Ethel Billie Branch, Attorney General
The Navajo Nation

Paul Spruhan, Assistant Attorney General
NAVAJO NATION DEPT. OF JUSTICE
Post Office Box 2010
Window Rock, Arizona 86515-2010
Telephone: (928) 871-6937

Attorneys for Navajo Nation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation, Plaintiff, v. APPROXIMATELY 15.49 ACRES OF LAND IN McKINLEY COUNTY, NEW MEXICO; UNITED STATES OF AMERICA; NAVAJO NATION, et al., Defendants.	No. 1:15-cv-00501

MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392

Pursuant to Rule 71.1(i)(1)(c) and (i)(2) of the Federal Rules of Civil Procedure, Defendant Navajo Nation (Nation) moves the Court to dismiss it as a Defendant and to dismiss Allotment Numbers 1160 and 1392 from the case altogether. Plaintiff Public Service Company of New Mexico (PNM) improperly joined the Nation as a defendant, as the Nation has sovereign immunity from the condemnation suit. The Nation must

then be dismissed from the action. However, as the Nation's property interests in the two allotments make it an indispensable party, and as the Nation cannot be joined, the condemnation actions against Allotments 1160 and 1392 must be dismissed in their entirety.

FACTS

The Navajo Nation makes a facial attack on Public Service Company of New Mexico's Complaint. *See U.S. v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001). The facts in the Complaint are taken to be true for purposes of the motion. *Id.* Based on the facts as pled, the Complaint fails to establish this Court's subject matter jurisdiction over the Nation, as the Nation is immune from the condemnation suit. Further, as the Nation is immune, and as it is a required party that cannot feasibly be joined, two of the five allotments must be dismissed from the case.

The Complaint seeks condemnation of five allotments under 25 U.S.C. § 357. Complaint, ¶¶ 21, 27. The Navajo Nation has fractional property interests in two of those allotments, identified as Allotment Numbers 1160 and 1392. *Id.*, ¶¶ 8, 16. As the Nation is a part-owner of those two allotments, Public Service Company of New Mexico (PNM) joined the Nation as a defendant in the condemnation action. *Id*.

ARGUMENT

I. THE NATION HAS SOVEREIGN IMMUNTIY FROM THIS CONDEMNATION SUIT.

Under federal law, Indian nations as sovereign governments are immune from suit. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2031 (2014) ("Among the core aspects of sovereignty that tribes possess . . . is the common-law immunity from suit enjoyed by sovereign powers." (internal quotation marks omitted)). Immunity

is a "necessary corollary to Indian sovereignty and self-governance." *Id.* Whether the case is in rem or in personam, or whether a party seeks money damages or declaratory or injunctive relief, is irrelevant. *See, e.g., Id.* (tribe immune from money damages claim); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) (tribe immune from injunction action); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (tribe immune from declaratory judgment concerning access to road over tribal lands); *Farmer Oil and Gas Properties, LLC v. Southern Ute Indian Tribe*, 899 F.Supp.2d. 1097, 1103 (D.Colo. 2012) (tribe immune from declaratory judgment concerning contested ownership of gas underneath tribal land). Regardless of the relief requested, the binding principle remains that an Indian nation cannot be joined as a defendant absent its own waiver or a waiver by Congress.

Neither the Navajo Nation nor Congress has waived the Nation's immunity for this action. Waiver of immunity by an Indian nation or by Congress must be "unequivocally expressed" to be effective. *Nanomantube v. Kickapoo Tribe in Kansas*, 631 F.3d 1150, 1152 (10th Cir. 2011). While the Nation has waived its immunity for certain types of actions through the Navajo Sovereign Immunity Act, federal court condemnation of its property interests is not one of them. *See* 1 N.N.C. § 554 (2005) (stating types of actions for which the Nation has consented to be sued). Further, nothing in the condemnation statute shows unequivocal congressional intent to waive tribal immunity. *See* 25 U.S.C. § 357. Indeed, Indian nations are not mentioned at all in the statute. *Id.* As neither the Nation nor Congress has waived the Nation's immunity from condemnation actions, the Nation's immunity is intact. PNM therefore

improperly joined the Nation, and this Court should dismiss the Nation as a defendant in this case.

II. AS THE NATION IS AN REQUIRED PARTY THAT CANNOT FEASIBLY BE JOINED, THE TWO ALLOTMENTS MUST BE DISMISSED FROM THIS CASE.

The Nation is a required party that should be joined if feasible. It cannot due to sovereign immunity. Because it cannot be joined, the two allotments must be dismissed from the action under Rule 19 of the Federal Rules of Civil Procedure.

A Rule 19 analysis has three parts. First, the court must find that the prospective party is "required to be joined" under Rule 19(a). *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1278 (10th Cir. 2012). Second, the court must find that the prospective party cannot feasibly be joined. *Id.* Third, the court must decide whether the party is so important to the action that the action cannot "in equity and good conscience" proceed in that person's absence. Fed. R. Civ. P. 19(c); *Northern Arapaho Tribe*, 697 F.3d at 1278-79. Under that three-part analysis, the two allotments must be dismissed.

A. The Nation is a "required party."

Under Rule 19, a plaintiff must join certain parties to a case. To be a "required party" under the rule, that person, among other reasons, must claim "an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest[.]" Fed. R. Civ. P. 19(a)(1)(B)(i). Under the facts of the Complaint, the Nation owns a fractional property interest in two of the allotments PNM seeks to condemn. The Nation clearly has an interest in the subject of the action. If the

allotments are condemned and a right-of-way granted in the Nation's absence, the Nation's ability to protect its interest in those allotments would undoubtedly be impaired or impeded. The Nation therefore is clearly a "required party" under Rule 19(a).

B. The Nation cannot feasibly be joined.

Though a "required party," as discussed above, the Nation cannot be joined because it is immune from the condemnation suit. *See supra,* Section I.

C. The action should not proceed in the Nation's absence.

As the first two elements of Rule 19 are met, this Court must "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). The factors include:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Id.

However, when the required party is a sovereign government protected by sovereign immunity, countervailing considerations override the factors in Rule 19(b).

There is a "strong policy that has favored dismissal when a court cannot join a tribe because of immunity." *Davis v. United States,* 192 F.3d 951, 960 (10th Cir.1999). When a necessary party is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves. *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel,* 883 F.2d 890, 894 (10th Cir.1989). Where a sovereign party should be joined in an action, but cannot because of sovereign immunity, the entire case must be dismissed if there is the potential for the interests of the sovereign to be injured. *See Republic of Philippines v. Pimentel,* 553 U.S. 851, 867 (2008). That is clearly the case here, where the Nation's property interests will be injured if the allotments are condemned and rights-of-way granted without the Nation's consent or participation.

Even if the factors of 19(b) are considered independent of those considerations, they weigh in favor of dismissing the two allotments.

Under the first factor, the Court considers the "extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties." Rule 19(b)(1). This prejudice test is essentially the same as the inquiry under Rule 19(a), whether "continuing the action without a person will, as a practical matter, impair that person's ability to protect his interest relating to the subject of the lawsuit." *Harnsberger*, 697 F.3d at 1282. As discussed above, the Nation's property interests in the two allotments will undoubtedly be affected by condemnation of the allotments, as this Court might grant a right-of-way over the land without its consent or participation, and therefore the Nation is prejudiced. This factor clearly weighs in favor of dismissal.

The second factor requires the court to consider "the extent . . . to which any

prejudice could be lessened or avoided by tailoring the judgment or relief in some way." *Id.* (internal quotation marks omitted). Condemnation is "an all-or-nothing" action, *see id.*; either the right-of-way is granted without the consent of the allotment property owners or it is not. There is no way to tailor a judgment that would not result in condemnation of the allotments without consent or participation of the Nation. This factor also weighs in favor of dismissal.

The third factor is "whether a judgment rendered in the person's absence would be adequate." Fed R. Civ. P. 19(b)(3). It is "not intended to address the adequacy of the judgment from the plaintiff's point of view." *Id.* (internal quotation marks omitted). "Rather, the factor is intended to address the adequacy of the dispute's resolution," that is, "the interest of the courts and the public in complete, consistent and efficient settlement of controversies." *Id.* (internal quotation marks omitted). It refers to the "public stake in settling disputes by wholes, whenever possible." *Id.* (internal quotation marks omitted). Here, complete, consistent and efficient settlement cannot be achieved if the allotments are condemned without the Nation's participation, as the allotments might be condemned[1] but the Nation, as a non-party, would not be compensated by this Court's order. The Nation would not be bound by the judgment and might have a potential separate claim to compensation that could not be adjudicated in this case.

The final factor considers "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(4). Here, if the "adequate remedy" is condemnation of the two allotments, PNM would not have an

[1] It is unclear how the allotments could be condemned at all in the absence of one of the property owners. However, if the Court nonetheless condemns the allotment in the Nation's absence, the Nation as a non-party would not be able to object or to receive court-ordered compensation.

adequate remedy, as it would be unable to use Section 357 of Title 25 to force a right-of-way across the allotments. However, "[w]hen viewed in light of the Tribe's sovereign immunity and the first three Rule 19(b) factors," *Harnsberger*, this factor alone does not justify continuing the case in the Nation's absence. Indeed, sovereign immunity may result in the lack of remedy for the plaintiff, but that concern is outweighed by the damage to the sovereign government's interests if the case is allowed to move forward. *See Harnsberger*, 697 F.3d at 1283-84; *Pimentel*, 533 U.S. at 867.

CONCLUSION

Based on the above, the Nation moves the Court to dismiss it as a defendant in this action and to dismiss Allotments 1160 and 1392 from the case entirely.

RESPECTFULLY SUBMITTED this 4th day of September, 2015.

By: /s/ Paul Spruhan
Ethel Billie Branch, Attorney General
Paul Spruhan, Assistant Attorney General
Navajo Nation Department of Justice
Post Office Box 2010
Window Rock, Arizona 86515-2010
Tele: (928) 871-6937
pspruhan@nndoj.org

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of New Mexico using the CM/ECF system on September 4, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

_ /s/ Paul Spruhan