the Commission and sends the case back to the
18 Commission for a ruling on the merits, the Hopi Tribe will be without a forum for having
19 the meaning of the Compact settled, and the Navajo Nation will continue to exercise self-
20 help in preventing Hopi religious practitioners from conducting sacred ceremonies on
21 allotments in violation of the Hopi Tribe's religious rights, which are protected under the
22 Compact, federal law and the United States Constitution.

23 **STATEMENT OF FACTS**

24 The ancestors of the Hopi Tribe settled in the area of present-day northeastern
25 Arizona at least a thousand years ago. Since that time, members of various Hopi clans
26 have made religious pilgrimages each spring to sacred eagle shrines to gather nestling
27 golden eagles. These religious pilgrimages are vital to the continued existence of the
28 Hopi Tribe's religion and culture. Some of the religious shrines used by the Hopi Tribe

1 are located within the present-day boundaries of the Navajo Nation's Reservation, which
2 completely surrounds the Hopi Reservation.

3 For decades, the Navajo and the Hopi disputed their respective rights in and to
4 lands located in northeastern Arizona. In 1974, Congress passed the Navajo-Hopi Land
5 Settlement Act (the "Settlement Act"), which, among other things, enabled the Navajo
6 and Hopi to sue each other as a means of settling their competing claims to the 1934 Act
7 Reservation. *See* 25 U.S.C. § 640d, *et seq.* The Settlement Act also provided for the
8 "use of and right of access to identified religious shrines for the members of each tribe on
9 the reservation of the other tribe where such use and access are for religious purposes,"
10 and directed the Secretary of the Interior to ensure such access. *See* 25 U.S.C. § 640d-20.
11 Even in 1974, Congress understood that providing access to sacred shrines on the land of
12 the other was critical for members of both tribes.

13 Pursuant to the Settlement Act, the parties litigated their rights to the 1934 Act
14 Reservation for more than 30 years, with religious rights being a centerpiece of the
15 litigation. *See generally Masayesva v. Zah*, 65 F.3d 1445 (9th Cir. 1995). With the
16 assistance of a senior judge of the United States Court of Appeals for the Ninth Circuit,
17 the Honorable William Canby, and after multiple decisions from this Court and the Ninth
18 Circuit, the Hopi Tribe and the Navajo Nation entered into the Compact on November 3,
19 2006 (attached as Exhibit 1). The Secretary of the Interior reviewed and signed the
20 Compact for purposes of "approval of the agreements and creation of the beneficial
21 interests and use and access rights upon and to certain trust lands set forth in this
22 Compact." Art. 7.3. This Court approved the terms and provisions of the Compact and
23 made them part of its Order and Final Judgment dismissing the litigation, and "retain[ed]
24 jurisdiction over the parties and the subject matter for the purpose of proceedings to
25 vacate, modify, or enforce any arbitration decision and award made under Section 8.4 of
26 the Intergovernmental Compact, or original enforcement proceedings under Sections 8.7
27 or 8.8 thereof." *See Honyoama v. Shirley*, Case No. 74-842, Order and Final Judgment,
28 (D. Ariz. Dec. 5, 2006), at 3-4.

1 In Article 2.4 of the Compact, the Navajo Nation agreed to use its sovereign power
 2 to allow members of the Hopi Tribe to collect golden eagles from designated areas of the
 3 Navajo Reservation depicted on a highly confidential map attached as Exhibit B to the
 4 Compact. The Navajo also agreed to not enforce trespass, hunting, and interference with
 5 wildlife laws that could interfere with Hopi religious practices within the Exhibit B areas.
 6 Article 2.4 provides that:

7 The Navajo Nation grants to the Hopi Tribe, for the use and
 8 benefit of all current and future enrolled members of the Hopi
 9 Tribe, a permanent, irrevocable, prepaid, non-exclusive
 10 easement, profit, license, and permit to come upon the Navajo
 11 Lands, ***and to gather and remove fledgling Golden Eagles***
 12 ***and hawks within the areas depicted on Exhibit B***, and to
 13 gather and remove minerals and plant materials for religious
 14 and medicinal purposes from the Navajo Lands generally;
 15 provided, however, that such materials and things shall not be
 16 gathered for sale or other commercial purposes. This
 17 Compact does not grant to the Hopi Tribe or its members any
 18 easement, profit, license, permit, or right to gather or remove
 19 any Golden Eagle or hawk from any part of the Navajo Lands
 20 outside the areas depicted on Exhibit B, and ***this Compact***
 21 ***does not prevent, limit or restrict the Navajo Nation from***
 22 ***enforcing any law governing trespass, hunting or***
 23 ***interference with wildlife against any person who comes***
 24 ***upon any part of the Navajo Lands outside the areas***
 25 ***depicted on Exhibit B for the purpose of gathering or***
 26 ***removing any Golden Eagle or hawk***. This Compact does not
 27 waive, limit or restrict any right the Hopi Tribe or its
 28 members may have under the United States Constitution or
 federal law to come upon any part of the Navajo Lands
 outside the areas depicted on Exhibit B for the purpose of
 gathering or removing any Golden Eagle or hawk. (emphasis
 added)

23 In addition, the Navajo agreed not to require that members of the Hopi Tribe obtain
 24 permits from the Navajo Nation to gather golden eagles from the Exhibit B areas, if the
 25 Hopi Tribe obtained a gathering permit from the federal government. Art. 5.3-5.7. The
 26 Navajo Nation further agreed to take steps to facilitate access to the Exhibit B areas by
 27 providing police escorts if requested by members of the Hopi Tribe. Art. 2.9.
 28

1 Despite these agreements, in May 2012, Navajo law enforcement personnel
2 arrested and criminally charged a Hopi religious practitioner for gathering a golden eagle
3 from a religious shrine located on the Exhibit B map because the Navajo claimed the
4 shrine was located on an "allotment." Allotments are parcels of land held in trust by the
5 United States for individual Navajos. The United States abandoned the policy of allotting
6 lands to individual Indians nearly 100 years ago. Over time, the ownership of allotments
7 has become fractionated, and today allotments commonly have dozens, if not hundreds,
8 of owners, each holding a tiny interest in the land that they often do not use or occupy.
9 The Navajo Nation has taken the position that it does not have the sovereign power to
10 agree in a treaty that Hopi religious access to these few sacred shrines is not a trespass or
11 other violation of Navajo law.

12 In further breach of the Compact, in May 2013, the Navajo Nation deployed law
13 enforcement officers to prevent Hopi practitioners from accessing another sacred shrine
14 because it is allegedly located on an allotment. The particular shrine to which the Navajo
15 denied access this past May is one where the Navajo have knowingly allowed Hopi
16 religious practitioners to access and use for decades. The Navajo Nation, however, now
17 has repeatedly asserted that it will criminally prosecute any members of the Hopi Tribe
18 who come onto allotments during their religious ceremonies, even though the Hopi have
19 used these particular religious sites for centuries. The Navajo position is inconsistent
20 with the terms of the Compact, the history of Hopi gathering from these shrines within
21 the Exhibit B areas, and the Navajo's sovereign authority within its reservation, including
22 over allotments.

23 Prior to the incident in May 2012, the Navajo Nation had allowed members of the
24 Hopi Tribe to come onto allotments within the Navajo Reservation for religious eagle
25 gathering for decades and likely much longer. In the past, the Navajo Nation issued
26 permits to members of the Hopi Tribe to collect golden eagles from shrines located on
27 allotments, and also provided police escorts onto allotments to Hopi practitioners who
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1 were concerned about altercations with Navajo citizens during their gathering
2 ceremonies.

3 Furthermore, in exercise of its inherent sovereignty as an Indian nation, the Navajo
4 Nation has legislative, executive, and judicial jurisdiction over the allotments within the
5 boundaries of the Navajo Reservation, including the ones located within the Exhibit B
6 areas. For example, as evidenced by the recent law enforcement measures the Navajo
7 Nation has taken to stop Hopi religious practitioners from accessing their shrines on
8 allotments, Navajo Nation police and wildlife officers have used their authority to come
9 onto allotments to enforce Navajo laws. The Navajo Nation also enforces land use,
10 environmental and health safety laws on allotments within its reservation.

11 On October 23, 2012, after unsuccessfully attempting to negotiate a resolution
12 with the Navajo Nation, the Hopi Tribe filed a Demand for Arbitration under Article 8.3
13 of the Compact with the five-member Commission established under the Compact to
14 administer the Compact and mediate disputes between the parties. Article 8.3 provides
15 that “[a]ny dispute arising under this Compact that is not resolved by negotiation may be
16 submitted to the Joint Commission for arbitration ... Arbitration before the Joint
17 Commission shall be the only procedure and the only forum for resolution of such
18 disputes unless and until the Joint Commission shall fail to make a decision within the
19 period specified in Section 8.4.” Under Article 8.4, when a party submits a dispute to
20 the Commission, the Commission “**shall decide and resolve the dispute** by issuing a
21 written Decision and Award signed by a majority of the 5 members within 180 days after
22 the date on which the demand for arbitration shall have been mailed to the last of the
23 members of the Joint Commission and the other party.” (emphasis added).

24 In its Demand for Arbitration, the Hopi Tribe only sought relief against the Navajo
25 Nation. It made no claims against the United States, individual Navajos or any other
26 parties. The Hopi Tribe requested that the Joint Commission resolve the parties’ dispute
27 as to the meaning of the Compact, explaining that both the terms of the Compact and the
28 history of its negotiation demonstrate that the Navajo Nation intended that members of

1 the Hopi Tribe could access all of the religious shrines on the Exhibit B map, including
2 the few shrines located on allotments. The Hopi Tribe asked that the Commission enter a
3 declaratory judgment regarding the meaning of the Compact, finding that members of the
4 Hopi Tribe are entitled to access the Exhibit B areas without interference from the Navajo
5 Nation, and an injunction preventing the Navajo Nation from interfering with Hopi
6 religious practitioners who access or gather eagles from the areas depicted on Exhibit B
7 in accordance with the terms of the Compact.¹ Oct. 23, 2012 Hopi Demand at 7-8
8 (attached as Exhibit 2).

9 On November 30, 2012, the Navajo Nation filed its Answer to the Hopi Demand
10 and a Motion to Dismiss. The Navajo Nation disputed that the parties intended in the
11 Compact to allow Hopi eagle gathering on allotments, and denied that it possessed the
12 sovereign power to permit Hopis to access allotments within the Exhibit B areas. The
13 Navajo further argued that the allotment holders and the United States were necessary
14 and indispensable parties to the dispute, which could not be joined in the arbitration
15 because the Commission had no jurisdiction over them. Therefore, according to the
16 Navajo, “federal court is the only venue in which the rights at issue can be practically
17 resolved.” Navajo Reply Brief at 11 (attached as Exhibit 3). *See also* Navajo Motion to
18 Dismiss at 12 (“Finally, the Hopi have an alternative forum –the forum deemed
19 appropriate by federal law–in district courts.”) (attached as Exhibit 4).

20 The Joint Commission preliminarily denied the Navajo Motion to Dismiss and
21 scheduled a week-long arbitration hearing to begin on April 8, 2013. The parties
22 proceeded with discovery. In addition to several rounds of document discovery, each
23 party designated an expert witness to testify about allotments and the Navajo Nation’s
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26 ¹ The Hopi Tribe’s October 23, 2012 Demand for Arbitration addressed a second dispute
27 with the Navajo Nation under the Compact, over which the Commission has retained its
28 jurisdiction. The parties have stipulated to a continuance of the last day that the
Commission must decide the second dispute to October 18, 2013. This Motion to Vacate
only relates to the Commission’s decision on the allotment issue.

1 authority to agree to allow access to allotments, and the parties conducted nearly a dozen
2 depositions of fact and expert witnesses.

3 On April 8, 2013, the day the hearing was scheduled to begin, the Commission
4 decided that it wanted to hear further argument on the Navajo Nation's Motion to
5 Dismiss. Tr. Apr. 8, 2013 Hr at 5 (attached as Exhibit 5). After hearing argument from
6 each party's counsel, the Commission indicated its belief that it did not have jurisdiction
7 to hear the dispute, that federal court was the proper forum for this case, and that it
8 intended to dismiss the Hopi Tribe's Demand on the allotment issue.

9 At a hearing the following day, April 9, the Hopi Tribe requested that the Joint
10 Commission reconsider its decision to dismiss the Hopi Demand, and counsel for the
11 Hopi Tribe described the pertinent and material evidence that the Hopi Tribe would
12 present in support of its claims, including the testimony of numerous Hopi and Navajo
13 witnesses. Tr. Apr. 9, 2013 Hr at 85-87 (attached as Exhibit 6). *See also* Hopi Witness
14 List (attached as Exhibit 7). The Hopi Tribe also tendered to the Joint Commission its
15 exhibit list, which listed hundreds of exhibits the Hopi Tribe intended to use to support its
16 claims, and several transcripts of testimony relevant to its case. *Id.* *See also* Hopi
17 Tribe's Exhibit List (attached as Exhibit 8). The Joint Commission, however, denied the
18 Hopi Tribe's request to reconsider its dismissal of the Hopi Tribe's claims on the
19 allotment issue.

20 The Hopi Tribe also asked that the Joint Commission's decision be without
21 prejudice so that the Joint Commission could reopen the matter if this Court were to
22 determine that the Joint Commission is the proper forum in which to resolve this dispute.

23 On April 17, 2013, the Joint Commission issued a Decision and Order granting the
24 Navajo Nation's Motion to Dismiss as to the allotment issue. The Commission held that
25 "it lacks jurisdiction to consider the dispute involving allotted lands since it has no
26 jurisdiction over the allotment holders and the U.S. Secretary of the Interior (the
27 allotment trustee) under the Intergovernmental Compact." Order dated Apr. 17, 2013, at
28 2 (attached as Exhibit 9). The Commission also held that "jurisdiction lies with the

United States District Court.” *Id.* But the Joint Commission dismissed the allotment dispute without prejudice, finding that “should the U.S. Courts determine that the Joint Commission has jurisdiction over the allotments then the Commission would take such jurisdiction.” *Id.*

ARGUMENT

In the Compact, the Navajo and the Hopi agreed that a decision of the Joint Commission may be vacated or modified on the grounds permitted under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the “Arbitration Act”), as it existed on December 5, 2006, the Compact’s Effective Date.² *See* Art. 8.6. Both parties also waived their sovereign immunity and consented to such a suit in this Court. *See* Art. 8.9.

If this Court determines that it cannot adjudicate the merits of the Hopi Tribe’s claims relating to the meaning of the Compact, the Hopi Tribe respectfully requests that the Court vacate the Commission’s decision on the allotment issue under the Arbitration Act because (1) the Commission did not “hear evidence pertinent and material to the controversy,” *see* 9 U.S.C. § 10(a)(3), which resulted in prejudice to the Hopi Tribe and deprived the Hopi Tribe of a fair hearing; and (2) the Commission exceeded its authority by declining to enforce the Compact as between the parties, and by entering an order that leaves unresolved important questions about the meaning of the Compact. *See* 9 U.S.C. § 10(a)(4) (awards may be vacated where arbitrators “exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made”).

I. THE HOPI TRIBE HAS NOT RECEIVED A FAIR HEARING TO PRESENT EVIDENCE PERTINENT AND MATERIAL TO ITS CLAIMS REGARDING THE MEANING AND INTENT OF THE COMPACT

The Commission heard no evidence relating to the parties’ dispute about the meaning of the Compact before it dismissed the Hopi Tribe’s Demand for Arbitration. The Commission’s dismissal was based solely on its conclusion that it “lacks jurisdiction

² The grounds for vacating or modifying a decision under the Arbitration Act have not changed since December 5, 2006.

1 to consider the dispute involving allotted lands.” Order dated Apr. 17, 2013 at 2. It was
 2 not an assessment of the merits of the Hopi Tribe’s claims or a determination of the
 3 meaning of the disputed provision of the Compact. *See also* Tr. Apr. 9, 2013 Hr at 92
 4 (Joint Commission Chairman Fields: “But we are granting the Motion to Dismiss, as to
 5 the first part of the Navajo Nation’s Motion to Dismiss, that we were -- we were without
 6 jurisdiction, as stated in their Motion. It is without prejudice. It is a legal determination.
 7 *We have not considered any facts. It’s strictly on the law.*”) (emphasis added).

8 However, if this Court determines that it cannot consider the evidence and enter a
 9 ruling on the meaning of the Compact, the Commission’s decision will be a *de facto*
 10 ruling on the merits, allowing the Navajo Nation to exercise self-help in denying the Hopi
 11 Tribe’s protected religious rights, as the Hopi Tribe is not aware of any other forum in
 12 which to have its case heard. The Arbitration Act precludes such a result by requiring
 13 that an arbitration panel hold a hearing and consider evidence “pertinent and material to
 14 the controversy” before entering a decision. Accordingly, if this Court will not take the
 15 Hopi Tribe’s case, it must vacate the Commission’s decision, and order the Commission
 16 to hold a hearing and consider the evidence as required by the Arbitration Act.

17 Under the Arbitration Act, the Hopi Tribe is entitled to a fair hearing to put on
 18 evidence “pertinent and material” to its claims, which the Commission must consider
 19 before deciding the case. 9 U.S.C. §10(a)(3); *Tempo Shain Corp. v. Bertek, Inc.*, 120
 20 F.3d 16, 20 (2nd Cir. 1997). *See also* *Sunshine Min. Co. v. United Steelworkers of Am.,*
 21 *AFL-CIO, CLC*, 823 F.2d 1289, 1295 (9th Cir. 1987) (“[T]he minimal requirements of
 22 fairness” are “adequate notice, a hearing on the evidence, and an impartial decision by the
 23 arbitrator.”). The arbitrator “must ... give each of the parties to the dispute an adequate
 24 opportunity to present its evidence and arguments.” *Sunshine Min. Co.*, 823 F.2d at 1295
 25 (citing *Hoteles Condado Beach, La Concha & Convention Center v. Union de*
 26 *Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir.1985)).

27 Declining to enforce the Hopi Tribe’s right to engage in its centuries-old, sacred
 28 religious practices without consideration of the evidence pertinent and material to the

1 meaning of the Compact does not satisfy the Arbitration Act's requirements, and would
 2 cause severe prejudice to the Hopi Tribe, if the Court does not or cannot hear the dispute.
 3 *See, e.g., Hoteles Condado Beach, La Concha & Convention Center v. Union de*
 4 *Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir.1985) (vacating an arbitration decision
 5 where the arbitrator refused to ascribe any weight to a transcript from a separate
 6 proceeding, as "no other evidence was available to substantiate or refute" the position the
 7 defendant in the arbitration had taken, and the evidence was "central and decisive");
 8 *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2nd Cir. 1997) (finding that the
 9 arbitrators had "excluded evidence plainly 'pertinent and material to the controversy,'" where the panel refused to continue a hearing to allow testimony from an important
 10 defense witness).

11
 12 Given the opportunity, the Hopi Tribe would have presented testimony and
 13 documentary evidence pertinent and material to the principal issue in this dispute – the
 14 meaning of the Compact. Among other evidence, the Hopi Tribe would have presented
 15 testimony refuting the Navajo position that a change to the definition of the term "Navajo
 16 Lands" in the Compact resulted in (or was intended to result in) the exclusion of shrines
 17 located on allotments from the grant of access to the Exhibit B areas. *See Navajo Motion*
 18 *to Dismiss* at 5 ("'**Navajo Lands**' is defined in Section 1.2 of the Compact as including
 19 'all lands held in trust by the United States for the benefit of the Navajo Nation or the
 20 Navajo people **as a whole**' (emphasis supplied),' a definition which makes no mention of
 21 allotments.'").

22 For example, during his deposition, former Navajo counsel Britt Clapham, who
 23 was a key Navajo negotiator in the Compact negotiations, testified that the "Navajo
 24 Lands" definition was not intended to affect the grant of access to the Hopi Tribe.

25
 26 Q: [I]n making this change to the definition of 'Navajo Lands,' the
 27 Navajo weren't intending to restrict where in Exhibit B the Hopi
 28 could gather, right?

A: No.

1 Q. . . . Am I correct that they were not making a change to where
2 the Hopis could gather within Exhibit B?

3 A. I don't think this was intended to be a change that affected
4 Exhibit B in any way

5 Clapham Dep. at 98-102 (emphasis added).

6 In addition to Mr. Clapham's testimony, several other representatives of the
7 Navajo Nation provided testimony showing that the Navajo Nation agreed to allow Hopi
8 gathering in all of the Exhibit B areas. *See, e.g.*, Hopi Pretrial Brief at 10-12 (attached as
9 Exhibit 10). The Joint Commission did not consider this evidence in dismissing the Hopi
10 Tribe's case, and the Hopi Tribe has not yet received a hearing in which to present this
11 testimony.

12 The Hopi Tribe also would have called Leigh Kuwanwisiwma, Director of the
13 Hopi Cultural Preservation Office, and Jim Scarboro, the Hopi Tribe's lead outside
14 negotiator during the Compact mediation. Mr. Kuwanwisiwma and Mr. Scarboro would
15 have provided key testimony regarding the parties' intent in entering into the Compact.
16 Both would have testified that the Navajo Nation and the Hopi Tribe intended and
17 expected that members of the Hopi Tribe would be able to collect golden eagles at all of
18 the sacred eagle gathering shrines located on the Exhibit B map, including those on
19 allotments.³

20 The Hopi Tribe has yet to receive a hearing to put on this and other pertinent and
21 material evidence relating to its sacred religious rights under the Compact, and the
22 Commission stated that it did not consider any evidence in dismissing the Hopi Tribe's

23 ³ The Hopi Tribe also would have put on evidence showing that the Navajo had been
24 aware of Hopi gathering at religious shrines on allotments for decades. *See, e.g.*, Hopi
25 Pretrial Brief at 21-23. In fact, the Hopi evidence would have demonstrated that the
26 Navajo Nation regularly issued permits to the Hopi Tribe to collect eagles from
27 allotments, and had even provided police escorts to Hopi practitioners during their
28 religious pilgrimages to shrines on allotments. *See id.* This history undercuts the Navajo
argument that it cannot allow Hopi gathering on allotments, and that, in the Compact, it
intended that Hopis would not be able to gather eagles from allotments within Exhibit B.

claim. Therefore, if this Court cannot resolve the Hopi Tribe's claims, it should vacate the Commission's decision on the allotment issue and remand the case to the Commission with an order that the Commission, in accordance with the requirements of the Arbitration Act, hold a hearing and consider the evidence pertinent and material to this dispute before entering a decision on the Hopi Tribe's Demand.

II. IF THIS COURT CANNOT RESOLVE THE DISPUTE, THE COMMISSION EXCEEDED ITS AUTHORITY BY REFUSING TO HEAR THE DISPUTE

If this Court declines to decide the issues raised in the Hopi Tribe's Complaint, the Court should also vacate the Commission's decision on the grounds that the Commission "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). *See also Coast Trading Co., Inc. v. Pac. Molasses Co.*, 681 F.2d 1195, 1197-98 (9th Cir. 1982).

A. The Commission Exceeded Its Authority By Failing To Decide And Resolve The Dispute Between The Parties Regarding The Meaning Of The Compact.

An arbitrator's task is "to interpret and enforce a contract," and "give effect to the contractual rights and expectations of the parties." *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 1768 (2010). This includes giving effect to requirements that the parties place on the arbitrators, and arbitrators exceed their powers if they "fail to meet their obligations, as specified in a given contract, to the parties." *W. Employers Ins. Co. v. Jeffries & Co.*, 958 F.2d 258 (9th Cir. 1992). In *Jeffries*, the Ninth Circuit vacated an arbitration award that did not comply with a provision in the underlying contract requiring an arbitration award to be accompanied by findings of fact and conclusions of law. *See id.* at 260-62. The court explained that the arbitrators' actions deprived the appellant of its "right to arbitration according to the terms for which it contracted," and that the Arbitration Act "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* at 261.

1 In Article 8.3 of the Compact, the Navajo and the Hopi agreed that “any dispute
2 arising under this Compact that is not resolved by negotiation may be submitted to the
3 Joint Commission for arbitration.” In Article 8.4, the parties instructed that the “Joint
4 Commission shall *decide and resolve* the dispute by issuing a written Decision and
5 Award ...” (emphasis added). In addition, the parties granted the Commission the
6 authority to “issue restraining orders, injunctions, declaratory judgments, and orders of
7 specific performance enforcing the terms of the Compact,” when entering its Decision
8 and Award. Art. 8.5.

9 Pursuant to these provisions, the Hopi Tribe’s October 23, 2012 Demand for
10 Arbitration sought to enforce the Hopi Tribe’s religious rights under the Compact against
11 the Navajo Nation. The Hopi Tribe made no claims against the United States, individual
12 Navajos or any other parties. In requesting a declaratory judgment regarding the meaning
13 of the Compact and an injunction preventing interference with Hopi gatherers, the Hopi
14 Tribe did not ask the Commission to bind any other parties. *See* Hopi Response to
15 Motion to Dismiss at 19 (attached as Exhibit 11) (“The Hopi Tribe has not asked the
16 Commission to enter an order against the United States or individual Navajo citizens.”).

17 The Commission did not “decide and resolve the dispute by issuing a written
18 Decision and Award,” as required by the Compact, and instead dismissed the Hopi
19 Demand on the grounds that “it has no jurisdiction over the allotment holders and the
20 U.S. Secretary of the Interior (the allotment trustee) under the Intergovernmental
21 Compact.” Order dated Apr. 17, 2013 at 2.

22 If this Court cannot decide the dispute, it should find that the Joint Commission
23 exceeded its authority, in violation of the Arbitration Act, by declining to decide and
24 resolve the parties’ dispute regarding their rights and obligations under the Compact. *See*
25 *W. Employers Ins. Co.*, 958 F.2d at 261. Irrespective of the Commission’s jurisdiction
26 over allotment holders or the United States, the parties obligated the Commission in the
27 Compact to decide and resolve disputes arising under the Compact by issuing a written
28 Decision and Award. The Commission was thus required to hear the evidence, decide the

1 case and enter an order on the merits as between the parties, both of which had agreed in
2 the Compact to the jurisdiction of the Commission over their disputes, *see* Art. 8.9.

3 The fact that the Commission's decision could possibly impact allotment holders
4 or the United States in no way alters the Joint Commission's obligation to enter a ruling
5 regarding the agreements the Navajo Nation made in the Compact. In the Compact, the
6 Navajo Nation and the Hopi Tribe recognized that their decisions as sovereigns to enter
7 into the Compact would affect their citizens, and they named their members as third-party
8 beneficiaries of the Compact. *See* Art. 12.6. However, rather than instruct the
9 Commission to refrain from resolving disputes that could impact Navajo or Hopi
10 members, the parties agreed that no member of either tribe had the right "as an individual
11 to institute or participate in any legal proceeding involving this Compact," *id.*, and they
12 required the Joint Commission to "decide and resolve" the disputes the parties brought to
13 it, Art. 8.4. *See Stolt-Nielsen*, 130 S. Ct. at 1774 ("[I]t is clear from our precedents and
14 the contractual nature of arbitration that parties may specify *with whom* they choose to
15 arbitrate their disputes.").

16 As to the United States, it is worth noting that the Secretary of the Interior signed
17 and approved the Compact on behalf of the United States. The parties did not provide in
18 the Compact that the Commission should (or could) refrain from deciding disputes if the
19 United States had a potential interest in the outcome. Moreover, if the United States
20 wants to take the position that members of the Hopi Tribe can no longer access religious
21 shrines if those shrines are on allotments within the Navajo Nation, the Hopi Tribe will
22 address that issue at the appropriate time. The Hopi Tribe does not believe that the
23 United States will take such a position, however, because access to and use of religious
24 shrines on the Navajo Reservation was guaranteed by Congress in the 1974 Settlement
25 Act. *See* 25 U.S.C. § 640d-20.

26 Furthermore, and in any event, the United States Supreme Court has held that
27 "[u]nder the Arbitration Act, an arbitration agreement must be enforced notwithstanding
28 the presence of other persons who are parties to the underlying dispute but not the

1 arbitration agreement.” *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460
 2 U.S. 1, 20 (1983). Accordingly, in *Moses H. Cone*, the Supreme Court found that the
 3 plaintiff there might have to resolve two related disputes in different forums because the
 4 plaintiff had an arbitration agreement in place with one defendant, but not with the other
 5 defendant. *Id.* (“If the dispute between Mercury and the Hospital is arbitrable under the
 6 Act, then the Hospital’s two disputes will be resolved separately—one in arbitration, and
 7 the other (if at all) in state-court litigation.”). *See also Stolt-Nielsen*, 130 S. Ct. at 1773.

8 If this Court does not hear the dispute, the Commission will not have satisfied its
 9 responsibilities under the Compact and will have left the parties without a resolution to
 10 their dispute regarding the meaning of the Compact and the Hopi Tribe’s religious access
 11 and use rights under the Compact. Accordingly, the Hopi Tribe is looking to this Court
 12 to hear the evidence and decide the meaning of the Compact. If this Court cannot take
 13 the Hopi’s case, however, it requests that the Court vacate the Commission’s decision on
 14 the allotment issue under the Arbitration Act, and order the Commission to hear the
 15 evidence and enter a judgment binding on the parties, as the Compact requires.

16 **B. The Commission’s Decision Does Not “Draw Its Essence” From The**
 17 **Compact**

18 An arbitration decision may also be vacated under section 10(a)(4) of the
 19 Arbitration Act if it “fail[s] to draw its essence” from the parties’ agreement. *See, e.g.,*
 20 *Coast Trading Co.*, 681 F.2d at 1197-98. A decision does not draw its essence from the
 21 agreement if it contravenes the plain language of the agreement or results from an
 22 arbitrator’s failure to comport with his role as defined by the agreement. *See Int’l Union,*
 23 *United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 388-89 (4th Cir.
 24 2000).

25 In Article 8 of the Compact, the Navajo and the Hopi established a procedure for
 26 having disputes under the Compact decided and resolved. The Compact provides that
 27 “any dispute arising under the Compact,” Art. 8.3, may be submitted for arbitration, and
 28 that arbitration before the Commission is the “only procedure and the only forum for
 resolution” of disputes between the parties, *see* Art. 8.3, unless the Commission does not

1 comply with its obligation to “decide and resolve the dispute by issuing a written
2 Decision and Award” within 180 days, *see* Art. 8.4. In cases where the Joint
3 Commission fails to act, the parties agreed that this Court could decide and resolve the
4 dispute. Art. 8.8 (“In the event the Joint Commission shall fail to issue a Decision and
5 Award within the period set forth in Section 8.4, either party may then commence
6 litigation in the United States District Court for the District of Arizona for any relief that
7 the Joint Commission could have awarded.”).

8 The parties put in place these procedures in order to ensure they had a mechanism
9 for resolving their disputes under the Compact. Taken as a whole, Article 8 demonstrates
10 that the parties intended to have the merits of their disputes decided either by the
11 Commission or this Court, so that there would be no lingering questions or ongoing
12 conflicts about their rights and obligations under the Compact. Nothing in Article 8
13 indicates that the parties intended to leave disputes hanging open, without a final decision
14 on what the Compact means. The Hopi Tribe has come to this Court for relief because
15 the Commission left important questions unanswered. If this Court cannot resolve those
16 questions itself, the Hopi Tribe requests that the Court vacate the Commission’s decision
17 under the Arbitration Act, and, in keeping with the essence of the parties’ agreement,
18 return the case to the Commission for a hearing and decision on the merits.

19 CONCLUSION

20 The Navajo Nation has left the Hopi Tribe with no choice but to seek a decision on
21 the meaning of the Compact in order to carry on its ancient religious practices. The
22 Commission directed the Hopi Tribe to this Court for relief, and the Hopi Tribe
23 respectfully asks that this Court agree to hear the Hopi Tribe’s case. If this Court cannot
24 enter an order on the meaning of the Compact, however, the Hopi Tribe asks that the
25 Court vacate the Commission’s decision on the allotment issue under the Arbitration Act,
26 and remand the dispute to the Commission so that the Hopi Tribe can obtain a judgment
27 on the merits there.
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1 Dated this 5th day of July, 2013

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