Philip R. Higdon (Bar No. 003499)
Kirstin T. Eidenbach (Bar No. 027341)
Thomas D. Ryerson (Bar No. 028073)
PERKINS COIE LLP
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
Telephone: 602.351.8000
Facsimile: 602.648.7000
Email: PHigdon@perkinscoie.com
KEidenbach@perkinscoie.com
TRyerson@perkinscoie.com

Attorneys for Defendant Navajo Nation

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

THE HOPI TRIBE,

Plaintiff,

v.

NAVAJO NATION,

Defendant.

No. CV13-8172-PCT-GMS

REPLY IN SUPPORT OF THE NAVAJO NATION'S MOTION TO DISMISS THE HOPI TRIBE'S FIRST CLAIM FOR RELIEF

The Hopi Tribe's response relies on three false premises.

- **<u>False Premise 1:</u> The Commission did not rule on the merits of the Hopi Tribe's arbitration demand.**

Therefore, says the Hopi Tribe, Section 8.8 of the Compact [Exhibit ("Ex.") 1[1]] waives the Navajo Nation's sovereign immunity. [Doc. 32 at 5, 9-12] But this is demonstrably untrue. The Commission resolved the dispute by interpreting the Compact and applying federal law, concluding that neither authorized the relief that the Hopi Tribe sought. As such, neither the Commission's decision nor the Compact waives the Navajo Nation's sovereign immunity.

[1] Citations to numbered Exhibits refer to Exhibits attached to the Hopi Tribe's Motion to Vacate Arbitration Decision. [Doc. 3]

- **False Premise 2: Congress waived the Navajo Nation's sovereign immunity through the 1974 Settlement Act.**

Therefore, says the Hopi Tribe, it can bring this suit against the Navajo Nation to settle the meaning of the Compact. [Doc. 32 at 7-9] But this is also untrue. This Court dismissed litigation under the Settlement Act with prejudice when the tribes executed the Compact. At that time, the waiver of sovereign immunity provided by Congress to settle land title ended. As a result, Congress did not waive the Navajo Nation's sovereign immunity for this action through the Settlement Act.

- **False Premise 3: A grave injustice has been exacted against the Hopi Tribe because it cannot conduct its "sacred pilgrimages" on allotments.**

Therefore, says the Hopi Tribe, this Court must give it relief against the Navajo Nation. But this is also untrue. The Hopi Tribe can conduct its sacred pilgrimages on allotments, and the Navajo Nation will not stand in the way. Federal law (and traditional property law) instruct, however, that if the Hopi Tribe wants to enter allotments, it must obtain permission from the owner of that allotment: the Indian allotment holder and the federal government. The Navajo Nation cannot give to the Hopi Tribe what it does not own.

Once these premises are corrected, it becomes clear that the Hopi Tribe's First Claim for Relief in its Complaint [Doc. 1 ¶¶ 68-79] must be dismissed.

Argument

As the Navajo Nation pointed out in its opening brief supporting this motion, the Navajo Nation's sovereign immunity precludes all litigation except where (1) "Congress has authorized the suit" or where (2) "the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.* 523 U.S. 751, 754 (1998) (citations omitted). For an Indian tribe's waiver to be effective, it must be "clear." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). Similarly, to abrogate

sovereign immunity, Congress must "unequivocally" express that purpose. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

The Hopi Tribe claims that both exceptions are applicable here because the Navajo Nation waived sovereign immunity for this suit under the Compact [Doc. 32 at 3-7], and Congress authorized this suit under the 1974 Settlement Act [Doc. 32 at 7-9]. But the Hopi Tribe's arguments proceed on misstatements of the arbitration record and federal law. In fact, no exception to the Navajo Nation's sovereign immunity applies.

I. SECTION 8.8 OF THE COMPACT IS INAPPLICABLE BECAUSE THE COMMISSION RESOLVED THIS DISPUTE

Both tribes recognize that their agreement—the Compact—contains a limited waiver of each tribe's sovereign immunity. Section 8.9 of the Compact provides that "[e]ach party hereby consents to arbitration and/or suit in the circumstances and for the relief described in Sections 8.3 through 8.8, and hereby waives its sovereign immunity for the limited purpose of such arbitration and/or suit." To make clear that this waiver is limited, Section 8.9 further states that "the limited waiver of sovereign immunity expressed herein does not extend to any claim for any other remedy."

The gravamen of the Hopi Tribe's argument is that the Navajo Nation waived its sovereign immunity because Section 8.8 of the Compact authorizes this suit. [Doc. 32 at 5 ("Section 8.8 authorizes the Hopi Tribe to bring its First Claim in this Court, and the Navajo Nation has waived its sovereign immunity to allow the Hopi Tribe's claim to proceed.")] Section 8.8 of the Compact states, in full:

> In the event the Joint Commission shall **fail to issue a Decision and Award** within the period set forth in Section 8.4, either party may then commence litigation in the United States District Court for the District of Arizona for any relief that the Joint Commission could have awarded.

(Emphasis added). Accordingly, Section 8.8 applies—and the Navajo Nation has waived sovereign immunity—only if the Commission "fail[ed] to issue a Decision and Award."

Contrary to the Hopi Tribe's repeated assertions, the Commission clearly rendered a decision here.

Because it forms such a central (and flawed) part of the Hopi Tribe's arguments to this Court, the Navajo Nation has established, *ad nauseam*, that the Commission's resolution of this matter was a decision on the merits of the Hopi Tribe's demand, applying both on the language of the Compact[2] and federal law. [Doc. 14 at 8-9 (setting forth the Commission's Order and the Commission Chairman's statements on the record describing the bases of the Commission's decision); Doc. 16 at 7-12 (describing how the Commission made its decision by interpreting the plain language of the Compact); *id*. at 12-15 (describing how the Commission made its decision by relying on pertinent federal law); Doc. 31 at 3-4 (describing how the Commission made its decision by relying on the language of the Compact and federal law); *id*. at 4-5 (describing how the Commission's order set forth its bases and incorporated the arguments in the Navajo Nation's motion to dismiss the arbitration demand)] At the risk of belaboring the obvious, however, the Navajo Nation will again summarize the arbitration record, which demonstrates that the Commission resolved the parties' dispute on the merits:

- The Navajo Nation filed a motion to dismiss the Hopi Tribe's arbitration demand, establishing that neither the Compact's language nor federal law allowed the relief sought in the Hopi Tribe's demand. [Ex. 4 at 5-8]

[2] Predictably, the Hopi Tribe has seized on the fact that the Navajo Nation brought to this Court's attention one piece of parol evidence supporting the Commission's decision, writing that by doing so the Navajo Nation "belies its claim that the Commission could resolve this case without hearing any evidence." [Doc. 32 at 11] The Hopi Tribe ignores that the Navajo Nation, immediately prior to describing the parol evidence, stated that the Commission "rightly interpreted the Compact without relying on parol evidence," and that this Court should only be made aware of that parol evidence to know that "the Hopi Tribe's claim that the Commission's decision was somehow against the weight of the proffered evidence is simply wrong." [Doc. 31 at 10] As to the Navajo Nation's explanation that the Commission properly made its decision without relying on parol evidence [Doc. 16 at 10-11; Doc. 31 at 6-7], the Hopi Tribe has no response.

- The Hopi Tribe responded, addressing both the Compact's language [Ex. 11 at 7-12], and pertinent federal law [*Id.* at 15-19].

- The parties filed prehearing briefs, arguing about the Compact's language and federal law. [Ex. 10 at 7-9, 13-18, 27-32 (Hopi Tribe's Pre-Hearing Brief); Ex. A[3] at 7-23 (Navajo Nation's Pre-Hearing Brief)]

- The parties engaged in oral argument about the meaning of the Compact and the limits of federal law. [Ex. 5 at 11-16, 24-33 (arguing the meaning of the Compact); *id.* at 9-11, 19-20 (discussing the application of federal law)]

- The Commission dismissed the case, noting specifically on the record that it was dismissing "on the basis that was set forth in the [Navajo Nation's] motion to dismiss," specifically that "[jurisdiction] is not given to us . . . in the agreement" and that "we don't have jurisdiction under Federal law." [Ex. 6 at 90]

- The Commission's written award stated that it was "grant[ing] the Navajo Nation's Motion to dismiss," and that "[a]ll Commissioners agree that [the Commission] lacks jurisdiction to consider the dispute involving allotted lands since it has no jurisdiction over allotment holders and the U.S. Secretary of the Interior (the allotment trustee) under the Intergovernmental Compact."[4] [Ex. 9 at 2]

Despite this record, the Hopi Tribe argues that the Commission "did not rule on the merits of the Hopi Tribe's claims." [Doc. 32 at 2] But while the Hopi Tribe may not like the result, the above establishes that the Commission's decision was well grounded in the merits of the case.

[3] Exhibit A is attached to the Declaration of Kirstin T. Eidenbach. [Doc. 17]

[4] The Hopi Tribe makes the specious form-over-substance argument that because the Commission did not style its order as a "Decision and Award" it should be vacated. [Doc. 32 at 5 n.1] This Court should decline to assess the validity of the Commission's decision by relying on the title it used. This Court should instead look at the substance of the Commission's order, which shows that it rendered a decision on the merits of the Hopi Tribe's arbitration demand.

Setting the record aside, the Hopi Tribe rests on two points to argue that the Commission's decision was not on the merits. *First*, it argues that the Commission's dismissal was "without prejudice." [Doc. 32 at 9-10] *Second*, it argues that the Commission's order indicates that "jurisdiction lies with the United States District Court." [Doc. 32 at 10] Both these facts fail to demonstrate that the Commission's order was made without regard to the merits:

- The Navajo Nation previously addressed why dismissal "without prejudice" reflects only the *type* of dismissal (for lack of subject matter jurisdiction to grant the relief sought), and that 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). [Doc. 31 at 5-6] As to the Hopi Tribe's observation that dismissal without prejudice allows it to bring the claim again [Doc. 32 at 10], it is correct. The Commission's decision does not prohibit the Hopi Tribe from bringing another case to access allotments—provided that it brings the suit against the appropriate parties (i.e., the owners of the allotments the Hopi Tribe seeks to access). The Commission's order still made clear, though, that it was resolving the merits of the dispute as between the Hopi Tribe and Navajo Nation.

- It is immaterial that the Commission stated that "jurisdiction lies with the United States District Court." [Ex. 9 at 2] The Hopi Tribe quotes the Commission out of context. Immediately preceding that statement was the Commission's order that the Commission "has no jurisdiction over the allotment holders and the U.S. Secretary of the Interior (the allotment trustee)." [*Id.*] Thus, the Commission's observation about the jurisdiction of this Court relates to its lack of jurisdiction over these required parties.[5] The

[5] Similarly, the Hopi Tribe points to the Navajo Nation's statement to the Commission that "the Hopi have an alternative forum—the forum deemed appropriate by federal law—in district courts." [Doc. 32 at 6] The Hopi Tribe again makes a self-serving contextual edit. Immediately prior to that statement, the Navajo Nation wrote that "Because the relief the Hopi seek hinges on the deprivation of allottee rights, relief cannot be tailored to eliminate the prejudice to the allottees." [Ex. 4 at 12; *see also* Ex. 3 at 12 (observing that "federal court is the only place that this matter can be adjudicated with all parties [e.g., allotment owners] present and to reach a final conclusion binding everyone")] Once again, the Navajo Nation was ushering the Hopi Tribe toward federal court not so that the Hopi Tribe would sue the Navajo Nation in federal court, but instead

> Commission was not sanctioning a district court suit against the Navajo Nation, nor was it indicating that, as between the Hopi Tribe and Navajo Nation, its decision was not on the merits.

In sum, the Commission made a decision on the merits of the Hopi Tribe's arbitration demand, resolving the dispute by determining that neither the Compact nor federal law gave it the authority to grant the Hopi Tribe the relief it sought. And although Section 8.8 of the Compact authorizes recourse to this Court if the Commission "fail[s] to issue a Decision and Award," that is simply not the case here.

II. THE 1974 SETTLEMENT ACT DOES NOT SUPPORT THE HOPI TRIBE'S POSITION BECAUSE THROUGH IT CONGRESS DID NOT WAIVE THE NAVAJO NATION'S SOVEREIGN IMMUNITY TO ALLOW THE PARTIES TO LITIGATE THE MEANING OF THE COMPACT

The Hopi Tribe also argues that Congress authorized the Hopi Tribe to sue the Navajo Nation for its First Claim for Relief under the 1974 Settlement Act. [Doc. 32 at 7-9] But Congress most certainly did not "unequivocally" express an abrogation of sovereign immunity in that Act for this purpose. *Santa Clara Pueblo*, 436 U.S. at 58. In fact, *nothing* in that Act supports the Hopi Tribe's argument.

As an initial matter, the Hopi Tribe ignores that the litigation authorized under that Act was settled and concluded, and in recognition that a sovereign immunity waiver no longer existed after settlement, the parties specifically agreed to a waiver of that immunity going forward for very limited purposes. The Court's Final Order in that litigation stated that "[a]ny and all claims asserted by the Navajo Nation or the Hopi Tribe against the other in this action are fully and finally adjudicated by this Order and Final Judgment and are hereby dismissed with prejudice." [Exhibit A1[6] at 4] That Order, recognizing each tribe's sovereign immunity going forward after the litigation's conclusion, further stated

---

so that it could sue the appropriate parties—the allotment holder and the federal government—in this forum if it thinks it has a right to access privately-held allotments.

[6] Exhibit A1 is attached to the Navajo Nation's Motion to Dismiss the Hopi Tribe's First Claim for Relief. [Doc. 14]

that the court "retain[ed] jurisdiction over the parties and the subject matter for the purpose of proceedings to vacate, modify, or enforce any arbitration decision and award made under Section 8.4 of the Intergovernmental Compact, or original enforcement proceedings under Sections 8.7 or 8.8 thereof."[7] [*Id.* at 3-4] Additionally, in settling that litigation, the parties specifically provided for a limited waiver of sovereign immunity in Section 8.9 of the Compact. That term would not have been necessary if, as the Hopi Tribe posits, Congress intended for a continuing waiver of immunity to claims by the Hopi Tribe against the Navajo Nation (or vice-versa).

Grasping at straws, the Hopi Tribe relies on two sections of the 1974 Settlement Act in a flawed attempt to show that the Navajo Nation's sovereign immunity does not bar its claim. First, the Hopi Tribe cites 25 U.S.C. § 640d-20 in support of its position. The Hopi Tribe claims that this statute states that "there must be 'reasonable provision for the use of and right of access to identified religious shrines for the members of each tribe.'" [Doc. 32 at 9] The Hopi Tribe's self-serving excerpt of this section is highly misleading. The statute instead provides that "the *Secretary [of the Interior]* shall make reasonable provision for the use of and right of access to identified religious shrines for the members of each tribe." 25 U.S.C. § 640d-20 (emphasis added). Accordingly, this section says *nothing* about the Navajo Nation's obligation to provide access to allotments (or anywhere else), and certainly does not establish any waiver of the Navajo Nation's sovereign immunity. Instead, this section reinforces and dovetails with the Navajo Nation's position: if the Hopi Tribe wants access rights to privately-held allotments, it must go to the allotment owner which, beyond dispute, includes the Secretary of the Interior.[8] *See infra* Section III.

---

[7] As discussed above, the waiver of sovereign immunity provided by Section 8.8 of the Compact is inapplicable here. As to Section 8.7, the Hopi Tribe has not cited that Section in support of its arguments. In any case, Section 8.7 of the Compact—relating to the appointment of a Commission Chairman—clearly does not apply to the Hopi Tribe's first claim.

[8] This section, which by its terms imposes obligations on the Secretary of the Interior, might be a logical starting point were the Hopi Tribe to seek the right to access allotments from the federal government. *See infra* Section III.

The Hopi Tribe also claims that 25 U.S.C. § 640d-17(c) authorizes this suit by permitting either tribe to file suit to "insure the quiet and peaceful enjoyment of the reservation lands . . . and to fully accomplish all objects and purposes of this subchapter." [Doc. 32 at 8 (quoting 25 U.S.C. § 640d-17(c))] But this statute is also very wide of the mark.

While Section 640d-17(c) permits suits for "quiet and peaceful enjoyment," that language was clearly envisioned to provide a limited mechanism through which each tribe could secure title and possession to reservation land. "Quiet enjoyment" is a well-defined term, referring to the protection of *property* rights. *See* Black's Law Dictionary 609 (9th ed. 2009), quiet enjoyment ("The *possession of land* with the assurance that the possession will not be disturbed by a superior title.") (emphasis added); *see also Johansen v. Ariz. Hotel*, 37 Ariz. 166, 173, 291 P. 1005, 1008 (1930) (describing "quiet enjoyment" as the right of "the lessee [to be] free from any interference on the part of the landlord"). Yet, the Hopi Tribe has consistently claimed that it is *not* seeking a property right, writing most recently in its response that "[t]his was never simply a case about easements." [Doc. 32 at 3] The Hopi Tribe cannot pervert the plain meaning of Section 640d-17(c)—which is geared toward protecting property rights—to somehow reveal Congress's intent to allow the Hopi Tribe to sue the Navajo Nation for access to individually-held allotments owned in trust for the allotment holders by the federal government.

Section 640d-17(c) also permits suits by one tribe against the other to "fully accomplish all objects and purposes of this subchapter [i.e., the 1974 Settlement Act]." This statute also does not waive the Navajo Nation's sovereign immunity against this suit. First, as has been noted, the litigation contemplated by the Act to settle land claims is over. Second, the Settlement Act states clearly that "[n]othing in this subchapter shall affect the title, possession, and enjoyment of lands heretofore allotted to Hopi and Navajo individuals." 25 U.S.C. § 640d-16(a). It would therefore subvert, and not "accomplish," the "objects and purposes of [the Settlement Act]" for the Hopi Tribe to seek an access right to allotments—Congress specifically provided that the 1974 Settlement Act would

not affect an allotment holder's ownership, possession or enjoyment of his or her own individual allotment.[9]

Finally, as a practical matter, reading Section 640d-17(c) so broadly would vitiate entirely the tribes' arbitration agreement. In that event, arbitration would be a toothless remedy, as any party dissatisfied with a Commission decision could bring an original action to this Court under Section 640d-17. The Court should decline the Hopi Tribe's invitation to destroy the tribes' agreed-upon arbitration procedure under the guise of applying such a clearly inapplicable statute.

III. THE HOPI TRIBE MAY ENTER ALLOTMENTS TO CONDUCT ITS SACRED PILGRIMAGES, BUT IT MUST GET THAT RIGHT FROM THE ALLOTMENT OWNER

Throughout its briefing, the Hopi Tribe suggests that the Navajo Nation is the entity standing between its religious practitioners and allotments. [Doc. 32 at 3 ("[T]he Navajo Nation continues to threaten Hopi religious pilgrims with arrest and prosecution.")] The Hopi Tribe further posits that, by standing between Hopi Tribe religious practitioners and allotments, the Navajo Nation is exacting an injustice by relying on a jurisdictional sleight-of-hand.

As an Indian tribe, the Navajo Nation understands the sometimes complicated and frustrating interaction between tribal religious practices and the limits of federal law.

[9] The case cited by the Hopi Tribe, *Sekaquaptewa v. MacDonald*, 619 F.2d 801, (9th Cir. 1980), does not support its position. In that case, the Hopi Tribe claimed that Section 640d-17(c) provided the district court with jurisdiction over the Hopi Tribe's accounting claim against the Navajo Nation. The Ninth Circuit rejected that argument, stating that "[t]he 1974 jurisdictional act, 25 U.S.C. § 640d-7, authorizes actions to quiet title and to partition lands in some circumstances. Section 640d-17(c) authorizes 'further original, ancillary or supplementary actions' only if they insure 'the quiet and peaceful enjoyment of the reservation lands' or to accomplish the 'objects' of the Act." *Id.* at 809. The court rejected that an accounting action fell within Section 640d-17 because "[t]hose objects [of the settlement act] are to quiet title and to partition certain lands. An action for accounting serves neither purpose." *Id.* Similarly, here, the Hopi Tribe's claim against the Navajo Nation relating to the meaning of their settlement agreement (the Compact) does not "serve[] [the] purpose" of quieting title and partitioning lands, particularly when the litigation that accomplished those objectives was long-ago settled. Enforcement of the Compact must instead follow the parties agreed-upon procedure: arbitration before the Commission.

Nonetheless, the Navajo Nation cannot help but observe that the Hopi Tribe's frustration, while quite genuine, is also quite misplaced. Federal law instructs, and the Hopi Tribe does not dispute, that the Navajo Nation owns *no* property interests in the allotted lands held by its individual members and the federal government. As a result, *even if it wanted to*, the Navajo Nation could not grant the Hopi Tribe the right to access allotments. The "jurisdictional catch" that the Hopi Tribe alleges is at issue [Doc. 32 at 9], is not a technicality, but reflects the legal reality that the Navajo Nation does not have rights in allotments to convey. Recognizing this, the Commission, in a very common-sense resolution of the question put before it, decided that the Hopi Tribe would need to seek a right to access allotments, not from the Navajo Nation, but from somewhere else. And that opportunity still presents itself: unlike the Commission, this Court has jurisdiction over allotments and, critically, the owners of those allotments. *See* 28 U.S.C. § 1353; 25 U.S.C. § 345. The Hopi Tribe's attempts to obtain that right from the Navajo Nation, however, must come to an end.

Conclusion

As discussed above, the Hopi Tribe's response is built upon three false premises. But, contrary to the Hopi Tribe's arguments in support of these premises:

- the Commission did not decline to resolve this dispute, instead ruling—based on the Compact and federal law—that it lacked the jurisdiction to grant the relief the Hopi Tribe sought;
- the 1974 Settlement Act is entirely inapposite; and
- the Hopi Tribe can access allotments, provided that it seeks the right to do so from the allotment's owners: the individual Indian allotment holder and the federal government.

For the foregoing reasons, this Court should grant the Navajo Nation's motion and dismiss the Hopi Tribe's First Claim for Relief.

Dated: August 30, 2013

PERKINS COIE LLP

By: s/ Philip R. Higdon
Philip R. Higdon
Kirstin T. Eidenbach
Thomas D. Ryerson
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788

Attorneys for Defendant Navajo Nation

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 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:

Timothy R. Macdonald
George R. Green
Michelle Kay Albert
ARNOLD & PORTER LLP
370 Seventeenth Street, Suite 4500
Denver, Colorado 80202-1370
Attorneys for the Hopi Tribe

I hereby certify that on August 30, 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 622, 401 West Washington Street, SPC 80, Phoenix, Arizona 85003.

s/ Susana M. Frietz