No. 19-1166

In the Supreme Court of the United States

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, SAN JUAN CITIZENS ALLIANCE; AMIGOS BRAVOS; SIERRA CLUB; AND CENTER BIOLOGICAL DIVERSITY,

Petitioners,

V.

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC; ARIZONA PUBLIC SERVICE COMPANY; BUREAU OF INDIAN AFFAIRS; U.S. DEPARTMENT OF THE INTERIOR; U.S. OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT; U.S. BUREAU OF LAND MANAGEMENT; DAVID BERNHARDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR; U.S. FISH AND WILDLIFE SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an action seeking to overturn the Navajo Nation's legal right to operate the Navajo Mine and existing contracts related to its trust lands may be litigated in the tribe's absence under Federal Rule of Civil Procedure 19.

RULE 29.6 STATEMENT

Arizona Public Service Company (APS) is a wholly-owned subsidiary of Pinnacle West Capital Corporation. No publicly held corporation owns 10% or more of Pinnacle West Capital Corporation's stock. APS jointly owns the Four Corners Power Plant with Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, Tucson Electric Company, and Navajo Transitional Energy Company, LLC.

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INTRODUCTION

The entire purpose of this case is to invalidate the legal rights of the Navajo Transitional Energy Company (NTEC) and Arizona Public Service Company (APS) to operate the Navajo Mine and Four Corners Power Plant ("the Plant") on Navajo Nation land. Because NTEC's legal rights are directly at stake, both lower courts correctly held that Federal Rule of Civil Procedure 19 prevents this case from moving forward unless NTEC is joined as a party. But NTEC is a tribal entity that possesses the Navajo Nation's sovereign immunity—and so it *cannot* be joined. For that reason, both lower courts concluded that Rule 19 mandates dismissal of the case.

That decision was plainly correct. As the Ninth Circuit explained, Rule 19 requires a "practical" and "fact specific" inquiry into whether it is fair and equitable to adjudicate a case that might impair the interests of an absent party. App. 36a (citation omitted). Here, it would be entirely inappropriate to adjudicate whether to eliminate NTEC's right to operate the Navajo Mine without NTEC itself—or the Navajo Nation—taking part in the case. NTEC was created in 2013 as part of a broader effort by the Navajo Nation to take sovereign control of its own natural resources, and the operations that take place at the Mine and Plant are the Nation's economic lifeblood. They provide jobs to hundreds of tribal members and generate approximately one-third of the Nation's revenues. It would be profoundly unjust—and contrary to the letter and spirit of Rule 19—to expose the Navajo Nation's economic well-being to potential disaster without having NTEC or the Navajo Nation in court to defend the tribe's rights.

Any suggestion that federal government agencies are capable of vindicating the Nation's unique sovereign interests here is wrong.

Petitioners urge this Court to grant review and overturn the Ninth Circuit's ruling based on an asserted circuit split over how to apply Rule 19 to Administrative Procedure Act (APA) cases touching on tribal interests. But the split does not exist: Petitioners point to a handful of cases that come out differently on their facts, but none of them adopts a different legal test than the case-specific Rule 19 inquiry applied by the Ninth Circuit here. Indeed, a number of the cited decisions rely on Ninth Circuit precedents that the Ninth Circuit panel in this case expressly distinguished.

Petitioners are also wrong to claim that the Ninth Circuit's rule will categorically foreclose APA challenges to federal actions affecting tribes. That is not the approach to Rule 19 the Ninth Circuit has taken in the many tribal-related cases it has allowed to *proceed* over the past few decades, and it is not the approach it took here. Rather, the court applied settled circuit precedent and held that in the particular circumstances here—where the goal of the litigation is to eliminate the tribe's existing legal rights and to force them to shut down ongoing mining operations essential to the tribe's well-being—dismissal is warranted. In reality, petitioners are the only ones who have advocated a categorical rule, arguing below that the *only* necessary respondent in an APA case is the federal government, regardless of whether and how the case will affect the legal rights of others. That is not the law.

Petitioners are threatening the Navajo Nation with catastrophe through litigation designed to shut

down a significant source of the revenue it needs to provide critical services to its members. Rule 19 does not allow this case to move forward without NTEC's participation. The petition should be denied.

STATEMENT OF THE CASE

1. For more than 50 years, the Navajo Nation has funded its government operations and public services with revenues derived from mining the Navajo Nation's abundant natural resources, including coal. SER2.[1] Coal extracted at the Navajo Mine is sold to APS to fuel operations at the Plant.

Navajo Mine and the Plant have operated on the Navajo Nation since the early 1960s. SER58, 60. Navajo Mine was privately owned until 2013, when the Navajo Nation created NTEC, an entity wholly owned by the Nation, to purchase and operate it as part of a broader plan to reclaim sovereign control over the tribe's natural resources and economic and financial well-being. SER43-44, 49-52, 73-77; Resp't NTEC CA9 Br. 16 (CA9 ECF No. 34 at 16). As an entity wholly owned by the Navajo Nation, NTEC retains the Nation's sovereign immunity. App. 23a-24a.

APS operates the Plant pursuant to lease agreements with the Navajo Nation, with the most recent lease renewal negotiated in 2011. SER29, 58, 60. Because the United States holds the Navajo Nation lands in trust for the tribe, federal law required APS and the Nation to obtain approval from the Bureau of Indian Affairs (BIA) for the lease

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[1] "SER" refers to APS's supplemental excerpts of record filed in the Ninth Circuit. *See* CA9 ECF No. 33. "ER" refers to petitioners' excerpts of record. *See* CA9 ECF No. 18.

renewal and for the renewal of APS's existing rights-of-way over Navajo Nation lands.

Navajo Mine operates pursuant to a permit issued by the Office of Surface Mining, Reclamation and Enforcement (OSMRE) under the Surface Mining Control and Reclamation Act (SMCRA). SER28. OSMRE first issued a SMCRA permit for Navajo Mine in 1977, and has issued multiple renewals since that time. *See* SER58.

Each year, Navajo Mine and the Plant generate between $40 and $60 million in revenue for the Navajo Nation—over a third of the Nation's general fund. ER127. The Navajo Nation uses those revenues to fund critical social services, including education, police, fire, and emergency medical services. SER37. Navajo Mine and the Plant also employ hundreds of Navajo Nation members, in what are some of the best-paying jobs in the region. *Id.*; SER3, 11.

2. In 2012, APS and NTEC's predecessor-in-interest filed applications for renewed lease approval, rights-of-way, and permits. These applications triggered a multi-year, multi-agency environmental review of Navajo Mine and the Plant. OSMRE served as the lead agency in preparing an environmental impact statement (EIS) required by the National Environmental Policy Act (NEPA). SER62. It did so in cooperation with the BIA, the U.S. Army Corps of Engineers, the Bureau of Land Management (BLM), the U.S. Environmental Protection Agency, the National Park Service, and the U.S. Fish and Wildlife Service (FWS). SER31-33. This environmental review process involved significant public participation, including 18 public open house meetings and public comment on the environmental review documents. SER62-64.

Following this comprehensive stakeholder outreach, OSMRE and the cooperating agencies published a 1,700-page final EIS, addressing potential environmental effects of Navajo Mine and the Plant operations under a number of alternatives. The report evaluated the impact on air quality, climate change, cultural resources, water quality, wildlife and habitats, and the socioeconomics of the Four Corners region. *See* SER15-22. The final EIS also considered and responded to the public comments received on the draft EIS. SER64.

While the NEPA review was underway, the agencies also consulted with FWS to ensure that the approvals for ongoing operations at Navajo Mine and the Plant would not jeopardize any endangered or threatened species or its habitat, as required by the Endangered Species Act (ESA). SER65. After an extensive consultation process, FWS published a biological opinion concluding that the proposed operations, which incorporated species conservation measures, would not jeopardize any protected species or adversely modify critical habitat. *Id.*

Following this review, on July 15, 2015, the agencies within the Department of the Interior (OSMRE, BIA, and BLM) executed a Record of Decision (ROD) granting APS and NTEC the approvals required for Navajo Mine and the Plant to continue to operate. ER125-39. These included BIA's approval of the lease amendment and rights of way for the Plant, ER133-37; OSMRE's renewal of the Mine's existing SMCRA permit, ER130-32; and BLM's approval of the Mine's Resource Recovery and Protection Plan as ensuring "maximum recovery" of coal deposits. ER138.

APS and NTEC then relied on these approvals and proceeded to make substantial financial investments in Navajo Mine and the Plant. For example, APS installed new state-of-the art air emission controls, totaling close to $500 million, and has been investing many more millions to implement additional Plant environmental protection upgrades along with species conservation and recovery measures. *See* Resp't APS CA9 Br. 13 (CA9 ECF No. 32); SER48. NTEC also pledged Navajo Mine and other assets to secure a new $115 million line of credit. SER3. A default on the loan would result in the loss of the Navajo Mine and the millions of dollars that the Navajo Nation directly contributed to start-up costs, in addition to the loss of billions of dollars in future revenues for the Navajo Nation. *See id.*

3. In April 2016, nearly a year after the ROD was issued, petitioners sued OSMRE, BIA, BLM, FWS, the Department of the Interior, and the Secretary of the Interior (together, the Government) under the APA, NEPA, and the ESA. ER49-67. Petitioners asked the district court to vacate the ROD, EIS, and Biological Opinion and to enjoin the Government from authorizing the continued operation of Navajo Mine and the Plant until it prepared a new EIS and Biological Opinion. ER68-69.

APS intervened in support of the Government. ER77-81. NTEC intervened for the limited purpose of moving to dismiss the action under Federal Rules of Civil Procedure 12(b)(7) and 19 for failure to join a required party—namely, NTEC itself, which could not be joined due to tribal sovereign immunity.

The district court agreed with NTEC and dismissed the case. "If successful," the district court explained, petitioners' suit would jeopardize the

"continued operation of Navajo Mine and Four Corners Power Plant" and, consequently, "the solvency of the Navajo Nation" itself. ER3-4. Given these "affronts to the Nation's sovereignty," the court held that NTEC had cognizable interests in the litigation that were protected by Rule 19. ER4. NTEC could not be brought into the litigation to defend those interests because, as an "arm" of the Navajo Nation, it enjoys tribal sovereign immunity. ER5-7. Nor could the federal agencies that were already defending the suit adequately represent NTEC's interests, since its interests in preserving the Navajo Nation's financial and economic stability "far exceed" the agencies' own interests in "'defend[ing] their analyses and decisions'" concerning the environmental review. ER4-5 (citation omitted). Thus, the district court concluded that the litigation could not move forward "[i]n equity and good conscience," and it granted NTEC's motion to dismiss the suit. ER7.

4. On appeal, petitioners urged the Ninth Circuit to adopt a categorical rule that "tribal sovereign immunity is not a sufficient basis for dismissing public interest lawsuits against federal agencies for violating NEPA and the ESA." Pet'rs CA9 Br. 20 (CA9 ECF No. 17). The Ninth Circuit rejected that approach, and instead affirmed the district court's dismissal of the action under its "practical" and "fact-specific" approach to Rule 19. *See* App. 14a (citation omitted).

a. The Ninth Circuit began by setting out its basic framework for compulsory joinder under Rule 19. When faced with a motion to dismiss for failure to join a party, the court explained, a court must first determine whether the absent party is "required"

under Rule 19(a), meaning that the party "must be joined" if feasible. App. 12a-13a (quoting Fed. R. Civ. P. 19(a)(1)). If an absent party is required but "cannot be joined," then the court must apply Rule 19(b) to determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." App. 13a (quoting Fed. R. Civ. P. 19(b)).

b. Applying this framework, the Ninth Circuit first considered whether NTEC is a required party under Rule 19(a) because it has a "legally protected interest" that would be "impair[ed]" if the litigation proceeded without it. App. 13a-23a (citing Fed. R. Civ. P. 19(a)(1)(B)). The court acknowledged that this inquiry under Rule 19(a) is "practical" and "fact specific." App. 14a (quoting *White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir. 2014) (citation omitted), *cert. denied*, 136 S. Ct. 983 (2016)).

The Ninth Circuit first concluded that NTEC has a "legally protected interest" in the subject matter of the litigation. App. 13a-18a. The court recognized that petitioners' suit targets "approvals already granted for [NTEC's] mining operations." App. 15a-18a. Indeed, if the suit is successful, it will result in vacatur of the environmental approvals—which would mean that "*the Mine could not operate*, and the Navajo Nation would lose a key source of revenue in which NTEC has already substantially invested." *Id.* at 18a (emphasis added). In reaching this conclusion, the court distinguished several Ninth Circuit precedents that had declined to recognize legally-protected interests of Indian tribes for Rule 19 purposes where the relief sought was prospective in nature. App. 16a-18a.

Next, the court concluded that no existing party "[can] be counted on to adequately represent NTEC's interests." App. 18a-23a. Although the defendant federal agencies (Federal Respondents) "have an interest in defending their decisions," the court explained, "their overriding interest . . . must be in complying with environmental laws such as NEPA and the ESA." App. 21a. This interest differs "in a meaningful sense" from NTEC's "sovereign interest in ensuring that the Mine and Power Plant continue to operate," including the Nation's "ability to govern itself, sustain itself financially, and make decisions about its own natural resources." App. 21a-23a. In reaching this conclusion, the Ninth Circuit again distinguished several prior decisions that *had* found a federal agency capable of representing the interests of an absent tribe. *Id.* at 19a-20a, 22a.

c. Having found that NTEC is a required party under Rule 19(a), the Ninth Circuit next determined that NTEC's joinder is not "feasible" under Rule 19(b), because NTEC shares the Navajo Nation's sovereign immunity. App. 23a-24a.

d. The court next proceeded to consider whether, "in equity and good conscience," the action could proceed without NTEC under Rule 19(b). App. 25a-28a. Applying the four factors relevant to this determination, the court concluded: (1) NTEC and the Navajo Nation would suffer prejudice because, "if this lawsuit were to proceed and [petitioners] were to prevail," the Nation could lose "an estimated 40 to 60 million dollars per year in revenue" and "its ability to use its natural resources how it chooses"; (2) the court could not shape relief so as to avoid this prejudice; (3) a judgment rendered without NTEC would be "adequate" because it would not impose "conflicting

obligations" on Federal Respondents; and (4) even if no alternative remedy were available to petitioners, that fact still would not preclude dismissal because "the lack of an alternative remedy 'is a common consequence of sovereign immunity.'" App. 26a-27a (citations omitted). Citing the "'wall of circuit authority' in favor of dismissing an action where a tribe is a necessary party," the Ninth Circuit concluded that "this litigation cannot, in good conscience, continue in NTEC's absence." App. 28a (citation omitted).

e. Finally, the Ninth Circuit addressed petitioners' contention that the so-called "public rights" exception exempts this case from Rule 19's joinder rules. App. 28a-33a. It explained that "[t]he public rights exception is a limited 'exception to traditional joinder rules' under which a party, although necessary, will not be deemed 'indispensable,' and the litigation may continue in the absence of that party." App. 28a (citation omitted). The court noted that the exception is "narrowly restricted to the protection and enforcement of public rights" and, importantly, it must not be applied where it would "destroy the legal entitlements of the absent parties." *Id.* (first quoting *National Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940); and then quoting *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (citation omitted)).

The Ninth Circuit concluded that the public rights exception does not apply here because the litigation "threatens to destroy NTEC's existing legal entitlements" in Navajo Mine and the Plant. App. 31a. Once again, in so holding, the Ninth Circuit distinguished on its facts a prior case in which the Ninth Circuit *did* apply the public rights exception.

Id. (citing *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988)).[2]

REASONS FOR DENYING THE PETITION

The Ninth Circuit correctly applied this Court's pragmatic and fact-specific approach to Rule 19 to determine that—in the unique circumstances of this case—this litigation cannot proceed without NTEC representing the interests of the Navajo Nation. That decision faithfully implements Rule 19, which is designed to prevent the legal rights of third parties from being adjudicated in their absence. Here, the litigation threatens immediate fiscal catastrophe to the Navajo Nation and would potentially undermine the Nation's sovereign control over its natural resources. The suit cannot proceed in NTEC's absence.

Petitioners' attempt to assert a circuit split over Rule 19's application to cases involving Indian tribes falls flat. Petitioners have identified no circuit that deviates from this Court's factbound approach to Rule 19, and the fact that different cases involving different circumstances come out in different ways does not undermine their uniform approach to the applicable legal standards. And this case is the wrong vehicle for addressing theoretical issues about the intersection of Rule 19 and tribal sovereign immunity in any event. Allowing this case to proceed would threaten the source of over a third of the Navajo Nation's general fund. This case must be dismissed under any reasonable approach to Rule 19. For all these reasons, the petition should be denied.

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[2] Petitioners' petition for rehearing en banc was denied in December 2019, without any judge requesting a vote. App. 45a.

I. THE NINTH CIRCUIT'S DECISION IS CORRECT

The Ninth Circuit correctly affirmed the dismissal of this case under a straightforward application of Rule 19's joinder requirements. Petitioners' argument to the contrary rests on a mischaracterization of that decision and a failure to appreciate the divergent interests of NTEC and the Federal Defendants with respect to the continued operation of the Navajo Mine.

A. The Ninth Circuit Correctly Applied This Court's Case-Specific Approach to Rule 19

1. Federal Rule of Civil Procedure 19 governs the joinder of required parties. It establishes a factbound and case-specific analysis designed to ensure that a lawsuit does not jeopardize the rights of nonparties.

Rule 19(a) provides that a person with "an interest relating to the subject of [an] action" must be joined as a party if "disposing of the action in the person's absence" would "as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). If joinder of a required party is not feasible—for example, because it would destroy the court's subject-matter jurisdiction—then Rule 19(b) directs the court to "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). In making that determination, the court considers four factors: (1) the prejudice to the absent party; (2) the extent to which potential relief can be tailored to limit that prejudice; (3) whether a judgment rendered without the absent party would be adequate; and (4) whether the plaintiff

would have an alternative remedy if the action were dismissed. *Id.*

As this Court has explained, "the determination whether to proceed [under Rule 19] 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 (2008). It turns on the particular interests asserted by the absent party and whether it is fair to adjudicate those interests in that party's absence. *Id.* at 863-64; *see also* 7 Charles Alan Wright et al., *Federal Practice and Procedure* § 1602 (3d ed. 2020 update, Westlaw) (noting that Rule 19 "provides a pragmatic approach to solving joinder dilemmas").

2. The Ninth Circuit correctly stated and applied these standard Rule 19 principles here. The court recognized that its first task in determining whether NTEC was a required party was to "carefully . . . identify [NTEC's] interest at stake." App. 13a (alterations in original) (citation omitted). In doing so, it emphasized that "'[t]he inquiry under Rule 19(a) "is a practical one and fact specific,"'" and that "'few categorical rules inform[] this inquiry.'" App. 14a (second alteration in original) (first quoting *White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir. 2014) (citation omitted), *cert. denied*, 136 S. Ct. 983 (2016); and then quoting *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 970 (9th Cir. 2008), *cert. denied*, 556 U.S. 1182 (2009)). The court emphasized that when the asserted interest arises from a contract, it must be "substantial," *id.* (citation omitted), and "more than a financial stake," *id.* (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 & n.5 (9th Cir. 1990)).

Applying these rules, the Ninth Circuit concluded that NTEC had a legally protected interest in the subject matter of this litigation. The court recognized that, as a general rule, a third party lacks a legally protected interest in an action "seeking only to enforce [agency] compliance with administrative procedures." App. 15a. But such an interest may lie where, as here, "the effect of [the] successful suit would be to impair a right already granted" to the absent party. *Id.*

Here, the court explained that "[a]lthough Plaintiffs' challenge is to Federal Defendants' NEPA and ESA processes, "it does not relate only to the agencies' future administrative process, but instead may have retroactive effects on approvals already granted for mining operations." App. 17a. The court noted that "[i]f [petitioners] succeeded in their challenge and the agency actions were vacated, NTEC's interest in the existing lease, rights-of-way, and surface mining permits would be impaired," because "*[w]ithout the proper approvals, the Mine could not operate*, and the Navajo Nation would lose a key source of revenue in which NTEC has already substantially invested." *Id.* at 17a-18a (emphasis added). The court expressly distinguished its prior decisions in *Makah* and *Colusa*, in which it had allowed cases to move forward without the participation of an absent tribe because the relief sought was "prospective only" and thus "prevent[ed] any impairment to a legally protected interest." App. 18a; *see also* App. 16a.

Next, the Ninth Circuit recognized that under Rule 19(a), "[i]f a legally protected interest exists," a court "must further determine whether that interest will be *impaired or impeded* by the suit." App. 14a (quoting *Makah*, 910 F.2d at 558). Practically

speaking, the court noted, an absent party's interest will not be impaired "where its interest will be adequately represented by existing parties to the suit." *Id.* (quoting *Alto v. Block*, 738 F.3d 1111, 1127 (9th Cir. 2013)). The court then listed three factors guiding this determination: (1) "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments"; (2) "whether the party is capable of and willing to make such arguments"; and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." App. 14a-15a (quoting *Alto*, 738 F.3d at 1127-28).

Again, the court applied these settled rules and concluded that, on the facts of this case, the Federal Respondents could not adequately represent NTEC's interests in the Navajo Mine and the Plant. "Although Federal Defendants have an interest in defending their decisions," the court explained, "their overriding interest . . . must be in complying with environmental laws such as NEPA and the ESA." App. 21a. "This interest differs in a meaningful sense from NTEC's and the Navajo Nation's sovereign interest in ensuring that the Mine and Power Plant continue to operate and provide profits to the Navajo Nation." *Id.* It stressed the sovereign nature of NTEC's interest in this case, which is "tied to [the Navajo Nation's] very ability to govern itself, sustain itself financially, and make decisions about its own natural resources." App. 22a-23a.

The court noted that NTEC's and the Federal Defendants' interests might diverge if "the district court were to hold that NEPA or the ESA required more analysis that would delay mining activities, or

that one of the federal agencies' analyses underlying the approval was flawed." App. 21a. In reaching this conclusion, the court addressed—and distinguished—various other cases in which it had held that federal agencies *could* adequately represent the interests of absent tribes under the particular facts at issue. *Id.* at 19a-20a (discussing *Alto* and *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998)). Similarly, although APS owns and operates the Plant, and thus has a financial stake in the outcome of the case, it "does not share the Navajo Nation's *sovereign* interest in controlling its own resources, and in the continued operation of the Mine and Power Plant and the financial support that such operation provides." App. 22a. Thus, the court concluded that NTEC is a required party under Rule 19(a).

Next, the Ninth Circuit held that NTEC's joinder was not "feasible" under Rule 19(b), because NTEC shared the Navajo Nation's sovereign immunity. App. 23a-24a. The court recognized that NTEC is "wholly owned by the Navajo Nation," "organized pursuant to Navajo law," and was "created specifically so that the Navajo Nation could purchase the Mine." App. 24a. The court explained that "tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself." App. 23a (citation omitted). The court thus concluded that NTEC could not be joined without its consent.

Finally, the Ninth Circuit applied Rule 19(b) and considered "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." App. 25a (quoting Fed. R. Civ. P. 19(b)). It then went on to list the factors enumerated in Rule 19(b), and noted that they were

"nonexclusive." *Id.* (quoting *Pimentel*, 553 U.S. at 862).

The court then carefully discussed each of the four factors enumerated in Rule 19(b). App. 26a-28a. The court held that the first factor—the potential prejudice to the absent party—weighed in favor of dismissal: NTEC would suffer prejudice because of the potential interference with mining operations, because if "[petitioners] were to prevail," they could lose "an estimated 40 to 60 million dollars per year in revenue for the Navajo Nation, as well as its ability to use its natural resources how it chooses." App. 26a.

The court recognized that the second factor—the possibility of shaping relief so as to avoid prejudice to the absent party—likewise supported dismissal. The court explained that "[a]lthough relief could be shaped to avoid prejudice in the short term," the Navajo Nation would "inevitably" be prejudiced "if [petitioners] ultimately succeeded and if, after further NEPA and ESA processes, Federal Defendants were not able to come to the same decisions without imposing new restrictions or requirements on the Mine or Power Plant." App. 27a.

By contrast, the Ninth Circuit acknowledged that the third factor—adequacy of the judgment—weighed against dismissal, "because it is Federal Defendants' duty, not NTEC's, to comply with NEPA and the ESA." *Id.* And although in theory the fourth factor also weighed against dismissal the court explained that "the lack of an alternative remedy 'is a common consequence of sovereign immunity.'" *Id.* (citation omitted). Thus, "[e]ven assuming that . . . both the third and fourth factors . . . weigh against dismissal," dismissal was nonetheless proper. And in reaching that conclusion the court highlighted its consistency

with circuit precedent, pointing to the "'wall of circuit authority' in favor of dismissing an action where a tribe is a necessary party." App. 28a (citation omitted). Thus, the court concluded under Rule 19(b) that "this litigation cannot, in good conscience, continue in NTEC's absence." *Id.*

3. The Ninth Circuit also correctly rejected petitioners' reliance on the "public rights" doctrine. This doctrine exempts from traditional joinder rules cases that are "narrowly restricted to the protection and enforcement of public rights." *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940). Thus, as the Ninth Circuit correctly recognized, the doctrine is a "limited 'exception to traditional joinder rules' under which a party, although necessary, will not be deemed 'indispensable,' and the litigation may continue in the absence of that party." App. 28a (quoting *Conner v. Burford*, 848 F.2d 1411, 1458-59 (9th Cir. 1988)). As the court further explained, the doctrine "may apply in a case that could 'adversely affect the absent parties' interests,' but 'the litigation must not "*destroy* the legal entitlements of the absent parties."'" *Id.* (quoting *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996)).

The public-rights doctrine derives from this Court's decision in *National Licorice*. That case allowed a challenge by the National Labor Relations Board to certain employment contracts under the labor laws, and the company argued that the employees were required parties without whom the litigation could not proceed under Rule 19. 309 U.S. at 351-56. The Court disagreed, ruling that the action was "narrowly restricted to the protection and enforcement of public rights," such that "the absent employees' legal entitlements would not be destroyed

[in the litigation]" because the employees would remain "free to assert such legal rights as they might have acquired under their contracts." *Id.* at 363-64, 366.

Applying this settled law to the facts of this case, the Ninth Circuit found that the public-rights doctrine was not applicable because this litigation "threatens to destroy NTEC's existing legal entitlements." App. 31a. Specifically, the court concluded that if the ROD were vacated, the approvals would be invalid "and NTEC would lose all associated legal rights" to operate the Mine. *Id.* Because NTEC could not engage in the mining activities absent the federal approvals that petitioners sought to vacate, the litigation threatened private rights and the public-rights doctrine was inapplicable. Thus, this case was unlike *National Licorice*, because there the suit did not threaten to destroy the absent employees' rights under their employment contracts. 309 U.S. at 366.

The Ninth Circuit also distinguished this case from a prior Ninth Circuit precedent applying the public rights exception to an environmental challenge to federal mining approvals. App. 29a-31a (citing *Conner*, 848 F.2d at 1442-45, 1460-61). In that case, the court explained, mining "had apparently not even been authorized or begun," whereas here, the approved mining and power generation activities were "already taking place." App. 31a. Thus the court concluded, unlike in *Conner*, NTEC's *existing* legal entitlements were at stake in this litigation. *Id.*

B. The Ninth Circuit Properly Rejected Petitioners' Categorical Approach to Rule 19

1. As explained above, the Ninth Circuit straightforwardly applied Rule 19's case-specific joinder principles to the particular facts at issue. Petitioners challenge that decision by mischaracterizing its holding as a sweeping prohibition on "challenging federal agency action that benefits entities that cannot be made parties to [the challenge]." Pet. 12. According to petitioners, "[i]t will now be impossible in the Ninth Circuit to challenge federal agencies' compliance with laws like NEPA and the ESA . . . when those actions affect Indian lands or the financial interests of tribes more generally." Pet. 25.

That sky-is-falling assertion wildly overstates the effect of the decision below. On the contrary, under the Ninth Circuit's longstanding case-specific approach to Rule 19, environmental actions and challenges to federal agency action are frequently allowed to proceed, depending on the extent to which they threaten to deprive absent parties (including Indian tribes) of their existing legal rights. The decision below does not change that.

In *Alto*, for example, the Ninth Circuit allowed former tribal members' APA challenge to the BIA's decision to disenroll them from the tribe to proceed—even in the tribe's absence—after concluding that the BIA could adequately represent the tribe's interest in "limiting enrollment to qualified individuals." 738 F.3d at 1128. Similarly, in *Conner*, the Ninth Circuit allowed a challenge under NEPA and the ESA to the issuance of certain oil and gas leases to proceed after

determining that the action "does not adjudicate or 'prejudge' the rights" of the absent lessees. 848 F.2d at 1461 (citation omitted).

In this case, the Ninth Circuit distinguished *Alto* and *Conner* on their facts—not based on any categorical rule requiring dismissal of any challenge to agency action benefitting absent parties. It explained that in *Alto* (unlike here) the BIA's and the tribe's interest in defending the BIA's enrollment decision was identical, and that in *Conner* (again, unlike here) the litigation did not threaten any existing legal right created by the challenged leases. App. 22a, 31a-32a. Far from creating a categorical rule blocking any challenge to federal agency action touching on tribal interests, the decision below reaffirms the Ninth Circuit's settled, fact-specific approach to Rule 19.

2. In fact, it is petitioners—not NTEC or APS—who have embraced a categorical approach to Rule 19 in this litigation. Although their petition does not say so, below petitioners urged the Ninth Circuit to embrace a new, bright-line rule that "tribal sovereign immunity is not a sufficient basis for dismissing public interest lawsuits against federal agencies for violating NEPA and the ESA." Pet'rs CA9 Br. 20. And even now, petitioners would exempt all APA litigation involving tribal interests from Rule 19's joinder requirements—either because the federal government can always represent the interests at stake, or because the public-rights doctrine always applies. Pet. 29-31.

No court has ever articulated any version of these categorical rules, and they are wrong as a matter of text and precedent. Rule 19 turns on a case-specific analysis of the facts at hand, calling for a "practical"

assessment of the absent party's interests and the application of "equity and good conscience" to determine whether the action should nevertheless proceed. Fed. R. Civ. P. 19(a)(1)(B)(i), (b). And courts, including this Court, have recognized that the Rule 19 analysis "turn[s] upon factors that are case specific" and is "based on equitable considerations." *Pimentel*, 553 U.S. at 862-63; *see also United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 481 (7th Cir. 1996) (noting that Rule 19 is "flexib[le]" and "mandates a case-specific inquiry").

Similarly, the public-rights doctrine has no application where private rights are threatened. Petitioners ignore the settled exception to the public-rights doctrine that "the litigation must not 'destroy the legal entitlements of the absent parties.'" *Kescoli*, 101 F.3d at 1311 (quoting *Conner*, 848 F.2d at 1459); *see also National Licorice*, 309 U.S. at 366 (applying the doctrine where "the [absent] third persons were left free to assert such legal rights as they might have acquired under their contracts").

To justify their categorical approach, petitioners point out that dismissing cases affecting Indian tribes under Rule 19 will impede their ability to obtain judicial review of federal agency action in this and other cases. Pet. 25-28. But by definition, Rule 19 *always* requires the dismissal of suits that could otherwise go forward. The policy embodied in Rule 19 is that—when its specifications are met—such suits should be dismissed so as to avoid adjudicating a third party's legal rights in that party's absence. The Court should reject petitioners' invitation to create a new, categorical carve-out to Rule 19 that would single out Indian tribes for inequitable treatment.

3. Petitioners also err in attacking the Ninth Circuit's application of Rule 19 to the facts of this case. Most importantly, petitioners minimize (at 29-31) the Nation's interests at stake in this litigation. NTEC's purchase of the Navajo Mine represented a major step forward in the Navajo Nation's pursuit of energy independence and economic development. For the Nation, hundreds of jobs and tens of millions of dollars in annual revenue are on the line if petitioners succeed in overturning the approvals—not to mention the hundreds of millions already invested in reliance on those approvals. *See supra* at 4.

Petitioners are also wrong to say (at 16, 29) that the government is capable of representing NTEC's interests. In theory, the Federal Defendants and NTEC are aligned in opposing the substance of petitioners' challenge. But as the Ninth Circuit found, the Federal Defendants' ultimate interest "must be in complying with environmental laws such as NEPA and the ESA." App. 21a. This interest is fundamentally different from NTEC's and the Navajo Nation's "sovereign interest in ensuring that the Mine and Power Plant continue to operate and provide profits to the Navajo Nation." *Id.* The interests of the Federal Respondents and NTEC could diverge with respect to what the environmental laws require, as well as to the proper remedy for any identified violation.

Simply put, the Federal Respondents do not share the Navajo Nation's existential concern about the outcome of this litigation. If the underlying approvals are vacated, Federal Defendants will have to conduct a new environmental review. By contrast, the Nation will lose—perhaps forever—a critical source of revenue and jobs for hundreds of tribal members.

Federal Defendants simply do not have the same incentive to pursue every possible avenue to defend the continued operation of Navajo Mine and the Plant. Indeed, the United States filed an amicus brief in the Ninth Circuit *opposing* dismissal on Rule 19 grounds. It is hard to imagine a clearer sign that the government cannot be relied upon to defend the Navajo Nation's interests in this case.

Given NTEC's unique sovereign interests at stake in this case, the Ninth Circuit properly ordered dismissal under Rule 19. That decision does not warrant further review.

II. THERE IS NO CIRCUIT SPLIT

Petitioners assert that certiorari is necessary to resolve a circuit split over Rule 19's application to challenges to federal agency action affecting Indian tribes. They are mistaken: All circuits agree that Rule 19's factbound, case-specific analysis governs the joinder analysis. None has adopted petitioners' proposed rule that such challenges are categorically exempt from Rule 19. Any difference in outcome across the cases reflects differences in their respective facts.

1. Petitioners assert (at 17-18) that the Ninth Circuit's ruling here conflicts with the Seventh Circuit's decision in *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999), *cert. denied*, 531 U.S. 811 (2000). There, the Seventh Circuit held that an Indian tribe was not a necessary party to a legal challenge to a federal agency's administration of an election to amend the tribe's constitution. *Id.* at 667; *see* 25 U.S.C. § 476(a)(2), (d) (1994).

Petitioners are mistaken: There is no conflict between *Thomas* and the decision below. Like the

Ninth Circuit, the Seventh Circuit recognizes that Rule 19 is "flexib[le]" and "mandates a case-specific inquiry." *Hall*, 100 F.3d at 481 (citing *Makah*, 910 F.2d at 558). And like the Ninth Circuit in this case, the Seventh Circuit in *Thomas* looked to "the missing party's interest" and applied the fact-specific analysis required by Rule 19. 189 F.3d at 667. The court held that under federal law, "Secretarial elections, such as the one at issue here, are federal—not tribal—elections," emphasizing that Congress had "unmistakabl[y]" decided "to privilege federal control over tribal interests in tribal constitutional elections." *Id.* at 667-68. The court thus concluded the tribe had no substantial interest in the way the election had been administered. *Id.* Unlike here, where NTEC itself has the legal right to operate Navajo Mine based on the challenged approvals, the tribe in *Thomas* had no authority to reject the amendment even if it concluded that the Secretary had conducted the election improperly. *See id.* at 668. ("[T]he tribal governing board has no legal authority to refuse to implement amendments to the tribal constitution that have been put to a vote and approved by the Secretary."). Thus, the challenge was merely "a challenge to the way certain federal officials administered an election for which they were both substantively and procedurally responsible," and it did not directly implicate any of the tribe's *own* rights. *Id.* at 667. The tribe itself was therefore not a necessary party. *Id.* at 667-68.

Thomas would have come out the same way had it arisen in the Ninth Circuit. Indeed, the facts in *Thomas* are similar to those in *Alto*, where the Ninth Circuit held that a tribe was not a necessary party to a challenge to a federal agency's decision to disenroll

certain tribal members, in part because the tribe had "delegated its authority over enrollment to the BIA," so vacatur of the disenrollment order "would not undermine authority the Tribe would otherwise exercise." 738 F.3d at 1129. The key to both cases was the fact of federal control over certain tribal functions—an element not present here. Notably, the Ninth Circuit here distinguished *Alto* on those very grounds. App. 22a. The Ninth Circuit's treatment of *Alto* below refutes any assertion of a conflict with the Seventh Circuit's decision in *Thomas*.

2. Petitioners also assert that the Ninth Circuit's decision here conflicts with the Tenth Circuit's decisions in *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), *Sac & Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002), and *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977). But in each of these cases, the Tenth Circuit applied the same approach to Rule 19 that the Ninth Circuit applied here: It carefully walked through the Rule 19 analysis based on the particular facts at issue.

To be sure, the Tenth Circuit declined to dismiss those cases. But unlike here, none of them directly challenged a tribe's "*existing* legal entitlements." App. 31a (emphasis added). For example, *Kansas* and *Sac & Fox Nation* both involved APA challenges to a federal agency's decision to designate certain property as "Indian lands" under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701-2721—a determination that would have allowed an Indian tribe to establish gaming facilities on the property. *Kansas*, 249 F.3d 1225-27; *Sac & Fox Nation*, 240 F.3d at 1258-59. In both cases, the Tenth Circuit articulated and applied the same fact-specific, Rule 19

test that the Ninth Circuit applied here—not any categorical rule allowing APA cases to proceed against the federal government simply because they involve challenges to federal agency action. Moreover, neither case involved the renewal of federal authorization to operate *existing* casinos. Here, by contrast, NTEC has an existing interest in Navajo Mine, which has operated since the 1960s. SER58.

Similarly, in *Manygoats*, the Tenth Circuit applied the standard Rule 19 analysis and refused to dismiss a challenge to a federal agency's NEPA approval of mining activities on tribal land. 558 F.2d at 558-59. Significantly, *Manygoats* first held that tribe *was* a "required" party to the litigation under Rule 19(a), since the federal government could not adequately represent its interests. *Id.* at 558. Nevertheless, the court ultimately concluded that the suit could proceed without the tribe in "equity and good conscience" under Federal Rule of Civil Procedure 19(b). But again, *Manygoats* involved an approval to "explore for, and mine, uranium," 558 F.2d at 557, not a renewal of an *existing* mining right (as in this case). That factual distinction refutes any purported circuit split.

Finally, petitioners cite footnoted dicta from *Southern Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966 (10th Cir. 2008). In that case, the district court found that BLM had violated NEPA in issuing certain oil and gas leases. *Id.* at 967-68. Two lessees filed a post-judgment motion to intervene as of right under Federal Rule of Civil Procedure 24, and then filed a notice of appeal before the district court ruled on their motion. *Id.* at 968.

In rejecting the lessees' appeal, the Tenth Circuit first noted the "usual rule" that "only parties to a

lawsuit . . . may appeal an adverse judgment." *Id.* (citation omitted). It then explained that nonparty appeals may be allowed where the nonparty has a "unique interest in the outcome of the case," but that here, the lessees had no such interest. *Id.* The court went on to "note" in a footnote that the lessees "were not indispensable parties to the district court proceedings because [the] action against BLM fell within the 'public rights exception' to joinder rules." *Id.* at 969 n.2.

This statement was quintessential dicta. No party had asked the court to address the issue, and the court never suggested that it was relevant to its resolution of the appeal. Far from breaking from the Ninth Circuit, moreover, the Tenth Circuit's footnote expressly endorsed that court's decision in *Conner*, which similarly rejected lessees' claims to be required parties to an APA challenge to BLM's issuance of oil and gas leases. *Id.* (citing 848 F.2d at 1458–62). In this case, the Ninth Circuit expressly distinguished *Conner*—and, by extension, *Southern Utah*. App. 31a-32a. It did not create a circuit split.

In short, none of the Tenth Circuit cases petitioners cite either rejects the legal standard applied by the Ninth Circuit here or applies that standard to reach a different conclusion based on the same set of facts. On the contrary, at least one district court in the Tenth Circuit has applied Rule 19 and dismissed a virtually identical challenge by one of the petitioners in this case to the continued operation of Navajo Mine, based on essentially the same theory adopted by the Ninth Circuit here. *Ctr. for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1224 (D. Colo. 2012) (addressing approvals granted to Navajo Mine in 2010). In doing so, the court explained that

"[t]he 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." *Id.* at 1227 & n.9 (distinguishing *Manygoats*).[3] The alleged split between the Ninth and Tenth Circuits is thus entirely illusory.

3. Nor are petitioners right to assert a conflict with the D.C. Circuit. Like the Seventh, Ninth, and Tenth Circuits, the D.C. Circuit also recognizes that Rule 19 "calls for a pragmatic decision based on practical considerations in the context of particular litigation." *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995).

Ramah Navajo School Board, Inc. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996), is not to the contrary. There, the D.C. Circuit held that an absent tribe was not an indispensable party to a challenge to the federal government's formula for allocating certain funds to which Indian tribes were entitled by statute to cover administrative costs associated with running certain tribal programs. *Id.* at 1341. Like the Ninth Circuit here, the D.C. Circuit applied the standard Rule 19 analysis, focusing on "whether the nonparty Tribes have a legally protected interest in the enjoined CSF funds." *Id.* at 1351.

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[3] The Tenth Circuit has also dismissed other challenges to agency action for failure to join an affected Indian tribe. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 995-96 (10th Cir.) (dismissing one Indian tribe's challenge the Department of the Interior's calculation of certain funds due to all federally recognized tribe on grounds that Rule 19 required joinder of the absent tribes), *opinion modified on reh'g*, 257 F.3d 1158 (10th Cir. 2001).

Ramah is easily distinguished from this case because there the absent tribes had no legally protected interest in the funds—a prerequisite that no party disputes NTEC has met here. *Id.* (holding that funds would provide only "negligible" benefits to absent tribes). And although the D.C. Circuit went on to state that the federal government could adequately represent the tribes' legally protected interests even if they did exist, that factbound conclusion rested on its assessment that there was no conflict between the government and tribes—or among the absent tribes themselves—as to the allocation of those funds. In reaching that conclusion, moreover, the D.C. Circuit endorsed the Ninth Circuit's decision in *Makah*, which articulated the exact same Rule 19 framework that the Ninth Circuit applied here. *Ramah*, 87 F.3d at 1351 (citing 910 F.2d at 558). Indeed, the Ninth Circuit's decision in this case itself invoked *Makah*—just as *Ramah* did. App. 16a. The D.C. Circuit's reliance on *Makah* shows that the alleged circuit split does not exist.

4. Finally, petitioners point (at 23-25) to two other circuit court decisions that they claim are in "tension" with the decision below. Petitioners are mistaken as to both.

In *School District of Pontiac v. Secretary of the United States Department of Education*, a group of school districts and education associations sued the U.S. Department of Education to prevent it from withholding federal funds on the basis of the schools' failure to implement certain requirements of the No Child Left Behind Act of 2001, which the schools claimed they could not implement without additional federal funding. 584 F.3d 253, 264-68 (6th Cir. 2009) (en banc). Recognizing that "Rule 19 calls for a

pragmatic approach," the Sixth Circuit held that the states in which the school districts lay were not required parties to the litigation, because they were merely "intermediaries through which federal funds flow to local schools" and so lacked a legally protected interest in the outcome. *Id.* at 265-66. The court also concluded—without further elaboration—that "the States' interests, if they have any, are adequately represented by the existing parties." *Id.* at 266-67.

There is no tension between *Pontiac* and the decision below. Unlike the states in *Pontiac*, which had no cognizable stake in the outcome of the litigation, here, the stakes for NTEC and the Navajo Nation are high, and include the Nation's long-term financial health and ability to provide public services to its members. And the primary conclusion for which petitioners cite *Pontiac*—its alternative holding that whatever interests the states may have are adequately represented by the "existing parties"—consists of a single sentence in the opinion followed by a string citation. *Pontiac* did not involve review of agency action; it did not rely on the public rights exception; and it did not recognize any absent party's interest in the litigation. It does not establish a circuit split warranting this Court's review.

Petitioners also point (at 24-25) to *Jeffries v. Georgia Residential Finance Authority*, a challenge brought by a group of tenants to a regulation that allowed leases for federal public housing to provide for unilateral termination by the private landlord with 30 days' notice. 678 F.2d 919, 929 (11th Cir.), *cert. denied*, 459 U.S. 971 (1982). Recognizing that "[t]he court's decision on joinder is guided by pragmatic concerns," the court allowed the challenge to proceed without the landlords, since the ultimate decision

whether to evict a tenant in public housing lies "solely within the discretion and responsibility of [the relevant state housing authority]," which must assess whether there is good cause for the eviction. *Id.* at 928-29. Alternatively, the court relied on the public-rights doctrine, explaining that "when litigation seeks vindication of a public right, third persons who could be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties." *Id.* at 929.

Again, this case is different. At stake in *Jeffries* was the owners' right to unilaterally terminate public housing leases without good cause. *Id.* at 922. Here, by contrast, petitioners' suit threatens the long-term financial stability of the Navajo Nation. Moreover, the suit in *Jeffries* did not threaten to destroy the landlords' underlying right to lease their apartments, whereas here, NTEC's ability to continue mining on Navajo lands is very much in jeopardy. In this case, then—unlike in *Jeffries*—the government defendants cannot adequately represent NTEC's interests, and the public-rights doctrine does not apply.

III. THIS CASE IS A POOR VEHICLE FOR REVIEW

For the reasons noted above, this case does not implicate the Court's traditional criteria for certiorari. The Ninth Circuit's fact-specific approach is clearly correct, and there is no circuit split. But even if the Court were inclined to address the application of Rule 19 to APA cases more generally, this would be an especially poor vehicle in which to consider that issue.

Navajo Mine and the Plant are the economic lifeblood of the Navajo Nation and the centerpiece of

its tribal energy policy, and it would be especially unfair to adjudicate their future in the Nation's absence. Navajo Mine and the Plant are essential to the economic well-being of the Nation and its 320,000 members. Navajo Mine and the Plant generate tens of millions of dollars in revenue for the Nation each year—over a third of the Nation's general fund—and those revenues fund the Nation's schools and police, fire, and emergency medical services. *See supra* at 4. Navajo Mine and the Plant also provide jobs for hundreds of Navajo Nation members. *See id*.

Given all this, there is no good reason to reopen litigation that threatens severe harm to the Navajo Nation. Although the environmental approvals here were entirely sound, *see supra* at 4-6, this Court should not subject the Nation to the uncertainty—not to mention sovereign indignity—of having other parties litigate the tribe's legal rights and fiscal well-being in its absence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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