No. 17-17320

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS, *et al.*,
Defendants,

ARIZONA PUBLIC SERVICE COMPANY, and NAVAJO TRANSITIONAL ENERGY COMPANY, LLC,
Intervenors-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona, No. 3:16-cv-08077-SPL
The Honorable District Judge Steven Paul Logan

AMICUS BRIEF OF THE NAVAJO NATION SUPPORTING APPELLES AND AFFIRMANCE OF THE DISTRICT COURT DECISION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 29(a)(4)(a), the Navajo Nation states that is a sovereign Indian nation, not a corporation.

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STATEMENT OF IDENTITY OF AMICUS CURIAE

Pursuant to FRAP 29(a)(4)(D), Amicus Navajo Nation (Nation) states that it is a sovereign Indian nation with a government-to-government relationship with the United States. Its interests in the case are that its elected officials approved the lease for the Four Corners Power Plant and the purchase of the Navajo Mine (Mine) and creation of the Navajo Transitional Energy Company (NTEC) to operate the Mine. The District Court correctly ruled that the Nation's sovereign interests in the revenue generated by the lease and Mine and the jobs for Navajo citizens at both sites, and the financial investment of the Nation in the Mine, could be negatively affected by the action, and therefore the case had to be dismissed under Fed R. Civ. Proc. 19. The Nation files this amicus brief as a sovereign government under FRAP 29(a)(2) and through its motion under FRAP 29(a)(3).

FRAP 29(a)(4)(E) STATEMENT

Amicus Navajo Nation states that no party's counsel authored this brief in whole or in part. Further, no party, party's counsel, or any other person contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

The Nation files its amicus brief to discuss one argument raised by Appellants in their Opening Brief (Op. Br.).

Appellants assert NTEC is barred from raising the Nation's interests when the

Nation itself did not assert them. Op. Br., Dkt. No. 17, at 23, 25 n.11, 30-31. According to Appellants, one party is foreclosed under Rule 19(a)(2) from raising the interests of an absent third party, if that third party declines to assert its own interests in the case. *See id.*

Appellants raise this argument for the first time on appeal. As such, the argument is waived. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1995) (stating an issue is waived if it is "not raised sufficiently for the trial court to rule on it"); *see also Dodd Hood River Cty.*, 59 F.3d 852, 863 (9th Cir. 1995) ("As a general rule a federal appellate court does not consider an issue not passed on below." (internal quotation marks omitted)). If the Court nonetheless considers it, the Nation responds below.

The Nation did not participate as a party or amicus in the District Court because NTEC correctly stated the Nation's sovereign interests in the matter. NTEC specifically asserted the interests of the Nation in the revenue and jobs generated by the Navajo Mine and the Four Corners Power Plant, as well as the Nation's investment in the purchase of the Mine. It was therefore unnecessary for the Nation to separately state its interests in the case. The Nation's silence was then not based on disinterest in the outcome of the case, but on the lack of a need to separately assert those interests already raised by its arm, NTEC, to which the Nation has extended its own sovereign immunity in order to protect the Navajo sovereign interests the

Nation formed NTEC to advance. To wit: the continued development of the Nation's coal resources at Navajo Mine; the continued generation of Navajo Mine-related coal royalties and taxes that fund the Nation's governmental operations; preservation of important, high-paying Navajo mining and power plant jobs in a fragile Navajo economy; and protection of the Nation's substantial initial investment of governmental revenues in establishing NTEC and acquiring Navajo Mine.

The case Appellants cite, *In re County of Orange*, 262 F.3d 1014 (2001) (*County of Orange*), and other cases this Court has decided similarly, do not apply here.

In *County of Orange*, a county government (County) sought to assert the interests of Mello-Roos Community Facilities Districts, governmental entities existing separately from the county under California law,[1] though the County collected taxes on their behalf. 262 F.3d at 1023-24. Under those circumstances, this Court barred the County from raising the districts' interests, because, among

[1] Community Facilities Districts were authorized by the California Legislature under the Mello-Roos Community Facilities Act of 1982 to finance public services. *See County of Orange*, 262 F.3d at 1022; Cal. Gov't Code § 53313. Such Districts can be formed by a "local agency," which includes counties, but also cities, school districts, and other political subdivisions of the California state government. *See* Cal. Gov't Code §§ 53312.5; 53317(h). The Court in *County of Orange* did not specify what local agency or agencies formed the Districts in that case, but clearly understood them to be separate political entities from the County. *See* 262 F.3d at 1022 (noting County collects Districts' taxes on their behalf and remits them to the Districts).

other reasons, the Districts themselves did not assert their interests in the case. *Id.* at 1024.

Similarly, this Court has barred other parties from asserting a third party's interest under Rule 19, when that third party made no attempt to independently assert his or her interest. *See U.S. v. Bowen*, 172 F.3d 682, 689 (1999) (denying claim that manufacturer of device was indispensable when manufacturer never asserted an interest in the case); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043-44 (1983) (denying claim that federal government was indispensable as government never asserted an interest and "has meticulously observed a neutral and disinterested posture, and regards this as a private dispute."); *Central Council of Tlingit & Haida v. Chugach Native Assoc.*, 503 F.2d 1323, 1326 (1974) (denying claim that Secretary of the Interior was indispensable in intertribal boundary dispute when the Secretary did not assert an interest).

Here, NTEC is as a wholly-owned entity of the Nation, with a very different relationship with the Nation from the parties' relationships in those cases. Two of the three cases cited above involved parties having no connection to the federal government seeking to assert the federal government's interests. *Northrop Corp.*, 705 F.3d at 1043-44; *Central Council*, 503 F.2d at 1326. The other case involved an unaffiliated private corporation. *Bowen*, 172 F.3d at 689. NTEC is not asserting the interests of an unaffiliated third party or the federal government. It is a creation

and asset of the Nation's government. Unsurprisingly then, NTEC has accurately stated the Nation's sovereign interests in the case. Therefore, under these circumstances, NTEC is not barred from raising the Nation's interests when the Nation itself did not separately assert them.

CONCLUSION

Based on the above, the District Court appropriately considered the Nation's sovereign interests, and the Nation's lack of participation separate from NTEC did not bar the court from applying those interests under Rule 19(a)(2).

Respectfully submitted this 18th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2018, the original of this motion was filed electronically with the Clerk of the Court through the CM/ECF system, with all counsel registered receiving notice.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This Brief uses a proportional typeface and 14-point font, and contains 1011 words.

May 18, 2018

/s/ Paul Spruhan
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