



Slip Copy, 2012 WL 32916 (D.Colo.)
(Cite as: 2012 WL 32916 (D.Colo.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Colorado.
THREE STARS PRODUCTION COMPANY,
LLC, an Oklahoma Limited Liability Company,
Plaintiff,

v.

BP AMERICA PRODUCTION COMPANY, a
Delaware Corporation, f/k/a Amoco Production
Company, Defendant.

Civil Action No. 11-cv-01162-WYD-MJW.
Jan. 6, 2012.

Lon W. Abadie, William Edmond Zimsky, Abadie
& Shill, PC, Durango, CO, for Plaintiff.

Thomas P. Dugan, Dugan & Associates, PC, Durango, CO, for Defendant.

ORDER

WILEY Y. DANIEL, Chief Judge.

I. INTRODUCTION

*1 THIS MATTER is before the Court on the Motion of Defendant BP America Production Company ("BP") Pursuant to Fed.R.Civ.P. 12(b)(7) and Fed.R.Civ.P. 19 filed on May 23, 2011 (ECF No. 10). A response was filed on June 15, 2011 (ECF No. 14), and a reply on July 5, 2011 (ECF No. 16). In addition, Plaintiff Three Stars Production Company, LLC ("Three Stars") filed a surreply on July 15, 2011 (ECF No. 24), and BP filed a response to the surreply on July 25, 2011 (ECF No. 27).

II. BACKGROUND

This case involves a dispute over proceeds derived from an oil and gas well, designated as the Southern Ute 53-1 Well ("Well"), located within the exterior boundaries of the Southern Ute Indian Tribe Reservation in La Plata County, Colorado. The land is owned by the United States in trust for the Southern Ute Indian Tribe ("Tribe"). Three

Stars alleges that the Well lies within an established 320-acre drilling and spacing unit, yet Defendant BP has wrongfully distributed the proceeds from the Well on a 240-acre basis. Three Stars has recently acquired the leasehold interest in the 80 acres allegedly within the drilling unit but not included in Defendant's 240-acre distribution area. Three Stars is suing for 25 percent of the proceeds from the Well dating back to 1992, when the Well first became operational, and a constructive trust that would provide for 25 percent of the proceeds going forward. Compl., ECF No. 1, ¶¶ 103-104, 106, 139, 143.

BP argues that the Department of the Interior ("DOI"), the Tribe, and the other owners of interest in the Well are indispensable parties in this action, and therefore must be joined or the action dismissed pursuant to Fed.R.Civ.P. 19. BP also requests an order pursuant to Fed.R.Civ.P. 12(b)(7) requiring Three Stars to file an amended complaint joining these parties to this action. Further, BP contends that the Southern Ute Indian Tribal Court ("Tribal Court") has already determined that the DOI is an indispensable party in this dispute, and thus the doctrine of issue preclusion, also known as collateral estoppel or res judicata, prohibits Plaintiff from relitigating the issue here.^{FN1} BP also alleges that the absence of mineral development on the subject lands resulted in the title to those mineral acres reverting back to the Tribe in 1966, well before Three Stars obtained the leases for the subject lands via a default judgment proceeding in a Colorado state district court in September 2009. BP's Mot. to Dismiss, ECF No. 10, at 6 n. 2; BP's Reply in Supp. of Mot. to Dismiss, ECF No. 16, at 5.

FN1. The previous action, commenced by Three Stars in February 2010, involved the same parties, dispute, and claims for relief. The Tribal Court issued an order in July 2010 finding the DOI to be an indispensable party and dismissing the case after the DOI declined to voluntarily join the litigation.

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tion, stating, "Any order purporting to pool or communitize non-Indian and Indian mineral leases must be approved by the United States Department of Interior.... The Southern Ute Tribal Court could not render an enforceable judgment without the participation of the United States Department of the Interior." The Southwest Intertribal Court of Appeals for the Southern Ute Tribal Court affirmed the decision in May 2011. BP's Mot. to Dismiss, ECF No. 10, at 2-3.

Plaintiff Three Stars counters by arguing that issue preclusion does not apply in this case and that Rule 19 does not require joinder of any additional parties. Pl.'s Resp. to Def.'s Mot. to Dismiss, ECF No. 14, at 7-8, 13-17. Three Stars further contends that BP's argument regarding the alleged reversion of title to the subject acres is without merit and is belied by the Tribe and BP's previous statements regarding the subject acres. Pl.'s Surreply to Def.'s Reply in Supp. of Mot. to Dismiss, ECF No. 24, at 5-10.

*2 For the reasons stated below, I find that the Tribe and the DOI are indispensable parties in this action, and, therefore, that BP's Motion Pursuant to Fed.R.Civ.P. 12(b)(7) and Fed.R.Civ.P. 19 (ECF No. 10) should be granted and this case dismissed for failure to join an indispensable party.^{FN2}

FN2. I note that on September 15, 2011, Defendant BP filed an unopposed motion for oral argument on its motion under Rules 12(b)(7) and 19. (ECF No. 31). BP's motion is denied as I find that oral argument is not necessary for resolution of the motion under Rules 12(b)(7) and 19.

III. ANALYSIS

I begin my analysis by examining BP's claim of issue preclusion. If I conclude that the doctrine of issue preclusion applies, my analysis will be complete. However, if I conclude that issue preclusion does not apply, I will continue my analysis by ap-

plying Rule 19 to the facts of the case to determine whether the DOI, the Tribe, or any other owners of interest in the Well are required parties to this action.

A. Issue Preclusion

BP argues that the doctrine of issue preclusion bars Three Stars from relitigating the question of whether the DOI is an indispensable party in this action because the issue was already considered and decided by the Tribal Court. Issue preclusion "bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim." *Park Lake Res. LLC v. United States Dep't of Agric.*, 378 F.3d 1132, 1136 (10th Cir.2004). Issue preclusion applies when:

- (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Id. (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)).

Given that Plaintiff Three Stars asserted essentially the same claims arising from the same dispute in a separate action before the Tribal Court, Compl., ECF No. 1, ¶¶ 11-12, the first, third, and fourth elements of the issue preclusion analysis have been satisfied. However, since the Tribal Court granted a motion to dismiss in that prior action based on Three Stars' failure to join an indispensable party pursuant to Rule 19, the prior action was not adjudicated on the merits.^{FN3} Thus, I conclude that the doctrine of issue preclusion does not apply in this case.

FN3. See Fed.R.Civ.P. 41(b) (stating that

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“any dismissal not under this rule— *except* one for lack of jurisdiction, improper venue, or *failure to join a party under Rule 19*—operates as an adjudication on the merits.” (emphasis added)).

B. Rule 19 Analysis

Federal Rule of Civil Procedure 12(b)(7) allows for dismissal for failure to join a person under Rule 19. Rule 19 requires that I perform a two step analysis before dismissing a claim for failure to join an indispensable person. *See Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1288 (10th Cir.2003). First, I must determine whether the absent person is a necessary party to the lawsuit. *Id.*; Fed.R.Civ.P. 19(a). A necessary party must be joined if joinder is feasible. *Id.*

If a party is necessary but joinder is not feasible, I must determine whether the party is indispensable. *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1411 (10th Cir.1996). This inquiry requires me to consider “whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.” Fed.R.Civ.P. 19(b). In addition, “The standards set out in Rule 19 for assessing whether an absent party is indispensable are to be applied in a practical and pragmatic but equitable manner.” *Rishell*, 94 F.3d at 1411.

1. Whether the DOI, the Tribe, or the Other Owners of Interest in the Well are Necessary Parties under Rule 19(a)

*3 A party is deemed necessary when:

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

Fed.R.Civ.P. 19(a)(1).

BP contends that if Three Stars prevails in its claims, it would result in a reallocation of the revenue distribution from the Well on the basis of 320 acres instead of the current 240-acre distribution. Thus, current owners of interests in the Well, including the Tribe, the DOI, and various others, stand to lose 25 percent of the proceeds they would otherwise accrue moving forward. BP's Mot. to Dismiss, ECF No. 10, at 7–8. Moreover, BP maintains that any decision concerning pooling of mineral interests or the execution of a communitization agreement on tribal lands requires the participation of the Tribe and approval of the DOI; therefore, they are both required parties. BP's Mot. to Dismiss, ECF No. 10, at 10 (citing *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir.1987)); *see also Petrogulf Corp. v. Arco Oil & Gas Co.*, 92 F.Supp.2d 1111, 1111 (D.Colo.2000).

Three Stars responds to these claims by first arguing that because all of the owners of interest in the Well have profited from BP's allegedly wrongful distribution of Well proceeds, they are akin to joint tortfeasors, which are not required parties under Rule 19. Pl.'s Resp. to Def.'s Mot. to Dismiss, ECF No. 14, at 13. Second, Three Stars contends that BP, as the operator of the Well, is the only party liable for Plaintiff's damages, so there is no basis for Three Stars to name any other parties in the suit. *Id.* at 14. Third, Three Stars argues that if it prevails on its claims, BP would potentially have an independent cause of action for indemnification against the other owners of interest in the Well, and potential indemnitors are never considered to be necessary parties. *Id.* at 15. Finally, Three Stars insists that it is not seeking to pool or communitize its lease with the Tribal Lease, but rather has brought causes of action for continuing trespass and drainage, conversion, civil theft, unjust enrichment, and constructive trust. *Id.* at 8–10.

I find Three Stars' arguments to be unpersuasive. Clearly, if Three Stars prevails on its claims and a constructive trust is imposed on its alleged

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proportionate share of the proceeds from the Well, the interests of the DOI, the Tribe, and all other owners of interest in the Well will be substantially affected. Further, I agree with both the BP and the Tribal Court that, in effect, Three Stars is seeking retroactive and prospective pooling or communitization of its alleged mineral interest with those of BP, the Tribe, and the other owners of interest in the Well. BP's Mot. to Dismiss, ECF No. 10, at 7; BP's Reply in Supp. of Mot. to Dismiss, ECF No. 16, at 7. Approval of communitization agreements falls within the discretion of the Secretary of the Interior pursuant to 25 U.S.C. § 396d.^{FN4} See also *Woods Petroleum Corp. v. U.S. Dept. of Interior*, 18 F.3d 854, 858 (10th Cir.1994) ("The Secretary has the discretion to approve or disapprove Communitization or Unit Agreements based on a determination of whether approval would be in the best interests of the Indian lessor."); *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 923 (10th Cir.1994); *Cheyenne-Arapaho Tribes of Oklahoma v. U.S.*, 966 F.2d 583, 588 (10th Cir.1992); *Kirkpatrick Oil & Gas Co. v. United States*, 675 F.2d 1122, 1125 (10th Cir.1982); 25 C.F.R. § 211.28. Therefore, this Court cannot provide Three Stars with the remedy it seeks without the participation of the DOI in the litigation.

FN4. The statute states: "All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease."

*4 Finally, concerning BP's claim that the 80 mineral acres reverted back to the Tribe prior to Three Stars obtaining leases to those lands, the merits of the claim are irrelevant at this stage of the litigation. Rule 19 is concerned with "claimed" interests; "[t]he underlying merits of the litigation are irrelevant" to the Rule 19 inquiry unless the claimed interest is "patently frivolous." *Davis*, 343 F.3d 1282, 1291 (10th Cir.2003) (quoting *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir.2001)). Because the Tribe asserted title to the minerals under the subject acres in the previous action before the Tribal Court, and as I do not find these claims to be frivolous, I conclude that the Tribe has an interest in the subject mineral acres, and that the Tribe's ability to protect that interest could be impaired if this action was disposed of in the Tribe's absence.

For the foregoing reasons, I find that the DOI, the Tribe, and the other owners of interest in the Well all have interests in the subject matter of this case that may be impaired by their lack of involvement in the litigation, and are, therefore, all necessary parties pursuant to Rule 19(a).

2. Whether the DOI, the Tribe, or the Other Owners of Interest in the Well are Indispensable Parties under Rule 19(b)

In deciding whether a party is indispensable, I consider four factors:

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

Fed.R.Civ.P. 19(b). This list of factors is not exclusive. *Davis*, 343 F.3d at 1289.

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Factor 1: Prejudice to the Absent Parties

Given that the Tribe, the DOI, and the other owners of interest in the Well stand to lose 25 percent of their future proceeds from Well production should Plaintiff Three Stars prevail in the lawsuit, there is a clear risk that each could be prejudiced if the suit moves forward in their absence. However, the potential prejudice to an absent party “may be minimized if the absent party is adequately represented in the suit.” *Rishell*, 94 F.3d at 1411 (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.1990)).

Three Stars argues that BP and the other owners of interest in the Well have identical interests in keeping it from acquiring a portion of the proceeds from the Well, and BP—as one of the largest companies in the world—is more than capable of representing the interests of the other owners. Pl.’s Resp. to Def.’s Mot. to Dismiss, ECF No. 14, at 6–17. I am inclined to agree with Three Stars concerning the other owners of interest in the Well; however, both the Tribe and the DOI have interests involved in this case that are not shared by BP. Both the Tribe and the DOI have an interest in overseeing mineral production and communitization on tribal lands, and the Tribe has an interest in its alleged title to the subject mineral acres. Thus, I find that this factor weighs in favor of requiring joinder of the Tribe and the DOI, and against joinder of the other owners of interest in the Well.

Factor 2: Whether the Prejudice Could be Reduced

*5 Concerning the second factor, Three Stars argues that the Court could shape a remedy in such a way that the Tribe/DOI’s portion of the proceeds would not be disturbed but that would allow Three Stars to collect its alleged portion of the proceeds from BP and the other owners of interest in the Well. Pl.’s Resp. to Def.’s Mot. to Dismiss, ECF No. 14, at 18–19. In other words, the Tribe/DOI receives approximately 18 percent of the proceeds currently; Three Stars is arguing that, should it succeed in the case without having joined the DOI or

the Tribe, the court could fashion a remedy that would include only Three Stars’ share of the remaining 82 percent of the total proceeds. This would theoretically not prejudice BP or the other owners of interest because their resultant shares of the total proceeds would be the same as they would have been had the DOI and Tribe been joined.

The creative remedy outlined by Three Stars would protect the Tribe and the DOI from reduced future proceeds from the Well, but would not address their interests in overseeing gas and oil production on tribal lands or their oversight of communitization agreements. In addition, and perhaps more importantly, this proposed remedy does not address the Tribe’s alleged interest in the subject mineral acres. For these reasons, I find that this factor ultimately weighs in favor of granting BP’s motion vis-à-vis the Tribe and the DOI.

Factor 3: Adequacy of the Judgment

As noted above, Three Stars insists that an adequate remedy would be possible if it prevailed and was awarded its alleged proportion of the proceeds currently distributed to BP and the other owners of interest in the Well. This would, according to Three Stars, provide it with 82 percent of its actual damages. Pl.’s Resp. to Def.’s Mot. to Dismiss, ECF No. 14, at 19. However,

[t]he Supreme Court has explained that Rule 19(b)’s third factor is not intended to address the adequacy of the judgment from the plaintiff’s point of view.... The concern underlying this factor is not the plaintiff’s interest “but that of the courts and the public in complete, consistent, and efficient settlement of controversies,” that is, the “public stake in settling disputes by wholes, whenever possible.”

Davis, 343 F.3d at 1293–94 (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968)). Accordingly, the Tenth Circuit has held that a judgment rendered in the absence of an Indian tribe that could lead to further litigation and possible inconsistent judgments is in-

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adequate. *Id.* at 1294.

With this understanding of the “adequacy” of judgments made in the absence of necessary parties, I find that any judgment rendered in the absence of the Tribe or the DOI would be inadequate in that it would address neither the issue of communitization nor the Tribe's purported interest in the 80 mineral acres.

Factor 4: Other Potential Remedies

As to the final factor, Three Stars contends that “the fact that BP paid wrongfully obtained proceeds from the Southern Ute 35–1 Well to the Tribe should not leave Three Stars without a remedy and should not insulate BP from liability for the damages it has caused to Three Stars.” ^{FN5} Pl.'s Resp. to Def.'s Mot. to Dismiss, ECF No. 14, at 20. In this vein, the Tenth Circuit has observed that “[t]he absence of an alternative forum would weigh heavily, if not conclusively against dismissal.” *Rishell*, 94 F.3d at 1413.

FN5. The parties dispute whether an administrative remedy exists for Three Stars to pursue. BP claims that Three Stars may seek approval from the DOI for a communitization agreement. Def.'s Mot. to Dismiss, ECF No. 10, at 4. The DOI also acknowledged this possibility. *Id.* at Ex. C. Three Stars disagrees, however, arguing that “[b]ecause BP ... refuses to sign a communitization agreement, there is no administrative remedies available to Three Stars to pursue and exhaust.” Pl.'s Resp. to Def.'s Mot. to Dismiss, ECF No. 14, at 9. Because I find that the Tribe and the DOI to be indispensable parties even in the absence of any alternative forum, I need not determine whether such an administrative remedy exists.

*6 On the other hand, the Tenth Circuit has recognized that “the plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public

policy that immunizes the absent person from suit.” *Davis*, 343 F.3d at 1293–94. In fact, the Court has stated that “[w]hen ... a necessary party ... is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves.” *Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir.1989).

Given that the Tribe ^{FN6} and the DOI ^{FN7} enjoy sovereign immunity, Plaintiff's alleged lack of any other forum within which to litigate its claim does not weigh heavily against joinder of the Tribe or the DOI. It is, however, a significant factor to consider in regard to the other owners of interest in the Well.

FN6. Indian tribes possess “the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

FN7. The United States and its agencies are immune from suits to which the United States has not consented. *Smith v. United States*, 507 U.S. 197, 200 (1993); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

IV. CONCLUSION

Based on the foregoing and after consideration of all the relevant factors, I find that the other owners of interest in the Well are necessary but not indispensable parties to the action. I do, however, find that the Tribe and the DOI are indispensable parties pursuant to Rule 19. Accordingly, it is

ORDERED that the Motion of Defendant BP America Production Company Pursuant to Fed.R.Civ.P. 12(b)(7) and Fed.R.Civ.P. 19 filed on May 23, 2011 (ECF No. 10) is **GRANTED**. Plaintiff Three Stars Production Company, LLC must join the Department of Interior and the Southern Ute Indian Tribe as parties to this action

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through the filing of an Amended Complaint, or if
they cannot be joined, dismiss the action.

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United States District Court,
D. Colorado.
CENTER FOR BIOLOGICAL DIVERSITY, Dine
Citizens Against Ruining Our Environment, and
San Juan Citizens Alliance, Plaintiffs,
v.
Joseph PIZARCHIK, in his official capacity as Dir-
ector, Office of Surface Mining Reclamation and
Enforcement, Western Region Office of Surface
Mining Reclamation and Enforcement, a federal
agency within the U.S. Department of Interior, and
Ken Salazar, in his official capacity as U.S. Secret-
ary of Interior, Defendants,
and
BHP Navajo Coal Company and the Navajo Nation,
Defendants–Intervenors.

Civil Case No. 11–cv– 00243–REB–CBS.
March 14, 2012.

Background: Environmental groups brought action against director of Office of Surface Mining Reclamation and Enforcement and United States Secretary of Interior, challenging defendants' grant of permit for operation of coal mine on Navajo tribal land. The coal company and Native–American tribe intervened and then moved to dismiss complaint for failure to join required party.

Holdings: The District Court, Blackburn, J., held that:

- (1) tribe enjoyed sovereign immunity;
- (2) tribe was required party, based on its economic interest in suit's outcome; and
- (3) action could not in equity and good conscience proceed without joining tribe.

Motion granted.

West Headnotes

[1] Federal Civil Procedure 170A ⚡1825

170A Federal Civil Procedure

170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1825 k. Motion and proceedings
thereon. Most Cited Cases

Party seeking dismissal for failure to join a necessary party bears the burden of persuasion. Fed.Rules Civ.Proc.Rules 12(b)(7), 19, 28 U.S.C.A.

[2] Federal Civil Procedure 170A ⚡201

170A Federal Civil Procedure
170AII Parties
170AII(E) Necessary Joinder
170AII(E)1 In General
170Ak201 k. In general. Most Cited
Cases

Federal Civil Procedure 170A ⚡1747

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1744 Parties, Defects as to
170Ak1747 k. Nonjoinder in general. Most Cited Cases

Determining whether a party is required by rule involves a two–step process, under which the court first determines whether the party is “required,” in that the court either cannot accord complete relief among existing parties or the party claims an interest related to the action, and, if so, the party must be joined if feasible, but, if joinder is not feasible, then the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

[3] Indians 209 ⚡210

209 Indians
209V Government of Indian Country, Reserva-

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tions, and Tribes in General
209k210 k. In general. Most Cited Cases

Native-American tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government.

[4] Indians 209 ⚡235

209 Indians
209VI Actions
209k234 Sovereign Immunity
209k235 k. In general. Most Cited Cases

Native-American tribe enjoyed sovereign immunity, which was neither abrogated by Congress nor waived in relation to environmental groups' challenge to federal government's grant of permit to coal company for operation of coal mine on tribal land, and thus tribe could not be joined as party to groups' suit. Surface Mining Control and Reclamation Act of 1977, § 101 et seq., 30 U.S.C.A. § 1201 et seq.; Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

[5] Federal Civil Procedure 170A ⚡219

170A Federal Civil Procedure
170AII Parties
170AII(E) Necessary Joinder
170AII(E)2 Particular, Necessary or Indispensable Parties
170Ak219 k. Governmental bodies and officers thereof. Most Cited Cases

Native-American tribe was required party in environmental groups' challenge to federal government's grant of permit to coal company for operation of coal mine on tribal land, seeking to prevent future coal-mining pursuant to permit until government complied with Endangered Species Act, where tribe had economic interests in lawsuit, in light of significant royalty and tax payments coal company paid to tribe in relation to mining operations, payments that would cease if groups were successful in their action, and its interests were not adequately represented by government, which did not share same potential economic damage if per-

mit were disallowed. Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.; Surface Mining Control and Reclamation Act of 1977, § 101 et seq., 30 U.S.C.A. § 1201 et seq.; Fed.Rules Civ.Proc.Rule 19(a)(1)(B)(i), 28 U.S.C.A.

[6] Federal Civil Procedure 170A ⚡201

170A Federal Civil Procedure
170AII Parties
170AII(E) Necessary Joinder
170AII(E)1 In General
170Ak201 k. In general. Most Cited Cases

Absent party is not a required party to an action if its interests will be fairly represented by those already party to the lawsuit. Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

[7] Federal Civil Procedure 170A ⚡1748

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1744 Parties, Defects as to
170Ak1748 k. Nonjoinder in particular actions. Most Cited Cases

Environmental groups' action, challenging federal government's grant of permit to coal company for operation of coal mine on Native-American tribal land, could not in equity and good conscience proceed among existing parties without joining tribe, warranting dismissal of action for failure to join tribe as required party, even though it was unclear whether there was danger of piecemeal litigation, whether tribe would be bound by any judgment rendered in action, and whether groups had adequate remedy if action were dismissed, where tribe enjoyed sovereign immunity, and tribe's significant economic interests were not protected by existing parties in event that groups successfully blocked operation of coal mine for any period of time. Surface Mining Control and Reclamation Act

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of 1977, § 101 et seq., 30 U.S.C.A. § 1201 et seq.; Fed.Rules Civ.Proc.Rules 12(b)(7), 19(a)(1)(B)(i), (b)(1-4), 28 U.S.C.A.

[8] Federal Civil Procedure 170A ➞ 1747

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1744 Parties, Defects as to
170Ak1747 k. Nonjoinder in general. Most Cited Cases

Dismissal of the action must be ordered for nonjoinder of party where there is a potential for injury to the interests of an absent sovereign. Fed.Rules Civ.Proc.Rule 19(b)(1, 2), 28 U.S.C.A.

[9] Federal Civil Procedure 170A ➞ 201

170A Federal Civil Procedure
170AII Parties
170AII(E) Necessary Joinder
170AII(E)1 In General
170Ak201 k. In general. Most Cited Cases

Plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor in determining whether an absent party is a required party when the source of that inability is a public policy that immunizes the absent party from suit. Fed.Rules Civ.Proc.Rule 19(b), 28 U.S.C.A.

*1222 Amy Rae Atwood, Portland, OR, Brad A. Bartlett, Western EnergyJustice Project, Durango, CO, for Plaintiffs.

*1223 John H. Martin, III, U.S. Department of Justice, Denver, CO, for Defendants.

Daniel J. Dunn, Jennifer L. Biever, Hogan Lovells U.S. LLP, Denver, CO, Deana Maria Bennett, Maria O'Brien, Walter E. Stern, III, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, NM, Patrick Dale Traylor, Hogan Lovells U.S. LLP,

Washington, DC, Brian Leland Lewis, William Allen Johnson, Navajo Nation Department of Justice, Window Rock, AZ, for Defendants-Intervenors.

ORDER GRANTING MOTION TO DISMISS
BLACKBURN, District Judge.

The matter before me is **The Navajo Nation's Amended Motion To Dismiss** [# 47] ^{FN1} filed June 14, 2011. I grant the motion.

FN1. "[# 47]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's electronic case filing and management system (CM/ECF). I use this convention throughout this order.

I. JURISDICTION

I have subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question).

II. STANDARD OF REVIEW

[1] Intervenor The Navajo Nation ("Nation") seeks to dismiss plaintiff's complaint under Fed.R.Civ.P. 12(b)(7) for failure to join a required party, namely the Nation, under Fed.R.Civ.P. 19. A party seeking dismissal for failure to join bears the burden of persuasion. *Lenon v. St. Paul Mercury Insurance Co.*, 136 F.3d 1365, 1372 (10th Cir.1998).

[2] Determining whether a party is required under Rule 19 involves a two-step analysis. *Sierra Club v. Young Life Campaign*, 176 F.Supp.2d 1070, 1077 (D.Colo.2001). First, the court determines whether the party is "required," as that term is defined by the rule:

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

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subject of the action and is so situated that disposing of the action in the person's absence may:

- (i) as a practical matter impair or impede the person's ability to protect the interest; or
- (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED.R.CIV.P. 19(a)(1). If the absent party meets one of these two standards, it must be joined "if feasible." FED.R.CIV.P. 19(a)(2).

If joinder is not feasible, such as when the required party enjoys immunity from suit, *see Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir.2001), *modified on other grounds on reh'g en banc*, 257 F.3d 1158 (10th Cir.2001), "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed," FED.R.CIV.P. 19(b). Rule 19(b) enumerates four factors that should be considered in determining whether to proceed:

- (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:
 - *1224 (A) protective provisions in the judgment;
 - (B) shaping the relief; or
 - (C) other measures;
- (3) whether a judgment rendered in the person's absence would be adequate; and
- (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

FED.R.CIV.P. 19(b)(1)-(4).

The Rule 19(b) factors are neither exclusive nor dispositive. "The design of the Rule ... indicates that the determination whether to proceed will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations." *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 862-63, 128 S.Ct. 2180, 2188, 171 L.Ed.2d 131 (2008). *See also Davis v. United States*, 192 F.3d 951, 961 (10th Cir.1999) ("The nature of the Rule 19(b) inquiry-a weighing of intangibles-limits the force of precedent and casts doubt on generalizations.") (citation and internal quotation marks omitted). Thus, a determination under Rule 19 will be "based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Pimentel*, 128 S.Ct. at 2189 (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119, 88 S.Ct. 733, 743, 19 L.Ed.2d 936 (1968)) (internal quotation marks omitted).

III. ANALYSIS

Pursuant to the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1201-1328, the Office of Surface Mining Reclamation and Enforcement ("OSM") is responsible for issuing permits for the operation of coal mines on tribal lands. On September 7, 2010, the OSM granted intervenor BHP Navajo Coal Company ("BNCC") a five-year right of renewal of its permit to operate the Navajo Mine, which is located entirely within the boundaries of the Navajo Reservation. BNCC holds a leasehold interest in the mine pursuant to a long-standing mining lease with the Nation.

Plaintiffs allege that defendants failed to consult with the United States Fish and Wildlife Service ("FWS") to consider the effect of mining operations on threatened or endangered species, as required by section 7(a)(2) of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1536(a)(2), and

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its implementing regulations, 50 C.F.R. Part 400. They ask the court to declare defendants' approval of the renewal permit unlawful, set aside the renewal permit, and enjoin further coal mining activities at the Navajo Mine until such time as defendants fully comply with the ESA.

The Nation and BNCC sought and were granted leave to intervene in this action for the limited purpose of bringing the instant motion to dismiss. (See **Courtroom Minutes/Minute Order** [# 58], filed July 7, 2011.) They maintain that this action must be dismissed because the Nation is a required party but cannot be joined as a result of its sovereign immunity. Under the prevailing standards set forth above, and, *a fortiori*, in light of the heavy weight to be afforded a sovereign's assertion of its immunity in these circumstances, I concur, and, therefore, grant the motion.

[3][4] "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978) (internal citations*1225 and quotation marks omitted). Accordingly, the Nation enjoys sovereign immunity, which has neither been abrogated by Congress nor waived in this instance.^{FN2} See *Kiowa Tribe of Oklahoma v. Manufacturing*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702, 140 L.Ed.2d 981 (1998). As a consequence, it cannot be joined in this lawsuit. See *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir.1977); *Dine Citizens Against Ruining Our Environment v. Klein*, 676 F.Supp.2d 1198, 1215 (D.Colo.2009).

FN2. That the Nation could waive immunity and intervene in this lawsuit for all purposes if it so chose is, of course, not a relevant consideration. See *Northern Arapaho Tribe v. Harnsberger*, 660 F.Supp.2d 1264, 1281 (D.Wyo.2009)

(citing *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1472 n. 25 (10th Cir.1987)).

[5] The first question the court must answer, then, is whether the Nation is a required party pursuant to Fed.R.Civ.P. 19(a)(1)(B)(i), that is, whether it "claims an interest relating to the subject of the action and is so situated that disposing of the action in [its] absence may ... as a practical matter impair or impede [its] ability to protect the interest." ^{FN3} Under this rule, the court need not—indeed, must not—consider the merits of the absent party's asserted interest. "Rule 19, by its plain language, does not require the absent party to actually *possess* an interest; it only requires the movant to show that the absent party *claims an interest* relating to the subject of the action." *Citizen Potawatomi Nation*, 248 F.3d at 998 (quoting *Davis*, 192 F.3d at 958) (internal quotation marks omitted; emphases in original). So long as that interest is neither "fabricated nor frivolous," it is not excluded from consideration under Rule 19(a). *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1289 (10th Cir.2003), *cert. denied*, 542 U.S. 937, 124 S.Ct. 2907, 159 L.Ed.2d 812 (2004).

FN3. The Nation does not claim required party status under either Rule 19(a)(1)(A) or (a)(1)(B)(ii), and I, therefore, do not consider the potential applicability of either of those iterations of the rule.

The Nation has presented substantial evidence supporting its claimed economic interests in this lawsuit. It has offered the declaration of Charles J. Cicchetti, Ph.D., an economist and professor of economics, to substantiate the nature and extent of these interests.^{FN4} Dr. Cicchetti notes that in 2007, the Navajo Mine paid nearly \$39 million in royalties and taxes to the Nation, constituting some 24 percent of the Nation's internal budget for the year. He suggests that cessation of operations at the mine could result in a loss of royalty revenue of some \$33 million, roughly 17 percent of the Nation's gross revenue from internal sources in 2008. The

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Nation also receives significant direct and indirect tax revenue from the operation of the Navajo Mine that would be lost if operation ceases.

FN4. The submission of this declaration alone serves to distinguish this case from *Klein* on which plaintiffs rely so heavily. See *Klein*, 676 F.Supp.2d at 1215 (noting that defendants in that case “produced no evidence with respect to [required party issues] in their opening brief, and scant evidence in their reply after Plaintiffs challenged them on this point in opposition to the motion”).

In addition, Dr. Cicchetti points out that the Navajo Mine is one of the Nation's largest single employers, employing more than 400 workers, the vast majority of whom are members of the Nation. In an area where unemployment hovers above 50 percent, and nearly 37 percent of the population lives below the poverty level, these relatively well-paying jobs ^{FN5} account for *1226 7.63 percent of the total income, salary, and benefits earned on the reservation. The Navajo Mine also supports other jobs in the local economy that would be adversely impacted if it were to cease operation. Dr. Cicchetti opines that the loss of salary for individual workers further can be expected to have multiplier effects in the Nation's economy as a whole, as unemployed workers have less money to spend in the local economy.

FN5. Dr. Cicchetti suggests that in 2002, comparable coal mining jobs paid an average annual income of \$55,530, more than 2.75 times the median annual household income on the Navajo Reservation (\$20,005).

Economic interests such as these are plainly sufficient to satisfy Rule 19(a). See *Manygoats*, 558 F.2d at 558; *Klein*, 676 F.Supp.2d at 1216. Plaintiffs attempt to soft-pedal these deleterious financial consequences by arguing that they are merely speculative and unreasonably premised on

the assumption that the mine will cease operation. The first assertion is nothing more than plaintiffs' mere *ipse dixit*. The various types of income derived from the operation of the mine over the recent past years is a more than sufficient basis on which to project future expected income.

Plaintiffs' second contention—that the argument assumes that the mine will cease operation—ignores the very allegations of their own amended complaint. Plaintiffs plainly state that they “seek vacatur of the Permit and an injunction preventing coal mining activities under the Permit unless and until Defendants fully comply with the ESA.” (**Amended Complaint for Review of Federal Agency Action** ¶ 11 at 4[# 11] filed February 23, 2011 (emphasis added).) There is, thus, little doubt that a resolution in plaintiffs' favor would result in closure of the mine for some indefinite period of time, if not permanently. Moreover, the allegations of the amended complaint suggest the strong possibility that the FWS might, indeed, conclude that operations of the mine threaten endangered species, further casting doubt on the continuation of mine operations into the future. (See *id.* ¶¶ 52–62 at 13–15.)

Plaintiffs aver further that the Nation's economic interests cannot convey required party status unless “the challenged decision, agreement, contract, lease or other instrument is issued or executed directly by the Indian tribe or where the tribe has a direct interest in a fixed fund or limited resource that the court is asked to adjudicate.” (**Response in Opposition to the Navajo Nation's Amended Motion To Dismiss (Doc. 47)** at 7 [# 64] filed August 5, 2011 (original emphasis omitted).) ^{FN6} I do not believe the cases plaintiffs cite in support of this purported principle stand for that proposition. Instead, and despite their divergent facts, all these cases essentially stand for the same, unremarkable, proposition—that the asserted interest must be “of such a *direct* and *immediate* character that the [absent party] will either gain or lose by the direct legal operation and effect of the judgment.” *United*

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Keetoowah Band of Cherokee Indians of Okla. v. United States, 480 F.3d 1318, 1325 (Fed.Cir.2007) (citation and internal quotation marks omitted; emphases and alteration in original). In examining that salient question, I “must begin by correctly characterizing the pending action between those already parties to the action.” *Id.* at 1326.

FN6. Although the *Klein* court distinguished cases on which the defendants there relied as “each involv[ing] a direct challenge to a tribe’s property right or to an agreement to which a tribe was a party,” 676 F.Supp.2d at 1216, it did not suggest that the existence of such a right was a prerequisite to required party status in all instances. Moreover, if such a requirement did exist, the relief sought by this lawsuit clearly would interfere with the Nation’s mining lease with BNCC. *Cf. id.* at 1217 (noting that in that case, plaintiffs did not seek to enjoin all mining under the lease).

Rule 19(a)(1)(B) confers required party status on one who “claims an interest relating to the subject of the action.” The *1227 subject matter of the present action is the validity of the renewal permit issued to BNCC. If the permit is declared invalid and, thus, revoked, the significant, adverse, economic consequences to the Nation outlined in Cicchetti’s declaration are likely to follow.^{FN7} These interests are neither frivolous nor fabricated. *See Davis*, 192 F.3d at 959. *See also Kescoli v. Babbitt*, 101 F.3d 1304, 1309–10 (9th Cir.1996). Therefore, those interests are sufficient to confer required party status on the Nation.

FN7. No one suggests that the mine may continue to operate absent the permit.

[6] Nor am I persuaded by plaintiffs’ argument that defendants will adequately represent the Nation’s interests such that it will not be prejudiced by nonjoinder. An absent party is not required under Rule 19 if its interests will be fairly represented by those already party to the lawsuit. *See Sac and Fox*

Nation of Missouri v. Norton, 240 F.3d 1250, 1259 (10th Cir.2001), *cert. denied*, 534 U.S. 1078, 122 S.Ct. 807, 151 L.Ed.2d 693 (2002); *Manygoats*, 558 F.2d at 558. However, the existing parties’ interests must be “virtually identical” to those of the Nation. *Sac and Fox Nation*, 240 F.3d at 1259.^{FN8}

FN8. Although a conflict of interest would clearly preclude adequate representation by the existing parties, *see Citizen Potawatomi Nation*, 248 F.3d at 999, plaintiffs’ attempt to make such conflict a necessary condition of the analysis ignores the important role sovereign immunity plays in the Rule 19 analysis, as discussed more thoroughly below. *See Enterprise Management Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir.1989) (noting difference between United States’ ability to adequately represent absent tribes’ interest as plaintiff and situations implicating tribes’ rights as sovereigns not to be sued without their consent). In addition, an alleged alignment of interests is a far cry from an identity of interests. *See Northern Arapaho Tribe*, 660 F.Supp.2d at 1281.

Such is not the case here. The Nation has significant and important economic interests in the uninterrupted continuation of the Navajo Mine, which interests simply do not impel OSM or the Department of the Interior. If the permit is vacated, the potential impact on the federal defendants will not include a 25 percent reduction (if any) in their own internal budgets or the loss of a significant number (if any) of jobs within the agency. While a vacatur of the permit may be inconvenient for the federal defendants, contrastingly, it is potentially devastating for the Nation. *See Manygoats*, 558 F.2d at 558 (noting that “[t]he national interest is not necessarily coincidental with the interest of the Tribe in the benefits which the [] agreement provides”). Moreover, even if the federal defendants might conceivably “make all of the [Nation’s] arguments”

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and are “capable of and willing to make such arguments”—a proposition of which I am not convinced—the Nation's unique role in relation to its members and to the management of its own lands means that it “would offer [a] necessary element to the proceedings that the present parties [might] neglect.” *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir.1999) (citation and internal quotation marks omitted; alterations supplied).

For these reasons, I find and conclude that the Nation is a required party under Fed.R.Civ.P. 19(a)(1)(B)(i), that is, that the Nation claims an interest relating to the subject of this action and is so situated that disposing of the action in its absence may, as a practical matter, impair or impede its ability to protect that interest. To rehearse, joinder of the Nation is not feasible because of its sovereign immunity. Thus, I turn to the provisions of Rule 19(b) to determine whether, even in the Nation's absence, this action may proceed.

[7] As noted above, Rule 19(b) requires a balancing of relevant, fact-specific *1228 considerations that bear on the question “whether, in equity and good conscience, the action should be proceed among the existing parties or should be dismissed.” FED.R.CIV.P. 19(b). Nevertheless, “[w]hen, as here, a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves.” *Enterprise Management Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir.1989) (internal citations and quotation marks omitted). Recently, the United States Supreme Court has reinforced the primacy of sovereign immunity in this analysis. *Pimentel*, 128 S.Ct. at 2189–94. ^{FN9} Thus, although the Rule 19(b) factors still must be considered, my “discretion in balancing the equities ... is to a great degree circumscribed, and the scale is already heavily tipped in favor of dismissal.” *Northern Arapaho Tribe v. Harnsberger*, 660 F.Supp.2d 1264, 1280 (D.Wyo.2009).

FN9. The Nation argues at length that *Pimentel* essentially has overruled *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir.1977). As I find *Manygoats* and the more recent decision of another court in this district, which relied on it heavily, see *Klein*, 676 F.Supp.2d 1198, distinguishable on their facts, I need not go quite so far. Nevertheless, to the extent these decisions failed to consider the effect of the absent tribes' sovereign immunity in the Rule 19 analysis, I find *Pimentel*, as well as other Tenth Circuit decisions specifically addressing the issue directly, more persuasive and authoritative.

[8] The first two Rule 19(b) factors are concerned with prejudice to the absent and existing parties and the extent to which any such prejudice can be lessened or avoided. FED.R.CIV.P. 19(b)(1) & (2). The answers to these questions must give due consideration to the absent party's sovereign immunity. *Pimentel*, 128 S.Ct. at 2189–90; *Northern Arapaho Tribe*, 660 F.Supp.2d at 1280. Indeed, where sovereign immunity is asserted, prejudice to the absent sovereign's interests is nearly a foregone conclusion: “[D]ismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.” *Pimentel*, 128 S.Ct. at 2191. Such deference is required to “[g]iv[e] full effect to sovereign immunity[, which] promotes the comity interests that have contributed to the development of the immunity doctrine.” *Id.*

Moreover, consideration of the prejudice prongs of Rule 19(b) “is essentially the same as the inquiry under Rule 19(a)(2)(i) [now renumbered as Rule 19(a)(1)(B)(i)]^[FN10] into whether continuing the action without a person will, as a practical matter, impair that person's ability to protect his interest relating to the subject of the lawsuit.” *Enterprise Management Consultants*, 883 F.2d at 894. From that earlier discussion, it is clear that a judgment rendered in the Nation's absence might prejudice its substantial interests, both economic and

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those of “historical and political significance.” *Pimentel*, 128 S.Ct. at 2190. Nor does it appear feasible to eliminate or extenuate such prejudice by manipulation of the relief provided or otherwise. Indeed, in fashioning relief under the ESA, “Congress has removed from the courts their traditional equitable discretion in balancing the parties’ competing interests.” *Silver v. Babbitt*, 924 F.Supp. 976, 988 (D.Ariz.1995). Given that the relief plaintiffs*1229 seek inevitably would require cessation of operations at the Navajo Mine for some period of time, it is difficult to discern any way in which the Nation’s interests could be protected. Thus, I find and conclude that the considerations of prejudice set forth in Fed.R.Civ.P. 19(b)(1) & (2) weigh heavily in favor of dismissal.

FN10. Rule 19 was amended in 2007 for stylistic purposes only. See *Pimentel*, 128 S.Ct. at 2184–85; FED.R.CIV.P. 19, Adv. Comm. Notes, 2007 Amend. Whereas previously, Rule 19(a) considered whether a party was “necessary” and Rule 19(b) addressed whether such a necessary party was, in addition, “indispensable,” the present version of Rule 19 speaks globally of “required” persons.

Rule 19(b)(3) inquires focuses on whether a judgment rendered in the Nation’s absence would be adequate. Adequacy in this context “refers to the public stake in settling disputes by wholes, whenever possible” and addresses the “social interest in the efficient administration of justice and the avoidance of multiple litigation.” *Pimentel*, 128 S.Ct. at 2193 (citations and internal quotation marks omitted). Neither the Nation nor plaintiffs appear to have understood the thrust of this factor in their briefing. It is not clear, therefore, whether there is a danger of piecemeal litigation in this matter and whether or to what extent the Nation may be bound by any judgment rendered in this action. See *Northern Arapaho Tribe*, 660 F.Supp.2d at 1282. Were it not for the overriding significance of sovereign immunity in this case, I would find this factor neutral. However,

because of the preponderant overlay of sovereign immunity, I am compelled to conclude that it too weighs in favor of dismissal, although less heavily than the first two Rule 19(b) factors.

[9] Finally, I must consider the extent to which plaintiffs will have an adequate remedy if the action is dismissed. It is not entirely clear whether plaintiffs may have other avenues of appeal at the administrative level. (See **Amended Motion** at 14) (suggesting that plaintiffs had a right, now apparently extinguished, to administrative adjudication before the Department of the Interior’s Office of Hearing and Appeals, and may have a right still before the Department’s Interior Board of Land Appeals). Regardless, “the plaintiff’s inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit.” *Davis*, 343 F.3d at 1293–94. Thus, “this final factor militating against dismissal can be outweighed by the weight of the first three factors in favor of dismissal.” *Northern Arapaho Tribe*, 660 F.Supp.2d at 1283.

I am not insensitive to the fact that dismissing this action for failure to join a required party may mean, as a practical matter, that the permitting decision is unreviewable in the absence of the Nation’s consent. See *Manygoats*, 558 F.2d at 559 (finding that dismissal for nonjoinder of Indian tribe “would produce an anomalous result” because “[n]o one, except the Tribe, could seek review of [a NEPA-required] environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on Indian lands”).^{FN11} Yet *1230 such is the not infrequent result of honoring sovereign immunity. *Pimentel*, 128 S.Ct. at 2194 (“Dismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity.”). The Supreme Court’s holding in *Pimentel* demands that I give “sufficient” weight to the Nation’s sover-

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eign immunity in order to promote comity and mutual dignity between co-equal powers. *Id.* at 2190, 2194. In this instance, that weight is dispositive and requires dismissal pursuant to Rule 19.

FN11. I am not persuaded by plaintiffs' attempt to invoke the "public interest exception" to Rule 19. *See Natural Resources Defense Council, Inc. v. Berkland*, 458 F.Supp. 925, 933 (D.D.C.1978) ("The Supreme Court has long recognized the inapplicability of the term 'indispensable party' to adjudications of public, not private rights.... [W]hen litigation seeks the vindication of a public right, third persons who may be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties."), *aff'd*, 609 F.2d 553 (D.C.Cir.1979). Procedurally, this argument is woefully underdeveloped, and, thus, I am neither required nor inclined to consider it on the merits. *See South Denver Anesthesiologists, PC v. Oblachinski*, 2007 WL 2255123 at *1 (D.Colo. Aug. 3, 2007) (noting that court does not consider " cursory, unsupported, or otherwise inadequately briefed arguments"). Even if I were to do so, however, I note that neither of the cases plaintiffs cite discuss the public rights doctrine in the context of a required party's sovereign immunity. My own research suggests that the doctrine is unlikely to apply in these circumstances. *See Kescoli*, 101 F.3d at 1311-12 (although noting that "[t]he contours of the public rights exception have not been clearly defined," rejecting its application where suit "threaten[ed] the Navajo Nation's and the Hopi Tribe's sovereignty by attempting to disrupt their ability to govern themselves and to determine what is in their best interests").

IV. ORDERS

THEREFORE, IT IS ORDERED as follows:

1. That **The Navajo Nation's Amended Motion To Dismiss** [# 47] filed June 14, 2011, is **GRANTED**;

2. That the **Amended Complaint for Review of Federal Agency Action** [# 11], filed February 23, 2011, by plaintiffs is **DISMISSED WITHOUT PREJUDICE** for failure to join a required party under Rule 19; and

3. That judgment **SHALL ENTER** on behalf of defendants, Joseph Pizarchik, in his official capacity as Director, Office of Surface Mining Reclamation and Enforcement; Western Region Office of Surface Mining Reclamation and Enforcement, a federal agency within the U.S. Department of Interior; and Ken Salazar, in his official capacity as U.S. Secretary of Interior, against plaintiffs, Center for Biological Diversity; Diné Citizens Against Ruining Our Environment; and San Juan Citizens Alliance, on all claims for relief and causes of action; provided, however, that the judgment **SHALL BE** without prejudice.

D.Colo.,2012.

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--- F.Supp.2d ----, 2012 WL 4856723 (D.Colo.)
(Cite as: 2012 WL 4856723 (D.Colo.))

Only the Westlaw citation is currently available.

United States District Court,
D. Colorado.
FARMER OIL AND GAS PROPERTIES, LLC, an
Arizona limited liability company, Plaintiff,
v.
SOUTHERN UTE INDIAN TRIBE, Defendant.

Civil No. 12-cv-00313-LTB.
Oct. 12, 2012.

Background: Property owner brought action against Indian tribe to resolve ownership of coalbed methane (CBM) gas beneath parcel of land within tribe's reservation. Tribe moved to dismiss.

Holdings: The District Court, Babcock, J., held that:
(1) tribe did not waive its sovereign immunity when tribe filed suit claiming ownership of CBM gas by virtue of its ownership of coal under parcel;
(2) settlement agreement between Indian tribe and mining company did not constitute waiver of tribe's sovereign immunity; and
(3) res judicata did not preclude tribe from asserting ownership over CBM gas.

Motion granted.

West Headnotes

[1] Federal Courts 170B 29.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk29 Objections to Jurisdiction, De-termination and Waiver
170Bk29.1 k. In General. Most Cited Cases

Federal Courts 170B 265

170B Federal Courts

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 k. Eleventh Amendment in General; Immunity. Most Cited Cases

Indians 209 235

209 Indians
209VI Actions
209k234 Sovereign Immunity
209k235 k. In General. Most Cited Cases

Indians 209 239

209 Indians
209VI Actions
209k238 Jurisdiction
209k239 k. In General. Most Cited Cases

Tribal sovereign immunity is matter of subject matter jurisdiction, which may be challenged by motion to dismiss for lack of subject matter jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

[2] Compromise and Settlement 89 11

89 Compromise and Settlement
89I In General
89k10 Construction of Agreement
89k11 k. In General. Most Cited Cases

Common law contract principles govern interpretation of settlement agreements.

[3] Contracts 95 147(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(1) k. In General. Most Cited Cases

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Primary goal of contract interpretation is to determine and effectuate parties' intent and reasonable expectations.

[4] Indians 209 ➡103

209 Indians
209I In General
209k102 Status of Indian Nations or Tribes
209k103 k. In General. Most Cited Cases

Indians 209 ➡210

209 Indians
209V Government of Indian Country, Reservations, and Tribes in General
209k210 k. In General. Most Cited Cases

Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories, and as aspect of this sovereign immunity, suits against tribes are barred in absence of unequivocally expressed waiver by tribe or abrogation by Congress.

[5] Indians 209 ➡249

209 Indians
209VI Actions
209k249 k. Evidence. Most Cited Cases

Party bringing suit against Indian tribe bears burden of showing that tribe unequivocally and expressly waived its immunity.

[6] Indians 209 ➡235

209 Indians
209VI Actions
209k234 Sovereign Immunity
209k235 k. In General. Most Cited Cases

Indian tribe did not waive its sovereign immunity to property owner's suit seeking declaratory judgment that it owned coalbed methane (CBM) gas under parcel of land within Indian reservation by virtue of warranty deed when tribe filed suit claiming ownership of CBM gas by virtue of its

ownership of coal under parcel based on Coal Lands Act's reservation of coal in United States and United States restoration of coal to tribe, where prior action did not examine ownership claims over CBM gas deriving from other sources, and current dispute derived from distinct conveyance and instrument and involved different facts and evidence. 30 U.S.C.A. § 83 et seq.

[7] Indians 209 ➡235

209 Indians
209VI Actions
209k234 Sovereign Immunity
209k235 k. In General. Most Cited Cases

Settlement agreement between Indian tribe and mining company regarding ownership of coalbed methane (CBM) gas within Indian reservation did not constitute waiver of tribe's sovereign immunity to suit by property owner seeking declaratory judgment that it owned CBM gas under parcel of land within Indian reservation by virtue of warranty deed, where tribe's waiver of sovereign immunity in agreement was expressly limited to matters falling within scope of agreement, owner was not party to settlement agreement, and mining company did not possess oil and gas interest in parcel.

[8] Judgment 228 ➡540

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k540 k. Nature and Requisites of Former Recovery as Bar in General. Most Cited Cases

Res judicata or claim preclusion applies when three elements exist: (1) final judgment on merits in earlier action; (2) identity of parties in both suits; and (3) identity of cause of action in both suits.

[9] Judgment 228 ➡585(2)

228 Judgment

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228XIII Merger and Bar of Causes of Action and Defenses

228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded

228k585 Identity of Cause of Action in General

228k585(2) k. What Constitutes Identical Causes. Most Cited Cases

For preclusion purposes, cause of action includes all claims or legal theories that arise from same transaction.

[10] Judgment 228 ⚡585(2)

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded

228k585 Identity of Cause of Action in General

228k585(2) k. What Constitutes Identical Causes. Most Cited Cases

Factors relevant to determining whether facts are so woven together as to constitute single claim for res judicata purposes are their relatedness in time, space, origin or motivation, and whether, taken together, they form convenient unit for trial purposes.

[11] Judgment 228 ⚡585(3)

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded

228k585 Identity of Cause of Action in General

228k585(3) k. What Constitutes Distinct Causes of Action. Most Cited Cases

Claim by owner of terminable mineral estate in parcel of land within Indian tribe's reservation to coalbed methane (CBM) gas under parcel by virtue

of warranty deed did not fall within scope of prior judicial determination that Indian tribe did not own coalbed methane gas under parcel by virtue of reservation of coal in Coal Lands Act and United States' order of restoration, and thus res judicata did not preclude tribe from asserting ownership over CBM gas; actions involved different facts and legal theories, and parties' rights under warranty deed were not actually litigated and determined in prior action. 30 U.S.C.A. § 83 et seq.

[12] Compromise and Settlement 89 ⚡17(1)

89 Compromise and Settlement

89I In General

89k14 Operation and Effect

89k17 Conclusiveness

89k17(1) k. In General. Most Cited Cases

Compromise and Settlement 89 ⚡17(2)

89 Compromise and Settlement

89I In General

89k14 Operation and Effect

89k17 Conclusiveness

89k17(2) k. Persons Concluded. Most Cited Cases

Claim by owner of terminable mineral estate in parcel of land within Indian tribe's reservation to coalbed methane (CBM) gas under parcel by virtue of warranty deed did not fall within scope of settlement agreement between Indian tribe and mining company regarding ownership of coalbed methane (CBM) gas within reservation, and thus res judicata did not preclude tribe from asserting ownership over CBM gas, where owner was not party to settlement agreement, and mining company did not possess oil and gas interest in parcel.

[13] Federal Courts 170B ⚡266.1

170B Federal Courts

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(A) In General

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170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited
Cases

In suit against Indian tribe, federal-question jurisdiction can only exist where another statute provides waiver of tribal sovereign immunity or tribe unequivocally waives its immunity.

[14] Indians 209 235

209 Indians
209VI Actions
209k234 Sovereign Immunity
209k235 k. In General. Most Cited Cases

Whether ancillary jurisdiction exists has no impact whatsoever on issue of tribal sovereign immunity or its waiver, and thus sovereign immunity bars such claims from being brought against Indian tribe absent waiver.

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Thomas H. Shipps, Maynes, Bradford, Shipps & Sheftel, LLP, Durango, CO, for Defendant.

MEMORANDUM OPINION AND ORDER BABCOCK, District Judge.

*1 This matter is before me on Defendant Southern Ute Indian Tribe's (the "Tribe") Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Fed.R.Civ.P. 12(b)(1) [Doc # 16]. After considering the parties' arguments, for the reasons below, I GRANT the motion.

I. Background

Plaintiff Farmer Oil and Gas Properties, LLC ("Farmer"), is an Arizona limited liability company. The Tribe is a federally-recognized Indian tribe organized pursuant to the Indian Reorganization Act of 1943, 25 U.S.C. §§ 461–479, occupying a reservation in southwestern Colorado. Its reservation is "a checkerboard" of lands owned by the United States in trust for the Tribe, interests held by

the Tribe, and interests held in fee by non-Indians. *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 874 F.Supp. 1142, 1151 (D.Colo.1995).

This case concerns the disputed ownership of the oil and gas estate beneath a certain 80-acre parcel of land within the Tribe's reservation located in the S/2SW/4 of Section 35, Township 33 North, Range 11 West, N.M.P.M., La Plata County Colorado (the "80-Acre Tract"). Specifically, the case involves the ownership of the coalbed methane gas ("CBM gas") underlying that tract. It is uncontroverted that the Tribe owns the surface estate to all of Section 35, including the 80-Acre Tract. It is also uncontroverted that the Tribe owns the entire subsurface estate of Section 35, except for, of course, the oil and gas estate underlying the 80-Acre Tract. Farmer contends that it and not the Tribe owns the 80-Acre Tract's oil and gas estate. The parties do not dispute that the CBM gas is one stick in the oil and gas estate ownership bundle. Considerable additional background is necessary to couch and evaluate the instant motion, beginning with the disposition of the 80-Acre Tract. The facts below are undisputed unless otherwise noted.

A

The 80-Acre Tract was originally part of a homestead patent issued under the Coal Lands Act of 1910. That patent transferred the 80-Acre Tract to Lewis H. Underwood, but it reserved the tract's coal estate in the United States.

On May 27, 1946, the presumed successors to Underwood—Raymond, Olive, and Laura Farmer—issued a warranty deed to John C. Cameron conveying approximately 2,440 acres of land within the Tribe's reservation, land which included the 80-Acre Tract (the "Cameron Deed"). The Cameron Deed, however, reserved

all minerals including oil, gas and carbonaceous minerals together with the right to prospect for, mine and remove the same, for a period of twenty years at which time such reservations shall terminate unless minerals are being produced from

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said land at the end of twenty years, in which event said reservations shall continue during production.

First Am. Compl. at ¶ 14. Farmer asserts that when Raymond, Olive, and Laura Farmer executed the Cameron Deed, they owned the 80-Acre Tract's oil, gas, and mineral estate (save the coal, which had been reserved to the United States in patents for those lands, as explained *infra*).

*2 Next, on July 8, 1946, John Cameron and his wife conveyed all their right, title, and interest to the lands contained in the Cameron Deed to "the United States of America in trust for the Southern Ute Tribe." The deed that Cameron and his wife issued to the United States did not contain a reservation, nor did it mention the mineral reservation contained in the Cameron Deed.

B

Fast forward to 1991. That year the Tribe sued those claiming an ownership interest in CBM gas contained in coal strata underlying lands within the Tribe's reservation which had previously been reserved in the federal government under the Coal Lands Acts of 1909 and 1910 ("the Coal Lands Acts"). *Amoco*, 874 F.Supp. at 1146. The defendants included Amoco Production Company, other oil companies, and individuals, including Farmer's predecessor in interest. *Id.* The Tribe sought a declaration that it owned the CBM gas underneath the land at issue, land which the parties agree included the 80-Acre Tract. *Id.* It argued that Congress's reservation of "coal" in the Coal Lands Acts also reserved the CBM gas. Therefore, when the United States restored the coal to the Tribe in 1938 pursuant to the Order of Restoration, see 3 Fed.Reg. 1425 (Sept. 14, 1928), it restored the CBM gas too. *Id.* at 1151. The "central question" in *Amoco* was "whether Congress included CBM gas in its reservation of 'coal' under the Coal Lands Acts." *Id.* at 1151, 1146.

On June 23, 1993, during the pendency of *Amoco*, the Tribe entered into a settlement agree-

ment (the "PSA") with Palo Petroleum, Inc. ("Palo"), one of the defendants in *Amoco*. See First Am. Compl. Ex. 1, Palo Settlement Agreement (hereinafter cited as "PSA") at 1, Recitals. Palo was mining and intended to mine minerals on certain lands within the Tribe's reservation pursuant to leases from private owners and operating companies. The PSA's purpose was to insulate Palo from the risk that the Tribe could obtain a favorable decision in *Amoco*. Farmer's predecessor-in-interest ratified the PSA by executing a ratification agreement (the "Ratification"). On August 6, 1993, I approved the PSA and dismissed all of the Tribe's claims against Palo with prejudice. The *Amoco* case proceeded against the rest of the defendant-class.

On February 5, 1995, *nunc pro tunc* to September 13, 1994, I held that Congress's reservation of coal in the Coal Lands Acts did not include a reservation of CBM gas. *Id.* at 1152. "Consequently, title to CBM gas in the lands at issue [in *Amoco*] was conveyed by United States patents issued to homesteaders under the 1909 and 1910 Acts upon surplus lands on the Tribe's reservation." *Id.* I therefore determined that the Tribe acquired no title to CBM gas in 1938 when the United States restored the coal to the Tribe. *Id.* The Supreme Court affirmed my ruling. See *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 119 S.Ct. 1719, 144 L.Ed.2d 22 (1999). By order dated March 22, 2000, on remand from the Supreme Court, I dismissed all of the Tribe's remaining claims unresolved by my prior order. This closed *Amoco*.

C

*3 The next background event occurred in 2010. That year the Tribe intervened in a lawsuit filed in Southern Ute Indian Tribal Court styled *Three Stars Production Company, LLC v. BP America Production Company*, Cause No.2010 CV 36. As an affirmative defense in that action, the Tribe asserted that it has owned the 80-Acre Tract's oil and gas estate, including the CBM gas therein, since May 27, 1966, on the theory that the terminable mineral interest in the Cameron Deed reverted

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to the Tribe on that date due to non-production. The case was ultimately dismissed because Three Stars could not join the United States, which the Tribal Court determined was an indispensable party.

Three Stars then filed suit in this Court. *See Three Stars Production Company, LLC v. BP America Production Company*, Case No. 11-cv-1162-WYD-MUW. That case is pending before Chief Judge Daniel. There, BP filed a motion to dismiss Three Stars's complaint. *See id.*, Doc10, 16. Based on the ownership claim that the Tribe asserted in Three Stars's case in Tribal Court, BP argued in its motion that the Tribe was the owner of 80-Acre Tract's mineral estate and, as such, that Three Stars had failed to join the Tribe as an indispensable party. The court granted BP's motion, although it did not decide the merits of BP's assertion regarding the Tribe's ownership claim. *See id.*, Doc # 42 at 8. ("[C]oncerning BP's claim that the 80 mineral acres reverted back to the Tribe prior to Three Stars obtaining leases to those lands, the merits of the claim are irrelevant at this stage of the litigation. Rule 19 is concerned with 'claimed' interests; '[t]he underlying merits of the litigation are irrelevant' to the Rule 19 inquiry unless the claimed interest is 'patently frivolous.' Because the Tribe asserted title to the minerals under the subject acres in the previous action before the Tribal Court, and as I do not find these claims to be frivolous, I conclude that the Tribe has an interest in the subject mineral acres, and that the Tribe's ability to protect that interest could be impaired if this action was disposed of in the Tribe's absence.") (internal citations omitted). The court also noted that the Tribe enjoys sovereign immunity. *Id.* at 12 (Given that the Tribe ... enjoy[s] sovereign immunity, ...").

D

After learning of the Tribe's asserted ownership of the 80-Acre Tract's oil and gas estate in the *Three Stars* cases, Farmer filed this suit. Farmer alleges that the terminable mineral estate in the Cameron Deed has been perpetuated by the production of oil or gas on lands subject to the deed's min-

eral reservation. It further alleges that it has succeeded to an undivided 78.5714286% terminable mineral interest in the 80-Acre Tract's oil and gas estate and that the Tribe has no interest therein.

Farmer brings three claims for relief. The first seeks a declaratory judgment that my ruling in *Amoco* held that the Tribe did not own the 80-Acre Tract's CBM gas as of March 22, 2000. The second asks for a declaratory judgment that the Tribe's claimed ownership of the CBM gas underneath the 80-Acre Tract is without merit and frivolous. The third is a declaratory judgment in favor of Farmer that in the PSA and Ratification, the Tribe agreed to communitize the 80-Acre Tract's CBM gas with the adjacent 240-acre parcel of Tribe minerals. Farmer asserts that this case presents a federal question and that jurisdiction therefore exists under 28 U.S.C. § 1331.

*4 The Tribe now moves pursuant to Fed.R.Civ.P. 12(b)(1) to dismiss Farmer's suit for lack of jurisdiction. Its primary contention is that it has sovereign immunity from the action. The Tribe further argues that neither federal question nor ancillary jurisdiction exists.

II. Standard of Review

[1] Before addressing the substance of the Tribe's motion, I must determine the standard of review. *See Holt v. U.S.*, 46 F.3d 1000, 1002 (10th Cir.1995); *Hall v. Bellmon*, 935 F.2d 1106 (10th Cir.1991). "Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under Fed.R.Civ.P. 12(b)(1)" *E.F.W. v. St. Stephen's Mission Indian High School*, 264 F.3d 1297, 1302-03 (10th Cir.2001) (internal citations omitted).

A Rule 12(b)(1) motion generally takes one of two forms. "First, a party may make a facial challenge to the plaintiff's allegations concerning subject matter jurisdiction, thereby questioning the sufficiency of the complaint." *Id.* at 1303. When addressing a facial attack, I must accept the allegations in the complaint as true. *Id.* "Second, a party

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may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends.” *Id.* (quoting *Holt*, 46 F.3d at 1003). When addressing a factual attack, I do not presume the truthfulness of the complaint’s factual allegations, and I have “wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1).” *Id.* (quoting *Holt*, 46 F.3d at 1003). Where evidence outside of the pleadings is considered, the motion is not converted to a motion for summary judgment under Fed.R.Civ.P. 56. *Holt*, 46 F.3d at 1003. A court, however, must convert a Rule 12(b)(1) motion into a Rule 12(b)(6) or Rule 56 motion when resolution of the jurisdictional question is intertwined with the merits of the case. *Id.* This occurs when “subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case.” *Id.* Importantly, when subject matter jurisdiction is challenged, the party asserting the existence of jurisdiction—here, Farmer—nevertheless has the burden of establishing that such jurisdiction exists. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir.2002).

In its complaint, Farmer cites *Amoco* and makes certain allegations concerning the case. The complaint further contains allegations regarding the PSA and Ratification and attaches both. One of those allegations is that the PSA required the Tribe to communitize the 80–Acre Tract with adjacent tracts subject to the PSA. First Am. Compl. at ¶ 5. In its response, Farmer relies on materials beyond the complaint and its exhibits to aver that the Tribe agreed to communitize that tract as part of other agreements extraneous to the PSA. *See* Pl.’s Resp. at 22–25.

The Tribe disputes the complaint’s allegations concerning *Amoco*’s scope, citing and quoting the case and its pleadings to do so. The Tribe also disputes the scope and text of the PSA and Ratification as they were alleged in the complaint. *See, e.g.*, Def.’s Mot. at 15 (“Clearly, nothing in the [PSA] obligated the Tribe to consent to communitize its

other acreage in Section 35 with the 80–Acre Tract.”). Additionally, both parties have submitted additional evidence beyond the pleadings concerning communitization of the 80–Acre Tract. *See, e.g.*, Pl.’s Resp. Ex. 9 and 10, Def.’s Reply at 12–14. Together, this strongly suggests a factual attack. *See E.F. W.*, 264 F.3d at 1303 n. 2. Farmer agrees. *See* Pl.’s Resp. at 6 (“The Tribe, however, mounts a factual attack on this claim”). I therefore construe the Tribe’s motion accordingly and consider matters beyond the allegations in Farmer’s complaint. *See Holt*, 46 F.3d at 1003. The Tribe’s motion need not be converted to a Rule 12(b)(6) or Rule 56 motion because resolving it is not intertwined with the merits of the case. Here, the jurisdictional question turns on whether the Tribe has sovereign immunity from this suit and, if it does not, whether federal question or ancillary jurisdiction exists under 28 U.S.C. § 1331 or 1367, respectively. None of these, however, provide the basis for Farmer’s claims. *See, e.g., Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir.1987) (“Courts have invoked this rule when subject matter jurisdiction has turned on whether a particular investment was a ‘security’ under the federal securities statutes.”); *see also Clark v. Tarrant Cnty.*, 798 F.2d 736, 742 (5th Cir.1986) (finding subject matter jurisdiction question and merits intertwined because the federal statute, Title VII, both conveys jurisdiction and creates a cause of action, and determination of both turned on whether defendant was an “employer” thereunder). Farmer does not argue otherwise.

III. Discussion

*5 A review of the briefs shows that this motion hinges on two issues: First, does Farmer’s instant action fall within *Amoco*’s scope? Second, does it fall within the PSA’s scope? The Tribe answers no to both, Farmer yes to both. Because the parties’ various arguments are predicated upon their competing answers to these two issues, for clarity and brevity, I address these issues first.

I agree with the Tribe that this action falls outside the scope of both *Amoco* and the PSA. Armed

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with these determinations, I then turn to the parties' specific arguments. Insodoing, I conclude that Farmer has failed to establish that I have subject matter jurisdiction over its claims. To be clear, I note that I do not touch upon the merits of the ownership dispute at the heart of this case—to wit, I do not consider or decide whether Farmer or the Tribe owns title to the 80-Acre Tract's oil and gas estate. Rather, I focus solely upon whether I have jurisdiction to even hear this dispute.

A 1

I begin by surveying *Amoco* to see whether the instant action falls within its territory. In *Amoco*, the Tribe sought to quiet title only to the “beneficial interest in the coal” and to all “constituent, inherent and integral components” of reserved coal, not to the larger oil and gas estate underlying the lands at issue. See Pl.'s Reply Ex. 2, Tribe's First Am. Compl. at 16, ¶¶ 2, 3. *Amoco* did not later expand to involve or decide any and all sources of claimed ownership over the CBM gas. See 874 F.Supp. 1142. It instead examined only ownership allegedly deriving from a very particular source: coal that was reserved in and by the United States in patents issued under the Coal Lands Acts and which was later restored to the Tribe in 1938. See *id.* Furthermore, *Amoco* decided competing ownership claims from a discrete, identified number of purported owners. See *id.* The case expressly reflects these tight contours:

The central question in this case is whether Congress included CBM gas in its reservation to the United States of “coal” under the Coal Lands Acts of 1909 and 1910. I hold that, as a matter of law, Congress' reservation of coal in the United States in the Acts of 1909 and 1910 did not include reservation of CBM gas. Consequently, title to CBM gas in the lands at issue here was conveyed by United States patents issued to homesteaders under the 1909 and 1910 Acts upon surplus lands on the Tribe's reservation. Accordingly, the Tribe acquired no title to the CBM gas

when, in 1938, under authority of the IRA, the United States restored the coal to the Tribe.

Id. at 1151–52; accord *id.* at 1146; see also *See Southern Ute Indian Tribe v. Amoco Prod. Co.*, Case No. 91–B–2273, Case Management Order No. 1 at ¶ 3 (April 24, 1992) (“This action shall be maintained as a class action on behalf of the Certified Class solely as to (a) the determination of ownership of coalbed methane located in or near coal reserved by the United States in patents issued under the Act of March 3, 1909, Ch. 270, 35 Stat. 844 (codified as 30 U.S.C. § 81) or under the Coal Lands Act of 1910, Ch. 318, 366 Stat. 583 (codified as 30 U.S.C. § 83–85)....”).

*6 Compare this to Farmer's instant suit generally. Farmer's claimed ownership of the CBM gas and the ownership it alleges the Tribe now claims derive solely from the oil and gas estate reserved in the Cameron Deed and the facts germane thereto—namely, whether that estate was perpetuated. Yet the above shows that neither the Cameron Deed generally, nor ownership of CBM gas or the larger oil and gas estate flowing from that deed specifically, was raised, examined, or settled in *Amoco*. Farmer was not even a defendant in *Amoco*. Whether Farmer owns (or, put as Farmer does, that the Tribe does *not* own) the 80-Acre Tract's CBM gas because of that deed's perpetuated reserved mineral estate thus patently falls outside *Amoco*'s ambit. Contrary to Farmer's insistence, then, this case is not “reasonably incident” to *Amoco*. See *United States v. Martin*, 267 F.2d 764, 769 (10th Cir.1959) (“[W]hen the United States institutes a suit, it thereby consents by implication to the full and complete adjudication of all matters and issues which are reasonably incident thereto.”). Comparing *Amoco* to Farmer's specific claims underscores this determination.

Farmer's first claim for relief seeks a declaration that *Amoco* held that the Tribe did not under any theory own the CBM gas beneath the 80-Acre Tract as of March 22, 2000, but the above shows that *Amoco*'s holding was not so broad or categoric-

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al. It held only that the Tribe did not own the CBM gas *by virtue of owning the coal that the United States restored to it in 1938*. Whether the Tribe owned the CBM gas on some other grounds was left unexamined. Indeed, the pleadings in *Amoco* did not address, nor was any party to the case permitted to address, ownership claims deriving from outside the context of the Coal Lands Act and the patents issued thereunder. *See Amoco*, Case No. 91-B-2273, Case Management Order No. 1 at ¶ 3. Farmer's second claim for relief seeks a declaration that the Tribe's asserted ownership of the 80-Acre Tract's CBM gas based on a terminated reserved mineral interest in the Cameron Deed is without merit and frivolous. But again, the Tribe did not assert, nor did *Amoco* examine or decide, that issue. And whether the Tribe agreed to communitize the 80-Acre Tract's CBM gas with adjacent tribal minerals was patently not part of that case. Farmer's claims are therefore not within *Amoco's* scope.

2

[2][3] I now turn to the PSA to determine whether Farmer's instant action falls within its boundaries. Common law contract principles govern the interpretation of settlement agreements such as the PSA. *See, e.g., Yaekle v. Andrews*, 195 P.3d 1101, 1107 (Colo.2008). "The primary goal of contract interpretation is to determine and effectuate the intent and reasonable expectations of the parties." *Copper Mountain, Inc. v. Industrial Systems, Inc.*, 208 P.3d 692, 697 (Colo.2009). To determine the parties' intent, I should give effect to the plain and generally accepted meaning of the contractual language. *Id.* That means interpreting a contract "in its entirety with the end in view of seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless" and examining "the entire instrument and not by viewing clauses or phrases in isolation." *Id.* (internal quotations omitted). With these precepts, I turn to the PSA.

(a)

*7 Section 3.01 delineates the PSA's scope:

"This Agreement affects only the Interests of Palo, and the interests of the parties ratifying this Agreement in accordance with Sections 9.01 and 9.02, ... in the Lands." *See* PSA § 3.01. "Lands" is defined as "certain lands within the [Tribe's reservation], such lands being more fully described on Appendices I and IA attached hereto (to the extent of Palo's Interest therein)" *Id.* at 1, Recitals. Appendix I lists the S/2SW/2 portion of Section 35, Township 33, the section containing the 80-Acre Tract. *See* PSA Appendix I. "Interests" is defined as "certain oil and gas interests (excluding any interests in properties held by Palo under Tribal leases or through third parties tracing their title to Tribal leases)" *Id.* at 1, Recitals.

Reading these definitions into section 3.01 elucidates the PSA's contours. With respect to the various parties' property interests, the PSA encompasses Palo's oil and gas interests in the Tribe's lands. It also encompasses an interest that a ratifying party has in a tract of land within the Tribe's reservation, but only if Palo has an oil and gas interest in that same tract. Hence, if a ratifying party had an interest in a particular parcel of land within the Tribe's reservation—such as title to the parcel's mineral estate—but Palo did not have an oil and gas interest in that parcel, the ratifying party's interest in that parcel was not subject to the PSA. With respect to the land that fell within the PSA's scope, the agreement encompassed only those lands within the Tribe's reservation in which Palo had an oil and gas interest. Therefore, if Palo did not have an oil and gas interest in a particular tract of land, that land was not subject to the PSA, nor was any interest associated with it. This makes sense, as the PSA was an agreement between Palo and the Tribe. With the PSA's boundaries traced, I turn to whether Farmer's instant action is found inside them.

(b)

One way to approach whether the instant action falls within the PSA's scope is as the parties do: by determining whether the 80-Acre Tract is subject to the PSA. As the claims flow from that tract of land,

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if the PSA does not encompass that tract, it would seem to follow that the PSA also does not encompass Farmer's claims. Pursuing this approach, based on Part III.A. 1.a, *supra*, the inquiry is whether Palo had an oil and gas interest in the 80-Acre Tract.

The parties do not dispute that Palo lacked an oil and gas interest in the 80-Acre Tract when the PSA was executed. At that time Palo had only a top-lease. Accordingly, I conclude that at the time the PSA was executed, the 80-Acre Tract did not fall within the PSA's scope.

This is consonant with the rest of the PSA. The 80-Acre Tract is specifically addressed in only one provision of the PSA: section 8.07. That section states that

Palo operates the Palo Southern Ute 35-1 Well, presently located on a 240-acre unit. *In the event that certain 80-acre tract (described in Appendix I) is communitized into said unit, the Tribe agrees that such tract shall be subject to this Settlement Agreement to the extent of Palo's interest therein.*

*8 PSA § 8.07 (emphasis added). The parties agree that the "80-acre tract" in section 8.07 refers to the 80-Acre Tract. "In the event" is conditional language evincing that the PSA does not apply to the 80-Acre Tract unless and until the Tribe agrees to communitize it with the surrounding 240 acres in Section 35. By the PSA's terms and definitions, this also means that the PSA does not apply to the tract's CBM gas. Hence, a plain reading of section 8.07 buttresses my determination that the 80-Acre Tract was not subject to the PSA when it was executed. No other provision is discordant.

My inquiry, however, does not end here because Farmer asserts that the 80-Acre Tract *has become* subject to the PSA through various mechanisms. Farmer first relies on section 10.01. That section states that "[t]his Agreement shall inure to the benefit of, and shall be binding upon, the respective lawful successors and assigns of (i) the Tribe and Palo and (ii) the Prior Interest Owners, to the extent

they are affected by this Agreement." PSA § 10.01. Relying on the property law doctrine of merger, *see Colorado National Bank-Exchange v. Hammar*, 764 P.2d 359, 361 (Colo.App.1988), Farmer maintains that when Palo's top-lease of the 80-Acre Tract terminated in 2009, that interest merged into its ownership of the 80-Acre Tract's CBM gas, making Farmer Palo's successor-in-interest by operation of law. Pl.'s Resp. at 14. Alternatively, Farmer argues that even if the two interests did not merge, Farmer's predecessor-in-interest ratified the PSA, meaning that all the PSA's benefits flowed to them.

This argument is untenable as it ignores section 3.01's circumscription and distorts section 10.01. Assuming, *arguendo*, that in 2009, Palo's top-lease to the 80-Acre Tract indeed merged with Farmer's asserted interest in the 80-Acre Tract's CBM gas, that does not bring the 80-Acre Tract within the PSA's scope because Palo still lacks an oil and gas interest in that tract. Per section 3.01, for that tract to be subject to the PSA, Palo must have an oil and gas interest in it; Farmer's interest is irrelevant. Put another way, by the terms of the PSA, whether the 80-Acre Tract was subject to the PSA was predicated upon whether Palo had an oil and gas interest in it—not whether Farmer does. Farmer's proffered interpretation of section 10.01 would effectively require reading in the italicized language into section 3.01: "This Agreement affects only the Interests of Palo *and its successors and assigns*, and the interests of the parties ratifying this Agreement in accordance with Sections 9.01 and 9.02, ... in the Lands." This runs counter to basic principles of contract interpretation. Section 10.01 does not expand or otherwise modify the scope of the PSA or replace "Palo" with everyone one of its assignees and successors. Nor does it append "and its successor and assigns" after every use of "Palo." To the contrary, the section explicitly states that Farmer, as Palo's successor, is bound by the PSA, which would include the scope delineated in section 3.01. My interpretation of section 10.01 is fortified by the fact that elsewhere the PSA explicitly expands certain provisions to include Palo's successors and

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assigns. *See, e.g.*, PSA § 6.01 (The Tribe does hereby release, waive and discharge Palo, *its successors, assigns, ...* from any and all claims") (emphasis added). Farmer's reading thus not only flouts section 10.0, but it also leads to inconceivable corollaries. One of which is that it makes the PSA's scope terminally ebb and flow with the "Interests" of each of Palo's successors or assignees. In this way it also disregards the fundamental concept of privity of contract by forcing the Tribe to contract with unknown, unforeseen actors who were not parties to the PSA. This cannot be what the parties intended. These defects apply equally to Farmer's alternative argument that its predecessor ratified the PSA.

*9 Farmer next cites section 3.01 in support of its contention that the 80-Acre Tract is subject to the PSA because Farmer's predecessor in interest ratified it. My interpretation of section 3.01, *supra*, shows that this argument dies before it is even born because Farmer fails to demonstrate that Palo had an oil and gas interest in that tract. *See* Part III.A.1.a, *supra*.

Farmer's final argument for why its instant action falls within the scope of the PSA is that section 8.07 "reflects the parties' agreement that after the [*Amoco*] case, upon a determination that the Tribe did not prevail on its claim" the 80-Acre Tract, through a distinct, separate agreement, would be communitized with the surrounding acreage that was subject to the PSA, thereby bringing the 80-Acre Tract within the PSA's scope. *See* Pl.'s Resp. at 24. It alleges that on October 16, 1991, the Bureau of Land Management sent Palo a letter stating that federal regulations required the communization of the 80-Acre Tract with the surrounding 240 acres. *See* Pl.'s Resp. at 23. That letter directed Palo to submit an approvable communitization agreement to the Bureau of Indian Affairs. *See id.* Ex. 8 at 7.

With this argument, Farmer does an about-face without explanation. Farmer's third claim asserts that the PSA *itself* —not some other agree-

ment—required the Tribe to communitize the 80-Acre Tract with the surrounding 240 acres. *See* Pl.'s First Am. Compl. at 13, ¶ 54 ("Farmer asserts that *under the terms of the [PSA] and Ratification*, the Tribe agreed to the communitization of the [80-Acre Tract's CBM gas] with the 240-acre tract"); *see also id.* at 2, ¶ 5 (alleging that I "approved [the PSA] *in which* the Tribe agreed to communitize" the CBM gas underlying the 80-Acre Tract) (emphasis added). In any event, this new argument also fails. Farmer concedes that an approvable communitization agreement was never submitted and approved, and it fails to persuade me that approval of such an agreement, as well as meeting other federally-prescribed requirements for communitization agreements, is unnecessary. *See, e.g.*, 25 C.F.R. § 211.28("(a) For the purpose of promoting conservation and efficient utilization of minerals, the Secretary may approve a cooperative unit, drilling or other development plan on any leased area upon a determination that approval is advisable and in the best interest of the Indian mineral owner.... (c) Requests for approval of cooperative agreements which comply with the requirements of all applicable rules and regulations shall be filed with the superintendent or area director.... (e) A request for approval of a proposed cooperative agreement, and all documents incident to such agreement, must be filed with the superintendent or area director at least ninety (90) days prior to the first expiration date of any of the Indian leases in the area proposed to be covered by the cooperative agreement.")). Farmer also ignores the plain language of section 8.07, which provides that if a communitization agreement for the 80-Acre Tract was submitted, that tract would still only have been subject to the PSA "to the extent of Palo's interest therein." PSA § 8.07. Even assuming that a communitization agreement was submitted, the 80-Acre Tract would not have been subjected to the PSA after Palo's top-lease interest in the tract expired in 2009, as that was Palo's only interest in the tract. For the same reasons articulated above, Farmer's arguments that it is the successor-in-interest to Palo's expired lease and that its predecessor ratified the PSA do not

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change this.

*10 Accordingly, I conclude that Farmer fails to establish that the 80-Acre Tract falls within the PSA's scope. Nothing in the Ratification demonstrates otherwise.

(c)

To determine whether Farmer's instant action falls within the scope of the PSA, I could use a different approach: I could assess whether Farmer's claims are found within the PSA. They are not.

As stated, Farmer's first claim for relief seeks a declaration that *Amoco* held that the Tribe did not under any theory own the CBM gas beneath the 80-Acre Tract as of March 22, 2000. Its second claim seeks a declaration that the Tribe's asserted ownership of the 80-Acre Tract's CBM gas based on a terminated reserved mineral interest in the Cameron Deed is without merit and frivolous. It is clear from the above that these two claims are not covered by the PSA. The 80-Acre Tract is not subject to the PSA. And, of course, the PSA was executed before *Amoco* was decided. The PSA also does not address the Cameron Deed, which is the basis for Farmer's alleged ownership and the Tribe's asserted ownership that Farmer seeks to quash with this action.

Farmer's third claim likewise falls beyond the PSA's scope. Relying on section 8.07, that claim seeks a declaration that "in the" PSA and Ratification, the Tribe agreed to communitize the 80-Acre Tract with the surrounding acreage that was subject to the PSA. That section does not require that the 80-Acre Tract be communitized at all, let alone by the Tribe. "In the event" is conditional language that does not oblige the Tribe to communitize. Section 8.07 merely allows for communitization of that tract and prescribes its effect. Farmer implicitly concedes this in its response. See Part III.A.2.b, *supra*. No other section in the PSA addresses communitization or the 80-Acre Tract. Farmer's third claim thus falls outside the PSA.

Accordingly, I conclude that Farmer fails to establish that any of its three claims fall within the PSA's scope. Nothing in the Ratification demonstrates otherwise.

B

Armed with these determinations, I now turn to the parties' specific arguments. The Tribe's principle contention is that it has sovereign immunity from this suit. It further argues that Farmer's claims fail to raise a federal question and that ancillary jurisdiction is absent.

Farmer opposes and argues the following. *Amoco*, under the doctrine of *res judicata*, and the PSA bar the Tribe from claiming that it owns the 80-Acre Tract's CBM gas. *Amoco* also waived the Tribe's immunity from its first claim, and the PSA waived the Tribe's immunity from its first and third claims. Ancillary jurisdiction exists over its first claim under *Amoco* and the PSA. Lastly, while its second claim is a state law action, I should nevertheless exercise supplemental jurisdiction over it should I determine that jurisdiction over the first or third claim exists.

I begin with whether the Tribe has sovereign immunity from the instant suit because sovereign immunity trumps federal-question jurisdiction. See *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011(10th Cir.2007) ("We disagree that federal-question jurisdiction negates an Indian tribe's immunity from suit. Indeed, nothing in § 1331 unequivocally abrogates tribal sovereign immunity.... [I]n an action against an Indian tribe, we conclude that § 1331 will confer subject matter jurisdiction where another statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its immunity."). I then address whether, as Farmer asserts, *Amoco* or the PSA bar the Tribe from claiming ownership of the 80-Acre Tract's CBM gas. Lastly, I turn to federal question, ancillary, and supplemental jurisdiction.

1

*11 [4][5] "Indian tribes are domestic depend-

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ent nations that exercise inherent sovereign authority over their members and territories. As an aspect of this sovereign immunity, suits against tribes are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress.” *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir.1997); accord *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). The Tribe asserts that its sovereign immunity bars Farmer's claims. Because Farmer has the burden of showing that subject matter jurisdiction exists, see *Montoya*, 296 F.3d at 955, it bears the burden of showing that the Tribe unequivocally and expressly waived its immunity. See, e.g., *James v. United States*, 970 F.2d 750, 753 (10th Cir.1992). (Farmer does not submit that the Tribe's immunity was abrogated by Congress.) Farmer argues that the Tribe waived its sovereign immunity in three ways; I address these in turn.

(a)

Farmer articulates various formulations of its first waiver argument. It initially states that the Tribe's sovereign immunity argument is “without merit” because Farmer “is merely seeking a judicial determination regarding the scope of this Court's decision in the [*Amoco*] case that the Tribe initiated.” Pl.'s Resp. at 17. Next, “the Tribe unequivocally expressed a waiver of its sovereign immunity with respect to the issue of its ownership of the [80-Acre Tract's CBM gas] that it presented for adjudication by filing the [*Amoco*] Case in federal court.” *Id.* Then, “[b]ecause Farmer is merely asking the Court to issue a declaratory judgment defining the contour and scope of its decision in the [*Amoco*] case, the Tribe, having initiated that case, cannot now assert that it enjoys sovereign immunity to bar this Court from making a determination that is necessary to ensure that there was a full and complete adjudication of the issues reasonably incidental to that case.” *Id.* These numerous articulations aside, they all allege waiver only as to Farmer's first claim for relief. They all also posit that *Amoco* not only included a decision that the Tribe did not own the CBM gas by virtue of owning the coal, but

also that it held that Tribe did not own that gas under *any* legal theory available at the time the Tribe filed the case. *Id.* at 17.

[6] Regardless of how Farmer frames this argument, it has numerous defects. It mischaracterizes Farmer's first claim. That claim does not seek a declaratory judgment defining *Amoco's* scope in the broad sense; it seeks the more specific declaratory judgment that *Amoco* held that the Tribe did not own the 80-Acre Tract's CBM gas as of March 22, 2000. Compare Pl.'s Resp. at 17–18, with First Am. Compl. at 14. Additionally, the assertion that the Tribe's sovereign immunity is waived or is otherwise inapplicable because Farmer is “merely seeking a judicial determination regarding the scope of this Court's decision in [*Amoco*]” is devoid of legal support. Fatally, my analysis in Part III.A.1, *supra*, also shows that the argument is premised on an erroneously broad construction of *Amoco*. The case only decided that because the Coal Lands Acts did not reserve CBM gas when they reserved “coal” in the United States, the Tribe did not own the CBM gas by virtue of owning the coal. *Amoco* did not examine ownership claims over the CBM gas deriving from other sources. For the reasons discussed in Part III.A.1, *supra*, Farmer's first claim therefore falls outside *Amoco's* scope. This argument thus fails to show that by filing *Amoco*, the Tribe unequivocally and expressly waived its sovereign immunity as to Farmer's first claim.

(b)

*12 Farmer next argues that by filing suit in *Amoco*, the Tribe waived its sovereign immunity in a second way. It contends that by seeking to quiet title to the CBM gas in that case, the Tribe waived its sovereign immunity as to counterclaims that sound in recoupment. While I agree with Farmer's articulation of the law, I disagree that it applies here.

The Tenth Circuit has held that “when a[n] [Indian] tribe files suit it waives its immunity as to counterclaims of the defendant that sound in recoupment.” *Berrey v. Asarco Inc.*, 439 F.3d 636,

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643 (10th Cir.2006) (citing *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir.1982)). *Jicarilla* was the first case to so hold. It explained the contours of this exception to tribal sovereign immunity in the following way:

when the sovereign sues it waives immunity as to claims of the defendant which assert matters in *recoupment-arising out of the same transaction or occurrence which is the subject matter of the government's suit*, and to the extent of defeating the government's claim but not to the extent of a judgment against the government which is affirmative in the sense of involving relief different in kind or nature to that sought by the government or in the sense of exceeding the amount of the government's claims; *but the sovereign does not waive immunity as to claims which do not meet the "same transaction or occurrence test" nor to claims of a different form or nature than that sought by it as plaintiff* nor to claims exceeding in amount that sought by it as plaintiff.

687 F.2d at 1344 (quoting *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir.1967)) (emphases added). In *Jicarilla*, the Tenth Circuit affirmed the district court's dismissal of counterclaims asserted against the plaintiff-Indian tribe because the events from which the counterclaims arose occurred well after the transactions underlying the Indian tribe's initial lawsuit. *Id.* at 1345.

I conclude that Farmer's instant action does not meet *Jicarilla's* requirements to qualify as an exception to the Tribe's sovereign immunity. In the first instance, Farmer is the plaintiff here, meaning its first claim is not a "counterclaim" at all. In that same vein, unlike in *Jicarilla*, Farmer is not asserting the claim in the same action in which the Tribe filed suit. Assuming, *arguendo*, that its first claim could be construed as a counterclaim, my analysis in Part III.A.1, *supra*, shows that Farmer's claim here simply does not arise from the "same transaction or occurrence" that was the subject of the Tribe's suit in *Amoco*. In *Amoco*, the prior interest owners based their claims of ownership over the

CBM gas on patents issued under the Coal Lands Acts. The Tribe asserted that it owned the CBM gas by virtue of owning the coal that was first reserved in the United States in 1909 or 1910 under those acts and was then restored to the Tribe in 1938. *Amoco* involved, and the ownership turned on, construing the Coal Lands Acts to determine whether Congress intended to reserve CBM gas when it reserved the "coal."

*13 By contrast, here, the ownership dispute over the 80-Acre Tract's CBM gas derives from a distinct conveyance and instrument—the Cameron Deed—executed 30 years after the patent to the 80-Acre Tract was first issued. This action would thus involve examining only a private deed and whether the oil and gas reservation therein has been perpetuated, not the Coal Lands Acts or ownership of coal. And whether the oil and gas reservation was perpetuated involves facts and evidence beginning from, at the latest, 1966 and running through today, thus dragging this action further and further from *Amoco* spatially and temporally. For these reasons, to say that Farmer's claims here arise from the "same transaction or occurrence" as the Tribe's in *Amoco* strains the phrase beyond its limits. This argument therefore fails to establish an unequivocal and express waiver of the Tribe's sovereign immunity as to Farmer's instant action.

(c)

Farmer's third and final waiver argument is that "the Tribe waived its sovereign immunity defense with respect to Farmer's claims because these claims require the Court to interpret the [PSA]." Pl.'s Resp. at 20. I note here that, *vis-a-vis* the previous two waiver arguments, Farmer contends that this waives the Tribe's sovereign immunity from its first and third claims. *See* Pl.'s Resp. at 2 ("[I]n order to evaluate the *bona fides* of Farmer's *first and third claims* for relief, the Court must interpret the Settlement Agreement.") (emphasis added).

Farmer cites *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), for the proposition that "[a]

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district court possesses ancillary jurisdiction to enforce a settlement agreement post-dismissal if the court expressly retains jurisdiction or incorporates the agreement in its order of dismissal.” Pl.’s Resp. at 20. Farmer explains that in section 11.02 of the PSA, the Tribe expressly agreed “to unequivocally submit to the jurisdiction of [this] Court, which shall have, to the extent the parties can so provide, original and exclusive jurisdiction ... over all matters of interpretation or enforcement of this Agreement” *Id.* (quoting PSA at 12, § 11.02). It further explains that I approved the PSA and incorporated it as part of my order dismissing the Tribe’s claims against Palo with prejudice. Thus, Farmer concludes, the Tribe waived its sovereign immunity, and I have ancillary jurisdiction under *Kokkonen* over its first and third claims.

The Tribe readily acknowledges that, as part of the PSA, it expressly waived its sovereign immunity so the Court could interpret and enforce the settlement. Its position, however, is that this waiver extends only to matters actually within the scope of the PSA. Stated differently, the Tribe argues that its waiver in section 11.02 did not waive its sovereign immunity from suits falling outside the PSA. And it contends that Farmer’s entire suit is beyond the PSA’s scope.

*14 [7] I conclude that interpreting the PSA does not waive the Tribe’s sovereign immunity. First, Farmer’s reliance on *Kokkonen* is misplaced. *Kokkonen* is legally and factually distinguishable because it addressed only ancillary jurisdiction, not sovereign immunity and waiver. *See* 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391. Furthermore, *Kokkonen* does not state that merely having to interpret a settlement agreement from an earlier suit in a subsequent action creates jurisdiction over the latter. *See id.* Farmer fails to cite any other legal authority in support of that proposition. More importantly, Farmer puts the cart before the horse: ancillary jurisdiction does not exist where an Indian tribe has sovereign immunity from the suit. *See Presidential Gardens Associates v. United States*,

175 F.3d 132, 140 (2nd Cir.1999); *see also McKay v. United States*, 207 Fed. App’x 892, 895–96 (10th Cir.2006) (unpublished).

Second, Farmer’s quotation of section 11.02 of the PSA is conveniently incomplete. In its entirety, section 11.02 provides the following:

In the event that any legal proceeding related to the interpretation or enforcement of this Agreement or of the documents contemplated herein is initiated by any party, *the Tribe agrees to a limited waiver of the defense of sovereign immunity in order that the legal proceeding shall be heard and decided in accordance with the terms hereof. The Tribe specifically surrenders its sovereign power to the extent necessary to effectuate the terms of this agreement* and to unequivocally submit to the jurisdiction of th[is] Court, which shall have, *to the extent the parties can so provide*, original and exclusive jurisdiction as contemplated in this paragraph, over all matters of interpretation or enforcement of this Agreement, the Minerals Agreement or any other documents to be delivered hereunder, and any assignment thereof made by Palo which the parties acknowledge arise under the Indian Mineral Development Act of 1982, the Act of June 18, 1934, 48 Stat. 984 and/or the Act of May 11, 1938, 52 Stat. 347.

PSA at 12, § 11.02 (emphases added). Farmers omits the italicized language, and yet it is this language that is the Tribe’s waiver. The italicized language does not unequivocally and expressly show that the Tribe waived its sovereign immunity from suits falling *outside* the PSA’s scope; and that is what the provision would need to convey to support Farmer’s position because if a matter must fall within the PSA’s scope for the waiver to apply, merely interpreting the PSA would not be enough. Such a reading is discordant with the cabining phrases “limited waiver, to the extent necessary, to the extent the parties can do provide.” Moreover, a matter beyond the PSA could not be resolved “in accordance with the terms” of the PSA, nor could the

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agreement's terms be "effectuated" with respect to that matter. Farmer's argument thus renders these phrases superfluous. That weighs heavily against waiver here.

***15** Beyond just the countervailing textual evidence, theoretical implications militate against adopting Farmer's argument. For example, Palo could file a civil conspiracy claim against the Tribe that is completely unrelated to the *Amoco* case and allege that the Tribe waived its sovereign immunity from the suit in the PSA. The court would naturally turn to the PSA to determine whether the Tribe indeed waived its sovereign immunity from civil conspiracy suits. Insodoing, if one subscribes to Farmer's argument, the Tribe's sovereign immunity has been waived. This is an absurd result both theoretically and within the textual confines of section 11.02.

Accordingly, I conclude that Farmer fails to show that the Tribe expressly and unequivocally waived its sovereign immunity from the instant suit.

2

Curiously, that the Tribe waived its sovereign immunity is not Farmer's leading argument in its response. Farmer instead first argues that *Amoco* and the PSA each bar the Tribe from claiming that it has owned the 80-Acre Tract's CBM gas since May 27, 1966. I address these in turn.

Before doing so, however, I note that because Farmer fails to show waiver by the Tribe, I am uncertain that I need to address these arguments. *See, e.g., Franklin v. Savings Corp.*, 385 F.3d 1279, 1286 (10th Cir.2004) ("Jurisdictional issues must be addressed first and, if they are resolved against jurisdiction, the case is at an end. In contrast, *res judicata* is *not* a jurisdictional bar; it is an affirmative defense, and, thus, would not defeat subject matter jurisdiction of this or the district court.") (internal citations and quotations omitted). I am therefore leery of doing so, but two things persuade me. The first is the peculiar way in which Farmer

seeks to use *res judicata* and the PSA. As plaintiff, Farmer is not seeking to assert them as an affirmative defense, as a shield, but as a claim, as a sword. It also appears to be using them to establish jurisdiction. The second is that the substance of Part III.B.2, *infra*, is not new; it is essentially Part III.A reshaped in a slightly different context.

(a)

Farmer argues that under the doctrine of *res judicata*, *Amoco* "encompassed any other claim to the [80-Acre Tract's CBM gas] that the Tribe had at the time it filed [*Amoco*]." Pl.'s Resp. at 8. Therefore, Farmer contends, *Amoco* bars the Tribe from asserting that it has owned the 80-Acre Tract's CBM gas since May 27, 1966, pursuant to the Cameron Deed. Farmer later uses this as a basis for arguing that ancillary jurisdiction exists.

Farmer's argument is untenable. As stated, I am unconvinced that it is using *res judicata* properly. That doctrine is not a jurisdictional issue; it is an affirmative defense, and "[j]urisdictional issues must be addressed first and, if they are resolved against jurisdiction, the case is at an end." *See Franklin*, 385 F.3d at 1286. Thus, whether *Amoco's res judicata* effect bars the Tribe's ownership claim here can only be decided once Farmer establishes that I have jurisdiction over its claims, which it has not done.

***16** [8][9][10] Nevertheless, Farmer also fails to show the elements of *res judicata*. In the Tenth Circuit, *res judicata* or claim preclusion "applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) identity of the parties in the two suits; and (3) identity of the cause of action in both suits." *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir.2005). If these elements exist, "*res judicata* is appropriate unless the party seeking to avoid claim preclusion did not have a 'full and fair opportunity' to litigate the claim in the prior suit." *Id.* (quoting *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 n. 4 (10th Cir.1999)). In determining what constitutes a "cause of action" for preclusion purposes, I use the "transactional ap-

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proach.” *Id.* at 832. “Under this approach, a cause of action includes all claims or legal theories that arise from the same transaction. A contract is generally considered to be a ‘transaction’ for claim preclusion purposes.” *Id.* More specifically, “transaction” “connotes a natural grouping or common nucleus of operative facts.” *Restatement (Second) of Judgments* § 24, at 199 (1982). Factors relevant to determining “whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin or motivation, and whether, taken together, they form a convenient unit for trial purposes.” *Id.*

[11] My discussion in Part III.A.1, *supra*, applies equally here and shows that the Tribe's claim in *Amoco* and the ownership claim involved here are not from the same transaction. I incorporate that discussion by reference. *See* Part III.A.1, *supra*. It bears repeating that in *Amoco*, the origin of the Tribe's ownership claim was its ownership of coal that was reserved in and by the United States in patents issued under the Coal Lands Acts and which was later restored to the Tribe in 1938. And *Amoco* held only that the Tribe did not own the CBM gas by virtue of owning that coal. In comparison, the origin of the Tribe's ownership claim at issue here is the Cameron Deed, a distinct contract that was not at issue in *Amoco* and that was executed by private parties over 35 years after the Coal Lands Acts. Moreover, the facts pertaining to the Tribe's ownership claim in the instant action are alien in time and type to those in *Amoco*. Involving the disputed perpetuation of the Cameron Deed's terminable mineral estate, they would date at least to the late 1960's and could stretch through today. *Amoco's* dispositive facts flow from 1909 and 1910.

Farmer also neglects the limitations on *res judicata* in the class action context.

The class-action was device was intended to establish a procedure for the adjudication of common questions of law or fact.... Indeed, Rule 23 is carefully drafted to provide a mechanism for the expeditious decision of common questions. Its

purposes might well be defeated by an attempt to decide a host of individual claims before any common question relating to liability has been resolved

*17 *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880–81, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984). To be sure, “[t]here is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.” *Id.* at 874. A judgment in favor of either side in a class action, however, “is conclusive in a subsequent action between them *on any issue actually litigated and determined*, if its determination was essential to that judgment.” *Id.* (emphasis added). It was settled in Part III.A.1, *supra*, that the issue of whether the Tribe (or Farmer, for that matter) owns the 80–Acre Tract's CBM gas pursuant to the Cameron Deed was not “actually litigated and determined” in *Amoco*. For these reasons, and for those in Part III.A.1, that case simply does not have the *res judicata* effect that Farmer purports.

(b)

Farmer also argues that the PSA bars the Tribe from claiming that it has owned the 80–Acre Tract's CBM gas since May 27, 1966. In support, Farmer cites a host of provisions through which it argues the 80–Acre Tract became subject to the PSA. *See* PSA §§ 3.01, 10 .01. Farmer then insists that section 9.01 of the PSA and paragraph 2(a) of the Ratification bar the Tribe from asserting it has owned the 80–Acre Tract's CBM gas since May 27, 1966, pursuant to the Cameron Deed.

[12] I again disagree with Farmer. In Part III.A.2, *supra*, I dealt with Farmer's arguments concerning whether the 80–Acre and its CBM gas are subject to the PSA, including sections 3.01 and 10.01, and I concluded they are not. And nowhere in the PSA or Ratification did the Tribe agree to Farmer's claims pursuant to the Cameron Deed. Section 9.01 of the PSA and paragraph 2(a) of the Ratification also do not lend Farmer succor. In sec-

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tion 9.01, the Tribe agreed, *inter alia*, “not to maintain any action against such Prior Interest Owner to recover ... royalties or Tribal severance taxes received or attributable to the production of Coalbed Methane from such Lands ...” PSA § 9.01. Paragraph 2(a) of the Ratification mirrored this covenant. Both provisions rely on the PSA’s definition of “Lands,” but because Palo never had an oil and gas interest in the 80–Acre Tract, “Lands” did not include that tract. *See* PSA at 1, Recitals; *see also* Part III.A.2, *supra*. Consequently, I conclude that the PSA does not have the preclusive effect that Farmer submits.

3

[13] The parties marshal additional arguments concerning jurisdiction. The Tribe asserts that Farmer’s claims fail to raise a federal question. In a suit against an Indian tribe, federal-question jurisdiction can only exist “where another statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its immunity.” *Miner Elec.*, 505 F.3d at 1011. Assuming that federal-question jurisdiction exists, it would not negate an Indian tribe’s sovereign immunity from suit. *Id.* Thus, a federal question cannot support jurisdiction against an Indian tribe where that tribe has sovereign immunity from the suit.

*18 [14] The parties also dispute whether ancillary jurisdiction exists over Farmer’s first or third claims. Ancillary jurisdiction “recognizes federal courts’ jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them.” *Kokkonen*, 511 U.S. at 378. “Whether ancillary jurisdiction exists, however, has no impact whatsoever on the issue of sovereign immunity or its waiver.... [S]overeign immunity still bars such claims from being brought against the government absent a waiver, ...” *Presidential Gardens*, 175 F.3d at 140. This is true even if ancillary jurisdiction is present. *Id.*; *see also McKay*, 207 Fed. App’x at 895–96 (affirming district court’s dismissal of suit for lack of jurisdiction because district court could not assert ancillary jur-

isdiction over a settlement agreement and could not otherwise exercise jurisdiction to order specific performance thereof in the absence of a waiver of sovereign immunity).

Farmer lastly argues that supplemental jurisdiction exists over its second claim. Supplemental jurisdiction is likewise a moot issue if an Indian tribe has sovereign immunity from suit. *See* 28 U.S.C. § 1367(a) (“Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”) (emphasis added); *see also Wisconsin v. Ho–Chunk Nation*, 512 F.3d 921, 936 (7th Cir.2008) (“While federal jurisdiction exists with respect to all the State’s remaining causes of action, the Nation’s sovereign immunity still barred these claims from being brought against it unless this immunity had been waived by the tribe or ‘unequivocally’ abrogated by Congress. The Supreme Court has held that Congress did not abrogate state sovereign immunity in the Supplemental Jurisdiction Act, and we find no indication Congress intended a contrary result with respect to tribal sovereign immunity under this statute.... Thus, the district court’s ability to hear these remaining claims depends upon whether the Nation has waived its sovereign immunity.”) (internal citations omitted).

Because Farmer fails to show that the Tribe unequivocally and expressly waived its sovereign immunity from this suit, whether federal question, ancillary, or subject matter jurisdiction exist are issues I need not address to resolve the pending motion.

IV. Conclusion

For the foregoing reasons, IT IS ORDERED that the Tribe’s Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Fed.R.Civ.P.

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12(b)(1) [Doc # 16] is GRANTED, and the Tribe is
awarded its costs.

D.Colo.,2012.

Farmer Oil and Gas Properties, LLC v. Southern
Ute Indian Tribe

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Only the Westlaw citation is currently available.

United States District Court,
D. Colorado.
DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, San Juan Citizens Alliance, Sierra Club, Center For Biological Diversity, and Amigos Bravos, Plaintiffs,

v.

UNITED STATES OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, an agency within the U.S. Department of Interior; Kenneth L. Salazar, in his official capacity as Secretary of the Interior; Al Klein, in his official capacity as Regional Director of the U.S. Office of Surface Mining Reclamation and Enforcement, Western Division; Bob Postle, in his official capacity as Manager of the Program Support Division for the Western Region of the Office of Surface Mining Reclamation and Enforcement; Rick Williamson, in his official capacity as Manager of the Indian Programs Branch of the Western Region of the Office of Surface Mining Reclamation and Enforcement; and Mychal Yellowman, in his official capacity as Navajo Mine Team Leader in the Office of Surface Mining Reclamation and Enforcement, Defendants.

Civil Action No. 12-cv-1275-AP.
Jan. 4, 2013.

Erik Schlenker-Goodrich, Megan MccreaAnderson O'Reilly, Kyle James Tisdell, Taos, NM, Shiloh Silvan Hernandez, Helena, MT, for Plaintiffs.

Peter James McVeigh, U.S. Department of Justice, Washington, DC, for Defendants.

ORDER DENYING MOTION TO DISMISS
JOHN L. KANE, District Judge.

*1 Respondent-Intervenor the Navajo Nation ("Tribe") moves to dismiss this lawsuit for failure to join a party pursuant to Federal Rules of Civil Procedure 12(b)(7) and 19. The lynchpin of the

Tribe's argument is the doctrine of sovereign immunity, namely that because it is both an indispensable party and immune from suit, the action itself must be dismissed. (Doc. 22) Diné Citizens Against Ruining Our Environment ("Diné CARE"), San Juan Citizens Alliance, Sierra Club, the Center for Biological Diversity, and Amigos Bravos (collectively, "Citizens") oppose the motion, urging me to apply the public rights exception to traditional joinder rules involving sovereign immunity. I accept the invitation and DENY the motion to dismiss.^{FN1}

FN1. The Tribe's Motion to Dismiss was filed in conjunction with its Motion to Intervene, whereupon receiving I issued a Minute Order stating: "Plaintiffs [sic] shall file a response either opposing or acquiescing to [the Nation's] motions as set forth in [22] no later than October 1, 2012, by Judge John L. Kane on 9/10/12." ECF No. 24. On September 27, 2012, Petitioners filed their Response in Opposition to the Tribe's Motion to Dismiss, with three supporting declarations and an attachment. ECF Nos. 25, 25-1, 25-2, 25-3, 25-4. Because Petitioners' Response argues only against dismissal and does not protest intervention, Petitioners acquiesced and accepted that the Nation's limited intervention in this case pursuant to Rule 24(a) to move for dismissal is appropriate. Thus, this Order addresses only the Tribe's Motion to Dismiss.

Background ^{FN2}

FN2. Unless otherwise noted, all facts are drawn from the Complaint. (Doc. 1)

The Navajo Mine, operated by Respondent-Intervenor BHP Navajo Coal Company (BHP), is an open-pit coal strip mine sprawling over 13,000 acres. The mine is located entirely within the

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boundaries of the Navajo Reservation on land the Tribe originally leased to BHP's predecessor (Utah Construction and Mining Company) in 1957. Strip-mining operations have been ongoing since the early 1960s. Respondent Office of Surface Mining Enforcement and Reclamation (OSM) is the regulatory authority for permitting strip-mining and assuring compliance with the National Environmental Policy Act (NEPA) for operations on Indian lands, and the tribes comment through the Bureau of Indian Affairs (BIA) on permitting decisions. 30 C.F.R. § 750.6(a)(1)-(2), (7), (d); cf. 30 U.S.C. § 1300(j) (granting tribes limited authority over abandoned mine programs on Indian lands, but not general permitting and regulatory authority).

The Navajo Mine is, and has always been, the sole source of coal for the adjacent Four Corners Power Plant (FCPP), which was built specifically to burn the coal from that mine. The Navajo Mine supplies approximately 8.5 million tons of coal to FCPP annually, though that number may fluctuate downward to as low as 6.4 million tons, depending on FCPP's demands.

Currently, BHP is contractually obligated to supply FCPP with coal from the Navajo Mine through early July 2016. Toward that end, BHP seeks to expand mining operations into a portion of the existing deposits ("Area IV North"). Area IV North contains approximately 12.7 million tons of coal. Currently permitted Areas II and III of the mine contain 30.8 million tons of coal. In 2005 the Federal Respondents approved a permit revision allowing strip-mining operations to expand over 3,800 acres into Area IV North. This decision was based on a fourteen-page environmental assessment (EA). *Diné CARE v. Klein (Diné CARE I)*, 676 F.Supp.2d 1198, 1203 (D.Colo.2009)(Kane, J.). *Diné CARE* and San Juan Citizens Alliance sued OSM, alleging the EA did not comply with the procedural requirements of NEPA, 42 U.S.C. §§ 4321-4370h, seeking, among other things, to enjoin mining operations in Area IV North until OSM compliance was achieved. *Diné CARE I*, 676

F.Supp.2d at 1203, 1204.

*2 As here, OSM and the intervenors moved to dismiss in *Diné I* on the basis of Rule 19 for non-joinder of the Navajo Nation. *Id.* at 1204. I denied the motion, *see id.* at 1215-17, later ruling in the petitioners' favor on the merits and remanding the matter to OSM to conduct a lawful NEPA analysis. *Diné CARE v. Klein (Diné CARE II)*, 747 F.Supp.2d 1234, 1263-64 (D.Colo.2010).

On remand, OSM reduced the size of the proposed mine expansion into Area IV North and prepared another EA. Despite Citizens submitting extensive comments advocating for a more extensive review of environmental impacts, OSM issued a Finding of No Significant Impact ("FONSI") and approved the mine expansion. Citizens again sought judicial review, bringing the instant case for declaratory relief and injunctive relief limited to future mining operations in Area IV North. BHP again intervened as a defendant, and the Tribe then moved to intervene for the limited purpose of filing their motion to dismiss. The matter has been fully briefed and is ripe for my review.

Discussion

The Tribe is not a party to this action and cannot be joined as a result of sovereign immunity. *See Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir.1977). Turning these jurisdictional truths to its advantage, the Tribe asserts it is additionally an indispensable party under FRCP 19 so that the action must be dismissed in its entirety. By this logic, virtually all public and private activity on Indian lands would be immune from any oversight under the government's environmental laws. This is neither the intent nor the import of Indian sovereign immunity.

There are three parts to a finding of indispensability under Fed.R.Civ.P. 19(b). *See Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir.2001). First, I must find that a prospective party is "required to be joined" under Rule 19(a). Second, I must determine that the required party cannot

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feasibly be joined. Then I must determine, under Rule 19(b), whether the required-but-not-feasibly-joined party is so important to the action that the action cannot “in equity and good conscience” proceed in that person’s absence. Fed.R.Civ.P. 19(b). When that is so, the action “should be dismissed.” *Id.* The Tribe, as the proponent of this Rule 12(b)(7) defense, has “the burden of producing evidence” showing both that the Tribe is a required party and that dismissal is required in its absence. *See Citizen Band Potawatomi Indian Tribe v. Collier*, 17 F.3d 1292, 1293 (10th Cir.1994) (proponent has burden of production, which “can be satisfied by providing affidavits of persons having knowledge of these interests as well as other relevant extra-pleading evidence;” internal quotation omitted).

It is indisputably clear the Tribe meets the “necessary” or “required” party standard for indispensability because the Tribe receives financial and other benefits from the mine’s operation. *See Manygoats* at 558. In light of the Tribe’s immunity from suit, I therefore proceed to the Rule 19(b) question of “whether, in equity and good conscience, the action should proceed” in the Tribe’s absence. Fed.R.Civ.P. 19(b). Under the Rule, I must consider the following factors in deciding this question: (1) the extent to which a judgment rendered in the Tribe’s absence might prejudice the Tribe or the existing parties; (2) the extent to which any prejudice could be lessened or avoided; (3) whether judgment rendered in the Tribe’s absence would be adequate; and (4) whether Plaintiffs would have an adequate remedy if the action were dismissed for nonjoinder. Fed.R.Civ.P. 19(b); *Thunder Basin Coal Co. v. Southwestern Pub. Serv. Co.*, 104 F.3d 1205, 1211 (10th Cir.1997).

*3 In *Manygoats*, for example, the Tenth Circuit ruled the Tribe would not be prejudiced by a judgment rendered in its absence because the requested relief, injunction of the Secretary’s approval until he complied with NEPA, did not call for any action by or against the Tribe. 558 F.2d at

558–59. The Court also found that dismissal of the action for nonjoinder of the Tribe “would produce an anomalous result” because then “[n]o one, except the Tribe, could seek review of [a NEPA-required] environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on Indian lands.” *Id.* at 559. This result, the court found, was not consistent with the national environmental policy set forth in NEPA. *Id.* For this reason and because no known tribal remedies or procedures were available to plaintiff, the Tenth Circuit held that “[i]n equity and good conscience the case should and can proceed without the presence of the Tribe as a party.” *Id.*

The Tenth Circuit took a different tack in *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir.1974), cert. denied, *682 420 U.S. 962, 95 S.Ct. 1353, 43 L.Ed.2d 440 (1975), granting dismissal. *Tewa Tesuque* is distinguishable from *Manygoats*, however, on at least two bases. First, in *Tewa Tesuque*, plaintiffs had attacked an existing lease to which the Pueblo was a party, whereas in *Manygoats* all that was sought was the enjoining of the Secretary from approving a pending lease. In *Tewa Tesuque* the assault was directed at the lease; in *Manygoats* it was aimed at the Secretary’s approval of the lease. Second, in *Manygoats*, the cause of action was brought under NEPA, whereas NEPA was not considered by the court in *Tewa Tesuque*.

Consideration of the two distinctions between *Tewa Tesuque* and *Manygoats* informs my determination concerning the indispensability of the Navajo Nation here. Because this action involves an attack on lease approvals as opposed to an attack on the leases themselves and because this action is brought under NEPA, I find, just as I found in *Diné CARE I*, that the instant action is more akin to *Manygoats*.

All the same, the Tribe argues sovereign immunity must be given cardinal weight in the indispensability calculus of 19(b), declaiming *Manygoats* and *Diné CARE I* as obsolete in light of *Re-*

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public of the Philippine's v. Pimentel, 553 U.S. 851, 863–875 (2008). Although their argument is made earnestly, *Pimentel* is wholly distinguishable from the case at bar and entirely unpersuasive for the proposition advanced by the Tribe.

Pimentel was an interpleader action, in which several parties alleged that funds were wrongfully taken by the Republic of the Philippines' ("Republic") former government. 553 U.S. at 855, 857–61, 871. When joinder was attempted by existing parties, the Republic successfully asserted sovereign immunity and was dismissed from the action. *In re Republic of the Phil.*, 309 F.3d 1143, 1149–52 (9th Cir.2002). The Republic then moved to dismiss as an indispensable party under Rule 19, won, and the issue proceeded all the way to the Supreme Court, which upheld the dismissal. *Id.* at 873.

*4 Applying the enumerated factors of Rule 19(b) (required party status was uncontested), the Court first reasoned that there was potentially significant prejudice to the Republic because the suit to proceed in its absence would undermine interests in comity and the dignity between foreign sovereigns endowed with "perfect equality and absolute independence." *Id.* at 865–66 (quoting *Schooner Exchange v. McFaddon*, 7 Cranch 116, 137 (1812)). The Court noted the "specific affront" of the Republic's claimed property being "seized by the decree of a foreign court." *Id.* at 866.

The third Rule 19(b) factor also favored dismissal because the Republic would not be bound by a judgment and presumably could bring additional litigation to recover the disputed funds. *Id.* at 870–71. Regarding the fourth factor, the bank, which was the plaintiff in the interpleader, would suffer little prejudice from dismissal because it could have any future actions against it dismissed under Rule 19 for nonjoinder of the Republic. *Id.* at 871–72. Also, though dismissal would in part harm the "international policy" of "combating public corruption," that international policy underscored the comity interests of foreign sovereigns. *Id.* Finally,

the Court noted that the balance of the equities could change if the special Philippine court tasked with resolving ownership of properties embezzled by Marcos did not resolve the case in a "reasonable period of time." *Id.* at 859, 873.

Pimentel thus differs from the instant case in the following respects: To begin, unlike this case and *Manygoats*, which both involve challenges to federal respondents' compliance with procedural obligations imposed by federal law, *Pimentel* was a dispute over property (money) to which the absent party claimed a legal entitlement. Compare *Pimentel*, 553 U.S. at 866 (noting the affront to the Republic of having "property they claim ... seized by the decree of a foreign court"); with *Manygoats*, 558 F.2d at 558 (noting challenge was not to tribal contract but "to the adequacy of the impact statement the Secretary must consider"). This distinction is critical because though the *Ex Parte Young* exception, elaborated below, allows suits against officers of state or tribal sovereigns for "prospective injunctive relief," it does not allow similar suits seeking "retroactive monetary relief." *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 278(1989).

Moreover, in *Pimentel*, an alternative forum was available in which the Republic's claim was being adjudicated; the Court suggested that if that forum delayed unreasonably in issuing a decision, the parties might be able to again bring their case in United States federal court. 553 U.S. at 873. Here, though the Tribe hints at some nebulous alternative forum, it has not credibly identified any judicial forum for review of the BLM's NEPA analysis.

Lastly, and most vitally, *Pimentel* involved "foreign" sovereign immunity, raising comity concerns between co-equal sovereigns. 553 U.S. at 866–67. Whereas United States federal law does not apply to foreign sovereigns, "general Acts of Congress," including NEPA, do apply on Indian lands. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960), applied in *Davis v. Morton*, 469 F.2d 593, 597–98 (10th Cir.1972); and *Manygoats*, 558 F.2d at 558. Thus, unlike "foreign"

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sovereign immunity, tribal sovereign immunity does not shield tribal (or state) sovereigns from suit for prospective injunctive relief for violations of federal law. See *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Okla.*, 725 F.2d 572, 574–75 (10th Cir.1984)(named tribal officials were not protected by tribe's sovereign immunity); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir.2007)(tribal official allegedly responsible for administration and collection of challenged tax was not immune from suit). Accordingly, the comity interests associated with tribal sovereign immunity, while present, are tempered here as in *Manygoats* by the interest in full application of federal environmental law.^{FN3} See *Manygoats*, 558 F.2d at 559.

FN3. To be clear, neither I nor the Citizens denigrate the doctrine of tribal sovereign immunity. It is an important mechanism for, among other things, protecting tribes from “encroachment” by States, *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998), and allowing tribes to govern internal tribal affairs, *Tewa Tesuque*, 489 F.2d at 243. However, these internal tribal interests are not implicated in this lawsuit, which instead champions the shared national interest in environmental procedural compliance.

*5 In fact, in the Court's view, *Manygoats* and the instant lawsuit work a “public right,” because the claims at hand derive from a federal regulatory scheme. See *Stern v. Marshall*, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011)(stating the Court applies a “public rights exception” to traditional joinder rules in cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority). Where a “public right” is at issue, traditional rules of joinder, including sovereign immunity, need not apply. See *Conner v. Burford*, 848 F.2d 1441, 1460 (9th

Cir.1988)(“The appellees' litigation against the government does not purport to adjudicate the right of current lessees; it merely seeks to enforce the public right to administrative compliance with the environmental standards of NEPA and the ESA.”).

As the Ninth Circuit observed in *Conner*, dismissing a NEPA case for nonjoinder of an absent party “sound[s] the death knell for any judicial review of executive decisionmaking.” 848 F.2d at 1460. Albeit without explicitly using the phrase “public rights exception,” this is the same reasoning the Tenth Circuit employed in *Manygoats* when it noted it would be “anomalous” to dismiss a NEPA case for nonjoinder of a Native American tribe because “[n]o one, except the Tribe, could seek review of an environmental impact statement covering significant federal action relating to leases or agreements of development of natural resources on Indian lands.” 558 F.2d at 559.

After *Manygoats*, the Tenth Circuit went on to adopt unambiguously the public rights exception, applying the doctrine by name. See *Southern Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966, 971 n. 2 (10th Cir.2008)(“We note that Movants as private lessees were not indispensable parties to the district court proceedings because SUWA's action against BLM fell within the “public rights exception” to joinder rules, most notably Fed.R.Civ.P. 19.”) (internal quotations omitted); *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272 (10th Cir.2012)(refusing to apply the public rights exception because this the claims at issue were not “seeking to vindicate broadly applicable public rights, such as the prevention of unfair labor practices or administrative compliance with environmental protection statutes and regulations.”)(emphasis added). Thus, the recent district court opinions within the Tenth Circuit, namely, *United Keetoowah Band of Cherokee Indians in Oklahoma v. Kempthorne*, 630 F.Supp.2d 1296, 1303–05 (E.D.Okla.2009) and *ThreeStars Production Co., LLC. V. BP America Production Co.*, 2012 WL 917273 (D.Colo.2012) upon which the Tribe relies

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so heavily are inapposite. Although these decisions, citing *Pimentel*, all grant motions to dismiss in favor of various Native American tribes on the ground of sovereign immunity, they are only superficially on point. Despite that all the aforementioned do indeed involve sovereign immunity as applied to Native American tribes, nary a one presented NEPA challenges, which fact is significant given the policy concerns that NEPA was enacted to address.^{FN4} "NEPA is concerned with national environmental interests. Tribal interests may not coincide with national interests. We find nothing in NEPA which excepts Indian lands from national environmental policy." *Manygoats* 558 F.2d at 559.

FN4. I note Respondents also volunteer *Center for Biological Diversity v. Pizarchik*, 2012 WL 872622 (D.Colo.2012), a case also involving a NEPA challenge, for the proposition that this case must be dismissed. *Pizarchik*, however, in addition not to being binding authority, specifically declined to consider the merits of the public rights exception, the court calling the argument in that case "woefully underdeveloped." 872622 at *7 fn. 11.

*6 Applying the Rule 19(b) factors to the instant action, I find the analysis of *Manygoats* controls. With respect to the first two factors concerning prejudice, I note the Citizens challenge, as in *Manygoats*, not a legal entitlement of the Tribe (i.e., the lease), but rather the Federal Respondents' allegedly deficient NEPA analysis. If it is determined on the merits of Citizens' challenge that the Federal Respondents must complete an EIS, or otherwise remedy their NEPA analysis, no prejudice will necessarily result to the Tribe, because the requested relief does not call for any action by or against the Tribe.

As to the adequacy of the judgment, that factor too favors allowing the case to proceed. This element reflects the interest of the public and the judicial system in "settling disputes by wholes whenever possible." *Provident Tradesmens Bank & Trust*,

390 U.S. 102, 104, *quoted in Pimentel*, 553 U.S. at 870. If this case proceeds to a resolution on its merits, it will be determined either that the Federal Respondents violated NEPA or that they did not. After that, there will be no remaining dispute to resolve. The Tribe fails to cite any other litigation that will be unresolved by this case. Nor is there any indication that additional litigation will occur if this suit proceeds in the Tribe's absence. Indeed, no additional litigation was engendered by this Court's previous ruling on this matter in *Diné CARE I*.

Finally, the fourth factor, "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder," Fed.R.Civ.P. 19(b)(4), weighs crushingly against dismissal. As mentioned above, the Tribe has failed to show that an alternative forum capable of granting an adequate remedy is available for the Citizens to challenge the Federal Respondents' NEPA analysis. Nor does it appear that any such forum is available, *Manygoats*, 558 F.2d at 559; *Diné CARE I*, 676 at 1217, for the Federal Respondents are the sole authority for issuing strip-mining permits and conducting required NEPA analyses on Indian lands. 30 C.F.R. § § 750.6(a)(1)-(2), (7). Thus, the Citizens cannot obtain adequate relief from the Tribe. As such, allowing the action to proceed would severely check NEPA's policy goals and would thwart the objectives of the public rights exception to traditional joinder rules.

The Motion to Dismiss, Doc. 22, is DENIED. The tribal/foreign government distinction between the instant case and *Pimentel* is fundamental and dispositive; *Manygoats* controls.

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