No. 19-___

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Federal Rule of Civil Procedure 19 requires dismissal of an Administrative Procedure Act action challenging a federal agency's compliance with statutory requirements governing federal agency decisions, for failure to join a non-federal entity that would benefit from the challenged agency action and cannot be joined without consent.

RULE 29.6 STATEMENT

Petitioners are nonprofit organizations and have no parent corporations. No publicly held corporation holds stock in any of the petitioners.

RELATED PROCEEDINGS

United States District Court (D. Ariz.):

Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs, No. CV-16-08077-PCT-SPL (Sept. 11, 2017)

United States Court of Appeals (9th Cir.):

Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs, No. 17-17320 (July 29, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Diné Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Amigos Bravos, Sierra Club, and Center for Biological Diversity respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 932 F.3d 843. The opinion of the district court (Pet. App. 34a-43a) is not reported but is available at 2017 WL 4277133.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2019. Pet. App. 1a. A timely petition for rehearing was denied on December 11, 2019. Pet. App. 44a-45a. On February 22, 2020, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including March 24, 2020. No. 19A934. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT RULE

Federal Rule of Civil Procedure 19 provides in relevant part:

(a) PERSONS REQUIRED TO BE JOINED IF FEASIBLE.

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

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

* * *

(b) WHEN JOINDER IS NOT FEASIBLE. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

* * *

STATEMENT

Through this suit, petitioners seek to enforce obligations imposed on federal agencies by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, and the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 *et seq.* Petitioners filed suit against all relevant federal agencies and officials, seeking judicial review of federal agency action and requesting prospective declaratory and injunctive relief against those agencies and officials, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* The district court and court of appeals held that a non-federal entity was a required party that could not be joined—and that the suit must be dismissed because it could not proceed without the non-federal entity.

1. a. The APA entitles an entity that is "adversely affected or aggrieved by agency action within the meaning of a relevant statute" to obtain judicial review of such action and to seek non-monetary relief against the United States, its agencies, and its officers. 5 U.S.C. § 702. Petitioners filed this suit pursuant to 5 U.S.C. § 706(2), which authorizes courts to "hold unlawful and set aside agency action, findings, and conclusions found to be," *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The APA does not provide a cause of action or authorize any relief against non-federal actors. *Id.* §§ 702, 706; *see id.* § 701(b)(1) (defining "agency").

b. Federal Rule of Civil Procedure 19 governs joinder of non-parties. The Rule defines the types of non-parties that must be joined to a suit if possible and the conditions under which a suit cannot proceed if joinder of such a party is not feasible.[1] Rule 19(a) describes necessary parties, providing that "[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," *inter alia*, "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," *inter alia*, "as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). Rule 19(b) dictates the consequences when a necessary party cannot be joined, providing that, "[i]f a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed," in light of a non-exhaustive list of enumerated factors. Fed. R. Civ. P. 19(b).

c. Recognizing the tension between compulsory-joinder rules and public administrative law, this Court long ago recognized an exception—the so-called public-

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[1] The category of non-parties who must be joined if feasible was formerly referred to as "necessary parties"; the subset of necessary parties without whom a suit may not proceed where joinder is not feasible was formerly referred to as "indispensable parties." The text of the Rule now refers to the former category as "[r]equired [p]art[ies]" and describes the consequence of dismissal as to the latter category without designating them as "indispensable." Fed. R. Civ. P. 19. As the notes of revision make clear, the 2007 revision in the text was not meant to be substantive. Pet. App. 13a n.5. For ease of reference, we sometimes use the old terms in this petition.

rights exception—to traditional joinder rules that would require dismissing a suit in the absence of an indispensable party. In *National Licorice Co. v. National Labor Relations Board*, the Court found an exception to such mandatory dismissal "[i]n a proceeding" that is "narrowly restricted to the protection and enforcement of public rights." 309 U.S. 350, 363 (1940). In such cases, the Court explained, "there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Ibid.* The principles of the public-rights exception are now embodied in Rule 19(b)'s command that a suit should proceed without a required party when "equity and good conscience" dictate. Fed. R. Civ. P. 19(b).

2. a. The Navajo Mine is a sprawling 33,000-acre coal strip mine located in New Mexico on tribal trust lands of the Navajo Nation, a federally recognized Indian tribe with territory spanning Arizona, Utah, and New Mexico. Pet. App. 6a. The Mine produces coal exclusively for the Four Corners Power Plant, which burns the coal to generate electricity. *Id.* at 7a. Most of the electricity generated is transmitted to Arizona, primarily to Phoenix. *See* C.A. E.R. 39-40. The Power Plant is owned by several large utility companies, including respondent Arizona Public Service Co. (APS), which operates the Power Plant on behalf of all co-owners pursuant to a decades-old lease agreement with the Navajo Nation. Pet. App. 7a. The Navajo Nation has authorized easements for rights-of-way to the Power Plant over Navajo lands; both the Navajo Nation and the Hopi Tribe authorize rights-of-way for power transmission lines on tribal lands. *Ibid.* The Mine is now owned by respondent Navajo Transitional

Energy Company (NTEC), a Navajo corporation created for the purpose of purchasing the Mine from its previous owner. *Id.* at 6a. The Mine and Power Plant provide significant revenue to the Navajo Nation. *Id.* at 7a.

The Mine and Power Plant have operated since the 1960s. Pet. App. 6a. Together they are a major source of pollution in the southwest United States, in the country as a whole, and in the Western Hemisphere. Residents of the "Four Corners" region (which includes parts of Arizona, Colorado, New Mexico, and Utah, as well as multiple Indian reservations), where the Mine and Power Plant are located, suffer elevated levels of lung disease and severely compromised public health. C.A. E.R. 14, 38, 46-47. Multiple native species of fish are endangered and on the brink of extinction because the San Juan River in which they live is polluted with mercury and selenium from the Power Plant. In addition, the Plant's withdrawal of water from the River directly and indirectly harms those species. *Id.* at 14-15, 36, 40-43. The Power Plant has long been one of the largest sources of air pollution in the United States. *Id.* at 38. The enormous pollution plume from the Power Plant was one of the first man-made phenomena observed by astronauts from outer space. *Ibid.* Together, the Power Plant and the neighboring San Juan Generating Station coal-fired plant constitute the largest source of air pollution in the Western Hemisphere. *Ibid.*

Pollution produced by the coal complex imposes immense monetary costs on the public, in addition to the public-health and environmental costs. According to estimates from federal respondent Office of Surface Mining Reclamation and Enforcement (OSM), the

cumulative social cost (which measures, *inter alia*, expected effects on agriculture, human health, ecosystems, and property values) from carbon emissions resulting from the complex will be between $4.8 and $46.3 billion over the life of the permits at issue here.[2] That estimate does not include costs from other types of pollution emitted from the complex.

b. The Mine and Power Plant, along with the associated network of transmission lines, operate pursuant to various permits from federal agencies, including a surface mining permit issued by OSM, pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq*. Pet. App. 6a-7a. In 2011, APS and the Navajo Nation amended the lease governing operation of the Power Plant. *Id.* at 7a-8a. The changes extended the term of the lease through 2041. *Id.* at 7a. BHP Billiton (the owner of the mine at the time) sought a renewal of the existing surface mining permit for the Mine and sought a new surface mining permit that would authorize mining activities in a new area within the larger area covered by the mine lease. *Id.* at 7a-8a.

The requests to renew and expand the mining operations and to extend the Power Plant lease and rights-of-way required approval of several bureaus within the Department of the Interior. Pet. App. 8a-9a. Governing law required the federal agencies to prepare an environmental impact statement pursuant

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[2] OSM, *Final Environmental Impact Statement for the Four Corners Power Plant and Navajo Mine Energy Project* 4.2-25 to 4.2-27 & tbl. 4.2-18b (May 2015), https://www.wrcc.osmre.gov/initiatives/fourCorners/documents/FinalEIS/Section%204.2%20-%20Climate%20Change.pdf.

to NEPA and required the Fish and Wildlife Service to prepare a biological opinion pursuant to the ESA, to ensure that the action would not jeopardize the continued existence of listed species. *Ibid.* In July 2015, the agencies issued a Record of Decision, and the Deputy Secretary of the Interior then approved the permit renewal and extension. *Id.* at 9a.

3. In 2016, petitioners—a coalition of tribal, regional, and national conservation organizations whose members are harmed by pollution from the coal complex and adverse effects on the endangered species—filed this action against the federal agencies and officials responsible for approving the permit renewal and extension, alleging that various agency actions violated NEPA and the ESA. Pet. App. 9a-10a. Petitioners filed the suit pursuant to the APA provisions that authorize a federal district court to review final agency action and to grant non-monetary relief when an action is found to be, *inter alia*, arbitrary, capricious, or otherwise contrary to law. *See* C.A. E.R. 18. Petitioners also invoked the provision of the ESA authorizing citizen suits. *Ibid.* Petitioners sought only declaratory and injunctive relief against the federal defendants, including an order remanding the matter to the responsible agencies for further analysis required by the ESA and by NEPA. Pet. App. 10a. Petitioners did not seek to cancel or modify any contract to which either NTEC or the Navajo Nation is a party. C.A. E.R. 68-69.

After the federal defendants filed an answer (which included a request to dismiss the action), APS intervened. Pet. App. 10a. NTEC also sought to intervene for the limited purpose of filing a motion to dismiss pursuant to Federal Rules of Civil Procedure

12(b)(7) and 19. *Id.* at 10a-11a. The district court granted NTEC's motion to intervene as of right because NTEC now owns the Mine. *Id.* at 11a. NTEC then filed a motion to dismiss petitioners' claims, arguing that it is a required party due to its economic interest in the Mine, that it cannot be joined because it has tribal sovereign immunity, and that petitioners' action could not proceed in the absence of NTEC. *Ibid.*; *id.* at 36a. Although dismissal of the case would have left the challenged agency actions in place, the federal defendants joined petitioners in opposing the motion to dismiss, arguing that the federal government is the only required party in an action seeking to enforce federal compliance with NEPA and the ESA. *Id.* at 11a.

The district court granted NTEC's motion to dismiss. Pet. App. 34a-43a. The court concluded that NTEC has a legally protected interest in the subject matter of the suit under Rule 19(a)(1)(B), which defines the parties that are "[r]equired" parties who must be joined if feasible. *Id.* at 36a; Fed. R. Civ. P. 19(a)(1)(B). The court acknowledged that the federal defendants and NTEC "both advocate for defending Federal Defendants' decisions which provide for the continued operation of the Navajo Mine and the" Power Plant. Pet. App. 39a. The court nevertheless held that the federal defendants could not adequately represent NTEC's interest in the litigation because they might someday offer different arguments in defense of the challenged federal actions. *Ibid.* And the court concluded that NTEC could not feasibly be joined as a party due to its tribal sovereign immunity. *Id.* at 39a-41a. Acknowledging that Rule 19 allows a suit to proceed without a required party when a court

determines that, "in equity and good conscience, the action should proceed among the existing parties," Fed. R. Civ. P. 19(b), the district court concluded that the suit could not proceed without NTEC because of NTEC's tribal sovereign immunity. Pet. App. 41a-42a.

4. Petitioners appealed, and the Ninth Circuit affirmed. Pet. App. 1a-33a. On appeal, the federal defendants participated as amicus curiae supporting petitioners' request that the court of appeals reverse the district court's dismissal order. *Id.* at 28a n.8.

The court of appeals agreed with the district court that NTEC has a legally protected interest in the subject matter of this suit. Pet. App. 13a-18a. Although the court of appeals recognized both that a legally protected interest must be "more than a financial stake," *id.* at 14a (citation omitted), and that "an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures," *id.* at 15a, the court concluded that NTEC's interest in the lease renewal and extension is legally protected and could be impaired because the suit "may have retroactive effects on approvals already granted for mining operations," *id.* at 17a.

Distinguishing this case from earlier cases in which the court had held that a party that stands to benefit from a federal agency action is *not* a required party in a suit to challenge the federal agency's compliance with procedural requirements, the court of appeals held that "an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted." Pet. App. 15a; *see id.* at 15a-18a. The court thus held that a party that stands to benefit from "*already approved*" agency action, *id.*

at 15a n.6, has a legally protected interest in any action challenging the agency's compliance with procedural requirements in approving the action. Applying that principle to this case, the court concluded that NTEC is a required party because of its financial stake in the already-approved mining operations, which could be delayed or disrupted if petitioners succeed in their procedural claims. *Id.* at 17a-18a.

The court of appeals also held that no existing party adequately represents NTEC's interest in the litigation. Pet. App. 18a-23a. The court acknowledged that the federal defendants shared NTEC's interest in defending the challenged agency action, but concluded that that shared interest was insufficient because of the government's "overriding interest . . . in complying with environmental laws such as NEPA and the ESA." *Id.* at 21a. The court also held that NTEC could not feasibly be joined in the suit because, as an arm of the Navajo Nation, it enjoys tribal sovereign immunity. *Id.* at 23a-24a.

Having thus determined that NTEC is a required party that cannot feasibly be joined, the court of appeals turned to the question "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Pet. App. 25a (quoting Fed. R. Civ. P. 19(b)). Considering the factors enumerated in the Rule, the court of appeals affirmed the district court's conclusion that the suit could not proceed without NTEC. *Id.* at 25a-33a. The court of appeals rejected the request from petitioners and the United States to apply the so-called "public-rights" exception, which permits litigation to proceed without a required party when the suit seeks to vindicate a public right. *Id.* at 28a-33a; *see Nat'l Licorice*, *supra*. The

court acknowledged that petitioners "seek only a renewed NEPA and ESA process," but concluded that, because "the implication of their claims is that Federal Defendants should not have approved the mining activities in their exact form," the suit "threatens NTEC's legal entitlements." Pet. App. 33a.

5. Petitioners filed a timely petition for rehearing en banc. After calling for a response, the Ninth Circuit denied the petition on December 11, 2019. Pet. App. 44a-45a.

REASONS FOR GRANTING THE WRIT

The courts of appeals are divided about an important and recurring question of federal administrative and procedural law. In the Ninth Circuit, private litigants are foreclosed from challenging federal agency action that benefits entities that cannot be made parties to an APA action or other actions seeking relief only against the federal government. That means that federal agencies can ignore requirements of environmental laws like the National Environmental Policy Act and the Endangered Species Act when approving activities on tribal land or undertaken by tribal entities—because such activities benefit Indian tribes or tribally owned businesses that cannot be joined because of tribal sovereign immunity. Even the United States, which could rely on the Ninth Circuit's rule to avoid legal challenges to its actions on tribal lands, does not welcome that regime. To the contrary, the United States *opposed* NTEC's motion to dismiss under Federal Rule of Civil Procedure 19, even while pursuing its own substantive request to dismiss the action. *See* Pet. C.A. Br. 7; Pet. App. 28a n.8.

This Court's immediate intervention is warranted because the existing circuit split involves jurisdictions comprising a vast majority of federally owned and Indian lands. The Ninth Circuit's decision directly conflicts with decisions of at least three other courts of appeals, including the Tenth and D.C. Circuits. More than 74 percent of federally owned land is located in the Ninth Circuit, and more than 90 percent of federally owned land is located in the combined territory covered by the Ninth and Tenth Circuits. Congressional Research Serv., R42346, *Federal Land Ownership: Overview and Data* 7-9 tbl. 1, 20 tbl. 5 (Feb. 21, 2020).[3] In addition, nearly all Indian land is found in the territory covered by the Ninth and Tenth Circuits. U.S. Dep't of Agric., *Forest Service National Resource Guide to American Indian and Alaska Native Relations* 6, D-3 tbl. 2 (Apr. 1997).[4] Because most APA suits can be filed in the District of Columbia, which is home to many federal agencies, a conflict about the application of NEPA and the ESA that involves the Ninth, Tenth, and D.C. Circuits need not deepen any further to warrant this Court's review.

I. The Decision Below Directly Conflicts With Decisions Of Multiple Federal Courts Of Appeals.

Petitioners filed this action against federal agencies and officials, seeking to compel compliance with federal environmental laws that govern the actions of federal agencies only. Petitioners did not seek to

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[3] https://fas.org/sgp/crs/misc/R42346.pdf.

[4] https://www.fs.fed.us/spf/tribalrelations/documents/publications/national-resource-guide-ver2.pdf.

cancel or to modify any contract; petitioners did not seek to compel any particular agency action with respect to the permit applications at issue. Petitioners seek only declaratory and injunctive relief against federal defendants, compelling compliance with requirements of federal environmental laws. If petitioners had filed this suit in the Tenth or D.C. Circuit, the suit would have proceeded to consideration of the federal defendants' substantive request to dismiss the action and, potentially, beyond. Instead, the Ninth Circuit dismissed the action—over the objection of the federal defendants—on the ground that the suit cannot proceed without NTEC, a tribal entity that enjoys tribal sovereign immunity. But petitioners seek to enforce federal statutory obligations that apply *only* to federal entities. Petitioners seek no relief against NTEC—and any interest NTEC has in the lower courts' upholding the challenged federal actions overlaps completely with the federal defendants' own interest in the same. This Court should grant this petition to resolve the circuit conflict on this important and recurring issue.

A. The Ninth Circuit's decision is a departure from ordinary rules applicable to actions challenging a federal agency's compliance with statutory requirements governing its decisional processes. Such suits, which are ordinarily filed pursuant to the APA, seek relief only from federal agencies and officials; they do not seek to alter any contractual rights of absent parties; and they do not (and could not) seek to impose obligations on any absent non-federal entities. Such suits, moreover, seek to enforce important public rights, including compliance with nationwide rules designed to protect our environment and endangered

species. The Ninth Circuit recognized as much, noting that petitioners' APA action is a challenge "to Federal Defendants' NEPA and ESA processes (rather than to anything that NTEC has done)." Pet. App. 17a. But the court held that "an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted." *Id.* at 15a. The court placed dispositive weight on the fact that approval for the mining operations at issue had "already [been] granted" when the suit was filed. *Ibid.* The court thus distinguished this case from other cases in which it had held that a party that stands to benefit from federal agency action is not an indispensable party in a suit challenging agency action when the action is merely "pending" (but not yet approved) or where the plaintiff seeks prospective relief governing future agency actions. *Id.* at 15a-18a (distinguishing *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 469 (9th Cir. 1986); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990); *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 974 (9th Cir. 2008)).

Although the Ninth Circuit recognized that NTEC and the federal defendants have the *same* interest in having the challenged agency actions upheld, the court held that the federal defendants cannot adequately represent NTEC's interest because NTEC and the federal government would derive different *benefits* from a successful defense of the challenged agency actions. Pet. App. 22a ("[W]hile Federal Defendants have an interest in defending their own analyses that formed the basis of the approvals at issue, here they do not share an interest in the *outcome* of the

approvals—the continued operation of the Mine and Power Plant."). The Ninth Circuit did not identify any argument in defense of the challenged actions that NTEC would make but the federal defendants would not; indeed, such an argument is difficult even to hypothesize because the federal defendants have all the information and expertise relevant to petitioners' procedural claims challenging the federal defendants' actions.

Finally, the Ninth Circuit declined to apply the principles of this Court's public-rights exception to ordinary joinder rules or to otherwise hold that, "in equity and good conscience," Fed. R. Civ. P. 19(b), the suit should proceed. Pet. App. 25a-33a. The court reasoned that NTEC would be prejudiced if (1) the courts determined that the permits were approved in violation of federal law and then (2) the federal defendants, after complying with NEPA and the ESA, "were not able to come to the same decisions without imposing new restrictions or requirements on the Mine or Power Plant." *Id.* at 27a. In other words, the court held that the suit could not proceed in part because it might ultimately result in eliminating a benefit that NTEC has *no* legal entitlement to because it does not conform to federal law. The court declined to apply the public-rights exception because enforcing national environmental law *might* harm NTEC's "entitlement[]" to benefits resulting from permit approvals if such approvals were issued in violation of law. *Id.* at 32a.

At each step of the analysis, the Ninth Circuit created law that conflicts with the law of other courts of appeals. In particular, the decision below directly conflicts with decisions of three other courts of appeals and is in serious tension with decisions from two

additional circuits. As discussed below at pp. 22-23, *infra*, moreover, the existing direct conflict warrants immediate resolution because it implicates nearly all federally owned and public lands and because it is not likely to resolve itself.

B. The Ninth Circuit's holding that NTEC is a necessary and indispensable party directly conflicts with decisions of the Seventh, Tenth, and D.C. Circuits.

1. The Seventh Circuit has rejected arguments materially identical to those adopted below. In *Thomas v. United States*, that court considered an APA challenge by tribal members to a federal agency's administration of a tribal election, alleging, *inter alia*, that the agency had violated procedural requirements governing the timing of agency action. 189 F.3d 662, 664 (7th Cir. 1999). When the suit was filed, the election had already occurred, resulting in the adoption of two amendments to the tribe's constitution, one of which altered the rules governing tribal membership. *Id.* at 665. There, like here, the agency action was complete before the suit was filed and the tribal entity had taken action in reliance on the challenged agency approval. As the district court did in this case, the district court in *Thomas* dismissed the suit because the tribal government was not a party and could not be made one due to its sovereign immunity. *See id.* at 666. But unlike in this case, the Seventh Circuit reversed. Acknowledging that the tribe "ha[d] a strong interest in matters . . . related to membership," including the agency action at issue in the case, *id.* at 668, the Seventh Circuit nevertheless held that the tribe was not a necessary party because, "[a]t its base, th[e] lawsuit [wa]s a challenge to the way certain

federal officials" performed functions assigned by law to them, *id.* at 667. The Seventh Circuit explained, moreover, that the absent tribe could have "advocate[d] for its interest by participating" in the suit as amicus curiae. *Id.* at 669.

Precisely the same considerations apply in this case: although NTEC has a financial interest in the activities authorized by the permits issued by the federal defendants, this suit challenges only the manner in which federal agencies and officials performed duties assigned to *them* by NEPA and the ESA in the course of issuing the permits. If this suit had arisen in the Seventh Circuit, it would not have been dismissed. And here, as in the Seventh Circuit, NTEC could have protected its interests—if indeed they do diverge from those of the federal defendants—by participating as amicus curiae without waiving its tribal sovereign immunity.

2. a. The Tenth Circuit has similarly rejected the approach adopted by the Ninth Circuit below. In *Kansas v. United States*, 249 F.3d 1213, 1220 (10th Cir. 2001), the State of Kansas filed an APA suit challenging federal agency action declaring certain lands to be "Indian lands" within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* The challenged agency action in that case was complete, and the plaintiff State argued that the agency had not complied with certain procedural requirements in taking the challenged action. 249 F.3d at 1219-1220, 1229. The Tenth Circuit rejected a non-party tribe's argument that the case should be dismissed because its interest in the relevant land made it a required and indispensable party. The court explained that, because the plaintiff's claims "focus[ed] on the propriety

of an agency decision," *id.* at 1226, the tribe's presence as a party was not necessary.

The Tenth Circuit relied on its then-recent decision in *Sac & Fox Nation of Missouri v. Norton*, which similarly held that an absent Indian tribe was not a necessary or indispensable party in an APA suit challenging a federal agency's in-progress decision to take land into trust for a non-party tribe on grounds that the decision-making process violated NEPA and other statutes. 240 F.3d 1250, 1253, 1257 (10th Cir. 2001); *see Kansas*, 249 F.3d at 1226-1227. The court explained that because each suit "turn[ed] solely on the appropriateness of the [agency's] actions, and the [agency] [wa]s clearly capable of defending those actions," no other party that might benefit from the challenged action was required. *Sac & Fox Nation*, 240 F.3d at 1260; *see Kansas*, 249 F.3d at 1226. Those holdings directly conflict with the decision below.

b. The decision below also conflicts with the Tenth Circuit's approach to the public-rights "exception" to joinder rules now embodied in Rule 19(b). The court invoked the principles underlying that doctrine in *Manygoats v. Kleppe*, an APA suit challenging a federal agency's NEPA compliance in a completed action approving mine exploration on tribal land. 558 F.2d 556, 558-559 (10th Cir. 1977). Like the Ninth Circuit in this case, the Tenth Circuit held that the non-party tribe on whose lands the permit authorized mining was a required party, even though the suit challenged only the propriety of federal agency action. *Id.* at 557-558. But in *conflict* with the decision below, the Tenth Circuit held that the suit need not be dismissed in the absence of the tribe (which could not be joined because of its immunity to suit). *Id.* at 558-559. The court

explained that the plaintiffs sought a declaration that the agency's NEPA analysis was inadequate and an order for additional analysis by the agency, *id.* at 558—just like petitioners in this case. Because the plaintiffs did not "call for any action by or against the Tribe," the court explained, the suit could proceed without the tribe. *Id.* at 558-559. The Ninth Circuit reached the opposite conclusion in this case.

As the Tenth Circuit explained, a position like that adopted by the Ninth Circuit in this case produces an untenable result: "No one, except the Tribe, c[an] seek review of an environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on Indian lands." *Manygoats*, 558 F.2d at 559. That approach has the effect of "except[ing] Indian lands from national environmental policy," a result directly at odds with NEPA, which "is concerned with national environmental interests." *Ibid.* The court reached a similar conclusion in *Southern Utah Wilderness Alliance v. Kempthorne*, explaining that energy companies that benefited from challenged agency action "were not indispensable parties" in a NEPA suit that "fell within the 'public rights exception' to joinder rules," including Rule 19. 525 F.3d 966, 969 n.2 (10th Cir. 2008).[5]

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[5] The Tenth Circuit held in *Citizen Potawatomi Nation v. Norton* that a district court did not abuse its discretion in dismissing an Indian tribe's suit against federal defendants because other tribes were indispensable parties that could not be joined. 248 F.3d 993, 1000-1001 (10th Cir. 2001). Although the plaintiff tribe challenged federal agency action, it sought relief that would have diverted money from the absent tribes' pockets into its own

3. The decision below also conflicts with a decision of the D.C. Circuit. In *Ramah Navajo School Board, Inc. v. Babbitt*, the D.C. Circuit held that, even if an absent tribe had a protectable interest in the subject of a suit, it was not an indispensable party because it shared the government defendant's interest in defending the challenged agency action. 87 F.3d 1338, 1351 (D.C. Cir. 1996). In that case, tribal contractors sued the Department of the Interior under the APA, challenging the Department's compliance with procedural rules governing the adoption of new methods of distributing certain funds allocated for Indian tribes. *Id.* at 1341-1343. The federal defendants argued that the suit could not proceed without joining tribes that benefitted from the agency's completed allocation decision—and that the suit must be dismissed because those tribes could not be joined. *Id.* at 1343, 1350. The D.C. Circuit rejected that argument, holding that the absent tribes were not indispensable parties because their only interest was in having funds distributed according to the agency's challenged allocation. *Id.* at 1351. That is the opposite of what the Ninth Circuit held in this case.

In this case and in *Ramah Navajo School Board*, the absent tribe and the federal defendant shared an interest in defending the challenged agency action. 87 F.3d at 1351; Pet. App. 21a-22a. In the D.C. Circuit, that was sufficient to allow the suit to proceed without the absent tribe. But in this case, the Ninth Circuit

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pockets. *Id.* at 995-996. The balance of interests in that type of case is distinct from that at issue here; petitioners seek to compel the federal defendants' compliance with federal law, but do not seek to transfer anything of value from the absent tribal entity's pockets into their own.

upheld dismissal of the case because the absent tribe had an interest not only in upholding the agency action but in enjoying the benefits that would flow to the tribe as a result of that action. Pet. App. 22a. That is not a distinction. The *only* reason the tribe in either case had an interest in the challenged agency action was because the tribe benefited from the activities approved by that action: distribution of funds in the D.C. Circuit and continued operation of the Mine in this case. If this case had been filed in the D.C. Circuit, it would not have been dismissed under Rule 19.[6]

4. The direct circuit conflict created by the decision below warrants this Court's immediate intervention because nearly all APA actions challenging federal agencies' compliance with procedural requirements on federal or Indian lands will be filed in the Ninth, Tenth, or D.C. Circuits. Together, the Ninth and Tenth Circuits contain 90 percent of federal lands and nearly all Indian lands. *See* p. 13, *supra*. Agency action approving activity on federal and Indian lands

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[6] The D.C. Circuit rejected a similar argument in *Hoopa Valley Tribe v. FERC*, in which a tribe challenged a decision by the Federal Energy Regulatory Commission under the Clean Water Act and a non-party State sought dismissal under Rule 19. 913 F.3d 1099, 1102-1103 (D.C. Cir. 2019). The court first noted that Federal Rule of Appellate Procedure 15—not Rule 19—governed petitions for review of agency action filed directly in the D.C. Circuit. *Id.* at 1103. But the court also explained that the State's indispensable-party argument was "incompatible with precepts of federalism" because the tribe's petition for review did not involve any action taken by the State, "but rather *a federal agency's order*," the propriety of which required only "the interpretation of federal law." *Ibid.* The same principles apply in this case and should have resulted in the Ninth Circuit's rejection of NTEC's arguments.

is therefore overwhelmingly likely to be challenged in those two circuits. The only other court of appeals with a significant number of APA actions of this sort is the D.C. Circuit, the home for venue purposes of most federal agencies. *See* 28 U.S.C. § 1391(e)(1). The direct conflict between the Ninth and D.C. Circuits in particular is untenable because it will promote forum shopping: when a plaintiff seeking to challenge agency action on Indian land has the option of filing suit in the District of Columbia rather than in the Ninth Circuit, it will likely do so, increasing litigation burdens on plaintiffs that reside in the Ninth Circuit and on non-party tribes that may wish to participate as amici.

There is also no likelihood that this conflict will resolve itself. Petitioners sought rehearing en banc in the Ninth Circuit, in part on the ground that the decision below created a conflict with the Tenth and D.C. Circuits. C.A. Pet. for Reh'g 14-15. The Ninth Circuit called for a response, but "no judge" "requested a vote on whether to rehear the matter en banc." Pet. App. 45a. The Ninth Circuit is fully committed to its position.

C. In addition to directly conflicting with decisions of the Seventh, Tenth, and D.C. Circuits, the Ninth Circuit's decision is also in tension with decisions of the Sixth and Eleventh Circuits, each of which has rejected similar Rule 19 arguments in cases challenging the validity of federal laws or regulations.

1. In *School District of Pontiac v. Secretary of the U.S. Department of Education*, the Sixth Circuit considered a challenge to the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, filed by local school districts and education associations that

received federal funding under the law through programs administered by States. 584 F.3d 253, 256-258 (6th Cir. 2009) (en banc). The en banc court rejected an argument that the suit could not proceed without joining the States, which could not be joined against their will because they enjoy sovereign immunity. *Id.* at 264-268. The Court explained that, although the States may have had an interest in the outcome of the suit, they were not necessary parties because any interest was adequately represented by an existing party. *Id.* at 266. The court noted that any State concerned that its interest might not be adequately represented could participate as amicus curiae without waiving its sovereign immunity. *Ibid.* Finally, the en banc court explained that viewing the States as indispensable parties "would have the undesirable effect of foreclosing a vast category of challenges to federal laws" by requiring dismissal of private suits challenging a federal law (or, presumably, a federal action) that would affect a State's interests. *Id.* at 268. The Ninth Circuit rejected similar reasoning in this case.

2. The Eleventh Circuit adopted a similar approach in a related context. In *Jeffries v. Georgia Residential Finance Authority*, a class of public housing residents sued federal and state agencies, challenging a federal regulation. 678 F.2d 919, 921 (11th Cir. 1982). The Eleventh Circuit rejected an argument that the suit must be dismissed in the absence of landlords that administered the public-housing program governed by the challenged regulation. *Id.* at 927-929. The court explained that, because the suit challenged "regulations promulgated by [the U.S. Department of Housing and Urban Development]," not "the propriety" of any landlord's actions, absent landlords were

not indispensable, even if their interests might be affected by the outcome of the suit. *Id.* at 928-929. Because the defendant agencies "advanced the same position as the absent landlords" in defending the regulation, the suit could proceed without the landlords. *Id.* at 928. The court also held in the alternative that, even if the absent landlords' rights might be adversely affected by the suit, "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 (citing *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350 (1940)). If the Ninth Circuit had adhered to that reasoning, it would have reversed the district court's dismissal of this suit.

II. The Question Presented Warrants This Court's Immediate Review.

A. The question presented is exceedingly important, particularly in the context of enforcing federal environmental protections. It will now be impossible in the Ninth Circuit to challenge federal agencies' compliance with laws like NEPA and the ESA—which impose procedural and deliberative requirements intended to protect the human environment and at-risk species—when those actions affect Indian lands or the financial interests of tribes more generally. As illustrated by this case, the consequence will be a concentration of adverse environmental effects in communities of Indians who live on Indian land. Members of those communities already suffer from a disproportionate share of health and economic problems. *E.g.*, U.S. Dep't of Health & Human Servs., Office of

Minority Health, *Profile: American Indian/Alaska Native*.[7] Those problems could materially worsen if federal agencies' compliance with environmental protections like NEPA and the ESA is no longer reviewable in the Ninth Circuit, where a substantial portion of Indian lands are found.

In addition, precluding review of federal agencies' compliance with federal environmental laws on Indian lands and other lands that affect the interests of tribally owned businesses will adversely affect surrounding lands as well. Air and water pollution do not remain within the jurisdictional boundaries of the lands from which they originate. Harm to the environment—not to mention harm to at-risk species—will be felt by all who have an interest in the surrounding natural environment and in the harmed species. Under the logic of the decision below, private citizens would be unable to invoke judicial review if a federal agency approved an action on Indian lands that would result in the extinction of a protected species. *That* is certainly not what Congress intended.

Such a result is directly contrary to Congress's intent in enacting those laws. In NEPA itself, Congress expressly declared its intent to "assure for *all Americans* safe, healthful, productive, and esthetically and culturally pleasing surroundings," and "recognize[d] that *each person* should enjoy a healthful environment and that *each person* has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. § 4331(b)(2), (c) (emphases added). NEPA does not exempt communities on or near Indian

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[7] https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlID=62 (last modified Mar. 28, 2018).

lands from its protections. The ESA is similarly intended to preserve "the ecosystems upon which endangered species and threatened species depend" throughout the country. 16 U.S.C. § 1531(b). Nothing about the statute's text or purpose would suggest that federal actions involving Indian lands or tribal financial interests more broadly are exempt from compliance with the ESA.

To make matters worse, the problems created by the decision below may not be limited to Indian lands and tribal interests. Already, the State of Arizona has relied on the decision below to seek dismissal of a suit challenging a federal agency's failure to comply with environmental laws in allowing disposal of lead ammunition in a national forest. State of Arizona Br., *Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. 12-cv-08176 (D. Ariz. Nov. 12, 2019). The State contends that compliance with the federal laws would interfere with the State's authority to regulate hunting on federal lands—and urges dismissal of the suit rather than adjudication of that issue because its assertion of an interest "is not 'patently frivolous,'" *id.* at 4 (quoting *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992)), and because the State is immune to suit, *id.* at 11-12. This Court's immediate intervention is warranted to prevent immune entities from rendering federal agency action unreviewable where Congress plainly intended the opposite.

This Court has explained that the APA "creates a 'basic presumption of judicial review [for] one "suffering legal wrong because of agency action."'" *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). When no such review is available—

and thus "no consequence[s]" result from violations—"legal lapses and violations occur" more often. *Ibid.* (quoting *Mach Mining LLC v. EEOC*, 135 S. Ct. 1645, 1652-1653 (2015)). Where, as here, no statute precludes review and the challenged action is not committed to agency discretion by law, the Court has "long applied a strong presumption favoring judicial review of administrative action." *Ibid.* (quoting *Mach Mining*, 135 S. Ct. at 1653). The decision below turns that presumption on its head by precluding judicial review based on the possibility of a future hypothetical disagreement between the federal defendants and a tribal entity.

The direct conflict between the Ninth Circuit's approach to Rule 19 in suits against federal agencies to enforce procedural rights and the approach of at least three other circuits is untenable. Statues like NEPA, the ESA, and other provisions enforced through APA suits and citizen suits directed at federal agencies apply nationwide standards governing the manner in which federal agencies make decisions. Although some plaintiffs may seek to avoid the consequences of the decision below by filing in the District of Columbia rather than in a court within the Ninth Circuit, that type of forum shopping simply highlights the problem with the existing circuit conflict. Together, the APA, NEPA, and the ESA (along with other statues imposing requirements on federal agency decision-making) provide a nationwide system of judicial review of agency actions. That system should apply uniformly throughout the country.

B. Review is also warranted because the decision below is wrong.

Even assuming that NTEC's financial interest in the activity authorized by the permits is sufficient to be cognizable under Rule 19, the Ninth Circuit erred in concluding that NTEC's "ability to protect th[at] interest" would "as a practical matter" be "impair[ed] or impede[d]" if the suit were to proceed without joining NTEC as a party. Fed. R. Civ. P. 19(a)(1)(B)(i). NTEC's *only* "interest relating to the subject of th[is] action," Fed. R. Civ. P. 19(a)(1)(B), is its interest in having the challenged agency action upheld. That is *the same* interest that the federal defendants have. Indeed, the federal defendants had already filed a substantive request to dismiss this action, strongly indicating that any implicated tribal interest would not be impaired by the tribe's absence as a party.

The Ninth Circuit therefore erred in concluding that the federal defendants would not adequately represent NTEC's interests. The court did not identify *any* argument in defense of the agency actions that NTEC would make but the federal defendants would not. If this action were permitted to proceed, the inquiry would focus on the record and deliberative processes employed by the federal agencies in taking the challenged actions and in particular on whether *those agencies* adequately considered impacts on endangered species and other natural resources. NTEC has no special expertise relevant to that inquiry, and the substantive defense of the agencies' compliance with federal law must rise or fall on the basis of the *agencies'* proffered justifications. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); *see also Nat. Res. Def. Council, Inc. v. Tenn. Valley Auth.*, 340 F. Supp. 400, 408 (S.D.N.Y. 1971) (holding that participation by coal

producers in NEPA action would not "elucidate the issue in the case," *i.e.*, "whether [the agency] followed the dictates of NEPA," because "[t]hey would have to take positions about [agency] procedures and [agency] estimates of environmental harms, topics on which they have no special knowledge"), *rev'd on other grounds*, 459 F.3d 255 (2d Cir. 1972).

NTEC can also protect its interests by participating as amicus curiae without waiving its tribal sovereign immunity. *Thomas*, 189 F.3d at 669; *Sch. Dist. of Pontiac*, 584 F.3d at 266. NTEC's interests are further protected by the presence in the action of intervenor APS, NTEC's partner in the Power Plant operation.

The Ninth Circuit identified only one potential divergence between the federal government's interests and NTEC's, explaining that, unlike NTEC, the federal defendants have an "overriding interest" in "complying with environmental laws such as NEPA and the ESA." Pet. App. 21a. But that is no basis for holding that NEPA and the ESA cannot be enforced against federal agencies when they do not comply. Under the Ninth Circuit's logic, the federal defendants' interests would diverge from NTEC's interests *only* if the permits were in fact authorized in violation of NEPA and the ESA. But NTEC has no legally protected interest in retaining permits that were issued in violation of federal law. Although NTEC would retain a financial interest in operating a mine pursuant to illegally issued permits, that is surely not the type of interest that requires dismissal under Rule 19.

The decision below also ignores this Court's public-rights exception to ordinary joinder rules, which is now reflected in Rule 19(b). The Court established in *National Licorice* that where, as here, a proceeding is

"narrowly restricted to the protection and enforcement of public rights, there is little need for the traditional rules governing the joinder of parties in litigation determining private rights." 309 U.S. at 363. Like the petitioner in that case, here "the right asserted by [petitioners] is not one arising upon or derived from the contracts between" the federal defendants and NTEC. *Id.* at 364. And, as in that case, the public rights created by NEPA and the ESA do not countenance protection of NTEC's "enjoyment of any advantage which [it] has gained by violation of th[ose] Act[s]." *Ibid.* Petitioners' action "is directed solely to the" federal defendants and leaves NTEC "free to assert such legal rights as [it] may have acquired" under the issued permits. *Id.* at 366. Under this Court's decision in *National Licorice*, the Ninth Circuit therefore erred in concluding that NTEC is an indispensable party.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 24, 2020

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT; SAN JUAN CITIZENS ALLIANCE; AMIGOS BRAVOS; SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY, *Plaintiffs-Appellants*, v. BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT; UNITED STATES BUREAU OF LAND MANAGEMENT; DAVID BERNHARDT,* IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF INTERIOR; UNITED STATES FISH AND WILDLIFE SERVICE, *Defendants-Appellees*, ARIZONA PUBLIC SERVICE COMPANY; NAVAJO TRANSITIONAL ENERGY COMPANY LLC, *Intervenor-Defendants-Appellees*	No. 17-17320 D.C. No. 3:16-cv-08077-SPL OPINION

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* David Bernhardt has been substituted for his predecessor, Sally Jewell, under Fed. R. App. P. 43(c)(2).

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

Argued and Submitted March 7, 2019
Phoenix, Arizona

Filed July 29, 2019

Before: Sandra S. Ikuta and Michelle T. Friedland, Circuit Judges, and Frederic Block,[**] District Judge.

Opinion by Judge Friedland

SUMMARY[***]

Joinder / Tribal Sovereign Immunity

The panel affirmed the district court's dismissal, pursuant to Federal Rules of Civil Procedure 19 and 12(b)(7), of an action brought by a coalition of tribal, regional, and national conservation organizations who sued the United States Department of the Interior, its Secretary, and several bureaus within the agency, challenging a variety of agency actions that reauthorized coal mining activities on land reserved to the Navajo Nation.

[**] The Honorable Frederic Block, United States District Judge for the Eastern District of New York, sitting by designation.

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Plaintiffs alleged that the agency actions violated the Endangered Species Act and the National Environmental Policy Act. The Navajo Transitional Energy Company, a corporation wholly owned by the Navajo Nation that owns the Navajo Mine, intervened in the action for the limited purpose of moving to dismiss under Rules 19 and 12(b)(7). The Navajo Transitional Energy Company asserted that it was a required party but that it could not be joined due to tribal sovereign immunity, and that the lawsuit could not proceed without it.

The panel held that the Navajo Transitional Energy Company has a legally protected interest in the subject matter of this suit that would be impaired in its absence. The panel reasoned that if plaintiffs succeeded in their challenge and the agency actions were vacated, the Navajo Transitional Energy Company's interest in the existing lease, rights-of-way, and surface mining permits would be impaired. Without the proper approvals, the Mine could not operate, and the Navajo Nation would lose a key source of revenue in which the Navajo Transitional Energy Company had already substantially invested.

The panel next held that because no other party to the litigation could adequately represent the Navajo Transitional Energy Company's interests, the district court did not err in determining that the Company was a party that must be joined if feasible under Rule 19(a). The panel held that the Federal Defendants could not be counted on to adequately represent the Company's interests because although the Federal Defendants had an interest in defending their decisions, their overriding interest must be in complying with environmental laws. This interest differed in a

meaningful sense from the Navajo Transitional Energy Company's and the Navajo Nation's sovereign interest in ensuring that the Mine and the Four Corners Power Plant, which buys coals exclusively from the Mine, continued to operate and provide profits to the Navajo Nation. The panel further held that defendant, the Arizona Public Service Company, did not share the Navajo Nation's sovereign interests in controlling its own resources and in the continued operation of the Mine and Power Plant.

The panel held that due to tribal sovereign immunity, the Navajo Transitional Energy Company could not feasibly be joined as a party to this litigation. The panel held that the district court correctly determined that the Navajo Transitional Energy Company was an "arm" of the Navajo Nation that enjoyed the Nation's immunity from suit. The panel noted that the Company is wholly owned by the Navajo Nation and is organized pursuant to Navajo law. It was created specifically so that the Navajo Nation could purchase the Mine. Applying the Rule 19(b) factors, the panel held that the district court did not err in concluding that the litigation could not, in good conscience, continue in the Navajo Transitional Energy Company's absence.

The panel rejected plaintiffs' and United States' request to apply the "public rights" exception to hold that this litigation could continue in the National Transitional Energy Company's absence. The panel held that although plaintiffs nominally sought only a renewed National Environmental Policy Act and Endangered Species Act process, the implication of their claims was that Federal Defendants should not have approved the mining activities in their exact form. The result plaintiffs sought, therefore, threatened the

National Transitional Energy Company's legal entitlements, and accordingly, the public rights exception did not apply.

* * *

OPINION

FRIEDLAND, Circuit Judge:

A coalition of tribal, regional, and national conservation organizations ("Plaintiffs") sued the U.S. Department of the Interior, its Secretary, and several bureaus within the agency, challenging a variety of agency actions that reauthorized coal mining activities on land reserved to the Navajo Nation. Plaintiffs alleged that these actions violated the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* The Navajo Transitional Energy Company ("NTEC"), a corporation wholly owned by the Navajo Nation that owns the mine in question, intervened in the action for the limited purpose of moving to dismiss under Federal Rules of Civil Procedure 19 and 12(b)(7). NTEC argued that it was a required party but that it could not be joined due to tribal sovereign immunity, and that the lawsuit could not proceed without it. The district court agreed with NTEC and dismissed the action.[1] We affirm.

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[1] At the parties' joint request, we take judicial notice of the existence of the following documents and their contents: (1) Record of Decision for the Four Corners Power Plant and Navajo Mine Energy Project (July 14, 2015); (2) Final Environmental Impact Statement for the Four Corners Power Plant and Navajo

I.

A.

The Navajo Mine ("Mine") is a 33,000-acre strip mine. It produces coal from which the Four Corners Power Plant ("Power Plant") generates electricity. The Mine and Power Plant are both on tribal land of the Navajo Nation within New Mexico. The Mine operates pursuant to a surface mining permit issued by the Department of the Interior's Office of Surface Mining Reclamation and Enforcement ("OSMRE") under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq*. Transmission lines that distribute electricity from the Power Plant run west into Arizona through lands reserved to the Navajo Nation and Hopi Tribe. The Mine, Power Plant, and transmission lines were built in tandem and have operated since the early 1960s.

The Navajo Nation is a federally recognized Indian tribe with its seat of government in Arizona and territory spanning areas of Arizona, Utah, and New Mexico. For many years, the Navajo Nation granted a coal mining lease to BHP Billiton Navajo Coal Company ("BHP Billiton"), a private company that owned and operated the Mine. In 2013, the Navajo Nation Council created the Navajo Transitional Energy Company (again, "NTEC") for the purpose of purchasing the Mine from BHP Billiton.

Mine Energy Project (May 1, 2015); and (3) Environmental Assessment and Finding of No Significant Impact for Navajo Mine Permit Transfer Application, Navajo Reservation, New Mexico (Nov. 2013). *See Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 727 n.3 (9th Cir. 2015).

The Power Plant is owned by several utility companies, including Public Service Company of New Mexico, Tucson Electric Company, Salt River Project, and Intervenor-Defendant Arizona Public Service Company ("APS"). APS operates the Power Plant on behalf of all co-owners subject to a lease agreement, originally executed in 1960, with the Navajo Nation. Under the agreement, the Mine sells coal exclusively to the Power Plant, and the Power Plant buys its coal exclusively from the Mine. The Navajo Nation also authorizes easements for rights-of-way over Navajo lands for the Power Plant, and both the Navajo Nation and Hopi Tribe authorize easements for rights-of-way for power transmission lines that cross tribal lands.

The Mine and the Power Plant are key sources of revenue for the Navajo Nation. Under the federally approved leases and permits that are at issue in this case, operations at the Mine and the Power Plant are expected to generate between 40 and 60 million dollars per year in revenue for the Navajo Nation.

B.

This lawsuit stems from changes and renewals to the lease agreements, rights-of-way, and government-issued permits under which the Mine and Power Plant operate.

In 2011, APS and the Navajo Nation amended the lease governing Power Plant operations, including by extending the term of the lease through 2041. BHP Billiton (which at the time still owned the Mine) then sought a renewal of the existing surface mining permit for the Mine and a new surface mining permit that

would allow operations to move to an additional area within the Mine lease area.[2]

The lease amendment and accompanying rights-of-way could not go into effect, and the surface mining permits could not be granted, without approvals from several bureaus within the Department of the Interior. First, OSMRE needed to approve the surface mining permits. Second, approval by the Bureau of Indian Affairs ("BIA") was required to effectuate the lease amendment. Third, BIA had ultimate responsibility to grant the associated rights-of-way for the Power Plant facilities and transmission lines that the tribes had approved. Finally, approval of the Bureau of Land Management ("BLM") was required to ensure adequate resource recovery and protection on the tribal lands.

OSMRE took the lead on considering the approval requests for the Mine. It cooperated with BIA and BLM, as well as with two additional bureaus within the Department of the Interior: the National Park Service and the Fish and Wildlife Service ("Fish and Wildlife"). OSMRE also coordinated with the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the Navajo Nation, and the Hopi Tribe on the review process.

OSMRE engaged in formal consultation with Fish and Wildlife, as required by the ESA when a project "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). In April 2015, Fish and Wildlife completed formal consultation and issued a Biological Opinion concluding that the proposed action would not

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[2] When NTEC purchased the Mine from BHP Billiton, NTEC became the applicant for these permits.

jeopardize the continued existence of any of the threatened and endangered species evaluated. Relying on Fish and Wildlife's assessments in the Biological Opinion, OSMRE produced an Environmental Impact Statement ("EIS") in May 2015.

OSMRE and BIA issued a Record of Decision in July 2015, which included the approvals by OSMRE, BIA, and BLM necessary for the continued operation and expansion of the Mine. The Deputy Secretary of the Interior approved the decisions of each of these bureaus within the Department of the Interior.

Since obtaining the required permits and approvals, APS and NTEC have made significant financial investments in the Power Plant and Mine, including by implementing conservation measures required by the Record of Decision. NTEC also moved mining operations into the areas designated in the new surface mining permit.[3] Additionally, NTEC secured a new $115 million line of credit in July 2016 that paid off the original note with which NTEC had purchased the Mine, and that provided additional capital. This line of credit is secured by, among other things, the Mine itself as an asset of NTEC.

C.

In April 2016, the plaintiff conservation organizations sued BIA, OSMRE, BLM, Fish and Wildlife, and

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[3] Although the details of APS's and NTEC's investments and mining activities that have taken place since issuance of the Record of Decision are not before us, APS states in its brief that it and NTEC have invested hundreds of millions of dollars in upgrades, improvements, and conservation measures in reliance on the Record of Decision. Plaintiffs have not disputed this assertion.

the Department of the Interior, along with its Secretary (collectively, "Federal Defendants"). Plaintiffs challenged the opinions and approvals that authorized continued operations at the Mine and the Power Plant. Specifically, Plaintiffs alleged that Fish and Wildlife's Biological Opinion violated the requirements of the ESA, and that BIA, OSMRE, and BLM violated the ESA by relying on the faulty Biological Opinion in deciding to approve the activities at issue. Plaintiffs also alleged that Federal Defendants violated NEPA by crafting an unlawfully narrow statement of purpose and need for the project in the EIS, failing to consider reasonable alternatives, and failing to take the requisite "hard look" at various impacts of the mining complex. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989) ("NEPA . . . require[s] that agencies take a 'hard look' at the environmental effects of their planned action.").

Plaintiffs sought: (1) declarations that Federal Defendants violated NEPA and the ESA; (2) orders setting aside Fish and Wildlife's Biological Opinion and Federal Defendants' Record of Decision and EIS and remanding the matter to the agencies for further analysis; (3) prospective injunctive relief prohibiting Fish and Wildlife from authorizing any adverse modification to critical habitat for, or take of, two types of fish; and (4) prospective injunctive relief prohibiting Federal Defendants from authorizing any element of the mining operations pending compliance with NEPA.

After Federal Defendants answered, APS filed a motion to intervene, which the district court granted. NTEC also sought to intervene in the action for the limited purpose of filing a motion to dismiss under

Federal Rules of Civil Procedure 19 and 12(b)(7). The court granted NTEC's motion to intervene as a matter of right as owner of the Mine, and NTEC then moved to dismiss. NTEC asserted that it was a required party because of its economic interest in the Mine, that it could not be joined due to tribal sovereign immunity, and that the action could not proceed in its absence. Even though dismissal would have left their decisions intact, Federal Defendants opposed NTEC's motion to dismiss, arguing that the federal government was the only party required to defend an action seeking to enforce compliance with NEPA and the ESA.

The district court granted NTEC's motion to dismiss. The court concluded that NTEC had a legally protected interest in the subject matter of this suit, because the "relief Plaintiffs seek could directly affect the Navajo Nation (acting through its corporation, Intervenor-Defendant NTEC) by disrupting its 'interests in [its] lease agreements and the ability to obtain the bargained-for royalties and jobs.'" The court held that Federal Defendants could not adequately represent NTEC's interest in the litigation, because although the agencies had an interest in defending their analyses and decisions, "NTEC's interests in the outcome of this case far exceed" those of the agencies. The court observed that, although NTEC's interests were *currently* aligned with those of Federal Defendants, there could be a "later divergence of interests" during the course of the litigation. The court further concluded that NTEC could not be joined due to the Navajo Nation's sovereign immunity, and that the litigation could not, "in equity and good conscience," continue in NTEC's absence.

Plaintiffs timely appealed, arguing that NTEC did not have a legally protected interest in Federal Defendants' compliance with environmental laws; that even if NTEC did have such an interest, Federal Defendants would adequately represent that interest; and that even if NTEC were a required party, the litigation could continue in its absence under the "public rights exception" to traditional joinder rules.

II.

We review a "district court's decision to dismiss [an] action for failure to join" a required party for abuse of discretion, but we review its underlying legal conclusions de novo. *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 997 (9th Cir. 2011).[4] When reviewing an order dismissing a case under Rule 12(b)(7) for failure to join a party, "we accept as true the allegations in Plaintiff[s'] complaint and draw all reasonable inferences in Plaintiff[s'] favor." *Id.* at 996 n.1. We review de novo the question whether a tribe feasibly can be joined. *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 778 (9th Cir. 2005).

III.

A person or entity is a "required party" and "must be joined" if feasible if either "in that [party]'s absence, the court cannot accord complete relief among existing parties"; or if "that [party] claims an interest relating to the subject of the action and is so situated that

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[4] We need not decide here precisely which parts of the Rule 19 analysis are underlying legal conclusions entitled to de novo review and which parts are entitled to abuse of discretion review, because even if we reviewed every component of the Rule 19 analysis here de novo, we would affirm the district court's decision.

disposing of the action in the [party]'s absence may . . . as a practical matter impair or impede the [party]'s ability to protect the interest" or "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). Under Rule 19, if the party "who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). If it cannot proceed, a motion to dismiss under Rule 12(b)(7) for failure to join a party is properly granted.[5]

A.

NTEC argues that it is a required party that must be joined if feasible because: (1) it has a legally protected interest in the subject matter of this litigation, and (2) proceeding with the lawsuit in NTEC's absence would impair that interest. *See* Fed. R. Civ. P. 19(a)(1)(B). We agree.

1.

In determining whether NTEC claims a legally protected interest in the subject matter of this suit, we must "carefully . . . identify [NTEC's] interest at stake." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 973

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[5] Before 2007, parties that are now called "required" under Rule 19 were referred to as "necessary," and parties without whom the litigation could not, in good conscience, continue, were referred to as "indispensable." *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 855–56 (2008). Rule 19 was revised in 2007, but the revisions were intended to be only "stylistic," and the Supreme Court has interpreted them as such. *Id*. at 855.

(9th Cir. 2008) ("*Colusa*"). "The inquiry under Rule 19(a) 'is a practical one and fact specific,'" *White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir. 2014) (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)), and "few categorical rules inform[] this inquiry," *Colusa*, 547 F.3d at 970.

To satisfy Rule 19, an interest must be legally protected and must be "more than a financial stake." *Makah*, 910 F.2d at 558. "[A]n interest that 'arises from terms in bargained contracts' may be protected, but . . . such an interest [must] be 'substantial.'" *Colusa*, 547 F.3d at 970 (quoting *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002)). "[A]n absent party has no legally protected interest at stake in a suit merely to enforce compliance with administrative procedures." *Id.* at 971.

"If a legally protected interest exists, the court must further determine whether that interest will be *impaired or impeded* by the suit." *Makah*, 910 F.2d at 558. "As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit." *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013) (quoting *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999)). Three factors are relevant to whether an existing party may adequately represent an absent required party's interests:

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

> proceedings that the present parties would neglect.

Id. at 1127–28 (quotation marks omitted).

2.

Although an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, our case law makes clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted. Under that case law, NTEC has a legally protected interest in the subject matter of this suit that would be impaired in its absence.

In *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466 (9th Cir. 1986), we held that absent miners with mining plans and access permits pending before (but not yet approved by) the National Park Service ("NPS") did not have a legally protected interest in a suit brought by environmental groups seeking to enjoin NPS from approving such plans and permits until NPS complied with NEPA and NPS regulations. *Id.* at 469.[6] We explained that "[t]he subject matter of th[e] dispute concern[ed] NPS procedures regarding mining plan approval," and that although "all miners [were] interested in how stringent the requirements [would] be," "miners with pending plans ha[d] no legal

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[6] We did not need to reach whether the miners had a legally protected interest in *already approved* plans, because we held that any claims related to those plans were moot. *Hodel*, 803 F.2d at 469 n.2.

entitlement to any given set of procedures." *Id.* (quotation marks omitted).

In *Makah*, we likewise held that absent tribes lacked a legally protected interest in a suit brought by the Makah Indian Tribe challenging the Secretary of Commerce's ocean fishing allotment "[t]o the extent that the Makah [sought prospective injunctive] relief that would affect only the *future conduct* of the administrative process." 910 F.2d at 559 (emphasis added). We also held, however, that absent tribes *did* have a legally protected interest "to the extent the Makah [sought] a reallocation of [a particular prior year's] harvest or challenge[d] the Secretary's [prior] intertribal allocation decisions." *Id.* We accordingly held that the suit could proceed but that "the scope of the relief available to the Makah on their procedural claims [was] narrow" and limited to prospective relief relating to such future processes. *Id.*

Similarly, in *Colusa*, we held that absent tribes, whose gaming compacts with California provided for the operation of "gaming devices" but limited the number of state licenses for such devices, had legally protected interests in the licenses that they already held under the compacts. Still, we held that such interests would not be impaired by a lawsuit brought by another compact-holding tribe (Colusa) against California "[t]o the extent that Colusa [sought] prospective relief" relating to the issuance of *future* licenses, such as Colusa's request for higher priority in the draw for licenses. 547 F.3d at 974. We explained that "Rule 19 necessarily confine[d] the relief that [could] be granted on Colusa's claims to remedies that [did] not invalidate the licenses that [had] already been issued to the absent . . . Tribes." *Id.* at 977.

In *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996), by contrast, we affirmed dismissal of a lawsuit in which there were legally protected interests at stake that we concluded were threatened by the retroactive effect of the relief sought in the litigation. Specifically, we held that the Navajo Nation and Hopi Tribe both had a legally protected interest and were necessary parties to a Navajo Nation member's suit challenging a settlement reached between those tribes and the government that modified special conditions required by a mining permit issued to a company that operated a mine under lease agreements with the two tribes. *Id.* at 1310. We reasoned that because the settlement dictated the conditions under which mining operations could be conducted, the litigation "could affect the amount of royalties received by the Navajo Nation and the Hopi Tribe and employment opportunities for their members." *Id.* at 1309–10. We explained that, unlike the prospective claim in *Makah*, the plaintiff's challenge to the settlement "could affect the Navajo Nation's and the Hopi Tribe's interests in their lease agreements and the ability to obtain the bargained-for royalties and jobs." *Id.* at 1310.

Applying these precedents, NTEC has a legally protected interest in the subject matter of this action. Although Plaintiffs' challenge is to Federal Defendants' NEPA and ESA processes (rather than to anything that NTEC has done), it does not relate only to the agencies' future administrative process, but instead may have retroactive effects on approvals already granted for mining operations. If Plaintiffs 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. Without 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. This case is therefore like *Kescoli*, where we concluded that absent tribes were necessary because the litigation could affect already-negotiated lease agreements and expected jobs and revenue. And it is unlike either *Makah* or *Colusa*, in which we could tailor the scope of relief available to being prospective only, preventing any impairment to a legally protected interest.

3.

The question whether any existing party adequately represents NTEC's interest in this litigation is closer, but we conclude that none does.

In *White v. University of California*, we affirmed a district court's dismissal of a suit against the University of California under the Native American Graves Protection and Repatriation Act ("NAGPRA") for failure to join absent tribes that we concluded could not be adequately represented by the existing defendant in the case. 765 F.3d. at 1015. *White* involved a custody dispute over human remains uncovered on land belonging to the University of California that was aboriginally occupied by members of the Kumeyaay Nation, which consists of several federally recognized tribes. *Id.* The University determined that it was required, under NAGPRA, to repatriate the remains to the Kumeyaay Cultural Repatriation Committee, which had requested repatriation. *Id.* at 1015–16. Several University professors sued to enjoin repatriation, and the district court dismissed the claim for failure to join the Repatriation Committee, which could not be joined due to tribal immunity. *Id.*

We affirmed, holding that absent Kumeyaay tribes and the Repatriation Committee had an interest that would be impaired if the suit proceeded in their absence. As we explained, if the plaintiffs "succeed[ed] in their efforts to enjoin transfer of the remains . . . then the claims of the Tribes and the Repatriation Committee [to the human remains] [would] be extinguished without the opportunity for them to be heard." *Id.* at 1027. We held that even though the University had determined that NAGPRA obligated it to repatriate the remains to the Kumeyaay, "the University [could not] sufficiently represent the interests of the Tribes or Repatriation Committee" in the litigation, because the University's and the absent tribes' interests would "not necessarily remain aligned." *Id.* The University's interest and the absent tribes' interest were of a different nature: the University had "a broad obligation to serve the interests of the people of California, rather than any particular subset, such as the people of the Kumeyaay tribes." *Id.* We theorized that if, contrary to the University's own assessment of its obligations under NAGPRA, "a court were to determine that the [] remains should *not* be transferred to the Kumeyaay under NAGPRA, it [was] questionable whether—perhaps even unlikely that—the University and the Kumeyaay would pursue the same next course of action." *Id.* (emphasis added). We therefore upheld the district court's determination that the Kumeyaay tribes and Repatriation Committee were necessary parties.

In *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998), by contrast, we held that the government could adequately represent a tribe's interest in litigation brought by an

environmental organization challenging, under NEPA and the ESA, the Secretary of the Interior's plan to begin using a new water storage facility. *Id.* at 1153. We recognized that the Salt River Pima-Maricopa Indian Community ("Community") had an interest in the facility's "becoming available for use as soon as possible" to store water, and we concluded that this interest would be impaired if an injunction issued in the case. *Id.* But, we reasoned, the government "share[d] a strong interest in defeating [the] suit on the merits and ensuring that the [facility was] available for use as soon as possible." *Id.* at 1154. We held that this made the government an adequate representative of the Community's interest. *Id.* at 1154. We also noted that although the government did not "share the Community's interest in protecting [the Community's] sovereignty," there was no explanation of "how the Community's sovereignty would be implicated" in the suit. *Id.* at 1154–55.

In *Alto v. Black*, we likewise held that the United States could represent a tribe's interest in a suit challenging a BIA order upholding the tribe's decision to disenroll certain individuals as members of the tribe. 738 F.3d at 1128. As we explained, the tribe's own governing documents vested BIA with ultimate authority over the tribe's membership decisions. *Id.* at 1115. We also relied on the government's shared interest in defending its own decision, which it had already "vigorously defended," and its obligation to protect tribal interests as part of its general "trust responsibility" to tribes. *Id*. at 1128 (citation omitted). The tribe had not "presented any arguments that it would offer . . . which [the government] ha[d] not or would not make." *Id.*

The Tenth Circuit in *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977), held, in contrast, that the government could not adequately represent a tribe's interests. In *Manygoats*, the Navajo had granted Exxon Corporation the right to mine uranium on tribal lands, and the Secretary of the Interior approved the agreement after completing an EIS. *Id.* at 557. Individual Navajo tribal members sought to enjoin performance of the mining agreement between the tribe and Exxon, claiming that the EIS was inadequate under NEPA. *Id.* The Tenth Circuit held that the Secretary of the Interior could not adequately represent the absent tribe because "[t]he Secretary must act in accord with the obligations imposed by NEPA," and the environmental goals of that statute were "not necessarily coincidental with the interest of the Tribe in the benefits which the Exxon agreement provides." *Id.* at 558.

Applying the lessons from these cases, we agree with the district court that Federal Defendants cannot be counted on to adequately represent NTEC's interests. Although Federal Defendants have an interest in defending their decisions, their overriding interest, as it was in *Manygoats*, must be in complying with environmental laws such as NEPA and the ESA. 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. 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, Federal Defendants' interest might diverge from that of NTEC. As we suggested in *White*, a holding that one or both of these statutes

required something other than what Federal Defendants have interpreted them to require could similarly change Federal Defendants' planned actions, affecting the lease, rights-of-way, and permits at stake.

This case is unlike *Southwest*, because while Federal Defendants have an interest in defending their own analyses that formed the basis of the approvals at issue, here they do not share an interest in the *outcome* of the approvals—the continued operation of the Mine and Power Plant. And no party in *Southwest* had explained how the tribe's "sovereignty would be implicated," 150 F.3d at 1154, as the Navajo Nation has explained here. This case is also distinguishable from *Alto*, where the tribe had specifically granted BIA final decisionmaking authority over tribal membership issues, making it more plausible that the government would represent the tribe's interest—or that the government's interest and the tribe's interest had become one and the same.

Plaintiffs resist the conclusion that no existing party can adequately represent NTEC's interest, arguing that APS, as operator and part owner of the Power Plant, can do so even if Federal Defendants cannot. In *Southwest*, we noted that the presence of other cities that were financially invested in, and dependent for their water supply upon, the facility lessened the risk that the Community's interest would be impaired. Here, APS shares at least some of NTEC's and the Navajo Nation's financial interest in the outcome of the case. But APS 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. The Navajo Nation's interest is tied to its

very ability to govern itself, sustain itself financially, and make decisions about its own natural resources. Because no other party to the litigation can adequately represent these interests, the district court did not err in determining that NTEC is a party that must be joined if feasible under Rule 19(a).

B.

Rule 19 requires us next to ask whether NTEC can feasibly be joined as a party to this litigation. Reviewing de novo, *see Peabody W. Coal Co.*, 400 F.3d at 778, we hold that, due to tribal sovereign immunity, it cannot be.

"Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe. This immunity applies to the tribe's commercial as well as governmental activities." *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008) (citation omitted). "[T]he settled law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself." *Id.*

Here, it is undisputed that Congress has not abrogated any relevant aspect of the Navajo Nation's tribal immunity, and that the Navajo Nation has not waived its immunity. The question is thus whether NTEC shares that immunity.

In *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006), we had "little doubt that [a] Casino function[ed] as an arm of the Tribe" that owned and operated it, and that the casino therefore "enjoy[ed] the Tribe's immunity from suit." *Id.* at 1047. In that case, the casino had been authorized by tribal ordinance and an interstate gaming compact; the casino

served to promote the tribe's self-sufficiency, economic development, and employment opportunities; and the economic advantages of the casino inured to the benefit of the tribe such that "[i]mmunity of the Casino directly protect[ed] the sovereign Tribe's treasury." *Id.* at 1046–47; *see also Cook*, 548 F.3d at 726 (holding that a corporation created by a tribe through tribal ordinance and intergovernmental agreement that was wholly owned and managed by the tribe, and from which the benefits flowed to the tribe, enjoyed the tribe's sovereign immunity).

Here, NTEC is wholly owned by the Navajo Nation and is organized pursuant to Navajo law. It was created specifically so that the Navajo Nation could purchase the Mine. NTEC's profits go entirely to the Navajo Nation, and those profits support the Navajo Nation's ability to govern and financially sustain itself. The district court was therefore correct that NTEC is an "arm" of the Navajo Nation that enjoys the Nation's immunity from suit and cannot be joined to this action.[7]

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[7] Plaintiffs argue that the court could order joinder of NTEC's chief executive officer pursuant to the *Ex parte Young* doctrine. That doctrine "permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune State or tribe." *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012) (citing *Ex parte Young*, 209 U.S. 123 (1908)); *see also Vann v. U.S. Dep't of Interior*, 701 F.3d 927 (D.C. Cir. 2012). But both *Salt River* and *Vann*, on which Plaintiffs rely in making this argument, involved claims against tribes as defendants, so it was possible for a tribal official, rather than the tribe itself, to be named as defendant pursuant to *Ex parte Young*. Plaintiffs' claims here are that *Federal*

C.

Because NTEC is a required party that cannot feasibly be joined, we must next 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).

1.

To evaluate whether an action could fairly proceed without a required party, we consider the following factors:

> (1) the extent to which a judgment rendered in the [party's] absence might prejudice that [party] 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 [party's] absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). The Rule 19(b) factors "are nonexclusive." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 862 (2008).

In general, "[i]f no alternative forum exists, [a court] should be 'extra cautious' before dismissing an

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Defendants violated environmental laws—not that the Navajo Nation itself did. The *Ex parte Young* doctrine therefore has no role to play here.

action." *Kescoli*, 101 F.3d at 1311 (quoting *Makah*, 910 F.2d at 560). But "[i]f the necessary party is immune from suit, there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" *Id.* (quoting *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991)); *see also Am. Greyhound Racing, Inc.*, 305 F.3d at 1025 ("[S]ome courts have held that sovereign immunity forecloses in favor of tribes the entire balancing process under Rule 19(b), but we have continued to follow the four-factor process even with immune tribes."). Indeed, we have observed that there is a "wall of circuit authority" in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity—"virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity." *White*, 765 F.3d at 1028.

2.

Applying the Rule 19(b) factors, we hold that the district court did not err in concluding that the litigation could not, in good conscience, continue in NTEC's absence.

Prejudice, the first factor in the Rule 19(b) analysis, "largely duplicates the consideration that made a party necessary under Rule 19(a)," *Am. Greyhound Racing, Inc.*, 305 F.3d at 1025, and clearly favors dismissal in this case. The Navajo Nation and NTEC would be prejudiced if this lawsuit were to proceed and Plaintiffs were to prevail—at stake is 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.

The second factor, the court's ability to shape relief so as to avoid prejudice, likewise favors dismissal. Although relief could be shaped to avoid prejudice in the short term, such as by remanding for further administrative review without vacating the permits and approval decisions in the meantime, the Navajo Nation inevitably would be prejudiced if Plaintiffs 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.

The third factor, on the other hand, weighs against dismissal. A judgment rendered in NTEC's absence would be adequate and would not create conflicting obligations, because it is Federal Defendants' duty, not NTEC's, to comply with NEPA and the ESA.

The fourth factor depends on whether Plaintiffs would have an alternate remedy if this suit is dismissed. Were this suit dismissed, Plaintiffs would have no alternate forum in which to sue Federal Defendants for their alleged procedural violations under NEPA and the ESA. NTEC argues, however, that Plaintiffs may be able to "raise environmental claims in Navajo courts" under Navajo law.

We need not decide whether any alternate remedy is available in the Navajo Nation courts for the environmental concerns motivating Plaintiffs' challenge to the mining operations at issue here. Even assuming that no alternate remedy exists, and that both the third and fourth factors therefore weigh against dismissal, we would hold that dismissal is proper. We have recognized that the lack of an alternative remedy "is a common consequence of sovereign immunity." *Id.* Accordingly, "we have regularly held that the tribal

interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Id.* Mindful of the "wall of circuit authority" in favor of dismissing an action where a tribe is a necessary party, *White*, 765 F.3d at 1028, we agree with the district court that this litigation cannot, in good conscience, continue in NTEC's absence.

3.

Finally, Plaintiffs and the United States urge us to apply the "public rights" exception to hold that this litigation can continue in NTEC's absence.[8] The 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. *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988). We hold that the exception does not apply here.

The public rights exception is reserved for litigation that "transcend[s] the private interests of the litigants and seek[s] to vindicate a public right." *Kescoli*, 101 F.3d at 1311. The public rights exception 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'" for the exception to apply. *Id.* (emphasis added) (quoting *Conner*, 848 F.2d at 1459).

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[8] Federal Defendants did not file an answering brief; instead the United States filed a brief as amicus curiae arguing that "federal agencies and officers are normally the only necessary defendants in" federal suits challenging agency action. Answering briefs defending the grounds of the district court's dismissal were filed by only NTEC and APS.

The doctrine derives from the Supreme Court's decision in *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350 (1940), in which the Court allowed a suit to proceed in the absence of necessary parties because it involved enforcement of public rights. In *National Licorice*, a company was the subject of a National Labor Relations Board ("NLRB") action challenging as violative of federal labor laws contracts the company had procured from its employees. *Id.* at 351–56. The defendant company argued that those absent employees were necessary and indispensable parties to the NLRB action. *Id.* at 356. The Court held that the employees did not need to be joined because the case was "narrowly restricted to the protection and enforcement of public rights"—specifically, the public's interest in "the prevention of unfair labor practices." *Id.* at 363–64. Analogizing to actions brought by the government under the Sherman Antitrust Act or orders entered by the Federal Trade Commission, *id.* at 365–66, the Court held that "the public right was vindicated by restraining the unlawful actions of the defendant." *Id.* at 366. It also reasoned that the absent employees' legal entitlements would not be destroyed because the employees "were left free to assert such legal rights as they might have acquired under their contracts." *Id.*

We applied the public rights exception to allow suit to proceed in *Conner v. Burford*, where the plaintiffs sued BLM alleging that its sale of oil and gas leases in two national forests violated NEPA and the ESA. 848 F.2d at 1442–43. BLM had sold two different types of leases: for one type, lessees were prohibited "from occupying or using the surface of the leased land without further specific approval from . . . BLM"; for the other, the government was authorized to impose

conditions on surface-disturbing activities, but not to altogether preclude such activities. *Id.* at 1444. During the ESA consultation process, Fish and Wildlife and the U.S. Forest Service decided to analyze the environmental effects of the lease sales only, and not those of post-leasing activities. *Id.* at 1444. The district court entered judgment in the plaintiffs' favor, reasoning that NEPA required a comprehensive EIS that evaluated not only the sale of a lease but also "the cumulative effects of successive, interdependent steps culminating in oil and gas development and production." *Id.* Several lessees attempted to intervene, arguing that they were necessary and indispensable parties. *Id.* at 1445.

Clarifying the district court's order, we "enjoin[ed] the federal defendants from permitting any surface-disturbing activity to occur on any of the leases [of either type] until they ha[d] fully complied with NEPA and [the] ESA." *Id.* at 1461. We recognized that the contracts themselves, however, "were not invalidated and further actions construing rights under them [were] not precluded." *Id.* at 1460–61. We thus held that the only thing foreclosed by the district court's judgment was the "lessees' ability to get 'specific performance' [on their contracts] until the government complie[d] with NEPA and the ESA," which was "insufficient to make the lessees indispensable to [the] litigation." *Id.* at 1461. The leaseholders still retained "many of the fundamental attributes of their contracts," given that "significant economic value inheres in the exclusive right to engage in oil and gas activities, should any be allowed." *Id.* Because "[t]he appellees' litigation against the government [did] not purport to adjudicate the rights of current lessees," but

rather to "enforce the public right to administrative compliance with the environmental protection standards of NEPA and the ESA," the public rights exception applied. *Id.* at 1460.

In *Kescoli*, by contrast, we declined to apply the public rights exception and thus affirmed dismissal of the suit. 101 F.3d at 1312. We reasoned that "if the action proceeded in the absence of the Navajo Nation and the Hopi Tribe, the rights of their members under the lease agreements could be significantly affected." *Id.* at 1311–12. "The litigation also 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 [by] balancing potential harm caused by the mining operations against the benefits of the royalty payments." *Id.* at 1312. The litigation therefore was "not limited to ensuring an agency's future compliance with statutory procedures," and was "not one in which the risk of prejudice to the Navajo Nation and the Hopi Tribe [was] nonexistent or minimal." *Id.*

This case is more like *Kescoli* than *Conner*. Here, the leases and rights-of-way are valid only with approval by BIA. If the Record of Decision that granted such approval were vacated, then those agreements would be invalid, and NTEC would lose all associated legal rights. And, unlike in *Conner* where surface-disturbing activity had apparently not even been authorized or begun, the activities approved by the Record of Decision here are already taking place. This litigation therefore threatens to destroy NTEC's existing legal entitlements. *See Am. Greyhound Racing, Inc.*, 305 F.3d at 1026 (rejecting application of the public rights exception, reasoning that the "litigation targeted the

extension or renegotiation of the compacts themselves," and did "not *incidentally* affect the gaming tribes in the course of enforcing some public right," but rather was "*aimed* at the tribes and their gaming"); *Kettle Range Conservation Grp. v. U.S. Bureau of Land Mgmt.*, 150 F.3d 1083, 1087 (9th Cir. 1998) (distinguishing *Conner* and holding that where title to land transferred in a challenged transaction had already vested in private parties, an order declaring the land exchange void would destroy the parties' legal entitlements, rendering the public rights exception inapplicable).

We acknowledge that Plaintiffs' claims relate to public rights insofar as they challenge only Federal Defendants' NEPA and ESA processes. We also recognize that the practical effect of this litigation on NTEC's rights would depend on what, exactly, the outcome of the litigation would be if it proceeded. It is possible that, if the lawsuit continued, the district court might grant judgment in favor of Federal Defendants, or it might grant limited relief for Plaintiffs that would not substantially impact NTEC's rights.

We believe, however, that the question at this stage must be whether the litigation *threatens* to destroy an absent party's legal entitlements. *See Kescoli*, 101 F.3d at 1311–12 (holding that the public rights exception was inapplicable in part because "if the action proceeded in the absence of [two tribes], the rights of their members under the lease agreements *could* be significantly affected" (emphasis added)); *Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992) ("Because of the threat to the absent tribes' legal entitlements, and indeed to their sovereignty, posed by the present litigation, application of the public rights

exception . . . would be inappropriate."). Here, although Plaintiffs nominally seek only a renewed NEPA and ESA process, the implication of their claims is that Federal Defendants should not have approved the mining activities in their exact form. The result Plaintiffs seek, therefore, certainly threatens NTEC's legal entitlements.

We also recognize, as the Tenth Circuit has pointed out, that refusing to apply the public rights exception arguably "produce[s] an anomalous result" in that "[n]o one, except [a] Tribe, could seek review of an environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on [that tribe's] lands." *Manygoats*, 558 F.2d at 559. Or, at least, no one could obtain such review unless the tribe were willing to waive its immunity and participate in the lawsuit. This result, however, is for Congress to address, should it see fit, as only Congress may abrogate tribal sovereign immunity. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). It is undisputed that Congress has not done so here.

The public rights exception therefore does not apply.

III.

For the foregoing reasons, we **AFFIRM**.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Diné Citizens Against Ruining Our Environment, et al., Plaintiffs, vs. Bureau of Indian Affairs, et al., Defendants.	No. CV-16-08077-PCT-SPL **ORDER**

Before the Court is Intervenor-Defendant Navajo Transitional Energy Company's Motion to Dismiss. (Doc. 50.) For the reasons set forth below, Intervenor-Defendant Navajo Transitional Energy Company's Motion to Dismiss is granted.

I. Background

Plaintiffs Diné Citizens Against Ruining Our Environment ("Diné CARE"), San Juan Citizens Alliance, Sierra Club, the Center for Biological Diversity, and Amigos Bravos (collectively, "Citizens") have filed suit against the Bureau of Indian Affairs ("BIA"), United States Department of the Interior ("DOI"), the Office of Surface Mining, Reclamation and Enforcement ("OSMRE"), Bureau of Land Management ("BLM"), R.K. Zinke, in his official capacity as Secretary of the United States Department of the Interior, and the United States Fish and Wildlife Service ("FWS") (collectively, "Federal Defendants"). (Doc. 1.) Plaintiffs allege that Federal Defendants violated the Endangered

Species Act ("ESA"), the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA") in the approval of: (1) a twenty-five year lease extension for operation of the Four Corners Power Plant ("FCPP") by Intervenor-Defendant Arizona Public Service Company, (2) the renewal of certain right-of-ways for existing transmission lines, and (3) a 5,568-acre expansion of strip mining in the Navajo Mine's Pinabete area. (Doc. 1 at 4-5.) Federal Defendants' actions were predicated on a Biological Opinion issued by FWS in April 2015, which Plaintiffs characterize as a mistaken determination that the "proposed authorizations for continued operations of the [FCPP] and the Navajo Mine . . . will neither jeopardize the survival and recovery of, nor adversely modify designated critical habitat of the Colorado pikeminnow and razorback sucker, two endangered fish native to the San Juan River, in violation of the ESA." (Doc. 1 at 3.) Plaintiffs contend that remaining Federal Defendants' reliance on FWS' Biological Opinion violated the ESA and that Federal Defendants' subsequent Record of Decision and Final Environmental Impact Statement were issued in violation of NEPA. (Doc. 1 at 3-4.) This litigation followed.

In August 2016, Arizona Public Service Company ("APS")—on its own behalf and as operating agent for the FCPP—was allowed to intervene as of right as a party defendant. (Doc. 26.) Navajo Transitional Energy Company ("NTEC") filed a Limited Motion to Intervene (Doc. 31), which this Court granted on October 28, 2016. (Doc. 49.) Intervenor-Defendant NTEC subsequently filed a Motion to Dismiss pursuant to Rules 12(b)(7) and 19 of the Federal Rules of Civil Procedure. (Doc. 50 at 2.) All parties, with the exception of

Intervenor-Defendant APS (Doc. 58), oppose Intervenor-Defendant NTEC's Motion to Dismiss. (Docs. 56, 57.)

II. Discussion

Intervenor-Defendant NTEC contends that it is a required party under Rule 19 of the Federal Rules of Civil Procedure, that cannot be joined by virtue of its sovereign immunity, and that the present action should therefore be dismissed in equity and good conscience. (Doc. 50 at 1-2.) The Court agrees.

A. Required Party

"Rule 19 sets the framework for determining whether a party is required and indispensable." *Friends of Amador Cty. v. Salazar*, 554 F. App'x 562, 564 (9th Cir. 2014). First, the Court must determine whether Intervenor-Defendant NTEC is a "required party." Fed. R. Civ. P. 19(a)(1). In making this determination, the Court must decide: (1) if it can accord complete relief among the existing parties and (2) whether Intervenor-Defendant NTEC has a "legally protected interest" in the subject of the present litigation which would be impaired or impeded if it was not party to this suit. Fed. R. Civ. P. 19(a)(1). If either inquiry is answered in the affirmative, then Intervenor-Defendant NTEC is a required party "and must be joined." *White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir. 2014). This inquiry "is a practical one and fact specific." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

A party is required under Rule 19 if it "claims an interest relating to the subject of the action." Fed. R. Civ. P. 19(a)(1)(B). The language of Rule 19 makes it clear that "the finding that a party is necessary to the

action is predicated only on that party having a *claim* to an interest." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (emphasis in original). A legally protected interest need not be "property in the sense of the due process clause." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002). Yet, this interest must amount to "more than a financial stake and more than speculation about a future event." *Makah*, 910 F.2d at 558 (internal citations omitted).

Intervenor-Defendant NTEC satisfies the threshold for having a legally protected interest under Rule 19(a)(1)(B). Just as in *Kescoli v. Babbitt*, the retroactive relief Plaintiffs seek could directly affect the Navajo Nation (acting through its corporation, Intervenor-Defendant NTEC) by disrupting its "interests in their lease agreements and the ability to obtain the bargained-for royalties and jobs." 101 F.3d 1304, 1310 (9th Cir. 1996). If successful, Plaintiffs' challenges to Federal Defendants' actions—which the continued operation of Navajo Mine and Four Corners Power Plant are conditioned upon—could simultaneously jeopardize the solvency of the Navajo Nation[1] and challenge

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[1] The Navajo Nation formed Navajo Transitional Energy Company in 2013 for the purposes of purchasing the Navajo Mine from BHP Billiton for $85 million with a three-year loan. (Doc. 32 ¶ 9.) In 2016, NTEC obtained a new loan for $115 million, which it used to pay off the original note and to maintain working capital. (*Id).* This 2016 loan is secured by NTEC's assets, which includes Navajo Mine. (*Id).* Hence, if operations at the Mine were hindered, NTEC could possibly default on the 2016 loan and lose ownership of the Mine—a loss that would cost the Navajo Nation millions of dollars. (*Id).*

the economic development strategies it has chosen to pursue. Such affronts to the Nation's sovereignty represent a legally protected interest under Rule 19.

"[A]n absent party's ability to protect its interests will not be impaired by its absence from the suit where its interests will be adequately represented by existing parties to the suit." *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013) (citing *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999)). Here, Plaintiffs and Federal Defendants contend that the United States can appropriately represent the interests of non-parties in this litigation without the presence of Intervenor-Defendant NTEC. (Docs. 56 at 3; 57 at 19-20.) Federal Defendants maintain that there is a shared common interest between Federal Defendants and all non-parties, including Intervenor-Defendant NTEC, "in having the analyses and approvals upheld." (Doc. 56 at 2.) The Court disagrees.

To discern if Federal Defendants adequately represent Intervenor-Defendant NTEC, the Court looks to: (1) "whether the interests of a present party to the suit are such 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." *Salt River Project Agric. Improvement & Power Dist.*, 672 F.3d 1176, 1180 (9th Cir. 2002) (internal citation omitted). Here, Federal Defendants are primarily concerned with being able to "defend their analyses and decisions in this litigation." (Doc. 56 at 2.) As discussed, Intervenor-Defendant NTEC's interests in the outcome of this case far exceed Federal Defendants' interest in "defending the validity of the

government's environmental compliance and subsequent approval of the leases, permits, and rights of way." (Doc. 56 at 9.) Presently, Federal Defendants and Intervenor-Defendant NTEC interests are aligned—both advocate for defending Federal Defendants' decisions which provide for the continued operation of the Navajo Mine and the FCPP—albeit for different reasons. Over the course of litigation, however, these different reasons "could lead to a later divergence of interests." *White*, 765 F.3d at 1027. If that were to occur, it is unlikely that Federal Defendants—in its effort to defend its decisions and processes—would assert the same arguments that Intervenor-Defendant NTEC would to protect its sizeable investments.

B. Sovereign Immunity

Having determined that Intervenor-Defendant NTEC is a required party to the present litigation under Rule 19(a)(1), the Court must next consider whether it can be feasibly joined as a party. Given the sovereign immunity it enjoys as an "arm" of the Navajo Nation, Intervenor-Defendant NTEC cannot be joined.

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Mich. v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (internal citations omitted). One of the core aspects of such inherent sovereignty "is the common law immunity from suit traditionally enjoyed by sovereign powers." *Id.* (internal citations and quotation marks omitted). In *Bay Mills*, the United States Supreme Court reaffirmed the sovereign immunity of American Indian tribes, noting "we have time and again treated

the 'doctrine of tribal immunity [as] settled law.'" 134 S. Ct. at 2030-31 (citing *Kiowa Tribe of Okla. v. Mfg. Tech, Inc.*, 523 U.S. 751, 756 (1998)). Tribal sovereign immunity can be diminished by congressional waiver or abrogation. *United States ex rel. Cain v. Salish Kootenai College, Inc.*, 862 F.3d 939, 943 (9th Cir. 2017). A tribe may also waive its own immunity, but such waiver will not be inferred and "is effective only if it is 'unequivocally expressed.'" *Quinault Indian Nation v. Pearson*, 2017 WL 3707898, at *2 (9th Cir. Aug. 29, 2017) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

"Tribal sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe." *White*, 765 F.3d at 1025 (internal citation omitted). Courts employ a multi-factor analysis when determining whether an entity of a tribe enjoys sovereign immunity as "an arm of the tribe" including: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities." *Id.* (internal citation omitted).

Applying undisputed facts, it is clear that Intervenor-Defendant Navajo Transitional Energy Company enjoys sovereign immunity as an "arm" of the Navajo Nation. Established in 2013, NTEC is a wholly-owned Navajo corporation organized pursuant to Navajo law. (Doc. 32 ¶¶ 3-5.) NTEC was created by the Navajo Nation "to protect and promote the economic and financial interests of the Nation and the Navajo people while remaining dedicated to responsible manage-

ment of the Nation's natural resources." (Doc. 32 ¶ 3.) Specifically, NTEC was formed so that the Nation could purchase the Navajo Mine from BHP Billiton, which it did in 2013. (Doc. 32 ¶ 9.)

NTEC is organized exclusively under Navajo law. (Doc. 32 ¶ 7.) The Navajo Nation's role in management includes representation by "a Member Representative Group consisting of five members of the Navajo Nation Council." (Doc. 32 ¶ 7.) The profits of NTEC are those of the Navajo Nation; distributions of net income are made to the Nation in accordance with NTEC's Formation Resolution and Operating Agreement. (Doc. 32 ¶ 8.) With regard to shared sovereign immunity, the Navajo Nation explicitly vested NTEC with sovereign immunity. A resolution by the Navajo Nation Council, dated October 24, 2013, reads: "The Navajo Nation is a sovereign, and as an arm and subordinate instrumentality of the Navajo Nation, the [Navajo Transitional Energy] Company must be provided all the protections, privileges, benefits, and authorities of its association and affiliation with a sovereign." (Doc. 32, Ex. 1 at 1.) NTEC's Operating Agreement further confirms that it was the Navajo Nation's intent that NTEC enjoy its sovereign immunity. (Doc. 32, Ex. 1 at 36.) Given these undisputed facts, Intervenor-Defendant NTEC is an "arm of the tribe" for purposes of sovereign immunity.

C. Indispensable Party

Intervenor-Defendant NTEC is a required party that cannot be joined because it enjoys sovereign immunity from suit. Accordingly, the Court must decide "whether, in equity and good conscience, the action should proceed among the existing parties or should

be dismissed." Fed. R. Civ. P. 19(b). Determination of "whether a party is indispensable 'can only be determined in the context of particular litigation.'" *Am. Greyhound,* 305 F.3d at 1018 (internal citation omitted). This decision, however, is made considerably easier because Intervenor-Defendant has sovereign immunity as an "arm" of the Navajo Nation and a "wall of circuit authority" supports dismissal of the present action. *White*, 765 F.3d at 1028. When presented with similar circumstances, "virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether a remedy is available, if the absent parties are Indian tribes invested with sovereign immunity." *Id.* (citing *Am. Greyhound*, 305 F.3d at 1015; *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002); *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996); *McClendon v. United States*, 885 F.2d 627 (9th. Cir. 1989)).

III. Conclusion

Intervenor-Defendant is a required party under Rule 19 of the Federal Rules of Civil Procedure because it has a protected interest in the subject of the present litigation that only it can adequately protect. As an arm of the Navajo Nation, however, Intervenor-Defendant NTEC enjoys sovereign immunity and since it has neither explicitly waived that immunity, nor has such immunity been abrogated or waived by Congress, it follows that Intervenor-Defendant NTEC cannot be joined. In equity and good conscience, the present case cannot continue without Intervenor-Defendant NTEC. Accordingly,

IT IS ORDERED:

1. That Intervenor-Defendant NTEC's Motion to Dismiss (Doc. 50) is **granted**;

2. That this action is **dismissed with prejudice** in its entirety;

3. That the Clerk of Court shall **terminate** this action; and

4. That the Clerk of Court shall enter judgment accordingly.

Dated this 11th day of September, 2017.

/s/ Steven P. Logan

Honorable Steven P. Logan
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT; et al., Plaintiffs-Appellants, v. BUREAU OF INDIAN AFFAIRS; et al., Defendants-Appellees, ARIZONA PUBLIC SERVICE COMPANY; NAVAJO TRANSITIONAL ENERGY COMPANY LLC, Intervenor-Defendants-Appellees.	No. 17-17320 D.C. No. 3:16-cv-08077-SPL District of Arizona, Prescott ORDER

FILED DEC 11, 2019
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Before: IKUTA and FRIEDLAND, Circuit Judges, and BLOCK,* District Judge.

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* The Honorable Frederic Block, United States District Judge for the Eastern District of New York, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is **DENIED**.