NO. 10-17895

UNITED STATES COURT OF APPEALS

FOR THE 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,

Plaintiffs - 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,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Docket No.: 3:08-CV-08028-JAT

APPELLANTS' OPENING BRIEF

JENNINGS, STROUSS & SALMON, P.L.C.
#0027500
John J. Egbert - 011469
johnegbert@jsslaw.com
Paul G. Johnson – 010309
pjohnson@jsslaw.com
One East Washington Street, Suite 1900
Phoenix, AZ 85004-2554
(602) 262-5994
Attorneys for Appellant Salt River Project
Agricultural Improvement and Power District

SNELL & WILMER, LLP
Lisa M. Coulter - 010199
One Arizona Center
400 E. Van Buren
Phoenix, Arizona 85004-2202
Telephone: (602) 382-6000
Attorneys for Appellant
Headwaters Resources, Inc.

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CORPORATE DISCLOSURE STATEMENT

Appellant Salt River Project Agricultural Improvement and Power District is a political subdivision of the State of Arizona.

Appellant Headwaters Resources, Inc. is a wholly-owned subsidiary of Headwaters Incorporated.

TABLE OF CONTENTS

Pages

CORPORATE DISCLOSURE STATEMENT

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

ISSUE PRESENTED 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 8

A. The Navajo Generating Station. 8

B. The Navajo Preference in Employment Act. 11

C. The Thinn and Gonnie Complaints. 13

D. Plaintiffs' *Ex parte Young* Claims 14

SUMMARY OF ARGUMENT 16

ARGUMENT 18

I. STANDARD OF REVIEW. 18

II. THE DISTRICT COURT'S ERRONEOUS APPLICATION OF RULE 19 ABROGATES THE *EX PARTE YOUNG* DOCTRINE. 19

A. The Purpose of the *Ex parte Young* Doctrine is to Allow Enforcement of Federal Law Despite the Sovereign Immunity of States and Tribes. 19

B. Requiring Joinder of an Immune Sovereign in *Ex parte Young* Cases Destroys the Delicate Balance the *Ex parte Young* Doctrine Created....24

C. Federal Courts Have Uniformly Refused to Apply Rule 19 to Defeat *Ex Parte Young* Claims....26

III. THE DISTRICT COURT INCORRECTLY APPLIED RULE 19 TO THIS CASE. 32

A. The Navajo Nation is Not a "Person Required to Be Joined if Feasible" Under Rule 19(a)....33

1. The Navajo Nation is not required to be joined under Rule 19(a)(1)(B)(i)....34

(i) The Navajo Nation has no legally protected interests in conduct which violates federal law....35

(ii) The Navajo Official Defendants' presence adequately protects any interests the Navajo Nation may have....41

2. The Navajo Nation is not required to be joined under Rule 19(a)(1)(A). 43

3. Conclusion. 47

B. The Absence of the Navajo Nation Does Not Require Dismissal Under Rule 19(b)....48

IV. ALTERNATIVELY, THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' ENTIRE ACTION. 53

CONCLUSION....60

CERTIFICATE OF SERVICE 61

CERTIFICATE OF COMPLIANCE....62

TABLE OF AUTHORITIES

Page

Cases

Agua Caliente Band of Cahuilla Indians v. Hardin,
223 F.3d 1041 (9th Cir. 2000) 21, 22, 36

American Bank and Trust Co. v. Dent,
982 F.2d 917 (5th Cir. 1993) 22

Arizona Public Service Co. v. Aspaas,
77 F.3d 1128 (9th Cir. 1995) .... *passim*

Arizona Public Service Co. v. Office of Navajo Labor Relations,
No. A-CV-08-87 (Navajo Sup. Ct. 1990)..11

AT&T Communications v. BellSouth Telecommunications Inc.,
238 F.3d 636 (5th Cir. 2001) 31

Big Horn County Electric Cooperative, Inc. v. Adams,
219 F.3d 944 (9th Cir. 2000) 55

Burlington Northern & Santa Fe Railway Co. v. Vaughn,
509 F.3d 1085 (9th Cir. 2007) 23

Burlington Northern Railroad Co. v. Blackfeet Tribe,
924 F.2d 899 (9th Cir. 1991) 55

Burrell v. Armijo,
456 F.3d 1159 (10th Cir. 2006) 23

Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California,
547 F.3d 962 (9th Cir. 2008) 38, 47, 48

Clinton v. Babbitt,
180 F.3d 1081 (9th Cir. 1999) 37

3773780v1(42000.8024)

Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes,
78 F. Supp. 2d 589 (E.D. Tex. 1999), aff'd in part, rev'd in part
on other grounds, 261 F.3d 567 (5th Cir. 2001) 32, 43

County of Fresno v. Andrus,
622 F.2d 436 (9th Cir. 1980) 42

Crowe & Dunlevy, P.C. v. Stidham,
609 F. Supp. 2d 1211 (N.D. Okla. 2009) 31

Dawavendewa v. Salt River Project Agricultural Improvement and Power District, 276 F.3d 1150 (9th Cir. 2002) .... *passim*

Disabled Rights Action Committee v. Las Vegas Events, Inc.,
375 F.3d 861 (9th Cir. 2004) 18, 37-39, 45, 56

EEOC v. Peabody Western Coal Co.,
400 F.3d 774 (9th Cir. 2005) 18, 33

EEOC v. Peabody Western Coal Co.,
610 F.3d 1070 (9th Cir. 2010), *petitions for cert. filed*, 79 U.S.L.W.
3457 (U.S. Jan. 28, 2011, Jan. 31, 2011 and Mar. 3, 2011) .... *passim*

Ex parte Young,
209 U.S. 123 (1908).. *passim*

Gila River Indian Community v. Winkleman,
2006 WL 1418079 (D. Ariz. 2006) 31

Idaho v. Coeur d'Alene Tribe,
521 U.S. 261 (1997)..22

Kansas v. United States,
249 F.3d 1213 (10th Cir. 2001) 29, 30, 31, 43

Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949).. 27, 28

Lomayaktewa v. Hathaway,
520 F.2d 1324 (9th Cir. 1975) 36

Makah Indian Tribe v. Verity,
910 F.2d 555 (9th Cir. 1990) 41, 49, 58, 59

MCI Telecommunications Corp. v. Illinois Bell Telephone Co.,
222 F.3d 323 (7th Cir. 2000) 31

Merrion v. Jicarilla Apache Tribe,
455 U.S. 130 (1982)...55

Montana v. United States,
450 U.S. 544 (1981).. 6, 15, 26

National Farmers Union Ins. Cos. v. Crow Tribe of Indians,
471 U.S. 845 (1985)...54

Pennhurst State School & Hospital v. Halderman,
465 U.S. 89 (1984)...22

Philadelphia Co. v. Stimson,
223 U.S. 605 (1912)...28

Plains Commerce Bank v. Long Family Land and Cattle Co.,
554 U.S. 316 (2008).. 24, 54

Provident Tradesmens Bank & Trust Co. v. Patterson,
390 U.S. 102 (1968).. 49, 51

Quileute Indian Tribe v. Babbitt,
18 F.3d 1456 (9th Cir. 1994) 53

Ramah Navajo School Board, Inc. v. Babbitt,
87 F.3d 1338 (D.C. Cir. 1996)..42

Salt River Project Agricultural Improvement and Power District v. Lee,
No. 09-15306, slip op. (9th Cir. Mar. 19, 2010)...5

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978)...23

Shermoen v. United States,
982 F.2d 1312 (9th Cir. 1992) 42, 43

Shields v. Barrow,
58 U.S. 130 (1854)...33

South Dakota v. Bourland,
949 F.2d 984 (8th Cir. 1991), *rev'd on other grounds*,
508 U.S. 679 (1993).. 26, 27, 38, 39

Southwest Center for Biological Diversity v. Babbitt,
150 F.3d 1152 (9th Cir. 1998) 41

Thomas v. United States,
189 F.3d 662 (7th Cir. 1999), *cert. denied,*
531 U.S. 811 (2000).. 28, 41, 44, 46

Vann v. Kempthorne,
534 F.3d 741 (D.C. Cir. 2008).. 23, 35, 36, 40

Washington v. Daley,
173 F.3d 1158 (9th Cir. 1999) 41

Constitutional Provisions and Statutes

U.S. Const. art. VI, cl. 2 19

25 U.S.C. § 323 ....8, 9

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

Navajo Nation Statutes

15 Navajo Nation Code § 601 *et seq.* 11

15 Navajo Nation Code § 603..12

15 Navajo Nation Code § 604... 11, 12

15 Navajo Nation Code § 607..11

Rules

Rule 4(a)(1)(A), F.R.A.P. 1

Rule 19, Fed. R. Civ. P. .... *passim*

Rule 65(d)(2), Fed. R. Civ. P. 46

Other Authorities

17A C. Wright, A. Miller, E. Cooper & V. Amar, *Federal Practice and Procedure* § 4231 (3d ed. 2007).. 20, 21, 25

17A C. Wright, A. Miller, E. Cooper & V. Amar, *Federal Practice and Procedure* § 4232 (3d ed. 2007)..22

STATEMENT OF JURISDICTION

District Court Jurisdiction: The district court had federal question jurisdiction under 28 U.S.C. § 1331.

Appellate Court Jurisdiction: The judgment from which Plaintiffs appeal is a final judgment. (Excerpts of Record ("ER") 1). Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

Timeliness of Appeal: The judgment from which this appeal is taken was entered on December 2, 2010. (ER 1). Plaintiffs filed a joint notice of appeal on December 23, 2010. (ER 16-18). That notice of appeal was timely under Rule 4(a)(1)(A), F.R.A.P.

ISSUE PRESENTED

Whether the district court erred in relying on Rule 19, Fed. R. Civ. P., to dismiss Plaintiffs' *Ex parte Young* claims against Navajo Nation officials, based on the absence of the Navajo Nation itself.

STATEMENT OF THE CASE

This appeal arises out of a suit by Plaintiffs Salt River Project Agricultural Improvement and Power District ("SRP") and Headwaters Resources, Inc. ("Headwaters"), seeking declaratory and injunctive relief against certain Navajo Nation officials to prevent them from proceeding in excess of their jurisdiction and contrary to federal law by attempting to regulate SRP's and Headwaters' employment relationships. SRP and Headwaters are non-Navajo and non-Indian entities. (ER 200 at ¶¶ 1-2).

This action arises out of claims asserted against SRP by its former employee, Leonard Thinn, and claims asserted against Headwaters by its former employee, Sarah Gonnie. (ER 201 at ¶¶ 6-7; ER 208 at ¶¶ 32, 38). Thinn and Gonnie are members of the Navajo Nation. (ER 201 at ¶¶ 6-7). They were employed to work at the Navajo Generating Station ("NGS"), a large electric generating plant located near Page, Arizona. (ER 202 at ¶ 12; ER 208 at ¶¶ 32, 38). They claimed the termination of their employment violated a Navajo Nation ordinance, the Navajo Preference in Employment Act. Thinn and Gonnie pursued their claims in two Navajo Nation administrative agencies, the Office of Navajo Labor Relations (the "ONLR") and the Navajo Nation Labor Commission (the "NNLC"), and in the

Navajo Nation Supreme Court. (ER 208 ¶¶ 32-41; ER 209 ¶¶ 42-44). SRP and Headwaters argued throughout the Navajo administrative and judicial proceedings that the Navajo Nation had no authority to regulate employment relations at NGS. After the Navajo Nation Supreme Court issued its final opinion rejecting this argument, SRP and Headwaters filed the underlying suit in the district court to enjoin the Director of the ONLR, the Members of the NNLC and the Justices of the Navajo Nation Supreme Court (collectively, the "Navajo Official Defendants") from attempting to enforce the Navajo Preference in Employment Act against SRP and Headwaters.[1] (ER 209 ¶ 45; ER 199-216).

Shortly after Plaintiffs filed suit, they filed a motion for a preliminary injunction to prevent the Navajo Official Defendants from attempting to regulate employment relationships through hearings which had been scheduled by the NNLC. (District Court Docket ("Doc.") 5-6). When the NNLC agreed to stay those hearings, thereby eliminating the need for immediate relief, Plaintiffs withdrew their request for a preliminary injunction but maintained their lawsuit. (Doc. 13, 23).

Upon filing their answer (Doc. 33), the Navajo Official Defendants simultaneously filed a motion to dismiss the complaint, arguing that the issues presented in the complaint had to be decided by the Secretary of the Interior, rather

[1] Plaintiffs' suit also names Thinn and Gonnie as defendants. They are collectively referred to herein as the "Individual Defendants."

than the district court. (Doc. 34). While the motion to dismiss was pending, Plaintiffs, the Navajo Official Defendants and the Individual Defendants filed extensive cross-motions for summary judgment, which addressed the merits of the legal issues raised in Plaintiffs' complaint. (Doc. 54-56, 60-62, 65-66, 70, 73-77, 84, 86-87).

On January 14, 2009, the district court granted the Navajo Official Defendants' motion to dismiss and denied as moot the parties' cross-motions for summary judgment. (Doc. 89). Plaintiffs' appeal to this Court resulted in a memorandum decision reversing the dismissal of Plaintiffs' claims. (Doc. 109-1 (*Salt River Project Agricultural Improvement and Power District v. Lee*, No. 09-15306, slip op. (9th Cir. Mar. 19, 2010)). This Court held:

> The district court erred in ordering Salt River Project to refer its claims to the United States Secretary of the Interior . . . . Contrary to the district court's supposition, Salt River Project has no further obligation to submit its dispute to the Secretary under the 1969 Lease's dispute resolution provisions. Its claims are thus properly before the district court. *See Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1132-34 (9th Cir. 1995).

(*Id*. at pp. 2-3).

Even before this Court's mandate issued, the Navajo Official Defendants filed another motion to dismiss with the district court. (Doc. 108). This time they contended that the claims Plaintiffs asserted were not properly before the district court; that Plaintiffs could assert only an administrative appeal under the

Administrative Procedure Act. (*Id.*). The Navajo Official Defendants also filed yet another motion to dismiss, arguing that Plaintiffs' claims should be dismissed under Rule 19 because the Navajo Nation and the United States could not be joined as parties. (Doc. 125, 132-34).

Both sides also reurged their positions on the merits in another round of cross-motions for summary judgment. (Doc. 119-21, 124, 126-29, 136-38, 140-43). Plaintiffs based their claims against the Navajo Official Defendants on the same two arguments raised in the analogous case of *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995). First, Plaintiffs primarily argued that, under the analytical framework established by *Montana v. United States*, 450 U.S. 544 (1981), and its progeny, the Navajo Official Defendants had no inherent authority to regulate nonmembers such as Plaintiffs. Second, Plaintiffs alternatively argued 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 owners of NGS. (ER 19-33)

The district court denied the Navajo Official Defendants' motion to dismiss based on the Administrative Procedure Act argument, but granted their motion to dismiss based on Rule 19, holding that the Navajo Nation had an interest relating to the subject of the action and that the action should not proceed in the Navajo

Nation's absence.[2] (ER 2-15 (Doc. 150)). Consequently the district court once again did not reach the merits of the parties' extensive cross-motions for summary judgment, but denied them as moot. (ER 15).

On December 23, 2010, the Plaintiffs filed a timely joint notice of appeal. (ER 16-18).

[2] The district court rejected the Navajo Official Defendants' Rule 19 argument that the United States was also required to be joined if feasible. (ER 8).

STATEMENT OF FACTS

A. The Navajo Generating Station.

Plaintiff Salt River Project Agricultural Improvement and Power District ("SRP") is a political subdivision of the State of Arizona. (ER 200 at ¶ 1). SRP operates a large electric generating plant called the Navajo Generating Station ("NGS"), which is located near Page, Arizona. (ER 202 at ¶ 12). Plaintiff Headwaters Resources, Inc. ("Headwaters") is a contractor employed by SRP at NGS. (ER 200 at ¶ 2). SRP and Headwaters are non-Navajo and non-Indian entities. (ER 200 at ¶¶ 1-2).

NGS is owned by SRP, Arizona Public Service Company, the Department of Water and Power of the City of Los Angeles, Nevada Power Company and Tucson Electric Power Company (collectively referred to as "the Participants"). The Participants have invested in excess of $1.1 billion in the construction of NGS. SRP operates NGS pursuant to an agreement among all the Participants. (ER 202 at ¶ 13).

NGS is located on Navajo reservation land pursuant to: (1) a lease which the Navajo Nation and the Participants entered into in 1969 ("the 1969 Lease"); and (2) rights-of-way which the United States (through the Secretary of the Interior) granted to the Participants, pursuant to 25 U.S.C. § 323 ("the § 323

Grant").[3] (ER 34-108 (1969 Lease); ER 109-183 (§ 323 Grant); ER 202 at ¶¶ 12, 14-15; ER 203 at ¶¶ 16-17; ER 204 at ¶¶ 19-21). The rights the federal government granted to the Participants by the § 323 Grant include "rights-of-way and easements in, on, over, along and across the lands" on which NGS is built and operates, and the rights of "quiet enjoyment and peaceful and exclusive possession" of that land. (ER 113; ER 138-39 at § 21). The § 323 Grant also, with certain limited exceptions not at issue here, "extinguished and prohibited" "[a]ll present existing Indian uses" of the granted lands. (ER 120-21 at § 3). The rights granted to the Participants by the § 323 Grant "are, and shall be deemed for all purposes to be, additional and supplementary to, and separate and independent from, any leasehold rights acquired" under the 1969 Lease, and the § 323 Grant rights "are not subject or subordinate to any provision of the [1969] Lease." (ER 121 at § 4; *see also* ER 45).

When issuing the § 323 Grant, the Secretary of the Interior expressly "determined that the construction, operation and maintenance of [NGS] will benefit the Navajo Tribe of Indians and will foster the development of resources of the Navajo Reservation," and the Secretary issued the § 323 Grant "in part to induce the [Participants] to proceed with the development of [NGS]." (ER 204 at

[3] Although the United States issued more than one grant pursuant to 25 U.S.C. § 323 in connection with the construction and operation of NGS, the § 323 grant in the record below is referred to herein as "the § 323 Grant."

¶ 20-21; *see also* ER 114). The Secretary expressly determined that the Navajo Nation had consented to the § 323 Grant by duly-approved resolutions of its Tribal Council and Advisory Committee. (ER 120 at § 3; ER 204-05 at ¶ 22).

Pursuant to the 1969 Lease, the Participants agreed, among other things, to pay rent to the Navajo Nation and "to give preference in employment to qualified local Navajos." (ER 58-65 at § 7; ER 79-80 at § 18). In turn, the Navajo Nation agreed, among other things, that it would not regulate the operation of NGS except to the extent expressly provided in the Lease itself:

> The Tribe covenants that, other than as expressly set out in this Lease, it will not directly or indirectly regulate or attempt to regulate the [Participants] in the construction, maintenance or operation of [NGS] . . . . This covenant shall not be deemed a waiver of whatever rights the Tribe may have to regulate retail distribution of electricity on the Reservation Lands.

(ER 78-79 at § 16).

The Participants' rights under the 1969 Lease also extend to the Participants' contractors, such as Headwaters. (ER 70 at § 11). SRP and the other Participants have fully complied with their obligations under the 1969 Lease. (ER 206 at ¶ 26).

The 1969 Lease and the § 323 Grant are intentionally interdependent parts of a whole, and by design became effective simultaneously. By its own terms, the 1969 Lease did not become effective until: (1) it was fully executed by the parties thereto and approved by the Secretary; **and** (2) the § 323 Grant became effective.

(ER 101 at § 34(a)). Similarly, the § 323 Grant, by its own terms, did not become effective until: (1) it had been fully executed by the parties thereto; **and** (2) the 1969 Lease had been executed by the parties thereto and approved by the Secretary of the Interior. (ER 135 at § 16.1).

B. The Navajo Preference in Employment Act.

In 1985, more than fifteen years after entering into the 1969 Lease, the Navajo Nation enacted an ordinance entitled "The Navajo Preference in Employment Act," codified at 15 Navajo Nation Code §§ 601 *et seq.* (ER 206 at ¶ 27). This Navajo ordinance purports to impose several significant administrative schemes and other burdens on employers beyond the simple preference-in-employment obligation to which SRP agreed in the 1969 Lease. For example, it requires that employers: pay a "prevailing wage" set by the Office of Navajo Labor Relations ("ONLR") (15 Navajo Nation Code § 607); discipline and terminate employees only for "just cause" (as determined by the Navajo Nation) (*id.* at § 604(B)(8)); provide only fringe benefit plans that recognize and accommodate Navajo cultural and religious beliefs (*id.* at § 604(B)(12); and sponsor a cross-cultural program designed to educate non-Navajo employees about Navajo cultural and religious beliefs (*id.* at § 604(B)(11)). (ER 206-07 at ¶ 27).[4] Furthermore,

[4] According to the Navajo Nation Supreme Court's own characterization of the Navajo Preference in Employment Act in *Arizona Public Service Co. v. Office of Navajo Labor Relations*, No. A-CV-08-87 (Navajo Sup. Ct. 1990), in addition to

even the preference requirement in the Navajo Preference in Employment Act is substantially broader than the one to which SRP agreed in the 1969 Lease; the Act requires that as long as there is at least one Navajo candidate who has the minimal "necessary qualifications," a non-Navajo candidate cannot be selected to fill a vacant position regardless of how much better qualified the non-Navajo candidate may be. (15 Navajo Nation Code §§ 603(I), 604(A), 604(C)).

The Navajo Preference in Employment Act authorizes the ONLR to investigate complaints and determine whether there is probable cause to believe there has been a violation of the Act. (ER 207 at ¶ 28). It also authorizes the Navajo Nation Labor Commission ("NNLC") to conduct hearings on complaints and, if it finds a violation of the Act, to issue "remedial orders," which may include orders for back pay, reinstatement of terminated employees, directed hiring of candidates, displacement of non-Navajo employees, injunctive relief and even civil fines. (ER 207 at ¶ 29).

Shortly after the enactment of the Navajo Preference in Employment Act, disputes between the Navajo Nation and SRP arose as to whether the Act applied to SRP's operations at NGS. SRP has consistently asserted that the ONLR and the

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requiring preference in employment, the Act also requires "employment procedures, just cause employment tenure, health and safety guarantees and training requirements."

NNLC lack jurisdiction to enforce the Act against SRP and the other Participants (or their contractors) at NGS. (ER 207 at ¶ 30).

In order to avoid legal disputes concerning the applicability of the Act to SRP at NGS, and without waiving any rights to assert their respective legal positions, the Navajo Nation and SRP cooperatively developed a "Navajo Generating Station Preference Plan" which SRP adopted in 1987. For many years, implementation of this NGS Preference Plan obviated the need for the Navajo Nation and SRP to confront the issue of whether the Navajo Preference in Employment Act could be enforced at NGS. (ER 207 at ¶ 31).

C. The Thinn and Gonnie Complaints.

In 2004, Leonard Thinn, a former SRP employee at NGS who is Navajo, filed a charge with the ONLR, alleging SRP had terminated his employment without just cause, in violation of the Navajo Preference in Employment Act. (ER 208 at ¶ 32). Similarly, in 2005, Sarah Gonnie, a former Headwaters employee at NGS who is Navajo, filed a charge with the ONLR, alleging Headwaters terminated her employment without just cause, in violation of the Act. (ER 208 at ¶ 38). Both Thinn and Gonnie then pursued their claims in the NNLC. (ER 208 at ¶¶ 34, 40). However, the NNLC granted SRP's and Headwaters' motions to dismiss for lack of jurisdiction (Doc. 5 at Exs. 6-7), citing this Court's decision in *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1996),

which held that the Navajo Nation could not enforce the Navajo Preference in Employment Act against Arizona Public Service Co.[5] at a different power plant built and operated on the Navajo reservation pursuant to virtually identical lease and grant provisions as used at NGS. (ER 208-09 at ¶¶ 35-36, 41-42).

Thinn and Gonnie then appealed these dismissals to the Navajo Nation Supreme Court. (ER 208-09 at ¶¶ 37, 43). That court reversed, holding that the Navajo Preference in Employment Act applies to SRP and Headwaters. It remanded the matter to the NNLC for further proceedings on the merits of Thinn's and Gonnie's claims. (ER 209 at ¶¶ 44-47).

D. Plaintiffs' Ex parte Young Claims.

SRP and Headwaters commenced this action in the district court on February 29, 2008. (ER 199-216; Doc. 1). Pursuant to the long-established *Ex parte Young* doctrine, *see Ex parte Young*, 209 U.S. 123 (1908), Plaintiff sought only prospective nonmonetary relief against the Navajo Nation officials responsible for enforcing the Navajo Preference in Employment Act. Specifically, Plaintiffs sought a declaration that the Navajo Official Defendants may not, as a matter of federal law, enforce the Navajo Preference in Employment Act against Plaintiffs at NGS or otherwise regulate Plaintiffs' employment relations at NGS, and an injunction prohibiting them from doing so. (ER 210-14). In support of these

[5] The plaintiff in *Aspaas*, Arizona Public Service Co., is also one of the Participants in NGS. (ER 202 at ¶ 13).

claims, Plaintiffs primarily argue that, under the analytical framework established by *Montana v. United States*, 450 U.S. 544 (1981), and its progeny, the Navajo Official Defendants had no inherent authority to regulate nonmembers such as Plaintiffs. Second, Plaintiffs alternatively argue 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. (ER 19-33).

Addressing the Navajo Official Defendants' most recent motion to dismiss, the district court held that Plaintiffs' *Ex parte Young* claims against the Navajo Official Defendants had to be dismissed under Rule 19, Fed. R. Civ. P., because the Navajo Nation itself could not be joined as a defendant. (ER 9-14). Although the district court acknowledged that Plaintiffs' action included a "traditional *Ex parte Young*" claim in which they argued that the Navajo Official Defendants are violating federal law by acting in excess of their inherent sovereign authority, the district court found that Plaintiffs "also argue that the Navajo Nation waived any inherent right to regulate employment matters at NGS." (ER 13). The district court concluded that it was this "argument that sets this case apart from the traditional *Ex Parte Young*" analysis, thus leading the district court to grant the Navajo Official Defendants' Rule 19 motion by dismissing Plaintiffs' action in its entirety. (ER 13-14).

SUMMARY OF ARGUMENT

The district court's erroneous application of Rule 19 in this case effectively abrogates the Supreme Court's long-established *Ex parte Young* doctrine. *See Ex parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* doctrine strikes a delicate balance between requiring states and Indian tribes to comply with federal law under the Supremacy Clause of the United States Constitution, and recognizing the rights of sovereign immunity enjoyed by such governmental entities. It achieves that balance by allowing suits against a governmental entity's officials – and deeming the entity as having no interest in its officials violating federal law – provided the suits are limited to claims for prospective, non-monetary relief.

By holding that Plaintiffs' *Ex parte Young* claims against the Navajo Nation's officials cannot proceed unless the immune Navajo Nation itself is joined, the district court undid precisely what the *Ex parte Young* doctrine is intended to accomplish. Not surprisingly, every federal case – prior to the district court's erroneous ruling below – that has addressed Rule 19 in the context of *Ex parte Young* claims against a governmental entity's officials has refused to dismiss the claims based on the absence of the governmental entity itself. The district court's

decision below effectively abrogates the *Ex parte Young* doctrine, and improperly allows the Navajo Nation and its officials to violate federal law with impunity.

The district court erred in concluding that the Navajo Nation is required to be joined if feasible under Rule 19(a). The Navajo Nation is not required to be joined under Rule 19(a)(1)(B)(i) because, under the fundamental principle of the *Ex parte Young* doctrine, a state or Indian tribe has no legally protected interest in its officials violating federal law. Furthermore, to the extent the Navajo Nation has any legally protected interests in the subject matter of this case, the presence of the Navajo Official Defendants adequately protects any such interests. The Navajo Nation is also not required to be joined under Rule 19(a)(1)(A) because Plaintiffs can obtain all the relief they seek from the existing parties, whether or not the Navajo Nation itself is a party.

Even if the Navajo Nation were required to be joined if feasible, the district court erred in concluding that this case should not proceed in the absence of the Navajo Nation under Rule 19(b). The Rule 19(b) factors weigh heavily in favor of allowing Plaintiffs' *Ex parte Young* claims to proceed against the Navajo Official Defendants. Indeed, the *Ex parte Young* doctrine itself represents the Supreme Court's careful balancing of all the relevant factors, which the district court's erroneous dismissal of this action improperly disrupts.

Accordingly, the district court erred in dismissing Plaintiffs' *Ex parte Young* claims based on Rule 19. Alternatively and at a minimum, the district court erred in dismissing Plaintiffs' claims to the extent they are based on the *Montana* analytical framework.

ARGUMENT

I. STANDARD OF REVIEW.

The grant or denial of a Rule 19 motion to dismiss "is generally reviewed under an abuse of discretion standard," but "legal conclusions that underlie the district court's decision are reviewed de novo." *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir. 2004) (reversing the district court's conclusion that a nonparty with sovereign immunity was required to be joined if feasible); *see also EEOC v. Peabody Western Coal Co.*, 400 F.3d 774 (9th Cir. 2005) [hereinafter *Peabody I*] ("We review de novo the district court's legal conclusion that it is not feasible to join the Navajo Nation."); *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150, 1154 (9th Cir. 2002) ("To the extent that the district court's determination whether a party's interest is impaired involves a question of law, we review de novo.").

II. THE DISTRICT COURT'S ERRONEOUS APPLICATION OF RULE 19 ABROGATES THE *EX PARTE YOUNG* DOCTRINE.

For more than one hundred years, the *Ex parte Young* doctrine has provided the means to ensure that states and Indian tribes comply with federal law, notwithstanding their sovereign immunity from suit. Relying on Rule 19 to require joinder of an immune sovereign in *Ex parte Young* cases would effectively destroy the delicate balance the *Ex parte Young* doctrine created. Such an application of Rule 19 would allow states and tribes to violate federal law with impunity, because their sovereign immunity would effectively trump the Constitution's Supremacy Clause. U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land"). Not surprisingly, until the district court's erroneous decision in this case, all prior cases have – without exception – refused to apply Rule 19 to defeat *Ex parte Young* claims.

A. The Purpose of the *Ex parte Young* Doctrine Is to Allow Enforcement of Federal Law Despite the Sovereign Immunity of States and Tribes.

To assert their claims against the Navajo Official Defendants, Plaintiffs rely on a doctrine the Supreme Court announced more than one hundred years ago in *Ex parte Young*, 209 U.S. 123 (1908). One preeminent treatise states that "it is not extravagant to argue that *Ex parte Young* is one of the three most important decisions the Supreme Court of the United States has ever handed down," and that the *Ex parte Young* doctrine is "indispensable to the establishment of constitutional

government and the rule of law." 17A C. Wright, A. Miller, E. Cooper & V. Amar, *Federal Practice and Procedure* § 4231 at 135 and 144 (3d ed. 2007) [hereinafter "*Federal Practice and Procedure*"].

Ex parte Young arose out of a law which the Minnesota legislature enacted, mandating the reduction of railroad rates. The stockholders of nine railroads brought suits in federal court against, among others, the state Attorney General (Edward Young), seeking to restrain him from enforcing the law. They claimed that the law violated the Fourteenth Amendment's due process requirements. Young objected that the suit against him was really just a suit against the state, which (he argued) violated sovereign immunity principles of the Eleventh Amendment. The district court nevertheless enjoined Young, and ultimately the Supreme Court held the injunction was proper:

> The act to be enforced is alleged to be unconstitutional; and, **if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity**. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is

> subjected in his person to the consequences of his individual conduct.

209 U.S. at 159-60 (emphasis added). The *Ex parte Young* doctrine "remains the basis for prospective relief against state officers" and Indian tribes today. *See EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1085 (9th Cir. 2010) [hereinafter *Peabody II*], *petitions for cert. filed*, 79 U.S.L.W. 3457, 3522 (U.S. Jan. 28, 2011, Jan. 31, 2011 and Mar. 3, 2011); *see also Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir. 2000) ("the *Young* doctrine is alive and well").

The *Ex parte Young* doctrine "rests on purest fiction." *Federal Practice and Procedure* § 4231 at 143; *see also Agua Caliente*, 223 F.3d at 1045 ("The *Young* doctrine is premised on the fiction that such a suit is not an action against a 'State' and is therefore not subject to the sovereign immunity bar."). This doctrine deems allegedly unlawful actions by a government official to be "without the authority of" the governmental entity, and as not affecting that governmental entity's "sovereign or governmental capacity," *Ex parte Young*, 209 U.S. at 159-60, even though the official is in fact attempting to enforce law enacted by the governmental entity's legislative branch. In other words, because states (and Indian tribes) cannot authorize their officers to violate federal law, suits seeking to enjoin such unlawful conduct are deemed not to be suits against the state (or tribe) itself, even though the injunction resulting from such suits has the practical effect of forcing

states and tribes to comply with federal law. *See American Bank and Trust Co. v. Dent*, 982 F.2d 917, 920-21 (5th Cir. 1993) ("[T]he Court in *Young* held that enforcement of an unconstitutional law is by definition – commentators often describe it as a 'fiction' – not an official act because the state *cannot* confer authority on its officers to violate the Constitution or federal law.") (citations omitted) (emphasis in original).

The Supreme Court has explained that this fiction is essential to reconcile "the supremacy of federal law" with "the constitutional immunity of the States." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 105 (1984). The *Ex parte Young* doctrine achieves this reconciliation because it "strikes a delicate balance by ensuring on the one hand that states enjoy the sovereign immunity preserved for them by the Eleventh Amendment while, on the other hand, 'giving recognition to the need to prevent violations of federal law.'" *Agua Caliente*, 223 F.3d at 1045 (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997)); *see generally Federal Practice and Procedure* § 4232 at 157 (discussing the "balance between the need for obtaining relief from state officials and the right of states not to have their public treasuries severely depleted"). Thus, although the *Ex parte Young* doctrine allows suits to proceed against government officials, the doctrine is limited to suits for prospective, nonmonetary relief. *Agua Caliente*, 223 F.3d at 1045 (*Ex parte Young* claims are limited to "prospective declaratory and

injunctive relief" against government officers "sued in their official capacities, to enjoin an alleged ongoing violation of federal law").

The Supreme Court and this Court have extended the *Ex parte Young* doctrine beyond state officials to the tribal context. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (citing *Ex parte Young*); *Burlington Northern & Santa Fe Railway Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (recognizing that the *Ex parte Young* doctrine "has been extended to tribal officials sued in their official capacity such that 'tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law'"); *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1133-34 (9th Cir. 1996) ("Tribal sovereign immunity, however, does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law."). The other circuits that have addressed this issue are in accord. *See, e.g., Vann v. Kempthorne*, 534 F.3d 741, 750 (D.C. Cir. 2008) ("Applying the principle of *Ex parte Young* in the matter before us, we think it clear that tribal sovereign immunity does not bar the suit against tribal officers."); *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) ("An Indian tribe's 'sovereign immunity does not extend to an official when the official is acting . . . outside the scope of those powers that have been delegated to him'" or "outside the amount of authority that the sovereign is capable of bestowing") (citations omitted).

In this action, Plaintiffs assert *Ex parte Young* claims against the Navajo Official Defendants. Specifically, Plaintiffs claim the Navajo Official Defendants are violating federal law by attempting to exercise authority over Plaintiffs, which are non-Indian entities. *See Plains Commerce Bank v. Long Family Land and Cattle*, 554 U.S. 316, 324 (2008) ("whether a tribal court has adjudicative authority over nonmembers is a federal question"). Plaintiffs seek only prospective, non-monetary relief against those Navajo officials who have enforcement responsibilities for the Navajo Preference in Employment Act. Specifically, Plaintiffs seek: (1) a declaration that the Navajo Official Defendants may not, as a matter of federal law, enforce the Navajo Preference in Employment Act (or similar employment regulations) against Plaintiffs at NGS; and (2) an injunction prohibiting them from doing so. (ER 210 at ¶ 54; ER 212-13 at ¶ 62).

Thus, there can be no dispute that this action falls squarely within the *Ex parte Young* doctrine. The district court itself acknowledged that "[t]he *Ex Parte Young* doctrine therefore permits lawsuits like the one here, where the Nation's officials allegedly have violated federal law and the Plaintiffs seek only prospective relief, no damages." (ER 13).

B. Requiring Joinder of an Immune Sovereign in *Ex parte Young* Cases Destroys the Delicate Balance the *Ex parte Young* Doctrine Created.

The very purpose of the *Ex parte Young* doctrine is to force governmental entities that enjoy the protections of sovereign immunity, such as States and Indian

tribes, to comply with federal law while at the same time respecting that immunity. The delicate balance struck by the *Ex parte Young* doctrine permits claims to be asserted against officials of the governmental entity for alleged violations of federal law – rather than against the entity itself – but only for non-monetary claims for prospective relief.

The *Ex parte Young* solution around a governmental entity's immunity is destroyed by the district court's erroneous reasoning in this case. The *Ex parte Young* doctrine allows claims against an immune entity's officials rather than claims directly against the entity. But by holding that such claims against the entity's officials cannot proceed unless the immune entity itself is joined, the district court's error undoes what the *Ex parte Young* doctrine is intended to do; the district court allows the entity's sovereign immunity to block completely any challenge to violations of federal law, despite the Supremacy Clause of the Constitution. Thus, by holding that the action against the Navajo Nation officials cannot proceed without joinder of the Navajo Nation itself – which its sovereign immunity makes impossible – the district court's holding allows federal law to be violated with impunity. *See Federal Practice and Procedure* § 4231 at 141 ("The effect of Ex parte Young is to bring within the scope of federal judicial review actions that might otherwise escape such review, and to subject the states to the restrictions of the United States Constitution that they might otherwise be able

safely to ignore."). Accordingly, the district court's decision below effectively abrogates one hundred years of *Ex parte Young* jurisprudence.

Significantly, the district court took this bold step without any supporting authority. It did not rely on a single case in which a court held that Rule 19 required dismissal of *Ex parte Young* claims against a governmental entity's officials because the governmental entity itself could not be joined. Nor did the Navajo Official Defendants cite any such case to the district court. That is because no such case exists.

C. Federal Courts Have Uniformly Refused to Apply Rule 19 to Defeat *Ex parte Young* Claims.

Prior to the district court's ruling in this case, every federal case that has addressed Rule 19 in the context of *Ex parte Young* claims against a governmental entity's officials has refused to dismiss the claims based on the absence of the governmental entity itself. The district court's ruling in this case is contrary to the otherwise unanimous view of the federal courts, and is simply wrong.

For example, in *South Dakota v. Bourland*, 949 F.2d 984 (8th Cir. 1991), *rev'd on other grounds*, 508 U.S. 679 (1993), South Dakota (like the Plaintiffs in this case) filed suit in federal district court against tribal officials, relying on the limitations on tribal inherent sovereign authority over non-Indians announced in *Montana v. United States*, 450 U.S. 544 (1981). South Dakota sought an injunction to prevent the tribal officials from regulating the hunting and fishing

activities of non-Indians on land taken by the United States for construction of a dam and reservoir. The district court held that the tribe possessed no regulatory authority over nonmembers hunting and fishing on the subject land, and permanently enjoined the tribal officials from attempting to exercise such authority.

On appeal, the tribal officials argued that the tribe was an indispensable party under Rule 19, and that therefore the district court erred in allowing the case to proceed in the tribe's absence. Recognizing that South Dakota's claims were asserted under the *Ex parte Young* doctrine, the Eighth Circuit rejected the Rule 19 argument even though the tribal officials were attempting to enforce the tribe's regulations:

> Although the State attacks the validity of the Tribe's regulations, its claim is premised on the argument that "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign. The power has been conferred in form but the grant is lacking in substance because of its invalidity." The State's suit seeking injunctive relief against the named tribal officials therefore is proper, and the Tribe is not an indispensable party.

Id. at 989 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949)) (citations omitted).[6]

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[6] The language the Eight Circuit quoted from *Larson* makes it clear that the *Ex parte Young* doctrine was the basis for rejecting the Rule 19 argument. *Larson* addressed "[t]he rule" by which prospective, non-monetary relief may be obtained

Significantly, because the district court and Eighth Circuit rejected the tribal officials' Rule 19 argument in the *Ex parte Young* context, the case did proceed forward, ultimately resulting in one of the Supreme Court's key decisions applying the same *Montana* framework on which Plaintiffs rely in this case. If the Eighth Circuit had used the same erroneous reasoning as the district court in this case, South Dakota's claims would have been dismissed and the tribal officials would have been free to continue regulating nonmember conduct in violation of federal law.

The Seventh Circuit also rejected the Rule 19 argument in the context of *Ex parte Young* claims in *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999), *cert. denied,* 531 U.S. 811 (2000). *Thomas* arose out of an election to ratify two amendments to a tribe's constitution. After the amendments were approved overwhelmingly, federal officials overturned the election results. Supporters of the amendments filed suit against (among others) the individual members of the tribe's governing board "under the *Ex parte Young* doctrine." *Id*. at 666. "[B]elieving that the tribal government was a party without whose presence the case could not go forward under the standards of Federal Rule of Civil Procedure 19," the district court dismissed the action, and the plaintiffs appealed. *Id*. at 664.

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against governmental officials alleged to be acting beyond the authority delegated to them or beyond the authority that could be delegated to them consistent with federal law. *Larson*, 337 U.S. at 689-91 (quoting *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912), which in turn cites *Ex parte Young*).

The Seventh Circuit rejected the Rule 19 argument and reversed the dismissal. The court acknowledged that the tribe had "a strong interest" in its constitution and the proposed amendments, but stated: "the fact that a tribe has an interest in the litigation is not enough in itself to make it a necessary party in the sense of Rule 19." *Id*. at 667-68. The court similarly rejected the argument that complete relief could not be given in the tribe's absence:

> Nor are we persuaded that there is a legally cognizable risk of incomplete relief that is so strong that this suit must be dismissed in the absence of the tribal governing body. . . . [T]he tribal governing board has no legal authority to refuse to implement amendments to the tribal constitution that have been put to a vote and approved by the Secretary. To say that the governing board must be a party because it might unlawfully refuse to implement the election results is not so different from saying that a warden is a necessary party in every criminal case, because she might unlawfully refuse to imprison a convicted criminal.

Id. at 668.

The Tenth Circuit also rejected the argument that Rule 19 requires dismissal of *Ex parte Young* claims against officials of a governmental entity when the governmental entity itself cannot be joined. In *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), the dispute arose out of efforts by the Miami Tribe of Oklahoma to establish gaming facilities on a tract of nonreservation land which the tribe was merely leasing, but which the National Indian Gaming Commission ("NIGC") nevertheless decided was "Indian land." The State of Kansas sought an

injunction against the NIGC, other federal officials, tribal officials and Butler National (the company with which the tribe had contracted for gaming management services).

Reserving its right to claim sovereign immunity, the tribe asserted that Rule 19 precluded the case from proceeding because it could not be joined as a party. Although the district court did not directly address the tribe's Rule 19 argument, its grant of the injunctive relief Kansas requested "implicitly rejected" that argument. *Id*. at 1221. The Tenth Circuit chose to "address the question in the first instance," noting that it "has an obligation to raise Rule 19 issue[s] *sua sponte*." *Id*. at 1226.

Addressing the merits of the Rule 19 argument, the Tenth Circuit held that the tribe was not even a person "required to be joined if feasible" under Rule 19(a), and therefore never even reached the Rule 19(b) factors to consider whether the case should proceed. Under Rule 19(a), the court held the tribe's absence "does not prevent the State from obtaining its requested relief," and is not "likely to subject the parties to this action to multiple or inconsistent obligations." *Id*. at 1226-27. Additionally, the court held that the tribe did not have interests that were not adequately protected:

> Finally, and most importantly, the potential for prejudice to the [tribe] is largely nonexistent due to the presence in this suit of not only the NIGC and other Federal Defendants, **but also the tribal officials** and Butler National. These Defendants' interests, considered

> together, are substantially similar, if not identical, to the Tribe's interests in upholding the NIGC's decision.

Id. at 1227 (emphasis added). Accordingly, the court rejected the Rule 19 argument.[7]

The federal district courts have also uniformly rejected the argument that Rule 19 requires dismissal of *Ex parte Young* claims against officials of a governmental entity when the governmental entity itself cannot be joined. *See Crowe & Dunlevy, P.C. v. Stidham*, 609 F. Supp. 2d 1211, 1221 (N.D. Okla. 2009) (holding that *Ex parte Young* claims against tribal court judge could proceed in the absence of entire tribal judicial branch, which enjoys sovereign immunity); *Gila River Indian Community v. Winkleman,* 2006 WL 1418079 at *4-5 (D. Ariz. 2006)

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[7] In other cases, federal courts have impliedly rejected the application of Rule 19 in cases asserting *Ex parte Young* claims, without directly addressing the Rule 19 analysis. For example, in *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323 (7th Cir. 2000), plaintiff carriers sued the Public Service Commission of Wisconsin, its individual commissioners and competing carriers for alleged violations of the Telecommunications Act of 1996. The district court held that the claims against the Commission and its commissioners were barred by sovereign immunity, and further held that, under Rule 19, the case should not proceed in their absence. On appeal, the Seventh Circuit reversed, initially holding that neither the Commission nor its commissioners were immune because Wisconsin had waived sovereign immunity in this context. *Id*. at 328. But the Seventh Circuit also held, "as an independent basis for decision, that the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine." *Id*. Even though, under this "independent basis for decision," the Commission could not be joined, the court saw no need to address the defendants' Rule 19 argument. *Id*. at 336 n.5. *See also AT&T Communications v. BellSouth Telecommunications Inc.*, 238 F.3d 636 (5th Cir. 2001) (same).

(holding that *Ex parte Young* claims against Arizona's state land commissioner may proceed despite the absence of the State itself); *Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes*, 78 F. Supp. 2d 589, 601-03 (E.D. Tex. 1999) (holding that *Ex parte Young* claims against tribal officials could proceed in the absence of the tribe; analyzing Rule 19(b) factors and concluding that the first two factors favor nondismissal because "the likelihood of prejudice to the Tribe is minimized by the presence of the members of the Tribal Council"), *aff'd in part, rev'd in part on other grounds*, 261 F.3d 567 (5th Cir. 2001).

The district court's decision in this case is in direct conflict with this otherwise unanimous body of law. Because the district court's decision effectively abrogates the Supreme Court's *Ex parte Young* doctrine, the judgment below must be reversed.

III. THE DISTRICT COURT INCORRECTLY APPLIED RULE 19 TO THIS CASE.

The issue of whether Rule 19 applies in a particular case "is a practical, fact-specific one, designed to avoid the harsh results of rigid application." *Dawavendewa*, 276 F.3d at 1154. A motion pursuant to Rule 19 "poses three successive inquiries": first, whether the absentee is "required to be joined if feasible" under the criteria stated in Rule 19(a); second, "whether it is feasible to order that the absentee be joined"; and third, "if joinder is not feasible, the court must determine . . . whether the case can proceed without the absentee or whether

the action must be dismissed," in light of the factors stated in Rule 19(b). *Peabody II*, 610 F.3d at 1078 (internal quote marks omitted). The concepts incorporated in Rule 19 existed long before the adoption of the federal rules of civil procedure. *See Shields v. Barrow*, 58 U.S. 130, 139 (1854) (addressing "persons having an interest in the controversy, and who ought to be made parties, in order that the court may act") (cited in *Peabody I*, 400 F.3d at 779).

In this case, the district court erred in concluding that the Navajo Nation is required to be joined if feasible under Rule 19(a). Alternatively, even if the criteria stated in Rule 19(a) had been satisfied, the district court erred in concluding that this case could not proceed in the Navajo Nation's absence under Rule 19(b).

A. The Navajo Nation is Not a "Person Required to Be Joined if Feasible" Under Rule 19(a).

As amended in 2007, Rule 19(a) sets out the criteria for determining whether an absentee is "required to be joined if feasible":

> **(a) Persons Required to Be Joined if Feasible.**
>
> (1) **Required Party.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party 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.

Rule 19(a)(1), Fed. R. Civ. P. "There is no precise formula for determining whether a particular nonparty should be joined under Rule 19(a). The determination is heavily influenced by the facts and circumstances of each case." *Peabody II*, 610 F.3d at 1081.

In this case, the district court concluded that the Navajo Nation was a person required to be joined if feasible primarily because it erroneously concluded that the Navajo Nation has an interest in the subject matter of this litigation and "[a]djudicating this action without the Navajo Nation will, as a practical matter, impair the Nation's ability to protect" its interests. (ER 9); *see* Rule 19(a)(1)(B)(i). Although not discussed as part of its Rule 19(a) analysis, the district court apparently also concluded that it could not accord complete relief to the Plaintiffs in the Navajo Nation's absence. (ER 11); *see* Rule 19(a)(1)(A). The district court was wrong on both counts.

1. <u>The Navajo Nation is not required to be joined under Rule 19(a)(1)(B)(i)</u>.

The district court erred in holding that the Navajo Nation's interests in this litigation require it to be joined if feasible because, as a matter of law, the Navajo

Nation has no interests in Plaintiffs' *Ex parte Young* claims against the Navajo Official Defendants. Furthermore, to the extent the Navajo Nation has any interests in the subject matter of this case, the presence of the Navajo Official Defendants, as a practical matter, adequately protects any such interests.

(i) The Navajo Nation has no legally protected interests in conduct which violates federal law.

The fundamental premise of the *Ex parte Young* doctrine is that the state or tribe has no legally protected interest at all in violating federal law. Thus, the governmental officer seeking to enforce state or tribal law that is claimed to violate federal law is "stripped of his official or representative character and . . . subjected in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. at 159-60. Thus, in the context of *Ex parte Young* claims, "[t]he tribe does not just lack a 'special sovereignty interest' in [violating federal law] – it lacks *any* sovereign interest in such behavior." *Vann v. Kempthorne*, 534 F.3d 741, 756 (D.C. Cir. 2008) (rejecting Cherokee Nation's efforts to avoid *Ex parte Young* claims against its officers) (emphasis in original).

In this case, the district court not only erred in finding that the Navajo Nation has a legally protected interest in Plaintiffs' *Ex parte Young* claims asserted against its officials, but it went so far as to "conclude[] that the Plaintiffs' real claim is against the Nation itself." (ER 14). This conclusion is antithetical to the Supreme Court's holding in *Ex parte Young* and the more than one hundred years

of experience applying the *Ex parte Young* doctrine. *See Ex parte Young*, 209 U.S. at 142, 149 (rejecting state officer's "objection . . . that the suit is, in effect, one against the State of Minnesota"); *see also id*. at 173-74 (Harlan, J., dissenting) (contending that the suit "was one, in legal effect, against the state"); *Dawavendewa*, 276 F.3d at 1159 n.10 ("[*Ex parte Young*] created an oft-cited legal fiction that injunctive relief against state officials acting in their official capacity does not run against the State."); *Agua Caliente*, 223 F.3d at 1045 ("The *Young* doctrine is premised on the fiction that such a claim is not an action against a 'State' ….") Thus, the district court's conclusion "is reminiscent of the losing argument in *Ex Parte Young*," which "is no more persuasive a century later." *See Vann*, 534 F.3d at 750 (rejecting Cherokee Nation's argument that the *Ex parte Young* claim against its officers "really runs against the tribe itself").

The district court erroneously relied on *Dawavendewa* to support its conclusion that "[a]s a party to [the 1969] Lease, the Navajo Nation has an interest in its contract with SRP." (ER 9). *Dawavendewa* held that the Navajo Nation had a legally protected interest under Rule 19 because the plaintiff in that litigation was attacking a portion of the 1969 Lease to which the Navajo Nation is a party:

> [T]oday we reaffirm the fundamental principle outlined in *Lomayaktewa [v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975)]: a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation **seeking to decimate that contract**.

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276 F.3d at 1157 (emphasis added). However, that principle has no application to this case because no part of the 1969 Lease between the Navajo Nation and SRP (and the other Participants) is being challenged or attacked in this litigation.

The inapplicability of the *Lomayaktewa* principle is illustrated by this Court's analysis in *Disabled Rights Act Committee v. Las Vegas Events, Inc.*, 375 F.3d 861 (9th Cir. 2005). In that case, an advocacy group for the disabled brought claims against a rodeo's sponsor and presenter, alleging violations of the public accommodation provisions of the Americans with Disabilities Act. The district court granted the defendants' motion to dismiss for failing to join the state university system which owned the arena where the rodeo was held. The defendants argued that the state university system was required to be joined merely because it was signatory to the licensing agreement with the rodeo presenter.

This Court reversed the dismissal, holding that "the district court abused its discretion in concluding that the University System is a necessary party." *Id.* at 883. Specifically, this Court concluded that *Lomayaktewa* and *Dawavendewa* were inapplicable because *Disabled Rights* "is not 'an action to set aside a contract,' an 'attack on the terms of a negotiated agreement,' or 'litigation seeking to decimate a contract.'" *Id.* at 881 (quoting *Dawavendewa*, 276 F.3d at 1156-57 and *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999)). This Court further explained:

> No term of the contract required discrimination on the basis of disability or precludes [the presenter and promoter] from accommodating disabled individuals to the extent Title III requires them to do so. Thus, if Disabled Rights is successful, the contract would not be invalidated or "set aside," but would remain legally binding.

Id. Accordingly, this Court held that "the determinative distinction" is that in cases like *Dawavendewa* "the judgment will necessarily 'set aside' the contract." *Id*.

Similarly, this Court also reversed a Rule 19 dismissal in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962 (9th Cir. 2008). In that case, an Indian tribe challenged a state gambling commission's interpretation of the tribe's gaming compact with the state. The defendants successfully argued in the district court that the case should not proceed in the absence of many other tribes which had "virtually identical" compacts with the state. *Id*. at 966. However, this Court reversed, holding that the absent tribes' interest in how the "virtually identical" contract language is interpreted was insufficient under Rule 19(a), noting that the plaintiff "does not seek to invalidate compacts to which it is not a party." *Id*. at 972; *see also Bourland*, 949 F.2d at 989 (holding tribe was not required to be joined even though the validity of the tribe's regulations were being challenged).

In this case, Plaintiffs' *Ex parte Young* claims against the Navajo Official Defendants do not attack or seek to invalidate the 1969 Lease or any portion of it.

Indeed, far from seeking to set aside the 1969 Lease, Plaintiffs contend, in part, that the Navajo Official Defendants' improper attempts to enforce the Navajo Preference in Employment Act against them violate the non-regulation provision of the 1969 Lease. Thus, if Plaintiffs are successful on the merits of their claims, "the [1969 Lease] would not be invalidated or 'set aside,' but would remain legally binding." *See Disabled Rights*, 375 F.3d at 881. Thus, the district court also erred in relying on *Dawavendewa* to find that the Navajo Nation has a legally protected interest in Plaintiffs' *Ex parte Young* action.

The district court also erred in concluding that the Navajo Nation was required to be joined in this action if feasible based on more general interests in "the job security of the Nation's members" and "governing the Navajo reservation." (ER 9). Such general interests are also insufficient for Rule 19 purposes in the context of *Ex parte Young* claims. *See Bourland*, 949 F.2d at 989 (rejecting Rule 19 argument even though "the State attacks the validity of the Tribe's regulations" related to hunting and fishing by nonmembers within the tribe's reservation).

If such interests were sufficient, the *Ex parte Young* doctrine would be abrogated and states and tribes would virtually always be able to violate federal law with impunity. For example, in *Ex parte Young* itself, the state officer who was the subject of that litigation was merely attempting to enforce a state statute

which the Minnesota legislature enacted to regulate railroad rates. Thus, if Minnesota's economic interests in railroad services provided to its citizens and its interest in "governing" within its boundaries were sufficient bases to require the joinder of Minnesota, the state's sovereign immunity may have defeated the plaintiffs' claims. The same is true with virtually every *Ex parte Young* case that has been decided over the past century. That is precisely why a fundamental tenant of the Supreme Court's carefully-crafted *Ex parte Young* doctrine treats conduct by a governmental entity's officials that allegedly violates federal law as though it were "without the authority of" the governmental entity and "does not affect the [governmental entity] in its sovereign or governmental capacity." *Ex parte Young*, 209 U.S. at 159. In other words, states and tribes simply do not, as a matter of long-established constitutional law, have "*any* interest in such behavior." *Vann*, 534 F.3d at 756 (emphasis in original).

If the Navajo Official Defendants' conduct is ultimately found not to be in violation of federal law, the Navajo Nation's interests will be unaffected. But if the Navajo Official Defendants' attempts to regulate and adjudicate the conduct of nonmembers are found to violate federal law, then the Navajo Nation is deemed to have no interest at all in such conduct. The district court's ruling below violates these *Ex parte Young* principles and therefore must be reversed.

(ii) The Navajo Official Defendants' presence adequately protects any interests the Navajo Nation may have.

Even if the Navajo Nation had a legally protected interest related to Plaintiffs' *Ex parte Young* claims (which it does not), it still would not be a "person required to be joined if feasible" under Rule 19(a). *See Thomas*, 189 F.3d at 668 ("but the fact that a tribe has an interest in the litigation is not enough to make it a necessary party in the sense of Rule 19"). In addition to the requirement that it have an interest, the Navajo Nation must also be "so situated that disposing of the action in [its] absence may . . . as a practical matter impair or impede [its] ability to protect the interest." Rule 19(a)(1)(B)(i). Here, the Navajo Nation is not so situated. Instead, the presence of the Navajo Nation's officials who are responsible for enforcing the Navajo Preference in Employment Act adequately protects any interests the Navajo Nation may claim.

This Court has repeatedly recognized that an absent party claiming an interest is not required to be joined under Rule 19(a) "if the absent party is adequately represented in the suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *see also Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) ("We agree with appellants that the Tribes are not necessary parties because the United States can adequately represent the Tribes in this matter."); *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998) ("We conclude, however, that as a practical matter, the [Salt River Pima-Maricopa

Indian] Community's ability to protect its interest will not be impaired by its absence from the suit because its interest will be represented adequately by the existing parties to Southwest's suit."); *accord Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) (holding that the Secretary of the Interior adequately represents the interests of absent tribes in action by one tribe challenging the allocation of contract support funds).

A court must "consider three factors in determining whether existing parties adequately represent the interests of the absent tribes." *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992). The relevant factors are:

> whether "the interests of a present party to the suit are such that it will undoubtedly make all" of the absent party's arguments; whether the party is "capable of and willing to make such arguments"; and whether the absent party would "offer any necessary element to the proceedings" that the present parties would neglect.

Id. (quoting *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980)).

In the context of *Ex parte Young* claims such as in this case, the presence of a governmental entity's officers adequately protects the absent entity's alleged interests. For example, the Tenth Circuit rejected a Rule 19 argument in an *Ex parte Young* case because "the potential for prejudice to the [tribe] is largely nonexistent due to the presence in this suit of . . . the tribal officials," among other defendants, and "[t]hese Defendants' interests, considered together, are substantially similar, if not identical, to the Tribe's interests." *Kansas*, 249 F.3d at

1227; *see also Comstock*, 78 F. Supp. 2d at 601 (rejecting Rule 19 argument in *Ex parte Young* case because "the likelihood of prejudice to the Tribe is minimized by the presence of the members of the Tribal Council").

In this case, even if it were possible for the Navajo Nation to claim a legally protected interest in Plaintiffs' *Ex parte Young* claims, any such interest would be adequately protected by the Navajo Official Defendants. The Navajo Official Defendants are the officials responsible for enforcement of the Navajo Nation's Navajo Preference in Employment Act. Plaintiffs have brought this action against them because they are violating federal law by attempting to enforce that Navajo Nation statute against Plaintiffs. As a practical matter, the Navajo Official Defendants, who have been sued in their official capacities (and their attorneys provided by the Navajo Nation to defend this action) are fully capable and willing to make, and will undoubtedly make, all the arguments the Navajo Nation would make if it were also made a defendant. *See Shermoen*, 982 F.2d at 1318. Accordingly, the district court erred in holding that the Navajo Nation was required to be joined if feasible under Rule 19(a)(1)(B)(i).

2. The Navajo Nation is not required to be joined under Rule 19(a)(1)(A).

An absentee may also be found to be a "person required to be joined if feasible" under Rule 19(a) if, "in that person's absence, the court cannot accord complete relief among existing parties." Rule 19(a)(1)(A). The district court

concluded that "[t]he absence of the Nation would seem to prejudice Plaintiffs as well" by not allowing the full relief Plaintiffs seek. (ER 11).[8] Because Plaintiffs can obtain all the relief they seek in this action – whether or not the Navajo Nation is a party – the district court's conclusion is wrong as a matter of law.

The relief Plaintiffs seek in this case is: (1) a declaration that the Navajo Official Defendants may not enforce the Navajo Preference in Employment Act against Plaintiffs (and other Participants at NGS), or otherwise regulate employment relations at NGS (except to the extent provided in the 1969 Lease); and (2) a preliminary and permanent injunction prohibiting the Navajo Official Defendants from doing so. (ER 213-14). It is beyond reasonable dispute that the district court can issue the declaratory and injunctive relief Plaintiffs request, even in the absence of the Navajo Nation. *Thomas*, 189 F.3d at 668 ("Nor are we persuaded that there is a legally cognizable risk of incomplete relief that is so strong that this suit must be dismissed in the absence of the tribal governing body.")

The district court nevertheless concluded that Plaintiffs could not obtain all the relief they seek because "[i]f what Plaintiffs want is for the Nation never again

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[8] In its Rule 19(a) analysis, the district court relied exclusively on the Navajo Nation's alleged interests in the subject matter of this action; it did not rely on the alternative basis of incomplete relief for the existing parties. (ER 9-10). However, the district court did address the issue of incomplete relief in its analysis of Rule 19(b)'s first factor (ER 11), and the analysis under that factor "is essentially the same as the inquiry under Rule 19(a)." *See Dawavendewa*, 276 F.3d at 1162.

to interfere with employment matters at the NGS, this lawsuit would not necessarily accomplish that goal," noting that an injunction "would not prevent some future or other tribal authority from attempting to 'regulate' employment at the NGS." (ER 11). The district court was wrong as a matter of law for many reasons.

First, Rule 19(a) measures "complete relief" in terms of the relief sought "among **existing** parties"; not in terms of potentially greater relief that might be available if the absentee were a party. *See* Rule 19(a)(1)(A) (emphasis added). The fact that a broader injunction might be possible if the Navajo Nation were a party and therefore bound by the judgment in this action does not change the fact that the district court is able to award the complete relief that Plaintiffs are actually seeking in this case.

Second, when addressing the complete-relief factor, "the court asks whether the absence of the party would preclude the district court from fashioning meaningful relief as between the parties"; not whether optimal relief is possible. *See Disabled Rights*, 375 F.3d at 879. In *Disabled Rights*, this Court noted that the district court "entirely failed to consider whether remedies not requiring [the absentee's] cooperation would provide meaningful relief," and concluded that such meaningful relief was indeed available, even though not all the relief the plaintiff might want was possible. *Id*. at 879-80.

Third, the district court's assertion that an injunction against the Navajo Official Defendants "would not prevent some future or other tribal authority from attempting to 'regulate' employment at the NGS" is, as a practical matter, wrong. District court injunctions are binding not only on the parties themselves, but also their "officers, agents, servants, employees and attorneys," as well as "other persons who are in active concert or participation with [them]." Rule 65(d)(2), Fed. R. Civ. P. The district court's position is very much like the erroneous notion that "all of a state's municipalities are necessary parties whenever a state referendum is contested in court, because any one of them might refuse to honor the court's disposition of the case" or that "a warden is a necessary party in every criminal case, because she might unlawfully refuse to imprison a convicted criminal." *See Thomas*, 189 F.3d at 668.

Moreover, the injunctive relief which this Court affirmed sixteen years ago in the nearly-identical case of *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1169 (9th Cir. 1995), has in fact effectively prevented the enforcement of the Navajo Preference in Employment Act at the Four Corners Power Plant, and therefore has afforded the plaintiffs in that case "complete relief." (*See* ER 184-98 (Amicus brief of the Navajo Nation Department of Justice, dated Feb. 20, 2007, acknowledging that "the Navajo Nation was further enjoined from exercising regulatory jurisdiction against APS" (at ER 190) and its contractors)). And even if

"some future or other tribal authority" were not bound by the district court's injunction order (as the district court hypothesized), that would not mean that the order fails to provide "meaningful relief" among the "existing parties." *See Cachil*, 547 F.3d at 970 ("interest must be . . . more than speculation about a future event").

Finally, if the district court's concern about the Navajo Nation itself not being bound by the injunction order were a valid basis for concluding that the Navajo Nation was required to be joined if feasible, then that would also be true in every *Ex parte Young* case. The State of Minnesota itself was not bound by the injunction order issued against its attorney general in *Ex parte Young*. Indeed, the very purpose of the *Ex parte Young* doctrine is to require states and tribes to comply with federal law without suing the state or tribe itself. The district court's Rule 19 analysis improperly negates the delicate balance which *Ex parte Young* and more than a century of its progeny have established. Accordingly, the judgment below must be reversed.

3. Conclusion.

The Navajo Nation is not "required to be joined if feasible" under Rule 19(a). Rule 19(a)(1)(B)(i) does not apply here because Plaintiffs claim that the Navajo Official Defendants are violating federal law, and the Navajo Nation has no legally protected interest in its officials violating federal law. Moreover, to the

extent the Navajo Nation has any legally protected interests, they are adequately protected by the presence of the Navajo Official Defendants. Rule 19(a)(1)(A) also does not apply here because the district court can provide all the relief sought among the existing parties. Accordingly, the Rule 19 analysis ends here; there is no reason to even consider Rule 19(b). *See Cachil*, 547 F.3d at 970 ("Our conclusion that the absent tribes are not required parties under Rule 19(a) makes inapplicable the provisions of Rule 19(b) . . . .").

B. The Absence of the Navajo Nation Does Not Require Dismissal Under Rule 19(b).

Alternatively, even if the Navajo Nation could properly be considered a "person required to be joined if feasible" under Rule 19(a), the district court erred in concluding that this action should not proceed in the Navajo Nation's absence under Rule 19(b). Rule 19(b) sets out non-exclusive factors a court must consider when determining whether an action may proceed without the required absentee or must be dismissed:

> **(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
>
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

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

Rule 19(b), Fed. R. Civ. P. The Rule 19(b) analysis "suggests four 'interests' that must be examined in each case":

> First, the plaintiff has an interest in having a forum. . . . Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another. . . . Third, there is the interest of the outsider whom it would have been desirable to join. . . . Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.

Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-11 (1968). The Rule 19(b) "inquiry is a practical one and fact specific and is designed to avoid the harsh results of rigid application." *Peabody II*, 610 F.3d at 1083 (quoting *Makah*, 910 F.2d at 558).

If the Rule 19(b) analysis is even reached, the totality of the Rule 19(b)'s factors weigh heavily in favor of allowing Plaintiffs' *Ex parte Young* claims to

proceed against the Navajo Official Defendants. The first factor, which considers the extent of prejudice to the absentee and the existing parties, "is essentially the same as the inquiry under Rule 19(a)." *Dawavendewa*, 276 F.3d at 1162. As demonstrated above in the analysis of Rule 19(a), a fundamental tenant of the *Ex parte Young* doctrine is that a governmental entity such as the Navajo Nation has no legally protected interest in its officials violating federal law. Thus, if on the merits of Plaintiffs' *Ex parte Young* claims the district court determines that the Navajo Official Defendants are violating federal law, the Navajo Nation will not be prejudiced by any resulting judgment. On the other hand, if the district court determines that the Navajo Official Defendants are not violating federal law, the Navajo Nation also will not be prejudiced. Similarly, because a judgment enjoining the Navajo Official Defendants from attempting to regulate employment relations at NGS will afford Plaintiffs the complete relief they seek, Plaintiffs also are not prejudiced by the Navajo Nation's absence. The district court's conclusions to the contrary are wrong as a matter of law.

Rule 19(b)'s second factor addresses the extent to which any prejudice that does exist could be lessened or avoided. In this case, because the Navajo Nation's absence does not prejudice any legally protected interest of the Navajo Nation (either because it has no such interest or because the presence of the Navajo

Official Defendants adequately protects such interests), and also does not prejudice the Plaintiffs in the least, there is nothing to be lessened or avoided.

Rule 19(b)'s third factor also strongly supports nondismissal of Plaintiffs' *Ex parte Young* claims. The district court erroneously construed this factor as merely addressing the Plaintiffs' interest in obtaining complete relief. (ER 12). The consideration of whether the Navajo Nation's absence will prejudice Plaintiffs is more appropriately addressed under Rule 19(b)'s first factor. By contrast, the Supreme Court teaches that the third factor relates to the interests of the courts and the general public:

> We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible . . . .

Provident Tradesmens Bank, 390 U.S. at 111.

In the context of *Ex parte Young* claims, the interests of the courts and the general public is already reflected in the *Ex parte Young* doctrine itself. The Supreme Court carefully considered the various relevant factors when it developed the delicate balance which upholds sovereign immunity, but at the same time ensures that immune sovereigns cannot violate federal law with impunity. Indeed, the Supreme Court concluded that the interest in upholding the Supremacy Clause is so substantial that it employed the well-established "fiction" that the government

officials allegedly acting in violation of federal law are really not acting on behalf of the sovereign.

By dismissing Plaintiffs' *Ex parte Young* claims against the Navajo Official Defendants, the district court failed to account for the strong interests of the federal courts and of the public in ensuring compliance with federal law and in the resolution of important disputes. In other words, dismissal of Plaintiffs' claims not only leaves Plaintiffs without any relief, but it also leaves wide open the constitutional gap that the *Ex parte Young* doctrine was intended to fill. The delicate balance that shaped the *Ex parte Young* doctrine has already considered and weighed all the competing factors – including the interests of sovereigns, like the Navajo Nation, who are immune from direct suit – and has concluded that claims against state or tribal officials **should** proceed in the absence of the state or tribe itself, as long as the relief is limited to prospective, nonmonetary relief. The district court's dismissal of these claims upsets this constitutional balance and effectively abrogates *Ex parte Young* and its progeny.

Finally, with respect to Rule 19(b)'s fourth factor, this Court has recognized that "[i]f no alternative forum exists, we should be 'extra cautious' before dismissing the suit." *Dawavendewa*, 276 F.3d at 1162. The district court nevertheless concluded that "Plaintiffs' interest in litigating 'may be outweighed by a tribe's interest in maintaining its sovereign immunity.'" (ER 12 (quoting

Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1460 (9th Cir. 1994)). Importantly, *Quileute* – and every other decision of this Court in which an action was dismissed under Rule 19 due to the sovereign immunity of an absent Indian tribe – did not involve *Ex parte Young* claims. Moreover, *Ex parte Young* and its progeny have repeatedly held that the sovereign immunity of states and tribes does not prevent claims for prospective relief against state and tribal officials, precisely because a tribe's interest in maintaining its sovereign immunity is outweighed (at least to the carefully-limited extent provided under the *Ex parte Young* doctrine) by the need to require their compliance with federal law under the Supremacy Clause.

Thus, even if the Navajo Nation were required to be joined if feasible under Rule 19(a), which it is not, the district court erroneously applied the Rule 19(b) factors in holding that Plaintiffs' action should not proceed in the absence of the Navajo Nation. Accordingly, the district court erred in granting the motion to dismiss under Rule 19.

IV. ALTERNATIVELY, THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' ENTIRE ACTION.

The district court acknowledged that defendants should not be allowed to use Rule 19 as "an end run around the *Ex parte Young* doctrine by claiming the absence of the governmental entity necessitates dismissal." (ER 13). However, it nevertheless justified dismissal of this action by concluding that this is not a "traditional *Ex Parte Young* case" because, "[w]hile Plaintiffs do argue that

Defendants have violated federal law by exceeding their authority in attempting to regulate the affairs of non-Navajos, they also argue that the Navajo Nation waived any inherent right to regulate employment matters at the NGS by signing the 1969 Lease." (ER 13-14). Thus, the district court concluded that "[i]t is the contractual waiver argument that sets this case apart from the traditional *Ex Parte Young* case," and Plaintiffs should not be allowed "to interpret and enforce the 1969 Lease without the signatory, the Navajo Nation, as a party" to the action. (*Id.*).

The district court's analysis is wrong as a matter of law. Plaintiffs' claims, seeking declaratory and injunctive relief against the Navajo Official Defendants, fall squarely within the scope of the *Ex parte Young* doctrine, irrespective of the underlying argument as to why the Navajo Official Defendants' actions violate federal law. But even if Plaintiffs' waiver argument could properly be considered to be a non-traditional *Ex parte Young* claim, then the district court erred by failing to limit its dismissal to just that claim.

It is now beyond reasonable dispute that the extent to which Indian tribes may exercise regulatory or adjudicatory authority over non-Indians is a question of federal law. *See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 324 (2008) ("whether a tribal court has adjudicative authority over nonmembers is a federal question"); *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851-52 (1985) (in cases concerning "the

extent to which Indian tribes have retained the power to regulate the affairs of non-Indians . . . the governing rule of decision has been provided by federal law" and such questions "must be answered by reference to federal law"); *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944, 949 (9th Cir. 2000) ("Questions about tribal jurisdiction over non-Indians is an issue of federal law").

In this case, Plaintiffs claim that the Navajo Official Defendants are violating federal law by attempting to regulate Plaintiffs' employment relations at NGS. Whether Plaintiffs base their claims on the inherent sovereign authority argument found in *Montana* and its progeny, or on the unmistakable waiver argument found in *Aspaas* and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), their claims are based on federal law and therefore fit squarely within the scope of the *Ex parte Young* doctrine.

Both the *Montana* and the waiver arguments on which Plaintiffs rely in this case were also at issue in *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995). Importantly, this Court held that the plaintiff's claims in *Aspaas* fit within the *Ex parte Young* doctrine and could therefore be asserted against the Navajo officials in that case. *Id*. at 1133-34 (citing *Burlington Northern Railroad Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *overruled on other grounds by Big Horn*, 219 F.3d at 953). Indeed, this Court decided *Aspaas* on the waiver argument alone (and therefore did not need to reach the *Montana* argument

at all). *Id*. at 1134. Thus, this Court decided the waiver argument in *Aspaas* as an *Ex parte Young* claim because the waiver argument is not "one of tribal contract law" but "a question of federal common law." *Id*. at 1132. Therefore, the district court in this case erred in treating Plaintiffs' waiver argument as outside "the traditional *Ex Parte Young* case."

The district court also erred in treating Plaintiffs' waiver argument as akin to the claims in *Dawavendewa*, so that the joinder of the Navajo Nation was required. *Dawavendewa* was not an *Ex parte Young* case. In fact, no claims were asserted in *Dawavendewa* against any Navajo Nation official at all. Instead, a former employee sued SRP, claiming that SRP's compliance with the Navajo preference provision in the 1969 Lease violated Title VII of the Civil Rights Act of 1964. Thus, the former employee's claims directly attacked a portion of a contract to which the Navajo Nation was a signatory. *Dawavendewa* "reaffirm[ed] the fundamental principle . . . [that] a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation **seeking to decimate** that contract." 276 F.3d at 1157 (emphasis added).

That principle reaffirmed in *Dawavendewa* does not apply when "the judgment will [not] necessarily 'set aside' the contract." *Disabled Rights*, 375 F.3d at 881. In this case, far from attacking any provision of the 1969 Lease, Plaintiffs' waiver argument merely relies on provisions of the Lease to demonstrate that the

Navajo Official Defendants are violating federal law by seeking to regulate Plaintiffs' employment relations at NGS. Accordingly, the district court erred in holding that Plaintiffs' waiver argument is outside "the traditional *Ex parte Young* case." (ER 13-14).

Even if there were any merit to the district court's treatment of Plaintiffs' waiver argument, the district court erred – at a minimum – in dismissing Plaintiffs' entire action, including their claims based on the *Montana* framework. If the district court believed that Plaintiffs' waiver argument, unlike their *Montana* argument, was outside "the traditional *Ex Parte Young* claim" and should not proceed without the Navajo Nation, then the district court should have dismissed - at most - only the waiver argument and allowed the *Montana* argument to proceed.

Rule 19 required the district court to explore such practical solutions. Courts must consider "the extent to which any prejudice could be lessened or avoided by . . . protective provisions in the judgment . . .[or] shaping the relief." Rule 19(b)(2). This Court recently illustrated the use of partial dismissal in *Peabody II*, 610 F.3d 1070. In that case, the EEOC sued Peabody and (later) the Navajo Nation, alleging that Peabody's compliance with the Navajo preference provision of its lease with the Navajo Nation violated Title VII of the Civil Rights Act of 1964. Peabody and the Navajo Nation moved to dismiss under Rule 19, arguing that the case should not proceed in the absence of the Secretary of the Interior. The

district court granted that motion and dismissed the EEOC's complaint in its entirety.

This Court agreed "that the Secretary is a person to be joined if feasible under Rule 19," and that it was not feasible to join the Secretary. *Id*. at 1080, 1083. However, this Court reversed the dismissal of all of the EEOC's action. *Id*. at 1080 ("But we do not agree that the entirety of EEOC's suit must be dismissed."). It held that the EEOC's request for monetary damages against Peabody had to be dismissed because the United States' sovereign immunity prevented Peabody from seeking indemnification from the Secretary. But it held that the EEOC's request for an injunction could proceed in the Secretary's absence because Peabody would not be barred from asserting a third-party complaint to enjoin the Secretary from enforcing the preference provision against Peabody. *Id*. at 1083-85.

This Court also limited the effect of Rule 19 to only a portion of the action in *Makah*, 910 F.2d 555 (9th Cir. 1990). The district court in that case had dismissed the entire action for failing to join absent tribes. This Court affirmed dismissal with respect to the plaintiff tribe's claims seeking a reallocation of fishing quotas among numerous tribes, but held that the absent tribes were not required to be joined with respect to the plaintiff tribe's claims related to the procedures the federal government used in promulgating the regulations at issue.

Id. at 559. Accordingly, this Court reversed the dismissal of the plaintiff's procedural claims. *Id*. at 561.

Accordingly, the district court erred in granting any portion of the Navajo Official Defendants' motion to dismiss based on Rule 19. Alternatively, the district court erred, at a minimum, in dismissing Plaintiffs' *Ex parte Young* claims to the extent they are based on the *Montana* analytical framework.

CONCLUSION

The district court's dismissal of Plaintiffs' *Ex parte Young* claims against the Navajo Official Defendants improperly abrogated the *Ex parte Young* doctrine and misapplied Rule 19. Accordingly, the judgment below should be reversed. Alternatively, and at a minimum, the judgment below should be reversed to the extent Plaintiffs' claims are based on the *Montana* analysis. This action should be remanded to the district court for further proceedings.

DATED this 18th day of April, 2011.

JENNINGS, STROUSS & SALMON, P.L.C.

By s/John J. Egbert
John J. Egbert
Paul G. Johnson
One East Washington Street, Suite 1900
Phoenix, Arizona 85004-2554
Attorneys for Appellant SRP

SNELL & WILMER, LLP

By s/Lisa M. Coulter (with permission)
Lisa M. Coulter
One Arizona Center
400 East Van Buren
Phoenix, Arizona 85004-2202
Attorneys for Appellant Headwaters Resources, Inc.

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number(s): **No. 10-17895**

I hereby certify that on the 18th day of April, 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.

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.

DATED this 18th day of April, 2011.

s/John J. Egbert
John J. Egbert

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Rule 32(a)(7)(C), F.R.A.P. and Ninth Circuit Rule 32-1, this Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 13,866 words.

Dated this 18th day of April, 2011.

s/John J. Egbert
John J. Egbert