No. 17-17320

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

Diné Citizens Against Ruining Our Environment, *et al.*,
Plaintiffs-Appellants,

vs.

U.S. Bureau of Indian Affairs, *et al.*,
Defendants,

and

Arizona Public Service, and Navajo Transitional Energy Company
Intervenor-Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, CASE NO. 3:16-cv-08077-PCT-SPL

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellants Diné Citizens Against Ruining our Environment, San Juan Citizens Alliance, Amigos Bravos, the Center for Biological Diversity, and the Sierra Club (collectively, "Conservation Groups") certify that they are nonprofit organizations and have no parent corporations. No publically held corporation holds stock in any of the Conservation Groups.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 and 16 U.S.C. § 1540(g). The clerk entered final judgment on September 11, 2017. Appellant Conservation Groups filed their notice of appeal on November 9, 2017, which is timely under Federal Rule of Appellate Procedure 4(a)(1)(B)(ii)-(iii). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether the public interest Conservation Groups' action against federal agencies for violating federal statutes, the National Environmental Policy Act ("NEPA") and Endangered Species Act ("ESA"), and seeking only prospective declaratory and injunctive relief, was erroneously dismissed by the district court on the basis of Federal Rule of Civil Procedure 19 for failure to join the Navajo Transitional Energy Company ("Energy Company"), an absent party against which the Conservation Groups brought no claims and sought no relief.

STATEMENT OF THE CASE

For a half-century, the people and environment of the Four Corners region, which includes portions of Arizona, Colorado, New Mexico, and Utah, and multiple Indian reservations, have borne the brunt of a coal-fired electricity system that fuels major cities throughout the American southwest. ER14. The people in the Four Corners region—many of whom have long opposed coal development—suffer elevated levels of lung disease and severely compromised public health. ER14, 38, 46-47. Endangered native fish species in the San Juan River, which flows from headwaters in Colorado through New Mexico and Utah to its confluence with the Colorado River in Arizona, are poisoned by mercury and selenium from coal plants and are on the brink of extinction. ER14, 36, 40-43. Due in part to this large-scale coal development, the region has been deemed a "national sacrifice area." Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation*, 13 Santa Clara J. Int'l L. 203, 243 (2015) (internal citation omitted).

The subject of this action is a suite of interrelated federal decisions (collectively, the "Project") prolonging the existence of the massive coal complex consisting of the Navajo Mine, a sprawling,

33,000-acre coal strip-mine, the Four Corners Power Plant, the large power plant that burns coal from the strip-mine, and the network of transmission lines that distribute electricity from the plant throughout multiple states in the southwest. ER16-17, 36-37, 44-45. The mine and power plant, which began operations in tandem in the early 1960s, are located in northwestern New Mexico on the Navajo Nation. ER16-17, 40. The mine sells coal exclusively to the power plant, which buys coal exclusively from the mine. *See* ER40. The transmission lines cross Navajo and Hopi lands in Arizona. ER16-17. The great majority of the electricity generated at the power plant is transmitted to Arizona, mainly Phoenix. ER39-40.

The power plant is owned by a conglomerate of large utility companies, including Arizona Public Service, Public Service of New Mexico, Tucson Electric Company, and the Salt River Project. ER18-19, 37. The coal mine is owned by a Navajo corporation known as the Navajo Transitional Energy Company. *See* ER37. Arizona Public Service, Tucson Electric Company, and the Salt River Project, which collectively own 87% of the power plant, are based in Arizona. ER37.

The Four Corners Power Plant has long been one of the largest sources of air pollution—including nitrogen oxide, carbon dioxide, and mercury—in the United States. ER38. The great pollution plume from the plant was one of the first man-made phenomena observed by astronauts from outer space. ER38. The Four Corners Power Plant and the San Juan Generating Station—the neighboring coal plant located across the San Juan River—together constitute the largest collective source of air pollution in the western hemisphere. ER38. Pollution from the coal complex causes environmental harm throughout the Four Corners Region across four states, Arizona, New Mexico, Colorado, and Utah. ER17.

The immense quantities of pollution from the coal complex impose equally immense monetary costs on the public. For example, by the Federal Defendants' own estimates, the harm to the public from just one pollutant—carbon dioxide—from the complex will total between $4.8 and $46.3 *billion* over the life of the Project.[1] The total harm and

[1] OSM, Final Environmental Impact Statement for the Four Corners Power Plant and Navajo Mine Energy Project, at 4.2-25 to -27 & tbl. 4.2-18b (May 1, 2015), *available at* http://www.wrcc.osmre.gov/initiatives/fourCorners/documentLibrary.shtm (follow "Section 4.2 - Climate Change" hyperlink) (included in

monetized cost of *all* pollution from the complex is undoubtedly much higher. In the words of the Energy Company's own expert, Charles Cicchetti:

> Power plants without pollution controls can no longer be permitted to use the air stream as a free waste transfer system that pollutes the air for downwind populations, not only causing many thousands of premature deaths and illnesses each year, but also causing higher labor and health insurance costs, lost jobs, lost state and local tax revenues, and higher gasoline prices in downwind regions.

ER71-73.

In 2015, multiple agencies within the U.S. Department of the Interior, acting pursuant to congressionally prescribed authority, issued multiple approvals for the Project, extending operations at the coal complex and its transmission system for another quarter century. ER14, 16-17. Specifically, the U.S. Office of Surface Mining approved a coal strip-mining permit for the Energy Company under the federal Surface Mining Control and Reclamation Act ("Surface Mining Law"),

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Excerpts of Record at ER122-24). The Court may take and is requested to take judicial notice of this official information—the environmental impact statement at issue in this case—posted on a website of the Federal Defendants. *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 727 n.3 (9th Cir. 2015). Because of the Energy Company's motion to dismiss, a complete administrative record was never filed. *See* ER89, 94.

30 U.S.C. § 1260.[2] Pursuant to 25 U.S.C. § 415(a), the U.S. Bureau of Indian Affairs approved a 25-year lease for the power plant between Arizona Public Service, the other power plant owners, and the Navajo Nation. ER133-34. Pursuant to 25 U.S.C. § 323, the Bureau of Indian Affairs approved the grant of easements across Navajo and Hopi tribal lands in New Mexico and Arizona for transmission lines from the power plant toward load centers in Albuquerque, New Mexico and Phoenix, Arizona. ER135-37. Given these required federal actions, the federal agencies also prepared an environmental impact statement pursuant to NEPA and the U.S. Fish and Wildlife Service issued a biological opinion pursuant to the ESA. ER15-16, 44. In approving the Project, the federal agencies acted pursuant to, and expressly recognized, their trust responsibility toward the Navajo Nation. ER126-29.

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[2] OSM, Four Corners Power Plant and Navajo Mine Energy Project Environmental Impact Statement Record of Decision (ROD), at 54-56 (July 14, 2015), *available at* http://www.wrcc.osmre.gov/initiatives/fourCorners/documentLibrary.shtm (follow "ROD" hyperlink) (included in Excerpts of Record at ER130-32). The Court is requested to take judicial notice of the record of decision at issue in this case. *Ariz. Libertarian Party*, 798 F.3d at 727 n.3.

The Conservation Groups, a coalition of tribal, regional, and national organizations based out of Arizona, Colorado, New Mexico, and California, whose members are harmed by interstate pollution from the coal complex, filed this action against the federal agencies, alleging violations of NEPA and the ESA. ER19-24, 49-67. The groups identified the district court's authority under the Administrative Procedure Act ("APA") to review final federal agency actions, and asserted jurisdiction based on 28 U.S.C. § 1331 (federal question jurisdiction) and the citizen suit provision of the ESA, 16 U.S.C. § 1540(g). ER18.

For relief, the Conservation Groups sought exclusively declaratory and prospective injunctive relief against the federal defendants, including, specifically, (1) declarations that the *Federal Defendants* violated NEPA and the ESA; (2) orders setting aside the *federal* record of decision, final environmental impact statement, and biological opinion for the Project and remanding the matter to the *Federal Defendants*, and (3) prospective injunctive relief prohibiting *Federal Defendants* from issuing further *federal approvals* until they comply with NEPA and the ESA. ER67-69. The groups did not seek any relief from the Energy Company or the Navajo Nation and intentionally did

not seek to cancel or modify any contract to which either the Energy Company or the Navajo Nation was party. *See* ER68-69.

The Federal Defendants answered, defending their approval of the Project and requesting the district court to "dismiss Plaintiffs' complaint in its entirety." ER75-76. Subsequently, Arizona Public Service, the majority owner and operator of the Four Corners Power Plant, sought and was granted intervention. ER77, 82. The utility company sought to defend its interest in the Project and to defend the federal approvals of the Project. ER78. Arizona Public Service noted that its "parochial" financial interests in extending operations of the power plant were narrower than the Bureau of Indian Affairs' broad trust responsibility to the Navajo Nation. ER80. The utility filed an answer asking the court to "deny all relief sought by Plaintiffs." ER85. The parties agreed that the case is "an action for review on an administrative record under the APA" and that the Federal Defendants would "prepare and lodge an administrative record." ER87.

The Navajo Nation itself did not intervene or otherwise participate in the district court litigation. However, the Energy Company subsequently sought to intervene in the action for the sole

purpose of moving to dismiss on the basis of Federal Rule of Civil Procedure 19. ER88. The Energy Company, a limited liability company created by the Navajo Nation in 2013, purchased the Navajo Mine from its previous owner BHP Billiton after that company determined that it could no longer "cost effectively produce" coal for the power plant and no other buyers stepped forward to purchase the mine. ER96, 99-100. In purchasing the mine, the Energy Company waived sovereign immunity allowing it to be subject to federal environmental laws: "[T]o facilitate administration of the [prior] permit and operations of the Navajo Mine, NTEC [the Energy Company] has proposed a limited waiver of sovereign immunity to comply with and be subject to enforcement of Title V of SMCRA and all other U.S. environmental protection and health and safety laws of general applicability."[3] The Chief Executive

[3] OSM, Environmental Assessment and Finding of No Significant Impact for Navajo Mine Permit Transfer Application, Navajo Reservation, New Mexico, at 9 (Nov. 2013), *available at* http://www.wrcc.osmre.gov/initiatives/navajoMine/permitTransfer.shtm (follow "Environmental Assessment" hyperlink) (included in Excerpts of Record at ER141). The Court is requested to take judicial notice of this official document of Federal Defendant Office of Surface Mining. *Ariz. Libertarian Party*, 798 F.3d at 727 n.3.

Officer of the Energy Company is Clark Moseley, ER97, who is not a member of the Navajo Nation.

In its motion to dismiss, the Energy Company asserted that it was a required party because of its economic interests in the mine, that it could not be joined due to sovereign immunity, and that the action should not proceed in the Energy Company's absence. ER103-04. The Energy Company asserted that a ruling in the Conservation Groups' favor "will result in a shutdown of the [Navajo] Mine and [Four Corners Power Plant]." ER104.[4] The Energy Company also referred to "tribal decision-making about use of tribal resources and economic development." ER104. The Energy Company admitted that the Federal Defendants have approved the federal Project "in accordance with the federal trust responsibility." ER102.

The Federal Defendants did not join in the motion to dismiss, but opposed it. While the agencies intended to vigorously defend their

[4] Two prior cases challenged and overturned the Office of Surface Mining's approval of prior expansions of the Navajo Mine. *Diné Citizens Against Ruining our Env't v. OSM*, 82 F. Supp. 3d 1201, 1218 (D. Colo. 2015), *order vacated as moot*, 643 F. App'x 799 (10th Cir. 2016); *Diné Citizens Against Ruining our Env't v. Klein*, 747 F. Supp. 2d 1234, 1264 (D. Colo. 2010). Neither case caused the closure of the mine or power plant.

decisions on the merits, they did not believe as a matter of jurisdiction that it should be dismissed, for largely the same reasons presented by the Conservation Groups. ER111-19. As noted above, the Navajo Nation itself did not join the case or otherwise join in the Energy Company's motion to dismiss.

The district court granted the Energy Company's motion to dismiss the case in its entirety. ER7-8. The Conservation Groups timely appealed. ER10.

STANDARD OF REVIEW

This Court reviews a district court's ruling on a Rule 19 motion "for abuse of discretion" and "review[s] the legal conclusions underlying that determination *de novo*." *Alto v. Black*, 738 F.3d 1111, 1125 (9th Cir. 2013). The questions of whether a person has an interest relating to an action and whether any such interest is adequately represented by existing parties are legal questions that are reviewed *de novo*. *See Prete v. Bradbury*, 438 F.3d 949, 953 (9th Cir. 2006) ("This court reviews *de novo* a district court's ruling on a motion to intervene as of right pursuant to Fed.R.Civ.P. 24(a)(2)."). In this review, "a court 'by definition abuses its discretion when it makes an error of law.'"

Philippines v. Pimentel, 553 U.S. 851, 864 (2008) (*quoting Koon v. United States*, 518 U.S. 81, 100 (1996)). This Court also "review[s] de novo [a] district court's conclusion that it is not feasible to join" an absent party. *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 778 (9th Cir. 2005).

"Issues of tribal sovereign immunity are reviewed de novo." *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015) (quoting *Burlington N. & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007)).

"On review of an order dismissing an action under Rule 12(b)(7), [this Court] accepts as true the allegations in Plaintiff's complaint and draw all reasonable inferences in Plaintiff's favor." *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of L.A.*, 637 F.3d 993, 996 (9th Cir. 2011).

SUMMARY OF ARGUMENT

A fundamental tenet of our constitutional structure and requirement for the rule of law is that state or tribal sovereign immunity cannot thwart the prospective enforcement of controlling federal law. The district court erred in dismissing, on the basis of Rule 19 and tribal sovereign immunity, the Conservation Groups' action

against Federal Defendants for violations of federal laws (NEPA and the ESA), and seeking only temporary and prospective declaratory and injunctive relief against the Federal Defendants, pending compliance with those federal laws.

First, pursuant to controlling Ninth Circuit precedent, *Northern Alaska Environmental Center v. Hodel*, under Rule 19(a), the Energy Company did not have a legally protected interest in the Federal Defendants' compliance with these federal laws when making decisions over which the Federal Defendants had ultimate authority. Further, and also contrary to controlling precedent, *Southwest Center for Biological Diversity v. Babbitt*, given the special federal trust responsibility toward American Indian tribes and the nature of judicial review under the Administrative Procedure Act, Federal Defendants could adequately represent tribal interests in the federal decision-making process. Accordingly, the Energy Company was not a required party under Rule 19(a). The district court's ruling to the contrary ignored *Northern Alaska Environmental Center* and *Southwest Center for Biological Diversity* and was, therefore, in error.

Second, even assuming the Energy Company was a required party, dismissal was not warranted under Rule 19(b) where: (1) there was no imposition on tribal sovereignty because Congress has granted the Federal Defendants—not the Energy Company—ultimate authority over the federal decisions at issue in this case; (2) the requested temporary prospective declaratory and injunctive relief would vindicate the strong federal interest in enforcement of federal law without causing any undue prejudice to tribal sovereign interests; (3) dismissal would thwart the public and judicial interest in enforcement of NEPA and the ESA, federal statutes that protect important public rights; and, (4) no alternative forum is available to the Conservation Groups. The district court's ruling to the contrary ignored controlling Ninth Circuit precedent, *Connor v. Burford*, that pursuant to the public rights doctrine a suit seeking identical prospective relief under NEPA and the ESA, should not be dismissed under Rule 19.

Finally, even assuming the Energy Company was a required party and the case could not continue in its absence, the Energy Company could effectively be joined to the suit via joinder of its Chief Executive Officer Clark Moseley under the *Ex parte Young* doctrine. The district

court's wholesale failure to consider the feasible joinder of Mr. Moseley was also contrary to controlling Ninth Circuit precedent and is therefore reversible error.

ARGUMENT

I. The District Court Misapplied Federal Rule of Civil Procedure 19.

"Rule 19 governs compulsory party joinder in federal courts." *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 778 (9th Cir. 2005). The rule "provides a three-step process for determining whether a court should dismiss an action for failure to join" an absent party. *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999). First, "the court must determine whether the nonparty should be joined under Rule 19(a)," *E.E.O.C.*, 400 F.3d at 779, *i.e.*, whether the party is "required." Fed. R. Civ. P. 19(a)(1)(B)(i).[5] Second, if the nonparty is "required" under Rule 19(a), the court must "determine whether it is feasible to order that the absentee be joined." *E.E.O.C.*, 400 F.3d at 779. If the required party can be joined, the court must order joinder. Fed. R. Civ. P. 19(a)(2). "Finally, if joinder is not feasible, the court must determine

[5] Rule 19(a) was amended stylistically in 2007 to replace the term "necessary party" with "required party." *Pimentel*, 553 U.S. at 855.

at the third stage whether the case can proceed without the absentee, or whether … the action must be dismissed." *E.E.O.C.*, 400 F.3d at 779; Fed. R. Civ. P. 19(b). "The considerations set forth in subdivision (b) are nonexclusive, as made clear by the introductory statement that '[t]he factors for the court to consider include.'" *Pimentel*, 553 U.S. at 862 (quoting Fed. R. Civ. P. 19(b)).

Rule 19 is "designed to accomplish justice between all parties having an interest in a dispute." 7 Charles Alan Wright *et al.*, Federal Practice and Procedure § 1602 (3d ed.). It "should be employed to promote the full adjudication of disputes with a minimum of effort." *Id.*[6] "Courts are loath to dismiss cases based on nonjoinder of a party, so dismissal will be ordered only when the resulting defect cannot be remedied and prejudice or inefficiency will certainly result." *Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 441 (4th Cir. 1999).[7] Rule 19 does not enlarge or modify sovereign immunity. *Vann v. U.S. Dep't of*

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[6] *See also* Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. Rev. 1061, 1062 (1985) (stating that the rule has "two basic goals: to identify nonparties whose joinder is necessary for a just adjudication and to secure that joinder").

[7] *Accord* Wright et al., *supra* § 1602 (noting courts' "reluctance to dismiss").

Interior, 701 F.3d 927, 929-30 (D.C. Cir. 2012).[8] Furthermore, "[t]he scope of the 19(a)(1) inquiry does not change because the purportedly necessary party is a federally recognized Native American tribe." *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245, 250 (D. Or. 2017) (citing *Alto*, 738 F.3d 1126-28).

In this case, the district court determined that the *Energy Company* was a required party to the Conservation Groups' action against the *Federal Defendants* for violating federal statutes—NEPA and the ESA—based on the absent *Navajo Nation's* interest in the Federal Defendants' approval of the Project. ER3-5. The court reasoned that although the Federal Defendants' and the Energy Company's interests in defending their approval of the Project "aligned," the Federal Defendants could not adequately represent the Energy Company because of the mere possibility that their presently aligned interests could diverge at some undefined point later in the litigation.

[8] *Accord Estate of Mitchell v. Modern Woodsmen of Am.*, No. 2:10-CV-965-JEO, 2015 WL 1778375, at *3 (N.D. Ala. Apr. 20, 2015) ("[R]ule 19 is a procedural rule that does not enlarge or modify substantive rights.") (citing 28 U.S.C. § 2072(a)-(b)); *Brennan v. Silvergate Dist. Lodge No. 50*, 503 F.2d 800, 804 (9th Cir. 1974) (noting that civil rules do not enlarge or modify substantive rights).

ER4-5. Upon finding that the Energy Company was required and could not be joined in the litigation on account of sovereign immunity, the court determined, in the space of three sentences, that dismissal was required. ER7-8. The court did not consider any competing interests, means of shaping relief to avoid undue prejudice, or the public rights doctrine. *See* ER7. Failure to give sufficient weight to one of the Rule 19(b) factors—let alone failure, as here, to consider factors entirely—warrants reversal. *See Pimentel,* 553 U.S. at 872.

II. Neither Sovereign Immunity nor Rule 19 Defeats This Action in Federal Court Alleging Violation of Federal Law and Seeking Prospective Injunctive Relief Against Federal Defendants.

Longstanding Supreme Court precedent limits the ability of parties to invoke sovereign immunity and Rule 19 to impede the enforcement of federal law—the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. In *Ex parte Young*, 209 U.S. 123, 160 (1908), the Court held that a "state has no power to impart on [any state officer] any immunity from responsibility to the supreme authority of the United States." Thus, the sovereign immunity of a state may not defeat such an action in federal court when the plaintiff "alleges an ongoing violation of federal law and seeks relief properly characterized as

prospective." *Verizon v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring)). This doctrine, which applies equally to sovereign tribes, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2035 (2014), "goes to the heart of a federal system" and is "indispensable to the establishment of constitutional government and the rule of law." 17A Charles Alan Wright *et al.*, Federal Practice and Procedure, § 4321 (3d ed.).

In *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 363 (1940), the Supreme Court held that the rule of compulsory joinder, *i.e.*, Rule 19, cannot be used to thwart litigation to enforce public rights. "In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for traditional rules governing the joinder of parties in litigation determining private rights." *Nat'l Licorice Co.*, 309 U.S. at 363. A contrary rule, the Court observed, would "set at naught" enforcement of federal laws designed to protect the public. *Id.* at 364.

Responsive to the Supreme Court's concerns about preventing sovereign immunity and Rule 19 from impeding enforcement of federal

law, the Ninth Circuit has repeatedly ruled to prevent the expansive use of these devices from "slam[ming] the courthouse door in the face of plaintiffs, who seek only to invoke … judicial oversight," *Thomas v. United States*, 189 F.3d 662, 669 (7th Cir. 1999), of *federal agency actions* under NEPA and the ESA. In particular, this Court has ruled that:

(1) absent third-party mine permittees are not required parties to public interest lawsuits against federal agencies alleging federal violations of NEPA in the permitting process, *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468-69 (9th Cir. 1986);

(2) absent tribes are not necessary parties to public interest lawsuits against federal agencies that allege violations of NEPA and the ESA because, absent a clear conflict, federal defendants adequately represent tribal interests pursuant to their trust responsibility, *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998);

(3) pursuant to the "public rights" doctrine articulated in *National Licorice Co.*, public interest lawsuits against federal defendants alleging violations of public rights under NEPA and the ESA, and seeking only prospective relief against federal agencies, may not be dismissed under Rule 19 for failing to join absent private parties, *Connor v. Burford*, 848 F.2d 1441, 1459-61 (9th Cir. 1988).

Pursuant to these principles, appellate courts have consistently recognized that tribal sovereign immunity is not a sufficient basis for dismissing public interest lawsuits against federal agencies for violating NEPA and the ESA. *Sw. Ctr.*, 150 F.3d at 1154-55 (NEPA and ESA suit); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259-60 (10th Cir. 2001) (NEPA suit); *Manygoats v. Kleppe*, 558 F.2d 556, 558-59 (10th Cir. 1977) (NEPA suit).[9] This consistent body of case law is well

[9] District courts and commentators overwhelmingly agree with this position. *Jamul Action Comm. v. Chaudhuri*, 200 F. Supp. 3d. 1042, 1052 (E.D. Cal. 2016) (NEPA suit); *Hayes v. Chaparral Energy, LLC*, No. 14-CV-495-GFK-PJC, 2016 WL 1175238, at **4-11 (N.D. Okla. Mar. 23, 2016) (NEPA suit), *vacated as moot sub nom. Hayes v. Osage Minerals Council*, 699 F. App'x 799 (10th Cir. 2017); *Diné Citizens Against Ruining our Env't*, 2013 WL 68701, at **2-6 (NEPA case); *Diné*

warranted: if sovereign immunity—enlarged by Rule 19—could force dismissal of such cases, "virtually all public and private activity on Indian lands would be immune from any oversight under the government's environmental laws." *Diné Citizens Against Ruining our Env't v. OSM*, No. 12-CV-1275-JLK, 2013 WL 68701, at *2 (D. Colo. Jan. 4, 2013). This would in turn undermine the rule of law in our federal system and effectively deregulate the most harmful, polluting industries on tribal lands.

In dismissing the Conservation Groups' action, the district court erroneously ignored these binding Ninth Circuit authorities.

Citizens Against Ruining our Env't v. Klein, 676 F. Supp. 2d 1198, 1216-17 (D. Colo. 2009) (NEPA suit); *Connecticut ex rel. Blumenthal v. Babbitt*, 899 F. Supp. 80, 83 (D. Conn. 1995) (NEPA suit); Thomas P. Schlosser, *Understanding Federal Rule of Civil Procedure 19 and Its Application in the Sovereign Immunity Cases*, Fed. Lawyer, Apr. 2013, at 42, 44 ; Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 Gonz. L. Rev. 1, 40 (2004).

III. Neither the Energy Company nor the Navajo Nation Was a Required Party.

A. Neither the Energy Company nor the Navajo Nation Has a Legally Protected Interest in Federal Defendants' Compliance with Federal Law Under NEPA and the ESA.

Under the first step of the Rule 19 analysis, a nonparty is "required" and should be joined if, among other things, it "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 … as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i).[10] In determining whether a party has claimed a sufficient interest, "it is necessary carefully to identify the absent part[y's] interest at stake." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California* (*Colusa*), 547 F.3d 962, 973 (9th Cir. 2008). A claimed interest must be "legally protected" and "must be more than a financial stake and more than speculation about a future event." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). The Ninth Circuit has further explained that "[a]n absent party has no legally protected interest at stake in a suit merely to

[10] This is the only basis on which the Energy Company alleged required party status. ER103.

enforce compliance with administrative procedures." *Colusa*, 547 F.3d at 971. Further, a nonparty (or party) may not assert the interest of a different nonparty that has remained silent. *In re County of Orange*, 262 F.3d 1014, 1023 (9th Cir. 2001).

Tribal sovereignty interests are not sufficient to make tribes required parties in cases for federal judicial review of decisions over which federal agencies—not tribes—have ultimate authority. *Alto v. Black*, 738 F.3d 1111, 1129 (9th Cir. 2013) (finding that tribe was not required party to action against federal agency over membership decision, where federal agency had ultimate authority over decision: "As to the Band's legal interest in maintaining sovereign control over membership issues, granting the relief requested in claims one through three—vacatur of BIA's Order—would not undermine authority the Tribe would otherwise exercise. The Tribe itself has delegated its authority over enrollment to BIA."); *Thomas v. United States*, 189 F.3d 662, 667-69 (7th Cir. 1999) (holding that despite legitimate tribal interest in tribal election to adopt tribal constitution, tribe was not required party to suit challenging election in light of ultimate federal authority over election: "At its base, this lawsuit is a challenge to the

way certain federal officials administered an election for which they were both substantively and procedurally responsible.").

With specific regard to a public interest lawsuit challenging a federal agency's compliance with NEPA, this Court has held that "miners with pending plans have no legal entitlement to any given set of procedures," and cannot therefore force the dismissal of a NEPA suit via Rule 19. *N. Alaska Envtl. Ctr.*, 803 F.2d at 469; *accord Jamul Action Comm.*, 200 F. Supp. 3d at 1052 (holding that tribe was not required party to NEPA suit against federal agencies because tribe "has no legally protected interest in the federal defendants' execution of a NEPA review").

Here, a careful analysis of the Energy Company's asserted interests reveals that they are insufficient to render the company a required party. First, as in *Northern Alaska Environmental Center* and *Jamul Action Committee*, the Energy Company had "no legal entitlement" in the federal agencies' compliance with NEPA or the ESA. 803 F.2d at 469; 200 F. Supp. 3d at 1052. Consequently, as in *Alto* and *Thomas*, the Energy Company cannot be a required party to the Conservation Groups' suit in federal court against federal agencies for

violating federal laws—NEPA and the ESA—and seeking prospective relief solely from the federal agencies. ER18, 49-70; *see Alto*, 738 F.3d at 1129 (holding that temporary delay of federal action pending remand "does not impose a coercive order on any sovereign entity"); *Thomas*, 189 F.3d at 668-69.

This conclusion is consistent with the logic of both the *Ex parte Young* doctrine and the public rights doctrine: the powerful interest in the supremacy and enforcement of federal law requires state or tribal immunity, as well as indirect interests of absent parties, to yield when plaintiffs seek only prospective injunctive relief. This is particularly so here, where the Conservation Groups have not—and indeed could not—bring suit against the Energy Company or the Navajo Nation. *See Connecticut*, 899 F. Supp. at 83 (holding plaintiffs could challenge a federal decision to take land into trust for tribe, but would not have standing to challenge underlying private sale of land to tribe).

Further, even assuming that the Energy Company could assert the interest of the Navajo Nation,[11] judicial review of the Federal

[11] The Energy Company should not be permitted to assert the broader interests of the Navajo Nation, because the Nation itself has "remained silent" in this litigation. *In re County of Orange*, 262 F.3d at 1023.

Defendants' compliance with NEPA and the ESA does not "undermine authority the [Navajo Nation] would otherwise exercise." *Alto*, 738 F.3d at 1129. Compliance with these federal statutes is the ultimate obligation of the federal agencies, not the Navajo Nation (or the Energy Company). 42 U.S.C. § 4332(2) (mandating that "all agencies of the Federal Government shall," *inter alia* prepare an environmental impact statement for certain "major Federal actions"); 16 U.S.C. § 1536(a)(2) (requiring "[e]ach Federal agency" to consult with the U.S. Fish and Wildlife Service to "insure that any action authorized, funded, or carried out by such agency" will not jeopardize threatened or endangered species or critical habitat). By congressional design, federal agencies' compliance with these federal laws is reviewable in federal court under the citizen-suit provision of the ESA, 16 U.S.C. § 1540(g)(1)(A), and the APA, 5 U.S.C. §§ 702, 704, which creates "a strong presumption that Congress intends judicial review." *Alto*, 738 F.3d at 1124 (internal quotation omitted) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)).

Moreover, the underlying federal decisions for the Project—issuance of a mining permit to the Energy Company, approval of the

power-plant lease between the plant owners and the Navajo Nation, and approval of the rights-of-way for the transmission lines—were the responsibility of the *federal agencies* pursuant to *federal law*. Under the Surface Mining Law, a company may not strip-mine without a permit from the regulatory authority, which on tribal land is the U.S. Office of Surface Mining. 30 U.S.C. § 1260; 30 C.F.R. § 750.6(a)(1). In issuing permits, the Office of Surface Mining must assure compliance with NEPA. 30 C.F.R. § 750.6(a)(7), and the ESA, *id.* § 773.15(j).[12] Similarly, ultimate authority to approve a lease or a right-of-way on tribal land rests by congressional design with the Bureau of Indian Affairs, not the tribes. 25 U.S.C. § 415(a) (providing that leases on tribal land may only

[12] Under the Surface Mining Law, the Navajo Nation may assume primary regulatory authority over strip-mining from the federal government (*i.e.*, "primacy"). 30 U.S.C. § 1300(j)(1)(B). However, to do so, the Navajo Nation must *waive sovereign immunity* to allow citizen suits in federal court against both the Navajo Nation and any permittee, like the Energy Company. *Id.* § 1300(j)(3)-(4). The Navajo Nation has *not* assumed primacy. It would be absurd and contrary to congressional design to conclude, as the Energy Company proposes, that the scope of sovereign immunity is *greater* now when the Navajo Nation has *no* authority over strip-mining than it would be if the Navajo Nation were to assume *exclusive* jurisdiction over strip-mining.

occur "with approval of the Secretary of the Interior")[13]; 25 U.S.C. § 323 (empowering "Secretary of the Interior" to grant "rights-of-way" on Indian trust lands).

The predominant federal role in this action is warranted here in light of the nature of the Project. The Project is a textbook example of interstate commerce, the regulation of which is the province of federal authority. U.S. Const. art. I, § 8, cl. 3; *see, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (noting interstate pollution has long been subject to federal regulation); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 280 (1981) (upholding congressional finding that coal strip-mining "has substantial effects on interstate commerce," justifying federal regulation); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011)

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[13] *See Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1235 (9th Cir. 1996) (stating that under § 415 "the Secretary must review and approve the lease of all lands held in trust for a tribe by the United States"). While approval of leases on tribal land has been subject to the ultimate authority of the federal government for over two centuries, recent legislation allows tribes to regain sovereign authority over certain leases upon tribal promulgation of appropriate regulations. *See* 25 U.S.C. § 415(h); Bryan Newland, *The HEARTH Act: Transforming Tribal Land Development*, Fed. Lawyer, Apr. 2014, at 66, 67-68. The underlying leases in this case were not subject to these provisions of the HEARTH Act. *See* ER133-35.

(holding that the ESA's federal regulatory scheme is authorized by Congress's Commerce Clause authority due to "substantial relation to commerce").

Here, the mine and power plant are within the boundaries of New Mexico, and the transmission lines are in Arizona, transmitting the electricity to load centers in that state. ER17, 36-40. Pollution from the coal complex harms people, including the Conservation Groups' members, in four states, as well as native endangered fish that migrate through four states via the San Juan River. ER14, 17, 19-24, 36-40. In cases involving regulation of interstate harm, the Rule 19 factors weigh in favor of maintaining the integrity of federal interstate regulatory regimes. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 490-91 (1987) (while states and tribes "have a strong voice in regulating their own pollution," federal environmental laws "contemplates a much lesser role" for interstate pollution, and states or tribes cannot take action which interferes with federal authority to control such pollution).

At bottom, this is a case about "the way certain federal officials administered [a decision making process] for which they were both substantively and procedurally responsible." *Thomas*, 189 F.3d at 667.

"[T]he balance of power that Congress struck in this context is the compass that [this Court] must follow for determining the significance of the tribal interest under Rule 19(a)." *Id.* As such, here, as in *Alto* and *Thomas*, though the Energy Company and the Navajo Nation have some interest in the Federal Defendants' compliance with the governing federal laws at issue here, those interests are not within the category of protected interests that could render either a required party. *Thomas*, 189 F.3d at 669; *accord Alto*, 738 F.3d at 1129.

The district court's analysis and conclusion to the contrary were based on errors of law, and were therefore an abuse of discretion. First, the court failed entirely to address this Court's on-point decision in *Northern Alaska Environmental Center*, which held that a mining company's interests in obtaining a permit from federal regulators is insufficient to make the company a required party in a NEPA suit challenging the federal permitting process. 803 F.2d at 468-69. Further, the district court did not, in fact, address *any* potential impacts to the interests of the Energy Company. Rather, the court improperly focused solely on potential financial impacts to the interests of the Navajo Nation, which is not a party to the case and has made no appearance to

express any interest. ER3-4 (finding incorrectly that the Energy Company had an interest because "the retroactive[14] relief Plaintiffs seek could directly affect the *Navajo Nation*" (emphasis added)); *cf. In re County of Orange*, 262 F.3d at 1023 (holding that a party may not assert the interests of another). The court's reliance on potential financial impacts to the Navajo Nation compounded this error because a mere financial interest is insufficient to satisfy Rule 19(a). *Makah*, 910 F.2d at 558; *cf.* ER4 & n.1. Moreover, contrary to the court's assertion, this action does not present an "affront[] to the [Navajo] Nation's sovereignty," ER4, because as noted, it only challenges *Federal Defendants' actions* in areas—mine permitting and lease and right-of-way approval—in which the Federal Defendants, rather than the Navajo Nation, have ultimate authority. *See Alto*, 738 F.3d at 1129 (suit did not "undermine" tribal authority, where underlying decision involved final authority of Bureau of Indian Affairs); *accord Thomas*, 189 F.3d at 669.

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[14] The Conservation Groups do not seek retroactive relief, but temporary prospective declaratory and injunctive relief from the Federal Defendants, pending remand to the Federal Defendants. ER67-69; *see also infra* Part IV.B (discussing requested relief).

Finally, the district court's reliance on *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996), was misplaced. *See* ER3. *Kescoli* is fundamentally different from the present case because, there, the plaintiff "s[ought] to invalidate" a part of a contract that two absent tribes were parties to (the Navajo Nation and the Hopi Tribe). *Kescoli*, 101 F.3d at 1307, 1309. "No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975).

In the instant case, however, the Conservation Groups do not seek to invalidate, modify, or set aside any contract to which the Energy Company or the Navajo Nation is a party (indeed, they would have no standing to do so), but rather seek only temporary, prospective injunctive relief against federal agencies for violating federal laws, NEPA and the ESA. ER68-69. The Tenth Circuit recognized this critical distinction in *Manygoats v. Kleppe*:

> In *Tewa Tesuque* the attack was on the lease and the action sought cancellation. In the instant case the attack is on the adequacy of the impact statement which the Secretary must consider before approving or rejecting the Navajo-Exxon agreement. The plaintiffs seek relief from the consequences of action based on the inadequate EIS. A holding that the

> EIS is inadequate does not necessarily result in prejudice to the Tribe. The only result will be a new EIS for consideration by the Secretary. The requested relief does not call for action by or against the Tribe.

558 F.2d 556, 558-59 (10th Cir. 1977), *cited with approval in Makah*, 910 F.2d at 559 n.6. Furthermore, *Kescoli* involved a fundamental issue of tribal sovereign self-regulation: tribal burial sites affected by a coal mine on tribal land. 101 F.3d at 1307-08. In such a case, the interest of tribal sovereignty is enhanced, and federal courts are more reluctant to intervene.[15] By contrast, as noted, the instant case is fundamentally interstate in nature, involving actions in two states, across multiple reservations, that adversely affect people and endangered species outside of Indian land in four states. ER14, 17, 19-24, 36-40. Thus, as noted above, the role of the federal government is enhanced and the interest of tribal sovereignty is diminished. The district court's overbroad reading of *Kescoli* directly conflicts with multiple Ninth Circuit decisions holding that public interest lawsuits against federal defendants under NEPA and the ESA, as here, are not subject to

[15] *See* Fletcher, *supra*, 40 Gonz. L. Rev. at 26-28, 43 (identifying pattern of courts' reluctance to become involved in internal tribal matters).

dismissal for failure to join nonparties. *See N. Alaska*, 803 F.2d at 468-69; *Sw. Ctr.*, 150 F.3d at 1154-55; *Connor*, 848 F.2d 1459-61.

B. Federal Defendants and Power Plant Operator Arizona Public Service Adequately Represent the Interests of the Energy Company and the Navajo Nation.

In addition to the foregoing, neither the Energy Company nor the Navajo Nation is a required party because any interests they may have in the Federal Defendants' approval of the Project are adequately represented by the Federal Defendants, as well as Intervenor-Defendant Arizona Public Service, the majority owner and operator of the power plant.

"As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from suit where its interest will be adequately represented by existing parties to the suit." *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999). Due in part to its "trust responsibility to … Tribes," "the United States can adequately represent an Indian tribe unless there exists a conflict between the United States and the tribe." *Id.* at 1167-68 (quoting *Sw. Ctr.*, 150 F.3d at 1154); *accord Alto*, 738 F.3d at 1128; *Connecticut*, 899 F. Supp. at 83. The mere "possibility of conflict" between the tribe and

the United States is insufficient to render the tribe a required party. *Washington*, 173 F.3d at 1168; *Sw. Ctr.*, 150 F.3d at 1154; *Alto*, 738 F.3d at 1128 (possible future conflict insufficient to show federal defendants could not adequately represent tribe where federal defendants were defending federal decision that the tribe supported).

To determine whether a nonparty is adequately represented by an existing party, this Court considers:

> [w]hether 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.

Washington, 173 F.3d at 1167 (internal quotation omitted) (quoting *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992)).

Here, the Energy Company and the Navajo Nation are adequately represented by the Federal Defendants and Arizona Public Service. First, as in *Alto*, *Washington*, and *Southwest Center*, the Federal Defendants share the interest of the Energy Company in defending the federal approval of the Project. ER76 (requesting dismissal). Similar to *Alto*, *Washington*, *Southwest Center*, and *Connecticut*, the Federal Defendants were acting pursuant to their trust responsibility to the

Navajo Nation when they made these approvals, ER126-29, as the Energy Company, itself, admits, ER102 (noting agencies approved the project "in accordance with the federal trust responsibility").

Moreover, because the Federal Defendants' administrative decisions "must be upheld, if at all, on the basis articulated by the agency itself," *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 50 (1983), the only arguments available to uphold those decisions are those arguments *the agencies already articulated* during the administrative process. Thus, as in *Alto*, *Washington*, and *Southwest Center*, the Federal Defendants will "undoubtedly make" and are "capable" of making all arguments that the Energy Company or the Navajo Nation could offer in support of the Project. Indeed, the Federal Defendants expressly affirmed that they would adequately represent the Energy Company's interest by "vigorously defend[ing]" the "approval of the leases, permits, and rights of way." ER113-14. Neither the district court nor the Energy Company "presented any arguments that [the Energy Company] would offer in defense of the [Project] which [the Federal Defendants] ha[ve] not [made] or would not make." *Alto*, 738 F.3d at 1128; *cf.* ER4-5. Further, because this challenge to final agency action is

"limited to the administrative record before" the agencies, *Alto*, 738 F.3d at 1128; ER87, neither the Energy Company nor the Navajo Nation could "offer new evidence in the judicial proceedings that would materially affect the outcome." *Alto*, 738 F.3d at 1128.

Even if the Federal Defendants would not adequately represent the Energy Company's interests, Intervenor-Defendant Arizona Public Service clearly would. Because the mine and power plant are interdependent—the mine sells only to the plant and the plant buys only from the mine, *see* ER40[16]—Arizona Public Service's interest in extended operations of the plant mirrors the Energy Company's interest in expanded operations of the mine. *See* ER78, 80 (asserting "economic interests in continued operation of" the Four Corners Power Plant). Together, Federal Defendants and Arizona Public Service adequately represent the interests of the Energy Company and the Navajo Nation. *See Sw. Ctr.*, 150 F.3d at 1154-55 (holding that federal defendants and

[16] *See Diné Citizens Against Ruining Our Environment v. OSM*, 82 F. Supp. 3d 1201, 1212 (D. Colo. 2015) ("[I]t is not economically feasible for the Four Corners Power Plant to secure coal from any other source."), *order vacated as moot*, 643 F. App'x 799 (10th Cir. 2016) (mem.).

intervenor-defendants adequately represented interests of tribe in NEPA suit).

The district court's reasoning to the contrary was erroneous. While acknowledging that "Federal Defendants and … NTEC's [the Energy Company's] interests are aligned," the court asserted that the Energy Company's interests "far exceed" those of the federal agencies. ER4-5. The court, however, failed to acknowledge the critical factor on which this Court relied in *Washington* and *Alto*—"[t]he federal government, including the Secretary, has a trust responsibility to the Tribe, as a trustee, which obligates the Secretary to protect the Tribe's interests in this matter." *Alto*, 738 F.3d at 1128 (internal quotation omitted) (quoting *Washington*, 173 F.3d at 1168); *accord Connecticut*, 899 F. Supp. at 83. Here, both the Federal Defendants and the Energy Company recognize that the Federal Defendants acted pursuant to this trust obligation in approving the Project. ER102, 126-29.

Further, the district court's reliance on a *possible* future divergence of interests between the Federal Defendants and the Energy Company was not anchored in any concrete facts and was directly contrary to this Court's prior rulings, which require demonstration of an

actual conflict. *Cf. Sw. Ctr.*, 150 F.3d at 1154 (rejecting argument that "possibility of conflict" between federal defendants and tribe in NEPA suit was sufficient to make tribe a required party); *accord Washington*, 173 F.3d at 1168; *Alto*, 738 F.3d at 1128 (rejecting arguments about potential future conflicts where "no such conflict has surfaced to this point in this case"). The district court also failed to acknowledge Arizona Public Service's interest in the Project that is nearly identical to that of the Energy Company. *See* ER4-5.

The district court's reliance on language about potential conflicts from *White v. University of California*, 765 F.3d 1010, 1027 (9th Cir. 2014), was unwarranted. *See* ER5. In *White*, this Court found that the non-federal "University [of California] cannot sufficiently represent interests of the Tribes," because "different motivations of the two parties could lead to a later divergence of interests." 765 F.3d at 1027. Critically, the University of California had *no trust responsibility* to the absent tribes. *See id.* Unlike *White*, the instant case, along with *Alto*, *Washington*, *Southwest Center*, and *Connecticut*, involves Federal Defendants making a federal decision pursuant to their trust responsibility to absent tribes. ER102, 126-29. This Court has

repeatedly explained that in this circumstance, the mere possibility of conflict is insufficient to support a finding that an absent tribe is a required party. The district court's failure to follow the binding decisions in *Alto*, *Washington*, and *Southwest Center* was error.

Finally, although not relied upon by the district court, the Energy Company relied on *Center for Biological Diversity v. Pizarchik,* 858 F. Supp. 2d 1221 (D. Colo. 2012), which dismissed a case over the mine based on Rule 19. However, while in the Tenth Circuit absent tribes are required under Rule 19(a) even if a case will not cancel a tribal contract, the case may nonetheless proceed under Rule 19(b) to vindicate NEPA. *Manygoats*, 558 F.2d at 558-59. Further, the Ninth Circuit holds that absent tribes are not required in NEPA suits because of adequate federal representation. *Sw. Ctr.*, 150 F.3d at 1154. In addition, *Pizarchik* also never considered the application of the public rights doctrine. *See Diné Citizens Against Ruining our Env't*, 2013 WL 68701, at *5 n.4 (distinguishing *Pizarchik*). Thus, *Pizarchik* both conflicts with Ninth Circuit law and was wrongly decided under Tenth Circuit law.

IV. Even if the Energy Company or the Navajo Nation Were a Required Party, the Harsh Result of Dismissal Was Not Warranted.

Assuming *arguendo* that the Energy Company or the Navajo Nation was a required party, *all* of the equitable considerations of Rule 19(b) align in favor of allowing the suit to continue, and the district court therefore abused its discretion in dismissing the action.

If a party is required and cannot be joined under Rule 19(a), 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). In making this determination, the factors 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 in 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.

Id.

In analyzing these factors, a court must avoid "reliance on formulas extracted from their context" and focus, instead, on "pragmatic analysis." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 n.16 (1968). The equitable analysis of Rule 19(b) should be applied to "accomplish justice between all the parties in interest," and not to "defeat the very purposes of justice." *Id.* at 116 n.12 (quoting *Parker Rust-Proof Co. v. W. Union Tel. Co.*, 105 F.2d 976, 980 (2d Cir. 1939)). "[I]f no *alternative forum* is available to the plaintiff, the court should be 'extra cautious' before dismissing the suit." *Makah*, 910 F.2d at 560 (emphasis in original) (quoting *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986)). Courts will not dismiss cases seeking to vindicate public rights, such as NEPA and the ESA, unless the adjudication will "destroy the legal entitlements of the absent parties." *Connor*, 848 F.2d at 1459; *Nat'l Licorice Co.*, 309 U.S. at 365-66 (denying dismissal and noting that suit to enforce public rights was "ineffective to determine any private rights" of absent parties).

The only two federal appellate decisions to address Rule 19(b) in the context of public interest NEPA suits with potential indirect

impacts to American Indian tribes found dismissal unwarranted. *Sac & Fox*, 240 F.3d at 1259-60; *Manygoats*, 558 F.2d at 558-59.

Here, each factor supports allowing this action to proceed.

A. Prospective Injunctive Relief Against Federal Defendants to Assure Federal Compliance with Federal Law Does Not Prejudice Sovereign Interests of the Energy Company or the Navajo Nation.

Here, the Conservation Groups seek only temporary prospective injunctive relief against the Federal Defendants for failing to comply with federal law. ER68-69; *Verizon*, 535 U.S. at 646 (holding that a "declaration of the *past*, as well as the *future*, ineffectiveness" of a government decision is within *Ex parte Young* doctrine, where it does not impose "past liability" on the government) (emphasis in original). Such relief, aimed only at the Federal Defendants, does not "undermine authority" that the Energy Company or the Navajo Nation "would otherwise exercise." *Alto*, 738 F.3d at 1129; *accord Manygoats*, 558 F.2d at 558-59 (reasoning that suit challenging the "adequacy of a[n] [environmental] impact statement [under NEPA] does not call for any action by or against the Tribe" and "does not necessarily result in prejudice to the Tribe"). Thus, there is no prejudice to any sovereign

interests. *See supra* Part III.A (demonstrating that federal defendants' have ultimate authority over permits and approvals). Furthermore, any "potential prejudice to [the Energy Company's or the Navajo Nation's] interest is offset in large part by the fact that [Federal Defendants'] interests in defending [their] decisions are substantially similar, if not virtually identical, to those of [the Energy Company and the Navajo Nation]." *Sac & Fox*, 240 F.3d at 1260; *see supra* Part III.B. Further, contrary to the district court's suggestion, prior public interest lawsuits challenging federal approval of different expansions of the Navajo Mine have not led to the closure of the mine or power plant. *See Diné Citizens Against Ruining our Env't*, 82 F. Supp. 3d at 1218; *Diné Citizens Against Ruining our Env't*, 747 F. Supp. 2d at 1264.

In sum, the Energy Company's and the Navajo Nation's sovereign interests should not be able to "defeat the very purposes of justice,"[17] *i.e.,* lawful judicial review of federal government action by aggrieved citizens, in an area of law over which neither the Energy Company nor the Navajo Nation exercises sovereign authority. *See Verizon*, 535 U.S. at 653 (Souter, J., concurring) (observing that in case involving "federal

[17] *Parker Rust-Proof Co.*, 105 F.2d at 980.

court … reviewing … [a] determination of a question of federal law," "it is neither prudent nor natural to see such review as impugning the dignity of the State or implicating the States' sovereign immunity in the federal system"). Thus, this factor weighs in favor of allowing this action to proceed.

B. Conservation Groups' Requested Temporary Prospective Injunctive Relief Against Federal Defendants Was Designed, in Light of Existing Law, to Avoid Prejudice to the Energy Company and the Navajo Nation.

In balancing the competing interests of state and tribal sovereignty with the enforcement of federal law, the Supreme Court has concluded that the interest of enforcing federal law prevails in cases in which plaintiffs seek prospective declaratory and injunctive relief to stop the violation of federal law; conversely, that interest will yield in cases seeking retrospective monetary relief from a sovereign. *Agua Caliente Band v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000) (noting "delicate balance" of the *Ex parte Young* doctrine). An action seeking a determination that a "past" decision is unlawful and an injunction "to restrain" enforcement of the allegedly unlawful action is within the *Ex parte Young* doctrine if it "does not impose upon the State a monetary

loss resulting from a past breach of a legal duty." *Verizon*, 535 U.S. at 645-46 (emphasis and internal quotation omitted) (quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)). Thus, in a case seeking prospective injunctive relief, "[t]he state has no power to impart … immunity from responsibility to the supreme authority of the United States." *Ex parte Young*, 209 U.S. at 160. If a tribe (or state) has no power to impart sovereign immunity to shield a tribal (or state) officer against enforcement of federal law, it cannot, *a fortiori*, wield its sovereign immunity via Rule 19 to shield a federal officer against enforcement of federal law, 28 U.S.C. § 2072(b), especially here, where the federal government has expressly *waived* sovereign immunity. *See* 5 U.S.C. § 702.

The Ninth Circuit has refused to allow use of Rule 19 to undermine the "delicate balance" struck by the *Ex parte Young* doctrine. *Salt River Project v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012) (explaining that allowing dismissal under Rule 19 "would effectively gut the *Ex parte Young* doctrine"). The *Ex parte Young* doctrine's balancing of interests by limiting relief dovetails, as noted, with the public rights doctrine, which allows suits defending public rights to proceed in the

face of Rule 19 challenges when the requested relief will not "destroy the legal entanglements of the absent parties." *Connor*, 848 F.2d at 1459; *Nat'l Licorice Co.*, 309 U.S. at 365-66; *see infra* Parts IV.C-D. Both doctrines uphold the Supremacy Clause, which assures the fundamental structure of our federal government and the rule of law. U.S. Const. art. IV, cl. 2.

Here, as in *Salt River Project*, the prospective relief sought by the Conservation Groups was carefully crafted to avoid undue prejudice to the Energy Company and the Navajo Nation, while upholding the substantial interest in the enforcement of federal laws, NEPA and the ESA, which protect important public rights. *See, e.g.*, *Manygoats*, 558 F.2d at 558-59 (allowing NEPA case against federal defendants regarding actions on tribal land to proceed where plaintiffs sought no relief against Indian tribe). Indeed, the impact on sovereign interests in this case is even further diminished than in the prototypical *Ex parte Young* case by the fact that the Conservation Groups have made *no claims* against the Energy Company or the Navajo Nation (or their officers) and seek *no relief* from them. ER67-69. Accordingly, the requested relief can be shaped—indeed it is designed—to avoid any

undue prejudice to the Energy Company or the Navajo Nation. This factor also weighs in favor of allowing this action to proceed.

C. A Judgment Rendered in the Energy Company's and the Navajo Nation's Absence Would Be Adequate, Would Prevent Federal Defendants from Violating Federal Law, and Would Prevent *De Facto* Deregulation of the Most Harmful and Polluting Industries on Tribal Land.

The third Rule 19(b) factor refers to the interest of "the courts and the public in complete, consistent, and efficient settlement of controversies." *Provident Tradesmens Bank*, 390 U.S. at 111. This factor also weighs heavily in support of allowing this action to proceed, because dismissal would prevent *any* judicial resolution of this controversy. Federal courts are reluctant to decline jurisdiction granted to them. *See, e.g.*, *Cohens v. State of Virginia*, 19 U.S. 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."). By allowing judicial review of final agency action under the APA, 5 U.S.C. § 704, and the ESA, 16 U.S.C. § 1540(g)(1)(A), Congress created a "strong presumption" in favor of judicial review, *Alto*, 738 F.3d at 1124, which must be considered prominently in the Rule 19 analysis. *See Thomas*,

189 F.3d at 667-68 ("[T]he decision of Congress to privilege federal control over tribal interests in tribal constitutional elections is unmistakable.").

Further, affirming dismissal of this action would have the deleterious effect of a "*de facto* deregulation of highly regulated" and broadly harmful industry—coal strip-mining and combustion—on tribal lands. *Bay Mills*, 134 S. Ct. at 2052 (Thomas, J., dissenting); ER14, 17, 36-40; ER73; ER122-24. The Supreme Court has strongly suggested that tribal sovereign immunity should not be construed so broadly as to allow such harm to evade judicial review. *Bay Mills*, 134 S. Ct. at 2036, n.8. The practical result of allowing sovereign immunity, enlarged via Rule 19, to require dismissal here would be to cement the status of reservation lands—in particular the Four Corners region—as "national sacrifice area[s]," Tsosie, *supra*, 13 Santa Clara J. Int'l L. at 243, in which the most polluting activities could operate without citizen oversight. This is not an idle concern. *See, e.g.*, R. Benjamin Nelson, Note, *Tribe-Sanctioned Nuclear Waste Facilities and Their Involuntary Neighbors*, 4 Colum. J. Race & L. 257, 259 (2014) (describing ongoing efforts to site nuclear waste facilities on tribal lands).

Dismissal would also represent a significant expansion of a deleterious aspect of the sovereign immunity doctrine—stymying public accountability, while encouraging governmental lawlessness. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201, 1201-03 (2001). Courts have repeatedly warned of this danger. *Connor*, 848 F.2d at 1460 (noting that dismissal would "sound[] the death knell for any judicial review of executive decisionmaking" and refusing to dismiss); *Manygoats*, 558 F.2d at 558-59 (observing that dismissal under Rule 19 would prevent public enforcement of public environmental law on tribal land); *Hayes*, 2016 WL 1175238, at *11 (same); *Diné Citizens Against Ruining our Env't*, 2013 WL 68701, at *5 (same). Thus, this factor weighs heavily in favor of allowing this action to proceed.

D. The Conservation Groups Have No Other Remedy, Which Is Determinative Under the Public Rights Doctrine.

There is no question that that the Conservation Groups would be wholly deprived of any remedy if this case is not allowed to move forward. This factor "weighs crushingly against dismissal." *Diné Citizens Against Ruining our Env't*, 2013 WL 68701, at *6. It is contrary

to our tradition of the rule of law to deprive a person of a remedy for a legal wrong: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Enlarging sovereign immunity via Rule 19 denies plaintiffs of any judicial forum, which erodes the constitutional guarantee of due process of law. U.S. Const. amends. V, XIV, § 1; *see* Chemerinsky, *supra*, 53 Stan. L. Rev. at 1215-16.

Here, the Conservation Groups are public-interest organizations seeking to enforce federal laws that protect important public rights. *Connor*, 848 F.2d at 1460 (recognizing "public right to administrative compliance with the environmental protection standards of NEPA and the ESA"); ER16-24. This Court and other appellate courts have repeatedly held that such cases against federal agencies should not be dismissed under Rule 19. *Connor*, 848 F.2d at 1460-62; *Manygoats*, 558 F.2d at 558-59; *N. Alaska Envtl. Ctr.*, 803 F.2d at 468-69; *Sw. Ctr.*, 150 F.3d at 1154-55; *Sac & Fox*, *Sac & Fox*, 240 F.3d at 1259-60; *see also Nat'l Licorice Co.*, 309 U.S. at 359-67 (articulating rule). As in these

cases, here the Conservation Groups do not seek to "destroy the legal entitlements" of the Energy Company or the Navajo Nation, but to temporarily "enjoin only the action of the government" "until the government complies with NEPA and the ESA." *Connor*, 848 F.2d at 1459, 1461. In this situation courts have refused to "slam the courthouse door in the face of the plaintiffs," *Thomas*, 189 F.3d at 669, because, again, dismissal would result in the "death knell for any judicial review of executive decisionmaking" on Indian lands. *Connor*, 848 F.2d at 1460.

In sum, even if the Court were to conclude that the Energy Company or the Navajo Nation were a required party under Rule 19(a), each factor in the Rule 19(b) analysis weighs in favor of allowing this suit to proceed and against dismissal. As such, the district court abused its discretion by determining in only three sentences and *without any analysis* that dismissal was required. *See* ER7; *Provident Tradesmens Bank*, 390 U.S. at 107 (reversing because lower court's "inflexible approach" to Rule 19 analysis "exemplifie[d] the kind of reasoning that the rule was designed to avoid").

V. If This Court Determines that This Case Cannot Proceed Without the Energy Company, the Court Should Order Joinder of Its Chief Executive Officer, Clark Moseley.

Rule 19(a) provides that if a nonparty is "required" and joinder is "feasible," "the court must order that the person be made a party." Fed. R. Civ. P. 19(a)(2). A court may order involuntary joinder of a nonparty despite "a plaintiff's inability to state a direct cause of action against [the] absentee." *E.E.O.C.*, 400 F.3d at 781. Thus, a nonparty may be joined in a NEPA suit—even though the plaintiff has no direct claim against the nonparty—to avoid a Rule 19 "joinder stymie," *Provident Tradesmens Bank*, 390 U.S. at 111-12, and to assure that the plaintiff can obtain complete relief, *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1344-45 (9th Cir. 1995).

A motion to dismiss pursuant to Rule 19 and sovereign immunity will not succeed if an officer of the sovereign is party to the action:

> The *Ex parte Young* doctrine allows suits for declaratory and injunctive relief against government officials in their official capacities—notwithstanding the sovereign immunity possessed by the government itself. The *Ex parte Young* doctrine applies to Indian tribes as well.
>
> ....
>
> As a practical matter, therefore, the Cherokee Nation and the Principal Chief in his official capacity are one and the

> same in an *Ex parte Young* suit for declaratory and injunctive relief. As a result, the Principal Chief can adequately represent the Cherokee Nation in this suit, meaning that the Cherokee Nation itself is not a required party for purposes of Rule 19. By contrast, if we accepted the Cherokee Nation's position, official-action suits against government officials would have to be routinely dismissed, at least absent some statutory exception to Rule 19, because the government entity in question would be a required party yet would be immune from suit and so could not be joined. But that is not how the *Ex parte Young* doctrine and Rule 19 case law has developed.

Vann, 701 F.3d at 929-30; *accord Salt River Project*, 672 F.3d at 1181. The advisory committee for the 1966 amendments specifically recognized the use of officer suits to avoid dismissal under Rule 19. Fed. R. Civ. P. 19 (advisory committee notes for 1966 amendments) (noting use of officer suits to avoid Rule 19 defenses based on "sovereign community [sic]"). Thus, courts allow joinder of non-federal officers in federal NEPA suits to avoid dismissal under Rule 19. *E.g.*, *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 330-32 (4th Cir. 2008) (rejecting Rule 19 argument to dismiss claim against state director in NEPA suit on basis of *Ex parte Young* doctrine); *see also Nat'l Wildlife Fed'n*, 45 F.3d at 1344-45 (allowing joinder of private party in NEPA case to avoid Rule 19 concerns); *Sierra Club v. Hodel*, 848 F.2d 1068, 1077-78 (10th

Cir. 1988) (allowing joinder of third party developer in NEPA suit to avoid Rule 19 joinder stymie).

Here, although the Conservation Groups have raised no claims against the Energy Company, if the company is determined to be a required party, it is feasible to join its Chief Executive Officer, Clark Moseley, ER97, under Rule 19(a)(2), and the *Ex parte Young* doctrine. As in *Vann*, the presence of the Energy Company's Chief Executive Officer in the action would adequately represent the interests of the Energy Company, obviating any need to join the company or to dismiss the Conservation Groups' action. Such joinder is mandated by Rule 19(a)(2) and is consistent with the Supreme Court's endorsement of "close attention to the significant pragmatic considerations involved in the particular circumstances, leading to a resolution consistent with practical and creative justice." *Provident Tradesmens Bank*, 390 U.S. at 119 n.16.

Thus, if the Energy Company is a required party, the district court erred by failing to join Mr. Moseley under Rule 19(a)(2).

CONCLUSION

Congressional directive and multiple decisions of this Court mandate that federal courtroom doors remain open to public interest plaintiffs seeking prospective relief against federal agencies for violations of federal statutes, including NEPA and the ESA. This Court has repeatedly held that neither sovereign immunity nor Rule 19 should operate to slam the courtroom doors to such suits. Because the district court's decision contravened these controlling authorities, it should be reversed.

Respectfully submitted this 9th day of February 2018.

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, I certify that Appellants are unaware of any related cases.

/s/ Shiloh Hernandez
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 11,288 words, excluding portions exempted under Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Shiloh Hernandez
Shiloh Hernandez

CERTIFICATE OF SERVICE

I certify that on February 9, 2018, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participant in this action are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Shiloh Hernandez
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