No. 10-17895

United States Court of Appeals
Ninth Circuit

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, a municipal corporation and political subdivision of the State of Arizona, HEADWATERS RESOURCES, INC., a Utah corporation

Appellants

v.

REYNOLD R. LEE, CASEY WATCHMAN, WOODY LEE, PETERSON YAZZIE, EVELYN MEADOWS, HONORABLE HERB YAZZIE, HONORABLE LOUISE G. GRANT, HONORABLE ELEANOR SHIRLEY, LEONARD THINN, and SARAH GONNIE

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
CASE NO. CV 08-8028-JAT

APPELLEES' RESPONSE BRIEF

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Issue Presented

Whether the district court abused its discretion in holding that the Navajo Nation is a party required to be joined pursuant to Rule 19 of the Federal Rules of Civil Procedure ("Rule 19") where the Nation is a signatory to the contract that Salt River Project Agricultural Improvement and Power District ("SRP") and Headwaters Resources, Inc. ("Headwaters"; collectively with SRP, "SRP") seek to interpret in a way that would waive the Nation's sovereign authority to regulate employment on tribal land.

Statement of Jurisdiction

The Navajo officials have no objection to SRP's Statement of Jurisdiction. *See* Fed. R. App. P. 28(b)(3); Circuit Rule 28-2.2.

Statement of the Case

This is a breach of contract case that SRP is attempting to reconfigure as a civil rights claim. The instant dispute arose out of two complaints filed in the Navajo Nation Labor Commission (the "Commission"), one by Leonard Thinn, a member of the Navajo Nation and former SRP employee at the Navajo Generating Station ("NGS"), and the other by Sarah Gonnie, also a member of the Navajo Nation and former Headwaters employee at NGS. [ER 201 ¶¶ 6-7] Both claimed that they were fired from their jobs without just cause in violation of the Navajo Preference in Employment Act ("NPEA"). [ER 208 ¶¶ 32, 38] SRP operates NGS

on Navajo Reservation land pursuant to a lease with the Navajo Nation (the "1969 Lease"). [*E.g.*, ER 202-04 ¶¶ 12, 17-18]

Thinn and Gonnie pursued their discharge claims before the Office of Navajo Labor Relations ("ONLR") and the Commission, and then before the Navajo Nation Supreme Court [ER 208-209 ¶¶ 32-45], which held that the Nation has authority to regulate employment at NGS and can enforce the NPEA at NGS and that the Nation did not waive that authority by signing the 1969 Lease [ER 209 ¶ 45; *see also* Supplemental Excerpts of Record ("SER") 65-76 (Navajo Nation Supreme Court Op.)].

SRP filed this lawsuit on February 29, 2008 against the Director of the ONLR, members of the Commission, and justices of the Navajo Nation Supreme Court (collectively, the "Navajo officials"), and Thinn and Gonnie, seeking declaratory and injunctive relief prohibiting the Navajo officials from enforcing the NPEA at NGS. [ER 202-03 ¶¶ 12-15] SRP alleged that the Navajo Nation expressly waived its authority to regulate employment at NGS, and therefore its authority to enforce the NPEA at NGS, by signing the 1969 Lease. [*E.g.*, ER 202-03 ¶¶ 14, 18(a)]

The Navajo officials moved to dismiss SRP's claims pursuant to Rule 19 because the Nation is a required party that cannot be joined. [SER 31-41 (Dkt. 125) (Def.'s Rule 19(b) Mot. to Dismiss); *see also* SER 1-12 (Dkt. 134 (Reply ISO

Rule 19 Mot. to Dismiss)] SRP countered that the Nation is not a required party because this case is a traditional *Ex Parte Young* action against tribal officials. [SER 13-30 (Dkt. 132) (SRP's Resp. to Rule 19(b) Mot. to Dismiss)] The district court granted the Navajo officials' motion to dismiss based on Rule 19, holding that the Nation is a required party that cannot be joined. [ER 1-15]

In reaching that conclusion, the district court thoroughly reviewed the Rule 19 factors. First, the court determined that the Nation is a party required to be joined, if feasible, under Rule 19(a) because adjudicating the action without the Nation "will, as a practical matter, impair the Nation's ability to protect its contractual and economic interests, along with its general interest in governing the Navajo reservation." [ER 9]

The court then proceeded to the four Rule 19(b) factors and concluded that these favored dismissal of the suit. First, "[a] judgment for [SRP] in this case would prejudice the Nation's economic interest in the 1969 Lease with SRP, namely its ability to provide employment protections and security for its members." [ER 10] Moreover, an injunction against the Navajo officials would not adequately protect SRP because the Nation and other officials would not be bound by the judgment. [ER 11] Second, SRP did not offer any methods for alleviating the prejudice; nor could the court discern any methods. [ER 12] Third, the district court held that any relief granted to SRP would be incomplete because

the Nation could nonetheless attempt to regulate employment at NGS. [*Id.*] Finally, the court was persuaded that SRP did have an alternative forum to air its disputes—the Secretary of the Interior ("Secretary"), as specified in the 1969 Lease itself.[1] [*Id.*]

The district court concluded its opinion by thoughtfully exploring why it was rejecting SRP's *Ex Parte Young* claim—this case is one sounding in contract:

> [SRP] also argue[s] that the Navajo Nation waived any inherent right to regulate employment matters at the NGS by signing the 1969 Lease. Indeed, the contractual waiver issue was [SRP's] main argument to the Secretary.
>
> It is the contractual waiver argument that sets this case apart from the traditional *Ex Parte Young* case where government officials solely are acting pursuant to an allegedly unconstitutional statute, etc. [SRP is] asking the Court, at least in the alternative, to bind the Navajo Nation to a lease provision that [SRP] believe[s] waives the Nation's right to regulate the employment of Navajos at the NGS. The attempt to interpret and enforce the 1969 Lease without the signatory, the Navajo Nation, as a party interferes with the Nation's sovereign rights, contractual rights, and economic rights.

[ER 13-14] Accordingly, the district court dismissed the case in its entirety. [ER 14]

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[1] In fact, before initiating this lawsuit, SRP had referred the dispute to the Secretary pursuant to the dispute resolution procedure set forth in the 1969 Lease. SRP asked the Secretary to determine whether the Nation had waived its authority to regulate employment at NGS. [ER 209 ¶ 46] On May 10, 2008, an Assistant Secretary of Indian Affairs construed the 1969 Lease as *not* waiving the Nation's right to regulate employment practices at NGS. [ER 4; *see also* SER 42-43 (Dkt. 120 at Ex. 1) (May 10, 2008 Letter from Assistant Secretary Carl J. Artman)] Although SRP asked the Secretary to reconsider, the office declined to do so because this litigation was pending. [ER 4-5]

This appeal followed.

Statement of Facts

SRP and other energy entities entered into the 1969 Lease with the Navajo Nation (then known as the Navajo Tribe), which allowed SRP to build and operate a power generating station on Navajo Reservation land. [ER 34-108; *see also* ER 202 ¶ 12] Pursuant to the 1969 Lease, SRP promised "to give preference in employment to qualified local Navajos." [ER 79-80 § 18] The Nation agreed that, "other than as expressly set out in this Lease, it will not directly or indirectly regulate or attempt to regulate [SRP] in the construction, maintenance or operation of the Navajo Generation Station." [ER 78-79 § 16 (the "operation clause")]

The instant dispute arose out of two complaints filed in the Commission, one by Leonard Thinn, a former SRP employee at NGS who is a member of the Navajo Nation, and the other by Sarah Gonnie, a former Headwaters employee at NGS who is also a member of the Navajo Nation. [ER 201 ¶¶ 6-7] Both claimed that they were fired from their jobs without just cause in violation of the NPEA. [ER 208 ¶¶ 32, 38]

SRP opposed the proceedings before the Commission and the Navajo Nation Supreme Court [ER 208-09 ¶¶ 35, 41, 45; *see also* SER 65-76 (Navajo Nation Supreme Court Op.)], argued its case to the Secretary [ER 209 ¶ 46; *see also* SER 42-43 (Dkt. 120 at Ex. 1) (May 10, 2008 Letter from Assistant Secretary Carl J.

Artman)], and presented argument to the district court [ER 19-33 (excerpt of Pls.' Mot. Summ. J.); SER 44-64 (Dkt. 119) (full version of Pls.' Mot. Summ. J.)], all based on SRP's contention that the Navajo Nation had waived its jurisdiction to regulate employment relations at NGS by virtue of the operation clause in the 1969 Lease. The finding of the Navajo Nation Supreme Court and the Secretary's determination were that no such waiver occurred. The Secretary explained why the operation clause did not constitute a waiver:

> In 1969, NGS agreed with the Nation to employ, and give preference in employment, to "local Navajos." The NPEA was enacted by the Nation in 1985. The Department is unaware of any modification of the 1969 Grant of Easement which would be a waiver by the Nation of its right to regulate employment practices at NGS. Additionally, the provisions cited in the February 4, 2008, letter cannot be read to override the individual employment rights of individual Navajos when exercising rights provided to them by the Nation within the Nation's jurisdiction.

[SER 42-43] Thus, SRP has requested that the Navajo Supreme Court, the Secretary, and the federal courts all resolve this dispute arising under the 1969 Lease concerning the jurisdiction of the Navajo Nation to enforce the NPEA at NGS and whether the Navajo Nation waived that jurisdiction in the 1969 Lease.

The district court recognized that the centrality of the 1969 Lease "sets this case apart from the traditional *Ex Parte Young* case." [ER 13-14] Therefore, the district court granted the Navajo officials' Rule 19 motion and dismissed the case in its entirety for failure to join the Navajo Nation as a party.

Summary of Argument

Notwithstanding SRP's lengthy and repetitive opening brief, the issue confronting this Court on appeal is remarkably straightforward. SRP claims that the Navajo Nation cannot regulate employment at NGS and has, in fact, waived its right to regulate such matters because of the operation clause in the 1969 Lease. Based on this clause, SRP seeks declaratory and injunctive relief prohibiting the Navajo officials from applying the NPEA to NGS. [ER 210-13 ¶¶ 51-63] The merits of SRP's claims regarding the Nation's regulatory authority at NGS are intertwined with the interpretation of the operation clause of the 1969 Lease, as SRP itself alleged in its Verified Complaint. The Navajo Nation is the sole lessor in the 1969 Lease and, therefore, the Navajo Nation is a party that is required for this litigation. The Navajo Nation cannot be joined because of sovereign immunity, and this case—as the district court correctly found—must be dismissed because of the Nation's paramount interests in its ability to regulate activity on tribal lands within its borders, enforce its bargained-for contracts, and indeed govern its land and people.

SRP attempts to confuse this clear analysis by claiming that the Nation is not required to the suit because the suit may proceed against the Navajo officials under the *Ex Parte Young* doctrine. But *Ex Parte Young* applies only when officials are acting contrary to a federal statute, a federal regulation, or the U.S. Constitution.

That is simply not the case here, where, as SRP's own complaint makes clear, this dispute revolves around an interpretation of a contract.

Although SRP's complaint never mentions *Montana v. United States*, 450 U.S. 544 (1981), or its legal framework, SRP's briefing before this Court suggests that *Montana* is the federal law that the Navajo officials are allegedly violating. But even assuming that *Montana* governs the present dispute and that SRP adequately pled a *Montana* claim, *Montana* does not advance SRP's cause in this case because "[a] tribe may regulate . . . nonmembers who enter consensual relationships with the tribe," and one of *Montana*'s paradigmatic examples of a "consensual relationship" is a lease. *Id.* at 565. Therefore, even if *Montana* were to apply, a court would have to interpret the meaning and effect of the operation clause in the 1969 Lease. The Navajo Nation, as a party to that lease, must be a party in this litigation. As the district court properly understood, it is the centrality of the 1969 Lease that takes the present case out of *Ex Parte Young*'s domain.

Argument

SRP attempts to recast this case as an application of *Ex Parte Young* where the Navajo officials have acted contrary to federal law, but it cannot be disputed that the basis for SRP's claim is a contract between SRP and the Nation—the 1969 Lease. This is patently clear from SRP's Verified Complaint, which consistently reminds the reader that the NPEA does not apply to the operation of NGS because

the Nation allegedly waived its right to regulate employment relations there pursuant to the operation clause in the 1969 Lease:

- Paragraph 14 alleges that "the Navajo Nation expressly waived and renounced any right or authority to regulate or attempt to regulate the construction, maintenance or operation of NGS, except as expressly provided in a lease between the Navajo Nation and the Participants." [ER 202]

- Paragraph 17 describes the formation of the 1969 Lease and acknowledges that the Navajo Nation is a party to the Lease. [ER 203]

- Paragraph 18 quotes extensively from the 1969 Lease, including the operation clause. [ER 203-04]

- Paragraph 24 explains that the rights granted SRP under a § 323 Grant are separate and independent from the rights granted under the 1969 Lease. [ER 206]

- Paragraph 26 alleges that SRP has complied with its obligations under the 1969 Lease. [*Id.*]

- Paragraph 35 acknowledges that, during the tribal proceedings, SRP relied on the alleged waiver in the 1969 Lease to argue for dismissal of the case for lack of jurisdiction. [ER 208]

- Paragraph 46 describes how SRP referred the issue to the Secretary "for resolution pursuant to the 1969 Lease." [ER 209]

- SRP's first claim for relief is based on the 1969 Lease, seeking "a declaration of their rights, and the rights of other parties to this action, under the 1969 Lease and related documents." [ER 210 ¶ 52]

- SRP alleges that the relief it seeks would apply "during the term of the 1969 Lease" and that the Navajo Nation "may not regulate, through tribal proceedings or otherwise, except as provided in the 1969 Lease, the operation of NGS by SRP, the other Participants, or their

contractors (including Headwaters), related to employment relations." [ER 210 ¶ 54]

- SRP alleges that granting injunctive relief will allow it "to continue to operate NGS without interference, as set forth in the 1969 Lease and related authority." [ER 212 ¶ 59]

- SRP's second claim for relief is also based on the 1969 Lease, seeking injunctive relief barring the Navajo officials from exceeding what SRP perceives as their limited authority under the 1969 Lease. [ER 212-13 ¶ 62]

- Finally, SRP's prayer for relief highlights the 1969 Lease. [ER 213-14]

Nothing in the Verified Complaint suggests that SRP's principal argument is that the Navajo officials are violating a federal regulation, a federal statute, or the U.S. Constitution; rather, the Verified Complaint cites the 1969 Lease more than a dozen times, thereby affirming that this case is a contract dispute focused on the operation clause of the 1969 Lease.

The complaint does mention four times in boilerplate that the Navajo officials are acting "in violation of federal law." [ER 211-12 ¶¶ 56-59] But the complaint never cites *Montana*, or any other federal law or constitutional provision that the Navajo officials are allegedly violating.[2] The district court, after reviewing

[2] *Montana* held that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" on non-Indian fee land, subject to two exceptions. 450 U.S. at 565. The first *Montana* exception recognizes that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* The

the Verified Complaint, agreed that this is a case sounding in contract, finding that "[t]he basis for [SRP's] suit against the [Navajo officials] therefore is in large part the 1969 Lease and its alleged operational waiver." [ER 9]

Despite the fact that SRP's claims hinge on the 1969 Lease, SRP now urges this Court to view this case as a traditional *Ex Parte Young* action where officials have acted in violation of the U.S. Constitution or federal law. This Court should not permit such legal legerdemain, but should instead recognize that this case is nothing more than a dispute over the meaning of a contract without one of the parties to that contract, the Navajo Nation. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 112 (1984) (noting that *Ex Parte Young* cannot be so broad as to allow a plaintiff to merely "claim a denial of rights protected or provided by statute in order to override sovereign immunity" because that would "make the constitutional doctrine of sovereign immunity a nullity")

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second exception allows a tribe to exercise "civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. Because this case involves a consensual relationship—the 1969 Lease—even if the *Montana* framework could be applied to the analysis, the final resolution would depend on an interpretation of that consensual relationship, thereby requiring the joinder of the Navajo Nation. [*See infra* Section I.D.2]

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT THE NAVAJO NATION MUST BE JOINED PURSUANT TO RULE 19.

This case involves a straightforward application of the three-part inquiry of Rule 19. *See Equal Emp't Opportunity Comm'n v. Peabody W. Coal Co.*, 610 F.3d 1070, 1078 (9th Cir. 2010) ("*Peabody III*"). First, this Court determines whether a nonparty is required to be joined under Rule 19(a).[3] *See id.* Second, this Court analyzes the feasibility of the joinder. *See id.* Finally, if joinder is not feasible, this Court determines whether the case may proceed without the nonparty, or whether the case must be dismissed. *See id.*

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[3] In *Peabody III*, this Court described why the Nation was required to be joined in that case if feasible:

> [T]he Nation is a party to the leases whose employment preference is challenged in this lawsuit.
>
> If the EEOC is victorious in this suit but the Nation has not been joined, the Nation could possibly initiate further action to enforce the employment preference against Peabody, even though that preference would have been held illegal in this litigation. Peabody would then be . . . "between the proverbial rock and a hard place—comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it." By similar logic, we have elsewhere found that tribes are necessary parties to actions that might have the result of directly undermining authority they would otherwise exercise.

Peabody III, 610 F.3d at 1078 (internal citation omitted). This reasoning applies to the present case as well.

A. Standard of Review.

This Court generally reviews a district court's decision to dismiss for failure to join a required party for abuse of discretion. *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1154 (9th Cir. 2002). Any questions of law are reviewed de novo. *Id.*

B. The Navajo Nation is a Nonparty Required to be Joined if Feasible Pursuant to Rule 19(a).

A party is required to be joined under Rule 19(a)(1) if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). If the Navajo Nation satisfies either the test under subsection (A) or either of the two tests under subsection (B), then it is a required party.[4] *See* 7C C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure*

[4] The Ninth Circuit has rejected SRP's suggestion [at Opening Brief ("OB") 40, 50] that if a court ultimately determines that the Nation did waive its jurisdiction over NGS, then the Nation does not have a legally protected interest in the suit because its position *ex post* turned out to be the losing position. A nonparty need

§ 4232 (3d ed. 2010 update) ("*Federal Practice and Procedure*"). In this case, the Nation satisfies all three tests.

1. The District Court Cannot Accord Complete Relief Among the Existing Parties.

Under Rule 19(a)(1)(A), judgment in the Navajo Nation's absence would not afford complete relief among the existing parties. As SRP's Verified Complaint makes clear, complete relief requires interpretation of the operation clause in the 1969 Lease regarding the Nation's authority to regulate employment practices and enforce the NPEA at NGS. [ER 210 ¶¶ 52, 54 (first claim for relief); ER 211-12 ¶¶ 57-59 (second claim for relief)]

In *Dawavendewa*, 276 F.3d 1150, this Court held that complete relief required joinder of the Navajo Nation because, otherwise, the Nation "could still attempt to enforce the lease provision in tribal court and ultimately, even attempt to terminate SRP's rights on the reservation." *Id.* at 1155; *see also Peabody III*, 610 F.3d at 1078. The same analysis governs the present case, where any interpretation of the 1969 Lease will not bind the Nation because the Nation is not—and cannot be made—a party to this litigation.

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merely *claim* a legally protected interest: "Just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992).

The district court agreed that the Nation is a party required to be joined under Rule 19(a)(1)(A), concluding that the court could not accord complete relief to SRP in the Nation's absence. [ER 11] The district court did not abuse its discretion in holding that the Nation is a party required to be joined under Rule 19(a)(1)(A).

2. The Nation Has an Interest in the Dispute, and Disposing of the Case in the Nation's Absence Will Impair its Interest.

Under Rule 19(a)(1)(B)(i), the Navajo Nation is also a required party because it has "an interest relating to the subject of the action," and disposition of the action in its absence may "as a practical matter impair or impede the [Nation's] ability to protect [its] interest." The Nation's interest, among others, is in its contract rights in the 1969 Lease. *See Dawavendewa*, 276 F.3d at 1161 ("At bottom, the lease at issue is between SRP and the Nation, and the relief Dawavendewa seeks would operate against the Nation as signatory to the lease."). "[N]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Id.* at 1156 (internal citation and quotations omitted); *accord Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547 (2d Cir. 1991); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) (same); *see also Peabody III*, 610 F.3d at 1078 ("It is undisputed that the Nation

was a necessary party, and is now, under the amended rule, a person required to be joined if feasible. As we explained in *Peabody II*, the Nation is a party to the leases whose employment preference is challenged in this lawsuit."); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996) ("As a party to the lease contracts at issue here, the Tribe has a commercial stake in the outcome of this litigation. It therefore would appear beyond dispute that the Tribe is a necessary party under Rule 19(a)."). This Court has held that a tribe is "a necessary (and indispensable) party to a suit by an individual challenging a lease . . . simply by virtue of [that tribe] being a signatory to the lease." *Dawavendewa*, 276 F.3d at 1156 (describing the holding of *Lomayaktewa*, 520 F.2d at 1326).

Because of the strong parallels between the present case and *Dawavendewa*, *Dawavendewa* should control the outcome here. In this case, SRP's urged interpretation of the 1969 Lease would alter that contract and the parties' contractual relationship substantially because SRP's interpretation is that the Nation has waived its sovereign authority to regulate employment at NGS—despite the fact that the Nation specifically bargained for the employment of Navajos at NGS in that same lease. [ER 79-80 § 18] SRP's interpretation upsets the Nation's economic relationship with SRP, tips the careful balance struck in the 1969 Lease, and ultimately impairs the Nation's sovereign capacity to negotiate contracts and effectively govern the reservation. These are precisely the interests

that this Court noted in *Dawavendewa* before dismissing that case for failure to join the Nation. *See* 276 F.3d at 1157 (noting that construing a contract between the Nation and SRP without joining the Nation "threatens to impair the Nation's contractual interests, and thus, its fundamental economic relationship with SRP," "challenges the Nation's ability to secure employment opportunities and income for the reservation—its fundamental consideration for the lease with SRP," and "will impair its sovereign capacity to negotiate contracts and, in general, to govern the Navajo reservation"). Therefore, and as in *Dawavendewa*, because "[u]ndermining the Nation's ability to negotiate contracts also undermines the Nation's ability to govern the reservation effectively and efficiently," *id.* at 1157, and because "the Nation has an interest in determining the appropriate balance between alternative lease terms," *id.* (citation omitted), the Nation is a required party under Rule 19(a)(1)(B)(i) as well.

SRP argues [at OB 36-38] that this case is different from *Dawavendewa* because, in this case, SRP is not seeking to invalidate a clause in the contract; rather, SRP claims to be seeking to construe and ultimately "enforce" the contract and its alleged waiver of authority. SRP and the cases sometimes write in terms of "decimating" or "setting aside" a contract, even when the majority of the contract might remain intact, because severing even a single provision "could cause the entire tapestry of the agreement to unravel," thereby destroying the bargain struck.

Dawavendewa, 276 F.3d at 1156. The use of those verbs does not necessarily suggest that the whole contract is under attack in those cases. And the present case, like *Dawavendewa*, is an "attack" on a provision in a contract—the operation clause in the 1969 Lease, which SRP wants to interpret as a waiver of the Nation's regulatory authority.

But even if SRP is correct that it is merely seeking to "enforce" the contract and not set it aside, as long as SRP "[has] not shown that [its] interpretation of the contract is undisputed"—and SRP has not—then the Nation has "an interest in [its] businesses and contract relationships, which is cognizable under Rule 19." *Young v. Regence Blueshield*, No. C07-2008RSL, 2009 WL 1604524, at *2 (W.D. Wash. June 4, 2009) (also noting that "[t]he mere fact that plaintiffs are requesting that the Court construe that contract language and decide the parties' obligations thereunder implicates the [absent parties'] rights"); *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 862 F. Supp. 995, 1004 (W.D.N.Y. 1994) ("Here, although the action brought by Plaintiff seeks judicial construction of the language of the franchise rather than an order setting aside the agreement, it is undeniable that a determination in the counterclaimants' favor would significantly affect the tribe's interest, based on its interpretation of the franchise language.").

Moreover, even if there were force to SRP's strained distinction between "setting aside" a contract and "interpreting" a contract in a way that restricts an

absent party's rights, SRP's reliance on *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861 (9th Cir. 2004), is misplaced. SRP argues that the present case, like *Disabled Rights Action Committee*, is not "an attack on the terms of a negotiated agreement." *Id.* at 881 (internal quotation marks and citations omitted). SRP is wrong in attempting to analogize this case to *Disabled Rights Action Committee*.

In *Disabled Rights Action Committee*, an advocacy organization sued private groups staging rodeos at public facilities under Title III of the Americans with Disabilities Act for failing to provide reasonable accommodations. *Id.* at 866. The defendants moved to join the public university system that owned the venue under Rule 19, *id.* at 867, but the Ninth Circuit determined that the university system was not a party required to be joined, *id.* at 878-84. In reaching that conclusion, this Court distinguished *Dawavendewa* in three ways that actually underscore why *Dawavendewa*, and not *Disabled Rights Action Committee*, controls the present case. This Court wrote,

- "Here, however, the licensing agreement with University System, unlike the lease in *Dawavendewa*, does not prevent Events from taking action to make the Rodeo accessible to the degree possible within the scope of the lease or, in the alternative, from holding the Rodeo at an accessible venue." *Id.* at 880.

- "[I]n *Dawavendewa*, a lease agreement between the Navajo Nation and a lessee of Navajo property mandated compliance with a hiring policy giving preference to Navajos." *Id.* at 881-82.

- "[I]n *Dawavendewa*, the Navajo Nation had specifically bargained for the hiring preference as the primary consideration for the lease, so the invalidation of that provision would essentially decimate the Nation's bargained-for rights." *Id.* at 882.

First, in the present case, as in *Dawavendewa*, the contract (at least from the Navajo officials' perspective) does prevent SRP from making the employment decisions it desires. [*See* ER 79-80 § 18] Second, in the present case, as in *Dawavendewa*, the lease agreement between the Navajo Nation and SRP mandated compliance with a hiring policy giving preference to Navajos. [*Id.*] Finally, in the present case, as in *Dawavendewa*, the Navajo Nation specifically bargained for the hiring preference as a primary consideration for the lease, so that reading the operation clause as overriding the employment preference clause would essentially decimate the Nation's bargained-for rights.

The district court agreed that, under Rule 19(a)(1)(B)(i), the Nation has an interest in the present case and that disposition in the Nation's absence would impair that interest. That court explained, "The basis for [SRP's] suit against [the Navajo officials] therefore is in large part the 1969 Lease and its alleged operational waiver. As a party to that Lease, the Navajo Nation has an interest in its contract rights with SRP. The Nation also has an economic interest in this action—the job security of the Nation's members." [ER 9 (internal citation and footnote omitted)] The district court also recognized that proceeding without the Nation would "impair the Nation's ability to protect its contractual and economic

interests, along with its general interest in governing the Navajo reservation." [*Id.*] The district court neither applied the wrong legal standard nor abused its discretion in reaching those conclusions.

Rule 19(a)(1)(B)(i) provides another reason, in addition to Rule 19(a)(1)(A), to find that the Nation is a party required for this lawsuit.

3. Disposition in the Nation's Absence Subjects SRP to a Substantial Risk of Incurring Inconsistent Obligations.

Finally, under Rule 19(a)(1)(B)(ii), a disposition in the Nation's absence threatens to leave the parties subject to multiple and inconsistent obligations. Any injunction would not bind the Nation, which could move to enforce the employment preferences in the 1969 Lease and the NPEA, or even alter the 1969 Lease. *See Dawavendewa*, 276 F.3d at 1157-58 (noting that an injunction would compel SRP to stop enforcing the Navajo hiring preference, but would not bind the Navajo Nation, which "could continue to enforce the hiring preference policy required by the lease").

SRP suggests [at OB 46] that a decision on the merits in SRP's favor would not risk inconsistent results because the Nation would, in effect, be bound by the injunction pursuant to Rule 65(d)(2) (noting that an injunction binds "officers, agents, servants, employees and attorneys" as well as "other persons who are in active concert or participation with [them]" if they receive actual notice of the injunction). SRP's interpretation of Rule 65(d)(2) threatens to swallow the concept

of sovereign immunity and is contrary to law. *See* 17A *Federal Practice and Procedure* § 4232 ("Even where the Young doctrine permits injunctive relief against state officers, an injunction cannot run against the state itself."). It makes sense that Rule 65(d)(2) cannot be deployed to effectively bind a sovereign entity because if a tribe (or the United States or any other sovereign entity) is always "bound" simply because someone within the tribe (or the United States or other sovereign entity) is bound, then no case could be dismissed under Rule 19 because of sovereign immunity, and sovereign immunity would have no meaning. *Cf. Peabody III*, 610 F.3d at 1080 (noting that Rule 65(d)(2) cannot bind the Nation to an injunction if injunctive relief is otherwise unavailable against the Nation).

Moreover, a decision on the merits in this case in SRP's favor would be inconsistent with the Navajo Nation Supreme Court's decision and the Secretary's decision that the operation clause in the 1969 Lease does not waive the Nation's authority, leaving the parties to this case and the parties to the 1969 Lease "between the proverbial rock and a hard place." *Dawavendewa*, 276 F.3d at 1156.

Therefore, for these reasons as well, the Navajo Nation is a party required to be joined under Rule 19(a)(1)(B)(ii). All three Rule 19(a) tests support the district court's well-reasoned conclusion that the Nation must be made a party to this suit, if feasible.

C. The Navajo Nation Cannot be Joined as a Party Because it Enjoys Sovereign Immunity.

As a federally recognized Indian Tribe, the Navajo Nation enjoys sovereign immunity from suit and may not be sued absent an express waiver of immunity by the Nation or abrogation of immunity by Congress. *See Dawavendewa*, 276 F.3d at 1159. Neither exception applies here, and SRP does not claim otherwise. Therefore, and as the district court correctly found [ER 10 (noting that SRP "do[es] not argue that the Nation has waived its sovereign immunity or that Congress has abrogated that immunity")], the Nation is immune from suit and cannot be joined.

D. This Action Cannot Proceed in Equity and Good Conscience Without the Navajo Nation.

If a required nonparty cannot be joined, then, in most cases, "the 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). Not all cases proceed to the Rule 19(b) analysis, however. In *Dawavendewa*, this Court held that the adoption of the *Lomayaktewa* rule (that a party to a contract is necessary, and if not capable of joinder, indispensable) obviates the need to conduct a Rule 19(b) analysis. *See Dawavendewa*, 276 F.3d at 1157 n.6 ("We recognize our adoption of *Lomayaktewa*'s rule requires only that we progress to the analysis of the Nation's sovereign immunity. Nevertheless, we complete the inquiry directed by Rule 19 as alternative grounds, reinforcing the same

conclusion."). Accordingly, if this Court determines that the Nation, as a signatory to the 1969 Lease, is a party that is required to be joined, but incapable of being joined because of sovereign immunity, this Court should affirm the district court's dismissal and need not reach, or weigh, the Rule 19(b) factors.

Should this Court decide to consider the Rule 19(b) factors, they are as follows:

> (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.

Fed. R. Civ. P. 19(b).

The U.S. Supreme Court has warned courts against giving insufficient weight to sovereign status under Rule 19(b). *See Republic of the Philippines v. Pimentel*, 553 U.S. 851, 865-66 (2008) ("The District Court and the Court of Appeals failed to give full effect to sovereign immunity when they held the action could proceed without the Republic and the Commission. Giving full effect to

sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine."); *see also Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) ("If the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.") (internal quotation marks and citation omitted). If this Court reaches the Rule 19(b) factors, the Nation's immunity should tip the balance significantly in favor of dismissal.

1. Judgment Rendered in the Nation's Absence Will Prejudice the Nation.

The prejudice test under Rule 19(b)(1) is analogous to the test under Rule 19(a)(1)(A). *See Dawavendewa*, 276 F.3d at 1162. In this case, just as the Nation is a party required to be joined under Rule 19(a)(1)(A) because complete relief cannot be granted in the Nation's absence, so too under Rule 19(b)(1) will the Nation be prejudiced if a decision regarding its economic interests and employment regulatory authority is rendered in its absence. *See* Fed. R. Civ. P. 19(b)(1).

The parties to the 1969 Lease struck a delicate bargain. The Nation bargained for the protection of Navajo employees at NGS [ER 79-80 § 18], while waiving authority to regulate the operation of NGS [ER 78-79 § 16]. By now claiming that the operation clause subsumes the employment preference provision, SRP is attempting to take away the very rights that the Nation bargained for in this

contract—and the Nation must be permitted to protect its interests. *See Disabled Rights Action Committee*, 375 F.3d at 881-82; *Kescoli*, 101 F.3d at 1311 ("[T]he Navajo Nation and the Hopi Tribe have an interest in the litigation by virtue of their lease and settlement agreements. Thus, the first factor weighs in favor of dismissal.") (citation omitted).

As the district court found, Rule 19(b)(1) supports dismissal of this case. [ER 10-11]

2. The Prejudice to the Nation Cannot Be Lessened.

The district court correctly understood that prejudice to the Nation cannot be alleviated—and, before the district court, SRP suggested no such methods. [ER 12; *see also* SER 13-30 (Dkt. 132 at 14) ("Because the Navajo Nation's absence does not cause prejudice, there is nothing to 'lessen or avoid.'")]

SRP now argues that the Navajo officials can adequately represent the tribe in this contract dispute. [OB at 41-42] But SRP's citations—like much of the rest of the brief—miss the mark because they do not stand for the proposition that an individual member of a tribe adequately represents the tribe in a contract dispute over whether the tribe has waived its sovereign authority on tribal land. Instead, several cases announce the principle that the *United States* may, in certain settings, adequately represent a tribe. *See Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999) (explaining that the federal government has a fiduciary duty to

protect tribes); *Sw. Ctr. For Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998); *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996);[5] *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). The United States is not a party to this action. And even if it were, because the party entering the contract has unique insight into the history and meaning of that contract, the Nation would not be adequately represented by anyone other than itself. *See, e.g.*, *Ex Parte Ayers*, 123 U.S. 443, 503 (1887) ("There is no remedy for a breach of contract, actual or apprehended, except upon the contract itself, *and between those who are by law parties to it*.") (emphasis added); *see also Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (holding that even the United States cannot represent the tribe's interest in a contract).[6]

SRP also suggests [OB at 53-59] that this Court may shape relief by excising those claims that are rooted in the 1969 Lease while leaving those claims that have

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[5] *Ramah Navajo School Board* is inapposite for another reason as well. In that case, the D.C. Circuit concluded that any benefit to the tribes would be "negligible," so they were not parties required to be joined under Rule 19(a). 87 F.3d at 1351. In the present case, an interpretation of the 1969 Lease in a manner that would strip the Nation of its sovereign authority over employment matters is surely not a "negligible" concern.

[6] SRP also cites *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), for the proposition that tribal officials may stand in for the sovereign entity. [OB at 42-43] But in that case, the court allowed the suit to proceed without the tribe precisely because the suit "does not seek to enforce a . . . contract." *Id.* at 1227 n.9.

their basis in *Montana v. United States*, 450 U.S. 544 (1981). This argument misunderstands the interplay between the 1969 Lease and SRP's *Montana* claims, if any. Even assuming that *Montana* applies[7] (and that SRP adequately pled *Montana* in its complaint),[8] one of the two recognized *Montana* exceptions is where the parties have entered into a consensual relationship. *See* 450 U.S. at 565. If the parties have done so, then the court must review that consensual relationship to determine the scope of the tribe's authority. Here, that consensual relationship is the 1969 Lease. Therefore, in reaching the merits of SRP's claims regarding the Nation's regulatory authority over employment at NGS, a court will have to construe the operation clause in the 1969 Lease. Because every claim is dependent on the contract, every claim must be dismissed. There are no *Montana* claims that can stand separate from the contract claims because the *Montana* analysis necessitates interpretation of the operation clause.[9]

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[7] *Montana* does not apply because the land at issue in this case is tribal land, not fee land. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-31 (1983) (concluding that the *Montana* opinion does not resolve questions of jurisdiction arising on land owned by the tribe).

[8] SRP's complaint neither cites *Montana* by name nor sets forth its framework for a tribe's authority over nonmembers on fee land.

[9] *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995), is not to the contrary, even though the plaintiffs there were allowed to maintain an action that included a contractual waiver argument. In that case, there is no indication that the defendants made a Rule 19 dismissal argument, and the "unstated assumption on [the] non-litigated issue[]" that this sort of action may be maintained is not precedential or binding on this panel. *Sorenson v. Mink*, 239 F.3d 1140, 1149 (9th Cir. 2001) (refusing to follow three previous decisions that simply stated a

SRP also claims [OB at 40, 50] that the Nation can never be prejudiced because if, *on the merits*, the district court determines that the Navajo officials cannot enforce the NPEA at NGS, then the Nation is violating the law and will not be prejudiced by the resulting judgment against its officials, while if the district court determines that the Navajo officials are not violating the law, then the Nation has essentially won, and it will also not be prejudiced by its win. Such circular logic cannot be allowed. Otherwise, no Rule 19 case poised for dismissal for failure to join a tribe would be dismissed because, if the tribe would ultimately lose on the merits, then it has not been prejudiced because its case is a loser, and if the tribe would win on the merits, it has not been prejudiced because its case is a winner. Moreover, this circuit and other circuits have recognized that a tribe has the right to be heard by virtue of being a signatory to the contract that is being attacked in the litigation. *E.g.*, *Dawavendewa*, 276 F.3d at 1156; *Fluent*, 928 F.2d at 547; *Jicarilla*, 821 F.2d at 540; *Lomayaktewa*, 520 F.2d at 1324 (all explaining that a party to a contract is required to be joined); *see also Shermoen*, 982 F.2d at 1317 (noting that Rule 19 protects a "party's right to be heard and to participate in

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conclusion without explanation). In fact, subsequent panels that have faced this "non-litigated issue" in *Aspaas* have recognized that these sorts of leases pose issues of contract interpretation necessitating joinder of the signatory tribe. *See, e.g.*, *Dawavendewa*, 276 F.3d at 1155-63; *Peabody III*, 610 F.3d at 1076-87. And although not pertinent to this appeal on the Rule 19 motion to dismiss, *Aspaas* is easily distinguished from the present case on the merits. [*See* Dkt. 126 at 12-15]

adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party").

The district court had it right. The prejudice to the Nation cannot be alleviated, so this Rule 19(b) factor weighs in favor of dismissal. [ER 12]

3. Relief in the Nation's Absence Will Not be Adequate.

The third Rule 19(b) factor refers to the "public stake in settling disputes by wholes, whenever possible." *Pimentel*, 553 U.S. at 870 (internal quotation marks and citation omitted). In *Pimentel*, the U.S. Supreme Court explained that allowing an action to proceed without the sovereign entities "would not further the public interest in settling the dispute as a whole because the [sovereign entities] would not be bound by the judgment in an action where they were not parties." *Id.* at 870-71.

Here, it is SRP that seeks to settle this dispute in pieces, first by taking the case to the Secretary, and then by abandoning that effort in favor of this federal court case. The administrative proceedings, however, would have had the added benefit of binding the Nation.

Moreover, even if this factor favors SRP, "the ability to accord relief dwindles in importance when compared with the significance of the Tribe's interest in the contracts at issue here." *Tribal Dev. Corp.*, 100 F.3d at 480 (citation

omitted). This factor too tips in favor of dismissal, as the district court correctly held. [ER 12]

4. SRP Has an Adequate Alternative Forum.

With respect to the final factor, the dispute resolution process set up in the 1969 Lease—and initially followed by SRP here—provides an adequate forum for SRP. The fact that SRP has previously availed itself of this alternative forum, and the Secretary has addressed the merits of this dispute, underscores the suitability and desirability of that dispute resolution procedure.

But even if there were no alternative remedy available to SRP, the lack of such a forum does not prevent the suit's dismissal. *See, e.g.*, *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) ("[T]he lack of an alternative forum does not automatically prevent dismissal of a suit.") (internal quotation marks and citations omitted).

The district court properly recognized that this final Rule 19(b) factor weighs in favor of dismissal both because the "[p]laintiffs have an alternative forum in this case" and because, "even if no alternative forum exists, the Court need not automatically deny the motion to dismiss." [ER 12] Therefore, this Rule 19(b) factor, and indeed all the Rule 19(b) factors, weigh in favor of dismissal.

II. THIS IS NOT AN *EX PARTE YOUNG* CASE.

Although SRP has brought this case for non-monetary relief against tribal officials, the fact that this case follows the *form* of an *Ex Parte Young* case does

not transform it into an *Ex Parte Young* case. The *Ex Parte Young* doctrine applies only when tribal officials are "acting pursuant to an unconstitutional statute" or are otherwise acting in contravention of a federal statute or regulation. *Dawavendewa*, 276 F.3d at 1159 (citing *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991)). SRP's own cases [*e.g.*, OB at 35] state that *Ex Parte Young* applies not when an official's action is alleged to violate federal caselaw, but instead when an official's action "is alleged to violate the Constitution directly or . . . is contrary to a federal statute or regulation that is the supreme law of the land." *Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008) (*citing* 17A *Federal Practice and Procedure* § 4232) (also *id.* at 750, allowing the case to proceed against the tribal officials because the plaintiffs "allege that the Cherokee Nation's officers are in violation of the Thirteenth Amendment and the 1866 Treaty").[10]

[10] *Vann* supports the Navajo officials' position on the merits of the Rule 19 inquiry. In *Vann*, the D.C. Circuit distinguished a U.S. Supreme Court case that was not allowed to proceed as an *Ex Parte Young* action on the grounds that the U.S. Supreme Court case involved an alleged breach of contract, not an alleged violation of the U.S. Constitution or federal statutes. 534 F.3d at 751 ("Unlike the federal officer in *Larson* [*v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)], who was only alleged to have breached a contract, the tribal officials in our case are said to have violated the Thirteenth Amendment and the 1866 Treaty. These allegations bring our case within the stripping rationale set forth in *Ex [P]arte Young* and described in *Larson*, such that tribal sovereign immunity should not bar the [plaintiffs'] suit against the officers of the Cherokee Nation.").

Additionally, despite SRP's attempts to recast this case as one of the Navajo officials contravening *Montana*, this case—*as framed by SRP's own complaint*—is about the interpretation of a contract to which the Nation is an undisputed signatory. SRP should not be permitted to "circumvent the barrier of sovereign immunity by merely substituting tribal officials in lieu of the Indian Tribe." *Dawavendewa*, 276 F.3d at 1160 (also *id.* at 1153, "[T]ribal officials cannot be joined to replace the immune Nation; rather, the Nation itself is indispensable to this suit."); *Shermoen*, 982 F.2d at 1320 (rejecting the plaintiff's attempt to sue individual officials rather than the tribe because "a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act") (internal quotation marks and citations omitted).

Nowhere in its sixteen-page, sixty-three paragraph complaint does SRP mention a federal statute, regulation, or constitutional provision that the Navajo officials are allegedly violating. *See Dawavendewa*, 276 F.3d at 1160 (refusing to apply the *Ex Parte Young* doctrine because, among other reasons, Dawavendewa's complaint never alleges "that tribal officials acted in contravention of constitutional or federal statutory law"; *id.* at 1161, Dawavendewa's "complaint specifies no action by tribal officials performed in contravention of constitutional

or federal statutory law"). And even in its brief, SRP is not forthcoming with which federal law the Navajo officials might be violating, except to suggest that the Navajo officials might be violating federal caselaw, *Montana*, 450 U.S. 544. [*E.g.*, OB at 17, 24] If SRP means to claim that the Navajo officials are "violating" *Montana*, that begs at least three questions: (a) whether *Montana* may support an *Ex Parte Young* action, (b) whether *Montana* applies given that the leased land is tribal land, and (c) the effect of the *consensual relationship* (that is, the 1969 Lease) between SRP and the Navajo Nation. If *Montana* does apply, then the consensual relationship—the 1969 Lease—becomes the focal point of the merits inquiry, and the parties to that consensual relationship must be made parties to this suit under Rule 19. *See, e.g.*, *Lomayaktewa*, 520 F.2d at 1325; *Dawavendewa*, 276 F.3d at 1156; *Peabody III*, 610 F.3d at 1078.

SRP claims that the Navajo officials have not cited a single case that was dismissed under Rule 19 despite an *Ex Parte Young* argument. [OB at 26] SRP thus ignores *Dawavendewa*, for example, in which the plaintiff argued that he could amend the complaint to add tribal officials so that the case could be analyzed under the *Ex Parte Young* rubric. 276 F.3d at 1159-60. The Ninth Circuit properly refused this invitation, recognizing that a suit against tribal officials was an end run around sovereign immunity because the required party was the signatory to the lease, the Navajo Nation. This Court wrote,

> Undoubtedly many actions of a sovereign are performed by individuals. Yet even if Dawavendewa alleged some wrongdoing on the part of the Nation officials, his real claim is against the Nation itself. At bottom, the lease at issue is between SRP and the Nation, and the relief Dawavendewa seeks would operate against the Nation as a signatory to the lease. As such, we reject Dawavendewa's attempt to circumvent the Nation's sovereign immunity by joining tribal officials in its stead.

Dawavendewa, 276 F.3d at 1161; *see also Shermoen*, 982 F.2d at 1320 (rejecting the plaintiff's attempt to sue individual officials rather than the tribe).

The district court "carefully" considered SRP's *Ex Parte Young* argument [ER 14] and correctly concluded that this is not a traditional *Ex Parte Young* case where the tribal officials are acting pursuant to an allegedly unconstitutional statute. [ER 13-14] Instead, and as the district court found, this case involves a disagreement over the meaning of a term in a contract, and *Ex Parte Young* is inapplicable. [*Id.*] This Court should affirm the district court's carefully considered decision on this matter.

A. SRP's Cases Do Not Support Its Position that Parties to a Contract Are Not Required to Be Joined.

SRP cites some cases [OB at 26-32], which it claims support the conclusion that the current case is properly brought under the *Ex Parte Young* framework. But the cases that SRP cites are factually inapposite because they do not involve situations where the plaintiffs have failed to sue the other party to a contract. *E.g.*, *South Dakota v. Bourland*, 949 F.2d 984 (8th Cir. 1991), *rev'd on other grounds*,

508 U.S. 679 (1993) (holding that the district court did not abuse its discretion in finding that the case could proceed without the tribe where the issues of the case centered on whether the tribe's regulations were permissible under federal law); *Thomas v. United States*, 189 F.3d 662, 667 (7th Cir. 1999) (concluding that tribal governing board was not a party required to be joined because of its "limited role").

Far from supporting SRP's position, *Kansas*, 249 F.3d 1213, instead shows why the Navajo officials' position is correct. The State of Kansas sought injunctive and declaratory relief that certain land was not "Indian land" within the meaning of the Indian Gaming Regulatory Act ("IGRA"). *Id.* at 1220. The Tenth Circuit, in refusing to dismiss the action on Rule 19 grounds for failure to join the Miami Tribe to the lawsuit, distinguished *Enterprise Management Consultants, Inc.*, 883 F.2d 890, which had dismissed a suit pursuant to Rule 19, on the grounds that *Enterprise Management* involved *interpreting a contract* to which the signatories were required parties that could not be joined. The court in *Kansas* explained the difference between the two cases:

> Notably, in this case, the State of Kansas does not seek to enforce a gaming management contract to which the Tribe is a party. Rather, the State's suit challenges [a federal] administrative decision holding that the tract constitutes "Indian lands" under IGRA.

Id. at 1227 n.9. Because the current case does seek to construe a contract to which the Nation is a party, dismissal pursuant to Rule 19 is proper—and the *Ex Parte Young* framework is inapplicable.

The Opening Brief also cites [at 38] *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962 (9th Cir. 2008), as an example of the Ninth Circuit refusing to uphold a Rule 19 dismissal. But in that case, this Court specifically acknowledged that "an interest that arises from terms in bargained contracts" may be sufficiently substantial to warrant dismissal under Rule 19. *Id.* at 970 (internal quotation marks and citation omitted). Because the tribe's interest in that case did not arise from a contract, but instead from a desire to be free from competition, the court held that dismissal under Rule 19 was inappropriate. *Id.* at 971. But the present case is not controlled by *Cachil Dehe Band of Wintun Indians* because this case does arise from terms in a bargained contract. *See id.* at 976.

B. Even SRP Concedes that this Case Involves Contract Interpretation.

To escape the well-established principle that parties to a contract are required to be joined, SRP is now trying to disclaim the centrality of the 1969 Lease. For example, SRP says that "no part of the 1969 Lease between the Navajo Nation and SRP (and the other Participants) is being challenged or attacked in this litigation" [OB at 37], and "[SRP] do[es] not attack or seek to invalidate the 1969

Lease or any portion of it" [OB at 38]. This carefully worded argument ignores that the central basis of SRP's own complaint is SRP's interpretation of the lease in opposition to the Nation's likely interpretation. [ER 199-216 ¶¶ 14, 17-18, 24, 26, 35, 46, 52, 54, 59, 62] Time and time again, the complaint relies on the 1969 Lease to show that the Navajo officials are acting wrongly; but the complaint never mentions any federal statute, regulation, or constitutional provision that the Navajo officials are allegedly violating.

And even SRP has to recognize that, at least as an "alternative argu[ment],"[11] it is claiming that "even if such inherent authority [to regulate nonmembers] existed at some point, the Navajo Nation had unmistakably waived that authority when it agreed to a non-regulation provision *in its lease agreement* with SRP and the other owners of NGS." [OB at 6 (emphasis added); *see also* OB at 15 ("[SRP] alternatively argue[s] that, even if such inherent authority existed at some point, the Navajo Nation had unmistakably waived that authority when it agreed to a non-regulation provision in its lease agreement with SRP and the other Participants."), 39 ("[SRP] contend[s], in part, that the Navajo Official Defendants' improper attempts to enforce the Navajo Preference in Employment Act against [SRP] violate the non-regulation provision of the 1969 Lease.")] In its summary

[11] What SRP now characterizes as an "alternative argument" is virtually the *only* basis for relief set forth in its complaint. Moreover, and as explained above, SRP's *Montana* argument also boils down to an interpretation of the 1969 Lease.

judgment papers before the district court, SRP also sets forth its position that it is entitled to an injunction because the regulation of employment relations at NGS is a "clear violation of [SRP's] rights under the 1969 Lease and the § 323 Grant." [SER 44-64 (at 15)]

Because, as even SRP concedes, this is a case regarding rights under the 1969 Lease, this case cannot proceed without the parties to that lease, including the Navajo Nation.

Conclusion

The district court properly understood this as a case involving the interpretation of a contract to which the Navajo Nation is a party; and the district court properly understood that this case is not, therefore, a typical *Ex Parte Young* action that may proceed against tribal officials, but instead one that can and must be dismissed under Rule 19. This Court should affirm the district court's well-reasoned judgment of dismissal.

DATED: May 18, 2011

Respectfully submitted,

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Certificate of Service

I hereby certify that on May 18, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Philip R. Higdon

Certificate of Compliance

I certify that:

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached response brief is proportionately spaced, has a typeface of 14 points or more and contains 9,939 words.

s/ Philip R. Higdon

Statement of Related Cases

Pursuant to Circuit Rule 28-2.6, Appellees state that they are not aware of any related cases pending in this Court.

s/ Philip R. Higdon