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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

THE HOPI TRIBE,

Plaintiff,

v.

NAVAJO NATION,

Defendant.

No. CV13-8172-PCT-GMS

NAVAJO NATION'S REPLY IN SUPPORT OF MOTION TO DISMISS THE HOPI TRIBE'S SECOND AND THIRD CLAIMS FOR RELIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CASES (CONT.)

STATUTES

OTHER AUTHORITIES

Introduction

Weary after more than three decades of hard-fought and seemingly unending litigation in this Court and elsewhere, the Navajo Nation and Hopi Tribe agreed that if a dispute arose under the Compact—their agreement to settle that litigation and underlying land claims—"[a]rbitration before the Joint Commission shall be the only procedure and the only forum for resolution of such disputes." [Ex. 1 § 8.3] In late 2012 and early 2013, the Navajo Nation and Hopi Tribe arbitrated whether the Compact and federal law gave Hopi eagle gatherers the right to enter privately-held allotments to collect eaglets. After extensive briefing and oral argument related to the meaning of the Compact and relevant federal law, the Commission decided that the Compact did not give the Hopi Tribe such a right and that, in any event, federal law did not allow it. The Commission accordingly dismissed the Hopi Tribe's arbitration demand, ruling that the Commission lacked jurisdiction to award the Hopi Tribe the relief it demanded. Not satisfied with that result, the Hopi Tribe concocted the specious theory that the Commission's award was a *non*-decision, and is coming to this Court for a do-over. But the Hopi Tribe's attempt to re-litigate the issues decided by the Commission fails.

Under the Compact, this Court's review of the Commission's action is limited to "the grounds permitted under the Federal Arbitration Act" ("FAA"). [Ex. 1 § 8.6] The Hopi Tribe's Second and Third Claims for Relief set forth two separate but equally flawed grounds under that Act to vacate the Commission's award:

- under 9 U.S.C. § 10(a)(3), the Commission "[was] guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy" [Compl. ¶¶ 80-87]; and
- under 9 U.S.C. § 10(a)(4), the Commission "exceeded [its] powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made" [Compl. ¶¶ 88-93].

The Navajo Nation's Motion to Dismiss the Hopi Tribe's Second and Third Claims for Relief demonstrated why the Hopi Tribe's FAA claims were baseless because (a) the Commission made the legal determination (based on the wording of the Compact and

federal law) that the Commission lacked jurisdiction and (b) the Commission did not need to consider the Hopi Tribe's parol evidence in reaching that decision. [Doc. 16 at 6-12] These unassailable facts remain unchanged. Accordingly, this Court should grant the Navajo Nation's motion and dismiss the Hopi Tribe's FAA claims.

Argument

I. THE COMMISSION INTERPRETED THE COMPACT AND APPLIED FEDERAL LAW, AND THUS RESOLVED THE DISPUTE

The Hopi Tribe argues that "the Commission did not rule on the merits of the dispute or the meaning of the Compact." [Doc. 23 at 2] In effect, the Hopi Tribe argues that the Commission's dismissal of the Hopi Tribe's arbitration demand was a *non*-decision. But the record instead shows that the Commission made a well-considered decision consistent with, and required by, the Compact's terms and federal law.

The Commission made the common sense determination that the Navajo Nation **did not** and **could not** grant to the Hopi Tribe a right to come on to privately-held allotments to hunt for eaglets: It **did not** because the Compact grants Hopi religious practitioners access only to "Navajo Lands" [Ex. 1 § 2.4] and, as the Hopi Tribe does not dispute, "Navajo Lands" are defined in the Compact to exclude allotments [*Id.* § 1.2]. It **could not** because allotments are owned only by individual Indians and the federal government, *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968) (finding that "the allotment system created interests in both the Indian and the United States"), and because, as a result, the Navajo Nation has no property rights in allotments to convey (including access rights), *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1 (1976) (noting that allotments "end tribal land ownership and . . . substitute private ownership"). A contrary decision of the Commission would have trampled the rights of allotment owners and the federal government, neither of whom were party to the Compact or the arbitration.

The Hopi Tribe does not and cannot deny that it and the Navajo Nation vigorously debated these issues before the Commission, arguing extensively about the meaning of the Compact and relevant federal law. Upon this voluminous briefing and oral argument, the

Commission rendered its decision, dismissing the Hopi Tribe's demand for lack of jurisdiction, and thus resolving the dispute. Now, though, because it is unsatisfied with the result, the Hopi Tribe argues that the Commission did not make a decision. But the Hopi Tribe is wrong.

A. The Commission Granted the Navajo Nation's Motion to Dismiss the Arbitration Demand, and on the Record Stated that It Was Both Interpreting the Compact and Applying Federal Law.

Despite its claim that the Commission made no decision, the Hopi Tribe does not dispute that the Commission granted the Navajo Nation's motion to dismiss the arbitration demand. It also does not dispute that Chairman Fields explained on the record that the Commission was dismissing the case "on the basis that was set forth in the Motion to Dismiss." [Ex. 6 at 90] The Commission's written decision similarly confirmed that the Commission "grant[ed] the Navajo Nation's Motion to dismiss" [Ex. 9 at 2], and further stated that "IT IS HEREBY ORDERED: Granting the Navajo Nation Motion to Dismiss" [*id.* at 3]. That granted motion set out why the Hopi Tribe's demand for allotment access was not cognizable under (a) the language of the Compact or (b) federal law. [Ex. 4 at 5-8] In granting it, the Commission expressly agreed, thereby rendering a decision about the meaning of the Compact and federal law.

Confirming the dual bases of the Commission's decision, Chairman Fields also explained on the record that "jurisdiction . . . is not given to us, and it can't be given to us in the agreement" (the Compact). [Ex. 6 at 90] He further explained that that "we [the Commission] don't have jurisdiction under Federal law." [*Id.*] The Commission's written order similarly stated that "[a]ll Commissioners agree that [the Commission] lacks jurisdiction to consider the dispute involving allotted lands since it has no jurisdiction over the allotment holders and the U.S. Secretary of the Interior (the allotment trustee) under the Intergovernmental Compact." [Ex. 9 at 2] In making that decision, the Commission also similarly (and properly) rejected the Hopi Tribe's argument that what it sought—the permanent right to enter allotments to hunt for eagles—was somehow something less than a property right. Before the Commission, and to date in these

proceedings, the Hopi Tribe has cited no authority that the Hopi Tribe's Compact-granted "easement, profit, license, and permit" [Ex. 1 § 2.4] to enter a privately-owned allotment, year after year, is something less than a property right. [Doc. 16 at 16 n.9]

In sum, the record shows that the Hopi Tribe's claim that the dismissal was a non-decision, unhinged from a consideration of the Compact and federal law, is false. And the Hopi Tribe's broad declaration that the "Navajo cannot cite a single indication that . . . the Commission held" that the relief was barred by federal law [Doc. 23 at 4] is untrue. Instead, the Commission determined that the Navajo Nation **did not** (via the Compact) and **could not** (under federal law) grant access to allotments.

B. The Commission's Order Was Clear.

Ignoring the record, the Hopi Tribe instead focuses on the Commission's written decision, claiming that it inadequately explained the Commission's reasoning. [*Id.* at 3] This is simply not true—the Commission's order fully explained the bases for dismissing the demand, both by incorporating the arguments made by the Navajo Nation in its motion to dismiss and by its statement that the Commission "has no jurisdiction over the allotment holders and the U.S. Secretary of the Interior (the allotment trustee) under the Intergovernmental Compact." [Ex. 9 at 2]

But even if the Commission's order had not set forth its reasoning, its award would still stand. If an arbitration panel's decision is not fully explained in its written order, that award will not be vacated if permissible grounds for the award exist. It is presumed that the arbitration panel relied on legally-viable and supportable grounds in making its award. *See A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992) (it is a "universally accepted rule that a statement of reasons is not required and arbitrators are presumed to have relied on permissible grounds"); *see also Edelman v. W. Airlines, Inc.*, 892 F.2d 839, 849 (9th Cir. 1989) ("[A] mere ambiguity in the [decision] accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.") (citation omitted); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Burke*, 741 F. Supp. 191, 194 (N.D. Cal. 1990) ("The

absence of express reasoning by the arbitrators does not support a conclusion that they disregarded the law."). The Hopi Tribe's complaint that the Commission's order did not specify the grounds for its decision therefore does not provide a basis for vacating the award; valid bases for this decision existed and were clearly considered by the Commission prior to dismissing the arbitration. That should conclude this Court's inquiry.

C. It Is Immaterial that the Commission's Decision Was Made "Without Prejudice."

In a last gambit to take all the substance out of the Commission's award, the Hopi Tribe focuses on the fact that the Commission dismissed the Hopi Tribe's demand "without prejudice." [Ex. 6 at 83:16-24] But although a dismissal without prejudice allows a plaintiff to bring the claim again, a dismissal without prejudice "does not mean [the dismissal is] without consequence." *Powell v. Starwalt*, 866 F.2d 964, 966 (7th Cir. 1989) (internal quotations omitted). "The dismissal of an action, even when it is without prejudice, is a final order." *De Tie v. Orange Cnty.*, 152 F.3d 1109, 1111 (9th Cir. 1998) (dismissed without prejudice for failure to timely serve); *accord Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1084-85 (9th Cir. 2003). Critically here, dismissal without prejudice is appropriate where an adjudicative body is dismissing for lack of subject matter jurisdiction. *Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 123-24 (2d Cir. 1999) ("Where a court lacks subject matter jurisdiction, it also lacks the power to dismiss with prejudice."); *In re Orthopedic "Bone Screw" Prods. Liab. Litig.*, 132 F.3d 152, 155 (3d Cir. 1997) (holding that "[i]f a case, over which the court lacks subject matter jurisdiction, was originally filed in federal court, it must be dismissed . . . . The disposition of such a case will, however, be without prejudice") (citation omitted).[1] Thus, the fact that the Commission's final order was without prejudice sheds no light on the legal

[1] The U.S. Supreme Court case the Hopi Tribe cites, *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384 (1990), addresses voluntary dismissals that fall under Federal Rule of Civil Procedure 41. The dismissal here was not voluntary but rather at the behest of the Commission. Involuntary dismissals for lack of jurisdiction are specifically excluded from Rule 41. Fed. R. Civ. P. 41(b).

questions the Commission resolved in making that order (or its legitimacy or finality), and dismissal without prejudice was appropriate here because the Commission was dismissing for lack of subject matter jurisdiction. Like an Article III court interpreting federal law to determine the limits of its jurisdiction (and dismissing "without prejudice"), the Commission here interpreted the Compact and applied federal law to determine it did not have jurisdiction. That the Commission's order was without prejudice reflects the *type* of dismissal the Commission made, but does not reflect on the dismissal's substance.[2]

II. UNDER ARIZONA LAW, THE COMMISSION WAS ENTITLED TO DISMISS, AND RIGHTLY DISMISSED, THE HOPI TRIBE'S DEMAND WITHOUT CONSIDERING THE HOPI TRIBE'S PAROL EVIDENCE

The Hopi Tribe's second contention is that the Commission engaged in "misconduct" by failing to consider the Hopi Tribe's proffered parol evidence—relating to the parties' intent in entering into the Compact—before making its decision. The Navajo Nation's motion demonstrated why the Commission made two *legal* determinations in making its decision, neither of which depended on the consideration of parol evidence. [Doc. 16 at Part I.A (discussing the Commission's interpretation of the Compact); *id.* at Part I.B (discussing the Commission's application of federal law)] Nothing in the Hopi Tribe's response changes that analysis and the Hopi Tribe's continued "[m]ere disagreement about [the Compact's] meaning . . . does not establish an ambiguity that requires admission of extrinsic evidence." *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 292, 246 P.3d 938, 943 (Ct. App. 2010).

A. The Commission Was Entitled to Interpret the Compact Without Considering the Hopi Tribe's Parol Evidence.

Under Arizona's parol evidence rule, a judge has the discretion to disregard parol evidence if the language of the contract is unambiguous. *See Arizona v. Tohono O'odham Nation*, CV-11-00296-PHX-DGC, 2013 WL 1908378, at *10 (D. Ariz. May 7, 2013) (if

[2] For these reasons, the Hopi Tribe's attempt to distinguish *Spungin v. Genspring Family Offices, LLC*, 883 F. Supp. 2d 1193 (S.D. Fla. 2012), is unavailing. Regardless of whether the dismissal is with or without prejudice, in both the present case and in *Spungin*, the arbitrator dismissed the arbitration based on the language of the parties' agreement.

contract language is not "reasonably susceptible" to the interpretation offered by the proponent of the parol evidence, "the court should disregard the evidence"); *Aztar Corp. v. U.S. Fire Ins. Co*., 223 Ariz. 463, 478, 224 P.3d 960, 975 (Ct. App. 2010). Under that governing legal authority, the Commission was entitled to disregard the Hopi Tribe's parol evidence in favor of interpreting and enforcing the Compact by its plain and unambiguous terms. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 155, 854 P.2d 1134, 1141 (1993) ("[T]he judge might quickly decide that the contract language is not reasonably susceptible to the asserted meaning, stop listening to evidence supporting it, and rule that its admission would violate the parol evidence rule."). Arizona courts commonly interpret agreements without consulting parol evidence because the proffered evidence "varies or contradicts" the agreement's plain meaning. *Aztar Corp.*, 223 Ariz. at 478, 224 P.3d at 975.

Critically, the Hopi Tribe has cited no authority to support that an arbitration panel is "guilty of misconduct" under 9 U.S.C. § 10(a)(3) if it interprets a contract without considering parol evidence, or that enforcing an agreement by its plain language requires the resulting award to be vacated. The Hopi Tribe also cannot contest that the Commission made its decision by applying federal law, and that no evidence could affect that purely legal analysis. And, finally, even if the Commission erroneously applied Arizona's parol evidence rule or federal law, its decision would withstand this Court's limited review. *See Employers Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1485-86 (9th Cir. 1991) (Even if "the 'arbitrators' view of the law might be open to serious question, . . . [an award] which is one within the terms of the submission, will not be set aside by a court for error either in law or fact.'") (citation omitted).

B. The Hopi Tribe's Interpretation of Section 2.4 of the Compact Remains Unreasonable and Was Properly Rejected.

In addition to arguing that the Commission erred in not considering parol evidence, the Hopi Tribe also starts from scratch, arguing that Section 2.4 of the Compact, by its "plain language," permits the Hopi religious practitioners to hunt for eaglets on privately-held allotments. [Doc. 23 at 6-7] In arguing for its interpretation of the Compact, the Hopi Tribe again selectively and misleadingly quotes from Section 2.4, taking the clause relating to eagle gathering out of its context. The implausibility of the Hopi Tribe's "three clause" reading was set forth in the Navajo Nation's prior motion. [Doc. 16 at 8]

Significantly, the Hopi Tribe fails to address the primary flaw in its "three clause" reading of Section 2.4 identified earlier: by that reading, "the first clause of Section 2.4 grants the Hopi Tribe a property right 'to come upon the Navajo Lands,' but that right is not associated with any purpose for that access." [*Id.*] As to the other problem, that by the Hopi Tribe's reading the no "commercial purpose[]" clause illogically applies to only minerals and plants, but not eagles [*id.* at 8-9], the Hopi Tribe responds that "the [commercial use] restriction applies to each of the foregoing clauses" [Doc. 23 at 7]. This does not help the Hopi Tribe's tortured reading because the clause prohibiting gathering for a "commercial purpose[]" would then strangely apply to the otherwise open-ended right "to come upon the Navajo Lands," a right which does not relate to gathering of any sort. [Doc. 16 at 8]

The Hopi Tribe again fails to demonstrate why its flawed "three clause" reading was not properly rejected by the Commission. The Commission's interpretation was well beyond plausible and, as such, must be sustained. *See Employers Ins. of Wausau*, 933 F.2d at 1485-86 ("The [arbitration] panel's interpretation of a contract must be sustained if it is 'plausible.'") (citation omitted); *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1205 (9th Cir. 1989) (noting that arbitrator's decisions are afforded a "nearly unparalleled degree of deference").

C. The Hopi Tribe's Attempt to Portray the Commission's Reading of the Compact As Against the Weight of the Parol Evidence is Misleading.

As shown above, the Commission rightly rejected the Hopi Tribe's parol evidence because the Compact's terms were not ambiguous. But even if the Commission had considered it, the full extrinsic evidence concerning the Compact's negotiation supports reading Section 2.4 as not giving the Hopi Tribe a right to access allotments. The Hopi Tribe does not present to this Court the one piece of negotiation correspondence between the parties explicitly addressing allotments. As shown to the Commission, Terry Fenzl (the Navajo Nation's lead negotiator and lead counsel in the underlying litigation since the mid-1970s) wrote, in a September 5, 2003 letter to James Scarboro (the Hopi Tribe's lead negotiator and lead counsel in the trials in the 1980s and 1990s) that:

> As previously written, the draft Compact, apparently would mean that the Navajo Nation and Hopi Tribe would be conveying property interests in allotments owned by members of each respective tribe. It seems clear to us that the tribes do not have authority to convey something they do not own, so such conveyances would be a nullity. In addition, we are concerned that the Secretary of the Interior would be unlikely to approve the Compact if it purported to convey interests in allotments, since the Department of Interior currently is extremely sensitive to protection of allotees' [*sic*] rights. Our draft attempts to correct this problem.

[Ex. A attached to Doc. 17 (Navajo Nation's Prehearing Brief) at 3 (quoting letter)] In the redline draft that accompanied his September 5 letter, Mr. Fenzl illustrated the proposed revisions resulting from his observation regarding allotments:

> 1.2 "The Navajo Lands" means all lands held in trust by the United States for the benefit of the Navajo Nation, or the Navajo people as a whole~~, or any enrolled member of the Navajo Nation, including the estate of any deceased member~~.
>
> 1.3 "The Hopi Lands" means all lands in Arizona held in trust by the United States for the benefit of the Hopi Tribe~~,~~ or the Hopi people as a whole~~, or any enrolled member of the Hopi Tribe, including the estate of any deceased member~~.

[*Id.*] Striking the words "or any enrolled member of the [tribe], including the estate of any deceased member" excluded allotments both by definition and by intention. Those edits to the Compact were accepted by the Hopi Tribe without comment.

Thus, although the Commission rightly interpreted the Compact without relying on parol evidence, this Court should be aware that the Hopi Tribe's claim that the Commission's decision was somehow against the weight of the proffered parol evidence is simply wrong.[3] And the Hopi Tribe's claim that "[t]he definition of 'Navajo Lands' does not say anything about allotments" [Doc. 23 at 7], is true—the parties specifically negotiated allotments *out* of that definition.[4]

D. The Hopi Tribe Was Not Deprived of a Fair Hearing.

Finally, the Hopi Tribe claims that it has been deprived of a fair hearing because "[w]hile 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." [Doc. 23 at 11] To date, the Hopi Tribe's description of evidence to this Court has mirrored what it previewed for the Commission—there appears to be nothing new. The Hopi Tribe's real complaint, therefore, appears to be that the Commission did not go through the laborious process of sitting through the presentation of this evidence before interpreting and enforcing the Compact according to its plain and unambiguous terms. But the parol evidence rule is intended to allow courts (and arbitrators) to avoid such gross inefficiencies by directing them to disregard parol

[3] Other evidence presented by the Navajo Nation also undercuts the Hopi Tribe's claim that the Navajo Nation was granting something short of a property right. [Doc. 23 at 4-5] For example, James Scarboro, the Hopi Tribe's lead negotiator, stated that the parties should grant "the rights of access, use and protection," so that "these rights are in the nature of property interests." [Ex. A attached to Doc. 17 at 2]

[4] The Hopi Tribe tries to infect confusion into the definition of "Navajo Lands" by citing and attaching as Exhibit 15 a brief drafted by a private practitioner in separate unrelated proceedings in the Navajo courts. [Doc. 23 at 7] That private practitioner was not authorized to speak on behalf of the Navajo Nation, nor was he involved in negotiating the Compact. Mr. Fenzl, on the other hand, had such authorization and negotiated the Compact, including the definition of "Navajo Lands," on behalf of the Navajo Nation.

evidence where, as here, an agreement's terms are unambiguous. *Taylor*, 175 Ariz. at 155, 854 P.2d at 1141 ("[T]he judge need not waste much time if the asserted interpretation is unreasonable or the offered evidence is not persuasive."). In any event, it was the Hopi Tribe's burden to come forth with evidence to support its reading of the Compact. It cannot complain of not having a sufficient opportunity to satisfy that burden. [Doc. 16 at 11-12 (describing the Hopi Tribe's numerous opportunities to proffer parol evidence)]

Conclusion

By seeking to obtain the right to enter allotments from the Navajo Nation—a tribe which beyond dispute holds no property rights in those allotments to convey—the Hopi Tribe seeks blood from a stone. The Commission correctly decided, based on the terms of the Compact and federal law, both that the Navajo Nation **did not** and **could not** grant the Hopi Tribe the right to enter privately-held allotments to hunt for eagles. The Commission agreed with the position the Navajo Nation has taken on this issue since it first arose: if the Hopi Tribe wants to access allotments, it must seek that right from the allotment owner or the federal government. In making that decision, the Commission did not engage in any misconduct by failing to consider evidence, 9 U.S.C. § 10(a)(3), or fail to render a decision, 9 U.S.C. § 10(a)(4). As such, the Navajo Nation's Motion to Dismiss the Hopi Tribe's Second and Third Claims for Relief should be granted.

Dated: August 7, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2013, I electronically transmitted the attached document to the Clerk of the Court using the CM/ECF system for filing and transmittal of a notice of electronic filing to the following CM/ECF registrants:

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I hereby certify that on August 7, 2013, I served the attached document by first class mail on the Honorable G. Murray Snow, United States District Court, Sandra Day O'Connor U.S. Courthouse, Suite 620, 401 West Washington Street, SPC 80, Phoenix, Arizona 85003.

s/ Delana Freouf