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10 Attorneys for Proposed Intervenor-Defendant
11 Terra-Gen Development Company, LLC

12 **UNITED STATES DISTRICT COURT**
13 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

14 BACKCOUNTRY AGAINST DUMPS,
15 DONNA TISDALE, and JOE E. TISDALE,

16 Plaintiffs,

17 v.

18 UNITED STATES BUREAU OF INDIAN
19 AFFAIRS, DARRY LACOUNTE, in his
official capacity as Director of the United
20 States Bureau of Indian Affairs, AMY
DUTSCHKE, in her official capacity as
21 Regional Director of the Pacific Region of the
United States Bureau of Indian Affairs,
22 UNITED STATES DEPARTMENT OF THE
INTERIOR, DAVID BERNHARDT, in his
23 official capacity as Secretary of the Interior,
and TARA SWEENEY, in her official
24 capacity as Assistant Secretary of the Interior
for Indian Affairs,

25
26 Defendants.

CASE NO. 2:20-cv-01380-KJM-DB

**TERRA-GEN DEVELOPMENT COMPANY,
LLC'S NOTICE OF MOTION AND
MOTION TO INTERVENE**

Hearing Date: September 25, 2020
Time: 10:00 a.m.
Court Room 3, 15th Floor
501 I Street, Sacramento, CA 95814

Hon. Kimberly J. Mueller

1 **TO ALL THE PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on September 25, 2020, at 10:00 a.m., or as soon
3 thereafter as the matter may be heard before the Honorable Kimberly J. Mueller in Courtroom 3,
4 15th Floor of the Robert T. Matsui United States Courthouse, 501 I Street, Sacramento, CA
5 95814, Proposed Intervenor-Defendant Terra-Gen Development Company, LLC (“Terra-Gen”),
6 pursuant to Federal Rule of Civil Procedure 24, will and hereby does respectfully move the Court
7 for an order granting Terra-Gen intervention as a defendant and allowing Terra-Gen to file its
8 response to the Complaint by the same deadline as required for Defendants U.S. Bureau of
9 Indian Affairs, U.S. Department of the Interior (“DOI”), and senior DOI officials (collectively,
10 “Federal Defendants”).¹

11 In accordance with this Court’s Civil Standing Orders, ECF No. 3-1, counsel for
12 Proposed Intervenor-Defendant Terra-Gen conferred with counsel for the parties and have
13 exhausted such meet and confer efforts before filing this motion. Counsel for Federal
14 Defendants stated that Federal Defendants do not oppose the intervention sought by Terra-Gen.
15 Despite repeated outreach by counsel for Terra-Gen and discussion with counsel for Plaintiffs,
16 counsel for Plaintiffs have not provided a position on Terra-Gen’s intervention, as described
17 further in the Declaration of Daniel P. Brunton filed with this Motion.

18 This Motion is made based on this Notice of Motion and Motion to Intervene, the
19 Memorandum of Points and Authorities in support of this Motion, the Declaration of Craig
20 Pospisil, the Declaration of Daniel P. Brunton, the Corporate Disclosure Statement Pursuant to
21 Federal Rule of Civil Procedure 7.1, the pleadings and papers filed in this action, and such
22 arguments as may be presented to the Court at or before the hearing on this Motion.

23
24 _____
25 ¹ Federal Rule of Civil Procedure 24(c) provides that a motion for intervention be accompanied
26 by a pleading. Terra-Gen requests that its deadline for filing a response to the Complaint be
27 aligned with the deadline for Federal Defendants for efficiency purposes (currently due on
28 September 14, 2020), or three days after intervention is granted, whichever is later. Terra-Gen
has not previously requested an extension from this Court.

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Dated: August 14, 2020

LATHAM & WATKINS LLP

By /s/ Daniel P. Brunton

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 and TARA SWEENEY, in her official
 24 capacity as Assistant Secretary of the Interior
 for Indian Affairs,

25
 26 Defendants.

CASE NO. 2:20-cv-01380-KJM-DB

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF TERRA-
 GEN DEVELOPMENT COMPANY, LLC'S
 MOTION TO INTERVENE**

Hearing Date: September 25, 2020
 Time: 10:00 a.m.
 Court Room 3, 15th Floor
 501 I Street, Sacramento, CA 95814

Hon. Kimberly J. Mueller

1 **I. INTRODUCTION**

2 Proposed Intervenor-Defendant Terra-Gen Development Company, LLC’s (“Terra-Gen”)
3 development office is located in San Diego County, California. Terra-Gen is the developer of
4 the Campo Wind Project (“Project”), a \$400 million renewable wind energy project that
5 Plaintiffs seek to block through this litigation. Terra-Gen entered into a 25-year lease (“Lease”)
6 with the Campo Band of Diegueno Mission Indians (“Tribe”) to allow Terra-Gen to develop,
7 construct, operate and maintain wind generation facilities on land within the Tribe’s Reservation
8 in exchange for payments and rents that will be a key source of revenue for the Tribe,
9 contributing significantly to tribal government functions. The Tribe’s Reservation is located in
10 San Diego County, and once developed, the Project would connect to San Diego Gas & Electric
11 Company’s Sunrise Powerlink transmission line and bring renewable wind energy to San Diego.

12 Because the Project is located on Tribal trust lands, federal law requires U.S. Bureau of
13 Indian Affairs (“BIA”) approval for the lease to be legally valid. Terra-Gen invested a
14 significant amount of time and money in support of this approval. To date, in addition to the
15 time and effort invested over 3.5 years to negotiate a mutually agreeable lease with its Tribal
16 partners and obtain Project approvals, Terra-Gen has invested over \$52 million in the Project,
17 including in support of the robust, multi-year environmental review undertaken by BIA. *See*
18 Declaration of Craig Pospisil in Support of Motion to Intervene (“Pospisil Decl.”), ¶¶ 6, 13.
19 Plaintiffs now challenge BIA’s approval of Terra-Gen’s Lease and the agency’s associated
20 environmental review. Terra-Gen, as the Project developer and lessee, has significant property,
21 economic, and contractual interests in the instant action that can only be protected through Terra-
22 Gen’s intervention in this action. The relief requested by Plaintiffs threatens those interests
23 because it jeopardizes the legal authorization to construct and operate the Project.

24 Therefore, Terra-Gen respectfully requests that the Court grant this motion to permit
25 Terra-Gen to intervene as a defendant in this action and, for economy, to file its response to the
26 Complaint by the same deadline as required for the Federal Defendants, or three days after
27 intervention is granted, whichever is later. For the reasons described below, this Court should
28 grant Terra-Gen intervention as of right because it meets the requirements of Federal Rule of

1 Civil Procedure 24(a)(2). Terra-Gen’s motion is timely. Terra-Gen has significant, legally
2 protectable interests at stake in this action, and a decision in Plaintiffs’ favor in this action could
3 severely impair such interests given that Plaintiffs seek to enjoin the necessary Project approvals.
4 Finally, Terra-Gen’s unique, private interests in the Project are not adequately represented by the
5 current Federal Defendants in this action. Alternatively, the Court should grant Terra-Gen
6 permissive intervention under Federal Rule of Civil Procedure 24(b).

7 Despite repeated outreach by counsel for Terra-Gen and discussion with counsel for
8 Plaintiffs, counsel for Plaintiffs have not provided a position on Terra-Gen’s intervention, as
9 described further in the Declaration of Daniel Brunton filed with this Motion.¹ The Federal
10 Defendants do not oppose Terra-Gen’s intervention. If granted intervention, Terra-Gen—as a
11 business based in San Diego—would support the recently filed motion to transfer to the Southern
12 District of California given the Southern District Court’s significant ties to this litigation.

13 **II. BACKGROUND**

14 The Project involves the construction and operation of 60 wind turbines and associated
15 infrastructure on the Campo Indian Reservation, along with a gen-tie line and related facilities on
16 adjacent private land in San Diego County. BIA, Record of Decision for Campo Wind Project
17 with Boulder Brush Facilities (Apr. 7, 2020) at 1, *available at* <http://www.campowind.com/>
18 (hereinafter Record of Decision). After construction, the Project will be capable of producing an
19 estimated 252 megawatts of electrical power from renewable wind resources, thereby increasing
20 renewable energy generation and decreasing greenhouse gas emissions. *Id.* at 1-2. Construction
21 and operation of the Project will generate significant economic benefits for the Tribe, including
22 jobs for Tribal members and a consistent revenue source from Terra-Gen’s payments under the
23

24
25 ¹ Although Plaintiffs have previously stipulated to intervention by energy project proponents in
26 other cases (*see, e.g.*, Order on Stipulation for Intervention, *Backcountry Against Dumps v.*
27 *Abbott*, Case No. 2:10-cv-00394-FC-KJN (S.D. Cal. Apr. 9, 2010) and Order Granting Joint
28 Mot. for Intervention, *Protect Our Communities Foundation v. Salazar*, Case No. 3:13-cv-
00575-JLS-JMA (S.D. Cal. Mar. 29, 2013)), Terra-Gen was unable to reach a stipulated
agreement with Plaintiffs before filing this motion.

1 Lease. *Id.* at 11.

2 The Tribe approved the Lease with Terra-Gen for the Project through a resolution
3 adopted by the General Council on April 3, 2018, and Terra-Gen executed the Lease with the
4 Tribe shortly thereafter. Pospisil Decl., ¶ 7. Since the property is located on Tribal land, the
5 Lease was then submitted to BIA for review in accordance with 25 U.S.C. § 415 and 25 C.F.R.
6 Part 162. BIA undertook an extensive environmental review of the proposed Project and public
7 process pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347,
8 including by issuing a Draft Environmental Impact Statement (“EIS”) and Final EIS for the
9 Project, hosting public meetings, and responding to public comments on the Draft EIS and Final
10 EIS. Record of Decision at 2-3, 52. On April 7, 2020, Defendant U.S. Department of the
11 Interior’s Assistant Secretary for Indian Affairs (“Assistant Secretary”) signed the Record of
12 Decision authorizing BIA approval of the Lease, and then approved the revised and restated
13 Lease between Terra-Gen and the Tribe on May 4, 2020. Pospisil Decl., ¶¶ 10-12. For more
14 than three and a half years, Terra-Gen has prepared for and participated in all phases of the
15 administrative process leading to the Assistant Secretary’s approval of the Record of Decision
16 and the Lease, including by providing information and participating throughout the NEPA
17 process. *Id.* ¶ 9. To date, Terra-Gen has expended millions of dollars securing federal approvals
18 for the Project, and plans to invest hundreds of millions of dollars in construction and operation
19 of the Project. *Id.* ¶¶ 6, 13, 16.

20 The relief requested by Plaintiffs in this case directly threatens the federal approvals that
21 will allow Terra-Gen to construct and operate the Project. Plaintiffs allege that the Project
22 approvals violate federal law and ask this Court to order “BIA to withdraw its Project approvals”
23 and Final EIS pending compliance with such federal law, and to enjoin BIA “from initiating or
24 permitting any activities in furtherance of the Project that could result in any change or alteration
25 of the physical environment unless and until the Defendants comply with” such requirements.
26 Compl. ¶ 140(2)-(3).

27
28

1 **III. ARGUMENT**

2 **A. Terra-Gen Is Entitled to Intervene As of Right**

3 Under Rule 24(a)(2), Terra-Gen is entitled to intervention as of right for all purposes in
4 this action. This rule provides that:

5 On timely motion, the court must permit anyone to intervene who[]
6 . . . claims an interest relating to the property or transaction that is
7 the subject of the action, and is so situated that disposing of the
8 action may as a practical matter impair or impede the movant’s
ability to protect its interest, unless existing parties adequately
represent that interest.

9 Fed. R. Civ. Pro. 24(a)(2). In *Wilderness Society v. U.S. Forest Service*, the Ninth Circuit
10 overruled prior precedent and affirmed that intervention as of right shall be granted whenever the
11 elements of Rule 24(a)(2) are met, including in NEPA cases in defense of the government. *See*
12 630 F.3d 1173, 1180 (9th Cir. 2011) (en banc) (“When considering motions to intervene of right
13 under Rule 24(a)(2), courts need no longer apply a categorical prohibition on intervention on the
14 merits, or liability phase, of NEPA actions.”). In determining whether an applicant meets the
15 requirements of Rule 24(a)(2), the Ninth Circuit, and district courts therein, apply a four-part
16 test:

17 (1) the motion must be timely; (2) the applicant must claim a
18 “significantly protectable” interest relating to the property or
19 transaction which is the subject of the action; (3) the applicant
20 must be so situated that the disposition of the action may as a
practical matter impair or impede its ability to protect that interest;
and (4) the applicant’s interest must be inadequately represented
by the parties to the action.

21 *Id.* at 1177 (quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)); *see also Sequoia*
22 *ForestKeeper v. Watson*, 2017 WL 4310257, at *1-*3 (E.D. Cal. Sept. 28, 2017) (applying four-
23 part test and granting intervention in NEPA case). In ruling on motions to intervene, courts must
24 apply “[a] liberal policy in favor of intervention”, *Wilderness Soc’y*, 630 F.3d at 1179 (citation
25 omitted), “guided primarily by practical considerations, not technical distinctions,” *Sw. Ctr. for*
26 *Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (citation omitted). Terra-Gen
27 satisfies these requirements for intervention as of right, as set forth below.
28

1 1. Terra-Gen’s Intervention Motion Is Timely

2 The “traditional features” of a timely motion to intervene are that the motion “was made
3 at an early stage of the proceedings, the parties would not have suffered prejudice from the grant
4 of intervention at that early stage, and intervention would not cause disruption or delay in the
5 proceedings.” *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 897 (9th
6 Cir. 2011). Terra-Gen is filing this motion approximately one month after Plaintiffs filed the
7 Complaint on July 8, 2020, and prior to any responsive pleading by Defendants. As such, the
8 parties will not be prejudiced by Terra-Gen’s intervention at this early stage of the action. *See*,
9 *e.g.*, *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (motion to
10 intervene timely filed when filed four months after complaint); *Watson*, 2017 WL 4310257, at *2
11 (motion to intervene timely filed eight months after complaint and after initial scheduling
12 conference). Therefore, Terra-Gen’s motion to intervene is timely.

13 2. Terra-Gen Has Significant Protectable Interests Related to the Subject of
14 This Action

15 Rule 24(a)(2)’s “interest” requirement “is primarily a practical guide to disposing of
16 lawsuits by involving as many apparently concerned persons as is compatible with efficiency and
17 due process.” *Wilderness Soc’y*, 630 F.3d at 1179 (citations omitted). In examining whether a
18 proposed intervenor has a “significantly protectable” interest in the subject of the action, “the
19 operative inquiry [is] whether the ‘interest is protectable under some law’ and whether ‘there is a
20 relationship between the legally protected interest and the claims at issue.’” *Id.* at 1180-81.

21 Terra-Gen has clearly cognizable, protectable interests relating to the challenged Project
22 approvals. Plaintiffs challenge BIA’s decision to approve a 25-year lease of land between the
23 Tribe and Terra-Gen to allow Terra-Gen to construct and operate the Project, jeopardizing Terra-
24 Gen’s property and contractual rights in the Project. *See* Compl. ¶¶ 1-3; Pospisil Decl., ¶ 11, 14.
25 As an initial matter, the Lease approved by BIA constitutes a legally protectable “license” under
26 the Administrative Procedure Act. *See* 5 U.S.C. § 551(8) (“‘[L]icense’ includes the whole or
27 part of an agency permit, certificate, approval, registration . . . or other form of permission”).
28 Moreover, Terra-Gen has invested a very significant amount of time and money in the Project

1 and in securing the challenged federal Project approvals. Pospisil Decl., ¶¶ 5, 9-10, 12-13.
2 Terra-Gen has already invested over \$52 million in the Project to date, including expending
3 millions of dollars securing federal approvals for the Project. *Id.* ¶¶ 6, 13. Pursuant to the terms
4 of its Lease, Terra-Gen has made monetary payments to the Tribe for the right to use the Tribe’s
5 land for the Project. *Id.* ¶ 15. And Terra-Gen plans to invest an additional hundreds of millions
6 of dollars to build and operate the Project. *Id.* ¶ 16.

7 Rule 24(a)(2) recognizes and protects interests of this nature. *See, e.g., Idaho Farm*
8 *Bureau Fed’n*, 58 F.3d at 1397-98 (finding participation in administrative process gives rise to
9 protectable interest for purposes of intervention as of right); *Watson*, 2017 WL 4310257, at *2
10 (holding proposed intervenor had protectable interest in NEPA action where intervenor
11 possessed contracts to implement projects that were subject of litigation); *Renewable Land, LLC*
12 *v. Rising Tree Wind Farm LLC*, 2013 WL 12320083, at *2-*3 (E.D. Cal. Mar. 11, 2013) (finding
13 proposed intervenor had protectable interest where intervenor held contractual option to acquire
14 a leasehold on property that was the subject of action). Terra-Gen clearly has significant
15 protectable property, economic and contractual interests that are related to the subject of this
16 action.

17 3. A Decision in Plaintiffs’ Favor Would Impair Terra-Gen’s Ability to
18 Protect Its Interests

19 Under the third element of the Rule 24(a)(2) inquiry, “[i]f an absentee would be
20 substantially affected in a practical sense by the determination made in an action, he should, as a
21 general rule, be entitled to intervene.” *Citizens for Balanced Use*, 647 F.3d at 898 (quoting Fed.
22 R. Civ. P. 24, advisory committee notes (1966 Amendment)). A party is even entitled to
23 intervene in an action that potentially threatens its interests. *See id.* at 900 (“intervention of right
24 does not require an absolute certainty that a party’s interests will be impaired”). Among other
25 things, Plaintiffs ask this Court to: (1) declare that the federal Project approvals, including the
26 Record of Decision authorizing the Project and Lease and Final EIS, violate federal laws; (2)
27 order BIA to withdraw Project approvals and Final EIS pending compliance with such federal
28 laws; and (3) enjoin BIA “from initiating or permitting any activities in furtherance of the Project

1 that could result in any change or alteration of the physical environment unless and until the
2 Defendants comply with” such requirements. Compl. ¶ 140(1)-(3). Thus, Plaintiffs seek a
3 remand or vacatur of the BIA’s Project approvals, which would impair Terra-Gen’s ability to
4 protect its significant interests in construction and operation of the Project. *See supra*, Section
5 II.A.2. Therefore, Terra-Gen stands to lose significant benefits from the Lease, and “will suffer a
6 practical impairment of its interests as a result of [the action]” if Plaintiffs prevail in this case.
7 *See Wilderness Soc’y*, 630 F.3d at 1180. Terra-Gen’s intervention in this action is thus necessary
8 to protect its interests in the Project and the BIA approvals authorizing the Project.

9 4. Existing Parties Will Not Adequately Represent Terra-Gen’s Interests

10 To satisfy the fourth element of the Rule 24(a)(2) inquiry, a proposed intervenor “need
11 only show[] that the representation of [its] interests ‘may be’ inadequate.” *Trbovich v. United*
12 *Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *see also Arakaki v. Cayetano*, 324 F.3d 1078,
13 1086 (9th Cir. 2003). In general, the public interest represented by government parties is not
14 “identical to the individual parochial interest” of private parties by virtue of “both entities
15 occupy[ing] the same posture in the litigation.” *See Citizens for Balanced Use*, 647 F.3d 893 at
16 899. To determine adequacy of representation, courts in the Ninth Circuit consider the
17 following: “whether the interest of a present party is such that it will undoubtedly make all the
18 intervenor’s arguments; whether the present party is capable and willing to make such
19 arguments; and whether the intervenor would offer any necessary elements to the proceedings
20 that other parties would neglect.” *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d
21 1489, 1498-99 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc’y*, 630 F.3d 1173.

22 Here, the Federal Defendants—BIA, DOI and senior agency officials—do not share
23 Terra-Gen’s interests in this matter. Government agencies advance the “broad public interest.”
24 *See Forest Conservation Council*, 66 F.3d at 1498; *see also Watson*, 2017 WL 4310257, at *3;
25 *Sequoia ForestKeeper v. Price*, 2017 WL 56655, at *1 (E.D. Cal. Jan. 5, 2017). By contrast,
26 Terra-Gen’s interest in this action is centered on protecting its property, contractual and overall
27 financial interests relating to the Lease and BIA’s Project approvals. *See supra*, Section II.A.2.
28 As the Federal Defendants do not share Terra-Gen’s interests in this action, the existing

1 Defendants may be incapable of and unwilling to make arguments that advance and protect
2 Terra-Gen’s interests as a private party. Even where the Federal Defendants and Terra-Gen may
3 share a common litigation posture, they “do not have sufficiently congruent interests” to warrant
4 a finding of adequate representation. *See Sw. Ctr. for Biological Diversity*, 268 F.3d at 823. As
5 such, Terra-Gen meets its “minimal burden” of demonstrating that Federal Defendants’
6 representation of Terra-Gen’s protectable interests may be inadequate. *See Forest Conservation*
7 *Council*, 66 F.3d at 1498.

8 Given the foregoing, Terra-Gen is entitled to intervene as of right in this matter, pursuant
9 to Rule 24(a)(2).

10 **B. Alternatively, This Court Should Grant Permissive Intervention**

11 In the alternative, this Court should permit Terra-Gen to intervene because Terra-Gen has
12 met the requirements of Rule 24(b). Rule 24(b)(1)(B) provides that on timely application, “the
13 court may permit anyone to intervene . . . who has a claim or defense that shares with the main
14 action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). Courts also consider
15 “whether the intervention will unduly delay or prejudice the adjudication of the original parties’
16 rights.” Fed. R. Civ. P. 24(b)(3).

17 Terra-Gen meets the standard for permissive intervention under Rule 24(b) for many of
18 the same reasons that Terra-Gen is entitled to intervene as of right. *First*, Terra-Gen’s motion is
19 timely. *See supra*, Section II.A.1. *Second*, Terra-Gen is moving to intervene in this case to
20 address the same claims set forth by Plaintiffs and thus defend the federal Project approvals,
21 which will involve common facts and legal principles with the main action. *Third*, Terra-Gen’s
22 intervention at this stage in the case will not “unduly delay or prejudice the adjudication of the
23 original parties’ rights” pursuant to Rule 24(b)(3). Rather, Terra-Gen seeks to intervene at this
24 very early phase in the litigation (approximately one month after the Complaint was filed), and is
25 prepared to participate in this case in accordance with the schedule that will be set by this Court.
26 As the Project developer and a key participant in the NEPA process that Plaintiffs challenge in
27 this case, Terra-Gen is uniquely positioned to provide relevant information to the Court to
28 address the merits of Plaintiffs’ arguments. Indeed, Terra-Gen’s participation in this action as

1 an intervenor will promote a fair and full adjudication of Plaintiffs' claims.

2 **IV. CONCLUSION**

3 For the foregoing reasons, Terra-Gen respectfully requests that this Court grant its motion
4 to intervene as of right or, in the alternative, to grant permissive intervention, and that Terra-Gen
5 be permitted to file its response to the Complaint by the same deadline as required for the
6 Federal Defendants, or three days after intervention is granted, whichever is later.

7

8 Dated: August 14, 2020

LATHAM & WATKINS LLP

9

By /s/ Daniel P. Brunton

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Terra-Gen Development Company, LLC

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