Case No. 22-2141

UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

GUY CLARK; LINDA CORWIN;
CRAIG CORWIN; WESLEY HANCHETT;
RICHARD JONES; MICHAEL WRIGHT,
Plaintiffs-Appellants,

v.

DEB HAALAND, in her official capacity as Secretary of the Interior;
CAMILLE C. TOUTON, in her official capacity as Deputy Commissioner, United States Bureau of Reclamation;
MARTHA WILLIAMS, in her official capacity as Principal Deputy Director, U.S. Fish & Wildlife Service;
DR. RUDY SHEBALA, in his official capacity as Executive Director, Navajo Nation Division of Natural Resources;
DAVE ZELLER, in his official capacity as head of Navajo Agricultural Products Industries;
MIKE HAMMAN, in his official capacity as State Engineer of the State of New Mexico; and
ROLF SCHMIDT-PETERSEN, in his official capacity as Director of the New Mexico Interstate Stream Commission,
Defendants-Appellees.

Appeal from the United States District Court for the
District of New Mexico, No. 1-21-cv-01901-KG-SCY
Judge Kenneth J. Gonzales, presiding

BRIEF OF APPELLEES DR. RUDY SHEBALA AND DAVE ZELLER

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RELATED CASE STATEMENT

No prior appeals have been taken in this action, or to this Court from any related action.

GLOSSARY OF TERMS

DNR	Navajo Nation Division of Natural Resources
NAPI	Navajo Agricultural Products Industry
Navajo Appellees	Appellees Dr. Rudy Shebala and Dave Zeller
Settlement	Navajo Nation Water Rights Settlement

RULE 31.3(B) STATEMENT

As the Navajo Nation is a government entity, as well as all other Appellees, 10 Cir. R. 31.3(B) does not apply, pursuant to 10 Cir. R. 31.3(D).

APPELLEES' STATEMENT OF THE ISSUES

1. Does a tribal nation waive its inherent sovereign immunity through participation in a state water adjudication where plaintiffs sue the tribal nation in a separate, collateral case in federal court?
2. Does the McCarran Amendment unequivocally abrogate tribal sovereign immunity when it makes no mention of tribes?
3. Does *Ex parte Young* provide an exception to tribal sovereign immunity where the complaint alleges no facts connecting tribal defendants to a specific violation of federal law and fails to establish a need for prospective relief?
4. Does *Ex parte Young* apply when a complaint attacks a tribal nation's special sovereignty interest in its federally-affirmed water rights?

APPELLEES' STATEMENT OF THE CASE

The Navajo Nation ("Nation") is a federally-recognized tribal nation that possesses inherent sovereign immunity against suit. The Division of Natural Resources ("DNR") is one of the twelve divisions of the Nation's Executive Branch. *See* 2 N.N.C. §§ 1251, *et seq.* (2005) (Navajo Nation Code provisions identifying divisions of the Executive Branch). The Navajo Nation Council ("Council") created DNR to manage the Nation's natural resources. 2 N.N.C. §§ 1901; 1902(A) (2005). The DNR executive director is appointed by the President of the Nation and confirmed by the Council. 2 N.N.C. § 1903 (2005). As an agency of the Nation's government, DNR enjoys the protections of the Nation's sovereign immunity. Navajo Agricultural Products Industry ("NAPI") is a wholly-owned enterprise of the Nation that operates a commercial farm with water delivered by the Navajo Indian Irrigation Project. 5 N.N.C. § 1601 (2005). The Council also created NAPI, and its governing board is appointed by the Navajo Nation President and confirmed by the Resources and Development Committee of the Navajo Nation Council. 5 N.N.C. § 1603(A) (2005). As such, NAPI shares the Nation's immunity. *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort,* 629 F.3d 1173, 1183 (10th Cir. 2010) (recognizing "tribal sovereign immunity may extend to subdivisions of a tribe" so long as "the relationship between the tribe and the entity is sufficiently

close").[1] Appellee Dr. Rudy Shebala is the Executive Director of DNR. Dave Zeller is the Chief Executive Officer of NAPI. Shebala and Zeller (collectively "Navajo Appellees") are therefore also protected from suit by the sovereign immunity of the Nation.

The McCarran Amendment provides a means of adjudicating federal water rights, including tribal water rights. It waives the sovereign immunity of the United States, allowing the federal government to be joined as a defendant in comprehensive general stream adjudications. 43 U.S.C. § 666.

The Nation, the United States, and the State of New Mexico participated in a general stream adjudication in New Mexico State District Court concerning rights to the San Juan River. The Nation ultimately settled its claim to San Juan River water in New Mexico through the Navajo Nation Water Rights Settlement ("Settlement"), approved by Congress in 2009. *See* Northwestern New Mexico Rural Water Projects Act, Pub. L. No. 111-11, § 10701, 123 Stat. 1396, 1396-1405. Following execution of the Settlement, the New Mexico State District Court entered two partial final judgments and decrees affirming the water rights of the Nation. *See State ex. Rel. State Eng'r v. United States,* 2018-NMCA-053, ¶ 5, 425 P.3d 723, 728.

[1] Appellants did not contest in the district court, and do not contest on appeal, that DNR and NAPI are protected by the Nation's sovereign immunity. Indeed, their complaint identifies NAPI as "an agency, instrumentality, or enterprise of the Navajo Nation." App. Vol. 1 at 17.

The New Mexico State District Court and the New Mexico Court of Appeals rejected objections to the Settlement, deeming it fair and consistent with all applicable federal and state laws. *Id.* ¶¶ 5-6, 45. Challengers to the settlement filed a petition with the Supreme Court of New Mexico. The Supreme Court quashed certiorari, *State Eng'r v. United States,* 504 P.3d 533 (N.M. 2021), and the parties did not seek further review by the United States Supreme Court.

In their federal complaint ("Complaint"), Appellants mount a collateral attack on the state adjudication, claiming a number of violations of federal law, and errors and misconduct by the state judges who affirmed the Settlement.[2] In doing so, they attack the sovereignty of the Nation and its federally-affirmed rights to San Juan River water.

As relevant here, Appellants allege broad, vague violations of federal law by the three sovereigns that they argue renders the Settlement invalid. However, though they name Navajo Appellees in the caption of the case, Appellants provide no further

[2] Notably, Appellants raise the same or substantially similar claims rejected in the state court proceedings, and were represented by the same attorney, Victor Marshall, prior to his suspension from the practice of law by the New Mexico Supreme Court. *See State ex. Rel. State Eng'r v. United States,* 2018-NMCA-053, 425 P.3d 723; Complaint, App. Vol. 1 at 15-57. The Supreme Court of New Mexico recently suspended Mr. Marshall for not less than eighteen months for statements he made in the state proceeding concerning the integrity of Judge James Wechsler, who presided over the state district court challenge to the Settlement. *In re Victor R. Marshall*, No. S-1-SC-37698 (N.M. Sup. Ct. March 13, 2023). The Complaint in this case repeats a number of the same allegations against Judge Wechsler. App. Vol. 1 45-49.

explanation of their involvement. Unsurprisingly, the District Court found that the Nation's sovereign immunity shielded Navajo Appellees from suit and accordingly dismissed the complaint against them. Appellants are appealing that decision.

SUMMARY OF THE ARGUMENT

Tribal nations, as sovereigns, enjoy inherent immunity from suit. This can only be overcome through an explicit waiver by the tribe or unequivocal abrogation by Congress. The shield of tribal sovereign immunity extends to tribal officials, barring a valid exception. Appellants have failed to establish a valid waiver, unequivocal abrogation, or appropriate exception. The District Court correctly found the Nation's immunity protected Navajo Appellees from suit, and determined it lacked subject matter jurisdiction over the claims against them. On appeal, Appellants again fail to overcome the Nation's immunity. This court should affirm.

Appellants attempt to establish a waiver or abrogation of the Nation's immunity by arguing that the Nation's participation in a separate state water adjudication waives the Nation's immunity in this federal action, but it doesn't. They also try to extend the "sue and be sued" doctrine, applicable to federal entities, to the Nation, but it simply does not apply. Finally, Appellants argue that the McCarran amendment waives the Nation's sovereign immunity, but the U.S. Supreme Court has held it does not.

Because Appellants cannot establish a waiver or abrogation of sovereign immunity, they must identify a valid exception to sue Navajo Appellees. They fall short of meeting this standard as well. Appellants fail to meet the basic threshold for applying the *Ex parte Young* doctrine because they fail to provide any facts tying Navajo Appellees to Appellants' claims and they fail to seek specific remedies against Navajo Appellees. Moreover, the *Young* doctrine is inapplicable in matters involving special sovereignty interests. The Nation's federally-affirmed water rights are a special sovereignty interest, and *Young* therefore does not apply.

ARGUMENT

I. TRIBES ARE IMMUNE FROM SUIT UNLESS THEIR IMMUNITY IS UNEQUIVOCALLY WAIVED OR CONGRESSIONALLY ABROGATED.

A district court's determination of subject matter jurisdiction is reviewed *de novo*. *Fletcher v. United States,* 116 F.3d 1315, 1324 (10th Cir. 1997). Moreover, the legal question whether Navajo Appellees have sovereign immunity is reviewed *de novo* as "tribal sovereign immunity is a matter of subject matter jurisdiction." *Id.* at 1323-24).

Tribes possess inherent sovereign immunity, and as such, "suits against tribes are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress." *Id.* at 1324. So long as tribal officials are acting within their official capacity, tribal immunity protects them as well. *Id.*

Appellants mischaracterize *Fletcher* as limiting tribal sovereign immunity to matters involving internal tribal affairs. Op. Br. at 30-31. However, sovereign immunity does not depend on the subject matter of the case or the identity or interests of the parties. Instead, as a general matter, "suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Com'n v. Citizen Band Potawatomie Indian Tribe of Oklahoma,* 498 U.S. 505, 509 (1991).

Though there is no bright-line test, a clear statement is required to prove congressional intent to abrogate tribal sovereign immunity. *Michigan v. Bay Mills Indian Community,* 572 U.S. 782, 790 (2014) (concluding "a congressional decision must be clear" to overcome "the baseline position" of tribal immunity). This is the same standard that applies to congressional abrogation of federal and state sovereign immunity. *See, Sossamon v. Texas,* 563 U.S. 277, 284-285 (2011) (finding abrogation of state sovereign immunity requires "a clear statement in the text of the statute"); *Lane v. Pena,* 518 U.S. 187, 192 (1996) (determining that abrogation of federal sovereign immunity must "appear clearly" in the statute). Under this framework, "[a]ny ambiguities in the statutory language are to be construed in favor of immunity." *FAA v. Cooper,* 566 U.S. 284, 290 (2012). Thus, abrogation of the Nation's immunity "cannot be implied," *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978), because courts will not "lightly assume that Congress in fact intends

to undermine Indian self-government." *Bay Mills Indian Community,* 572 U.S. at 790.

II. APPELLANTS FAIL TO IDENTIFY AN EXPLICIT WAIVER OR UNEQUIVOCAL ABROGATION OF THE NAVAJO NATION'S SOVEREIGN IMMUNITY.

While Appellants assert the lower court "overlooked several waivers that apply to this case," they fail to identify a valid one. Op. Br. At 24. They contend "the three governments waived sovereign immunity by suing water owners on the San Juan River." Op. Br. at 27. They also assert that governments automatically waive immunity when exercising their alleged power to "sue and be sued." *Id.*

However, a tribe that files suit in one action does not automatically waive its immunity in a different action. Even if Appellants had filed a counterclaim within the same suit, "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it." *Citizen Band Potawatomi,* 498 U.S. at 509-510. Because tribes are immune from direct suit, they are equally immune from counterclaims. *Id.* Regardless, Appellants did not file a counterclaim here. They filed an independent collateral attack in federal court challenging a state court adjudication. If a counterclaim in the same case is insufficient to waive tribal immunity, then a collateral attack in a separate forum is also clearly insufficient.

Appellants' reliance on the "sue and be sued" doctrine is also mistaken. The doctrine is only relevant when Congress includes a "sue and be sued" clause in

legislation to abrogate the sovereign immunity of a federal entity. *See FDIC v. Meyer,* 510 U.S. 471, 475-476 (1994). Tribes are not federal entities, and there is no statute with a "sue and be sued" clause relevant here. Therefore, that doctrine does not provide a waiver of the Nation's sovereign immunity.

Appellants further argue the McCarran Amendment abrogates tribal sovereign immunity. Op. Br. At 31. However, the McCarran Amendment only abrogates the immunity of the United States in certain water rights adjudications, which this case is not. *See* 43 U.S.C. § 666 (consenting to join the United States as defendant in the adjudication and administration of certain water rights "provided, [t]hat no judgment for costs shall be entered against the United States in any such suit"). Even if the McCarran Amendment applied here, it does not mention tribes at all. *Id.* Because Congress must provide a clear statement to unequivocally abrogate tribal sovereign immunity, the McCarran Amendment does not authorize this suit.

Moreover, this argument has already been considered and rejected by the Supreme Court. In *Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545 (1983), the Supreme Court held the McCarran Amendment only abrogated *federal* sovereign immunity, and explicitly *disclaimed* it abrogated tribal sovereign immunity. *San Carlos*, 463 U.S. at 567, n.17 (explaining the "McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications") (emphasis in original). Appellants

erroneously rely upon *San Carlos* to state the opposite of its actual holding. Op. Br. at 32.

Appellants make additional arguments concerning the immunity of the State of New Mexico and the United States, but those cases are inapposite and fail to establish a waiver of the Nation's immunity. For example, Appellants allege the Administrative Procedure Act ("APA") waives federal immunity for non-monetary claims against an agency or officer of the United States. Op. Br. At 25. However, even if true, the APA is solely applicable to agencies of the United States, not to tribal nations. *See* 5 U.S.C. §§ 551-559 (defining federal "agency" as "each authority of the Government of the United States"). Appellants also argue *Gill v. PERB* applies, which is a New Mexico Supreme Court case solely applicable in New Mexico State Courts, and only relevant to the State of New Mexico. *See Gill v. PERB,* 2004-NMSC-016, ¶ 26, 135 N.M. 472, 90 P.3d 491 (determining that the *Young* doctrine applies to the state government in New Mexico state courts). It is unclear if Appellants believe these authorities also apply to the Nation, but they simply do not. Appellants must overcome the sovereign immunity of each government independently. *See Jicarilla Apache Tribe v. Andrus,* 687 F.2d 1324, 1334, n.14 (10th Cir. 1982) (recognizing that a Congressional abrogation of United States' sovereign immunity does not automatically overcome tribal sovereign immunity as well). They fail to do so with respect to the Nation.

Appellants must identify an unequivocal waiver of sovereign immunity by the Nation or abrogation by Congress. Appellants fail to meet this high standard, and therefore the Nation remains immune from suit and this Court should affirm the lower court's ruling.

III. THE *EX PARTE YOUNG* DOCTRINE DOES NOT APPLY TO NAVAJO APPELLEES IN THIS CASE.

A. Appellants fail to allege sufficient facts to tie Navajo Appellees to an ongoing violation of federal law from which Appellants can seek prospective relief.

As noted above, tribal officials sued in their official capacity enjoy the same immunity from suit as the tribe they serve. *Fletcher,* 116 F.3d at 1324 (concluding "tribal immunity protects tribal officials against claims in their official capacity"). However, under the *Young* doctrine, tribal officers may be subject to suit if the complaint sufficiently alleges an ongoing violation of federal law and seeks prospective relief. *See Ex parte Young,* 209 U.S. 123, 159-60 (1908).[3] The District Court held the *Young* doctrine did not apply, and dismissed the complaint on sovereign immunity grounds. App. Vol. 2 at 200.

[3] Appellants are correct that *Young* might provide an exception to tribal sovereign immunity, though, as discussed below, it does not apply to the facts of this case. Op. Br. at 15 (citing *Crowe & Dunlevy, P.C. v. Stidham,* 640 F. 3d 1140, 1154 (10th Cir. 2011)).

In determining whether *Young* applies, a court conducts "a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Public Serv. Comm'n of Md.,* 535 U.S. 635, 645 (2002) (internal quotation marks and citation omitted).[4] However, the doctrine cannot be used solely to evade sovereign immunity. *Virginia Office for Protection and Advocacy v. Stewart,* 563 U.S. 247, 256 (2011). Consequently, a complaint must have a "non-frivolous, substantial claim for relief against the [tribal] officers that does not merely allege a violation of federal law solely for the purpose of obtaining jurisdiction." *Muscogee (Creek) Nation v. Pruitt,* 669 F.3d 1159, 1167 (10th Cir. 2012) (internal quotation marks and citation omitted).

Further, the named official defendant must have some connection with the enforcement of some allegedly invalid law, otherwise it amounts to an improper attempt to make the sovereign a party. *Peterson v. Martinez,* 707 F.3d 1197, 1205 (10th Cir. 2013); *see also Hendrickson v. AFSCME Council 18,* 992 F.3d 950, 965

[4] Following *Verizon,* this Court has focused on the "straightforward inquiry" into "whether the relief requested is properly characterized as prospective." *See Hill v. Kemp,* 478 F.3d 1236, 1259 (10th Cir. 2007). This Court has also applied a three-part test, where "plaintiffs must show that they are: 1) suing state officials rather than the state itself, 2) alleging an ongoing violation of federal law, and 3) seeking prospective relief." *Muscogee (Creek) Nation,* 669 F.3d at 1167. Appellants fail under either analysis because they have not alleged *any* facts regarding an ongoing violation of federal law by Navajo Appellees or requested *any* prospective relief against them.

(10th Cir. 2021) (concluding that a named official "must have some connection with the enforcement" of the challenged statute, as well as a "particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty").

In *Peterson* the plaintiff filed suit against the director of the Colorado Department of Public Safety to challenge a state law regulating concealed handgun licensing. 707 F.3d at 1201. This Court concluded that the plaintiff did not cite any Colorado statute, nor allege any factual allegations, to connect the director to an enforcement duty. *Id.* at 1206. Without doing so, the *Young* exception did not apply. *Id.*

In *Hendrickson,* a former union member sued the Governor and Attorney General of New Mexico for alleged violations of New Mexico's Public Employee Bargaining Act. *Hendrickson,* 992 F.3d at 966. There, this Court similarly found the named officials had no connection to the enforcement of the law in question, and were therefore immune from suit. *Id.* at 965.

Appellants' complaint fails to support *Young's* application to Navajo Appellees for even more basic reasons. Appellants do not allege *any* action or omission by Navajo Appellees, and they fail to identify *any* law Navajo Appellees are enforcing.[5] They fail to name *any* federal law Navajo Appellees allegedly are

[5] Indeed, other than naming them in the caption of the case and including a cursory mention of them in the body of the Complaint, App. Vol. 1 at 17, Appellants make

violating. Their conclusory assertion that unspecified "defendants" have not "complied with or enforced *these laws*" is insufficient to connect Navajo Appellees themselves to any ongoing federal violation. *See* App. Vol. 1 at 32 (emphasis added). Finally, they request no actual prospective relief against Navajo Appellees. *See* App. Vol. 1 at 54-56. Without even a cursory explanation of what Navajo Appellees were or were not doing, what law they were enforcing, what federal laws they were allegedly violating, or what relief the court should issue against them, Appellants improperly invoke *Young.*

B. The *Young* doctrine further does not apply because Appellants' complaint implicates the Navajo Nation's special sovereignty interests.

1. Appellant's complaint directly attacks the Navajo Nation's federally-affirmed water rights.

Sovereigns are immune from suit when their special sovereignty interests are at stake, even if the suit is brought against individual officials. *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 269 (1997); *see also Virginia Office for Protection and Advocacy,* 563 U.S. at 256 (explaining the *Young* doctrine is limited when the effect of the relief sought is against the sovereign). Consequently, *Young* cannot provide an exception to sovereign immunity in actions where the sovereign itself has a continuing interest in the litigation. *Coeur d'Alene Tribe,* 521 U.S. 261

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no allegation at all establishing Navajo Appellees' role in the Settlement or its implementation.

at 269. While *Young* remains valid, "to interpret [it] to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism" and undermine the principle of sovereign immunity. *Id.* at 270. As such, "even if Plaintiffs meet all the traditional requirements for the application of the *Ex parte Young* doctrine . . . that does not *automatically* allow the suit to proceed in federal court." *Elephant Butte Irr. Dist. Of New Mexico v. Dep't of Interior,* 160 F.3d 602, 611 (10th Cir. 1998) (emphasis in original). Thus, *Young* requires an examination of the "nature of the claim" and what special sovereignty interests, if any, are implicated. *Id.*[6]

In *Coeur d'Alene*, a tribal nation filed suit against the State of Idaho and several of its state officials in their official capacity, alleging ownership of the submerged lands and waters in Lake Coeur d'Alene. 521 U.S. at 264-265. The tribe sought declaratory and injunctive relief to establish its right to the lake. *Id.* at 265. The Supreme Court concluded such "far-reaching and invasive relief" would diminish the State's control over an integral part of its territory, and thus impinge on

[6] While this argument was not raised below, "arguments that the court *lacks* jurisdiction can be raised at any time." *McKenzie v. U.S. Citizenship & Immigr. Servs., Dist. Dir.,* 761 F.3d 1149, 1155 (10th Cir. 2014) (emphasis in original). *See also United States ex rel. Ramseyer v. Century Healthcare Corp.,* 90 F.3d 1514, 1518 n. 2 (10th Cir. 1996) (discussing duty to consider unargued obstacles to subject matter jurisdiction).

its sovereign authority. *Id.* at 282. Under such special circumstances, the Court held *Young* did not apply, and the State was immune from the suit. *Id* at 287.

Here, Appellants' claims similarly implicate the sovereign interests of the Nation. Appellants directly attack the Nation's sovereign water rights affirmed in the Settlement as an alleged violation of federal law. Op. Br. at 5, App. Vol. 1 at 19-21. Appellants request declaratory judgments on the meaning of federal water law in relation to the amount of water the Nation received under the Settlement, and some unspecified injunction against all the defendants. Such far-reaching and invasive relief is clearly designed to invalidate the Nation's water rights, which directly attacks the Nation's special sovereignty interests. The requested relief, if granted, would alter or reduce the Nation's access and use of its federally-affirmed right to San Juan River water, potentially have devastating effects on the Nation and its people. This case is then an improper invasion of a vital and necessary aspect of the Nation's sovereignty.[7]

[7] Other circuit courts of appeal have barred suits under *Young* as improperly attacking sovereign property rights. *See Lacano Investments, LLC v. Balash,* 765 F.3d 1068, 1074 (9th Cir. 2014) (describing ownership of submerged lands as "an essential attribute of sovereignty"); *Western Mohegan Tribe and Nation v. Orange County,* 395 F.3d 18, 23 (2d Cir. 2004) (determining a tribe's claim for aboriginal rights over state-owned land would impinge on the state's sovereignty); *MacDonald v. Village of Northport, Mich.,* 164 F.3d 964, 972 (6th Cir. 1999) (finding a right-of-way that provides public access to a navigable waterway implicates the State's "special sovereignty interests"). Prior to *Verizon,* this Court interpreted the special sovereignty interest analysis even more broadly, applying it far outside of the

2. Intervening Supreme Court precedent has clarified that Coeur d'Alene remains good law.

This case is an opportunity for this Court to revisit the scope of the *Young* doctrine in light of intervening Supreme Court precedent. As discussed above, after *Coeur d'Alene,* the Supreme Court determined *Young* required a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks prospective relief. *Verizon Md. Inc.,* 535 U.S. at 645 (citing *Coeur d'Alene Tribe,* 521 U.S. at 296). This Court interpreted *Verizon's* holding to repudiate the special sovereignty interest analysis established in *Coeur d'Alene. See Hill,* 478 F.3d at 1259; *see also Tarrant Regional Water Dist. v. Sevenoaks,* 545 F.3d 906, 911-914 (10th Cir. 2008).

However, four years after this Court determined the special sovereignty interest analysis was no longer relevant, the Supreme Court reaffirmed its validity. *See Virginia Office for Protection and Advocacy,* 563 U.S. at 256. The Supreme Court recognized *Young* could not always be satisfied through a straightforward inquiry, and that a deeper analysis was still necessary. *Id.* Indeed, the Supreme Court actually applied the *Coeur d'Alene* analysis in *Virginia Office for Protection and Advocacy*, ultimately determining there were no special sovereignty interests

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property context. *See ANR Pipeline Co. v. Lafaver,* 150 F.3d 1178, 1193 (10th Cir. 1998) (recognizing the power to tax was a special and fundamental interest that precluded the application of *Young*).

under the facts of that case. *Id.* at 257. Therefore, the special sovereignty interest analysis remains relevant to *Young*.

Based on *Coeur d'Alene's* continued viability, this Court should overrule *Hill* and *Tarrant*. It is true that "courts should not lightly overrule prior judicial decisions." *United States v. Villano,* 816 F.2d 1448, 1453 (10th Cir. 1987). However, this Court is only bound by its precedent "absent *en banc* reconsideration or a super[s]eding contrary decision by the Supreme Court." *George, on behalf of Bradshaw v. Beaver Cnty., by & through Beaver Cnty. Bd. of Commissioners,* 32 F.4th 1246, 1257 (10th Cir. 2022); *see also Currier v. Doran,* 242 F.3d 905, 912 (10th Cir. 2001) (recognizing an exception to prior precedent of this Court when superseded by the Supreme Court). In lieu of an en banc reconsideration, "a panel decision may overrule a point of law established by a prior panel through an en banc footnote by obtaining authorization from all active judges on the court." *United States v. Melgar-Cabrera,* 892 F.3d 1053, 1060 n.3 (10th Cir. 2018) (citations omitted).

The Supreme Court in *Virginia Office for Protection and Advocacy* clarified that special sovereignty interests continue to bar suits against official defendants, even if *Young's* other requirements are satisfied. Thus, this Court should clarify that *Coeur d'Alene* remains valid and apply it to this case, as superseding precedent or through an en banc footnote.

CONCLUSION

Based on the above, the District Court did not err, and this Court should affirm the dismissal of all claims against Navajo Appellees for lack of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on March 29, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Paul Spruhan
Name

March 29, 2023

Counsel for the Navajo Nation

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

1. This brief complies with the type-volume limitations Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,945 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).
2. This brief complies with the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of the Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point font.

s/ Paul Spruhan
Name

March 29, 2023

Counsel for the Navajo Nation