No. 21-55869

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BACKCOUNTRY AGAINST DUMPS; et al.,
Plaintiffs-Appellants,

v.

BUREAU OF INDIAN AFFAIRS; et al.,
Defendants-Appellees,

and

TERRA-GEN DEVELOPMENT COMPANY, LLC;
CAMPO BAND OF DIEGUENO MISSION INDIANS,
Intervenor-Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTHERN CALIFORNIA
CASE NO. 3:20-CV-02343-JLS-DEB

HONORABLE JANIS L. SAMMARTINO

APPELLEE'S ANSWERING BRIEF

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[Oral Argument Requested]

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INTRODUCTION

The issue on appeal is whether the district court abused its discretion in dismissing this action under Federal Rule of Civil Procedure (Rule) 19 because Appellee Campo Band of Diegueno Mission Indians, otherwise known as the Campo Kumeyaay Nation (Tribe), is a required and indispensable party that cannot be joined to this lawsuit due to its sovereign immunity. The Tribe is a federally recognized tribe consisting of approximately 310 enrolled citizens (Tribal Members).[1] As with most Indian tribes, the Tribe's land is its most valuable resource. However, the Tribe's reservation is fifty miles from any job center, lacks reliable public transportation, and has limited natural resources of non-arable land. As a result, the Tribal Members have struggled to obtain jobs and to foster any self-generated economic development to support the community and tribal government operations. Unemployment rates are high and more than half of the population on the reservation lives below the poverty level.

Appellants Backcountry Against Dumps and Donna and Joe Tisdale (Plaintiffs) have previously obstructed the Tribe's efforts to control its land and to use its limited natural resources. In this case, Plaintiffs have sued for declaratory and

[1] Plaintiffs do not contest the Tribe's sovereign immunity or contend that any waiver or abrogation of tribal sovereign immunity occurred with the respect to the claims in this case.

injunctive relief seeking to set aside approvals by appellees Bureau of Indian Affairs (BIA) and other federal defendants (collectively, Federal Defendants) of a 25-year lease agreement (Lease) between the Tribe and appellee Terra-Gen Development Company, LLC (Terra-Gen) thereby preventing construction and operation of a $400 million renewable energy project (Project) to be built on the Tribe's reservation.

The Tribe has committed to utilizing the abundant natural wind resources on its land for the benefit of current and future generations of Tribal Members. The funds from the Lease, which was negotiated by the Tribe in furtherance of its strategic decision to pursue a renewable energy vision for its land, will serve as the principal means of funding the Tribe's government operations for the next 25 years. If Plaintiffs' requested relief were granted, the Project will be halted, threatening tens of millions of dollars in tribal revenue, jobs for Tribal Members, and the Tribe's sovereign right to control its resources and land. The Tribe has already realized benefits from the Lease, including interim payments, jobs and a scholarship program.

Plaintiffs argue that this case should proceed without the Tribe even though this action seeks to extinguish the Tribe's legal right to manage its land and wind resources with devastating consequences to sovereignty interests and legally protected interests of the Tribe and its people. Unable to contest the Tribe's

significant legal interests at stake, Plaintiffs rely on excluded evidence (AOB 9-12) and irrelevant (and untrue) allegations regarding alleged adverse impacts of the Project (AOB 12-30) that the district court correctly rejected as irrelevant to the court's Rule 19 analysis. Plaintiffs even purport to paternalistically speak on behalf of Tribal Members and their interests claiming they know what is better for the Tribe than the Tribe itself (AOB 3-4, 32-33), thereby second-guessing the Tribe's decision-making—precisely what Rule 19 was enacted to protect.

As controlling precedent makes clear, when an Indian tribe has sovereign immunity, and the legally protected interests of the tribe are threatened, Rule 19 requires dismissal. *See Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 848, 851 (9th Cir. 2019), (*Dine Citizens*); *Kescoli v. Babbitt*, 101 F.3d 1304, 1307 (9th Cir. 1996); *Jamul Action Committee v. Simermeyer*, 974 F.3d 984, 989 (9th Cir. 2020); *Deschutes River Alliance v. Portland General Electric Company*, 1 F.4th 1153, 1156 (9th Cir. 2021) (*Dechutes*). Here, given the clear threat of serious injury to the Tribe's legally protected interests, and the inability of the other defendants to adequately represent the Tribe's interests, the district court acted well within its discretion under Rule 19 in determining that dismissal was required.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1337 (regulation of commerce), 1346 (United States as

defendant), 1361 (mandamus against an officer of the United States), 2201 (declaratory judgment) and 2202 (injunctive relief). [*See* Supplemental Excerpts of Record (SER) 72, ¶11.] After the district court dismissed the action for failure to join the Tribe as a required and indispensable party under Rule 19, Plaintiffs timely filed a notice of appeal. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in dismissing this action under Rule 19 because the Tribe is a required and indispensable party that cannot be joined due to its sovereign immunity.

STATEMENT OF THE CASE

I. HISTORY OF THE TRIBE'S EFFORTS TO DEVELOP ITS REMOTE LANDS AND LIMITED NATURAL RESOURCES

A. The Tribe Has Inherent Sovereign Rights to Develop Its Land and Natural Resources to Advance Its Own Tribal Goals

The Campo Band of Diegueno Mission Indians, otherwise known as the Campo Kumeyaay Nation, is a federally recognized tribe comprised of Kumeyaay people consisting of approximately 310 enrolled citizens. [SER 4 and 54, ¶5; *see also* 85 Fed. Reg. 5462-01, 5463 (Jan. 30, 2020).][2] The Tribe is governed by the

[2] Marcus Cuero, the duly elected Chairman of the Tribe, filed two substantially similar declarations in connection with the Tribe's motion to intervene and motion to dismiss. [Dkts. 49-2 and 75-2.] Plaintiffs did not object to the Cuero declaration filed in connection with the Tribe's motion to intervene. [1-ER 15, n.1.] The district

General Council of the Tribe pursuant to the Constitution of the Campo Band of Mission Indians, which was adopted by the Tribe's members on July 13, 1975, and approved by BIA on January 20, 1976. [SER 4 and 54, ¶6.] The Tribe, through its General Council, exercises sovereign authority over the reservation and its Tribal Members. The Tribe is represented by a seven-member Executive Committee, elected by the General Council, which is empowered to represent the Tribe in all negotiations and relationships between the Tribe and local state and federal governments or agencies, and all other organizations and agencies that may have a relationship with the Tribe. [*Id*. at ¶¶3, 9.]

The Campo tribal government has the responsibility to provide governmental and culturally-relevant social services to its tribal community. [*Id*. at ¶13.] These services include, but are not limited to fire and emergency services, access to utility services and telecommunications, waste management, water well testing and maintenance, septic tank maintenance, environmental protection, natural habitat restoration and maintenance, housing, land use planning, road maintenance and development, social services, water and sewer needs, educational services, and cultural education, preservation and development programs and tribal religious and funerary events. [*Id*.] In addition, the government is responsible for and maintains

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court overruled Plaintiffs' later objections to the second Cuero declaration; however, to avoid controversy cited to the first declaration in its dismissal order. [*Id*.]

locations for community gatherings including its Tribal Center, recreation center, education facility, church and cemetery areas. The government incurs costs for each of these services. [*Id*.]

The Tribe has developed a General Welfare Ordinance designed to help Tribal Members address essential needs, including utilities, infrastructure, housing (e.g., rental assistance, home rehabilitation assistance), education (e.g., tuition costs, supplies, and transportation costs), transportation to essential services, elder and disabled persons programs (e.g., meal assistance, home care, and transportation), child day-care, cultural immersion and involvement (e.g., expenses related to attending and participating in cultural and religious ceremonies) and end of life traditions. [*Id*. at ¶14.] The Tribe's government services have historically relied nearly entirely on limited federal funding to provide governmental and social services; however, federal funding is not consistent and the limitations and restrictions on such funding can be overly burdensome. As a result, the Tribe's services and needs remain unfulfilled. [*Id*. at ¶15.] Unlike state and local governments, the Tribe does not have the benefit of a broad property tax system to create a tax base to generate revenue; therefore, independent tribal economic development is critical for the Tribe to gain income to provide the much needed governmental and social services to Tribal Members and residents, including

housing, healthcare, social services, recovery programs, training and educational opportunities, cultural programs, and other general welfare benefits. [*Id*. at ¶16.]

The Campo Indian Reservation, established in 1893, currently comprises 16,512 acres of land located in eastern San Diego County, and is home to over 500 individuals, including Tribal Members and their families. [*Id.* at ¶7.] Due to the reservation's remote location, which is fifty miles from any job center, the absence of reliable public transportation, and limited natural resources of non-arable land, the Tribe's economic and job opportunities are scarce. [SER 54, 62, ¶¶8, 45; SER 4, 12, ¶¶8, 45.] These conditions have made it difficult for the Tribe to foster any self-generated economic development to support tribal government activities and hinders outbound job opportunities for Tribal Members. [SER 7 and 57, ¶19.]

The Tribe's geographic conditions, economic limitations, and historical inequities and realities have negatively impacted the Campo people. [SER 55, 57, ¶¶11-12, 20; SER 5, 7, ¶¶11-12, 20.] Very few Tribal Members pursue a higher education, which exacerbates the Tribe's economic difficulties. [SER 7 and 57, ¶¶19-20.] Approximately 53% to 62% of the population living on the reservation lived below the poverty level in 2011, a condition that has not changed in the ensuing ten years. [*Id.* at ¶18.]

These circumstances cause the reservation to suffer from inadequate income, which limits the Tribe's ability to provide the governmental and culturally-relevant

services it is responsible to facilitate as a tribal government. [SER 6 and 56, ¶14.] The Tribe is unable to fund many of the programs and services authorized by its General Welfare Ordinance due to inadequate tribal government income. [*Id.*] As explained by the Chairman Cuero:

> "The Tribe's government has had to adapt and adjust to ever-changing federal policies with respect to Indian tribes (including physical and cultural genocide, and theft of land and resources), and throughout those changing policies, the Tribe has fought to maintain its inherent sovereign authority over its reservation and Tribal Members. The Tribe's retained sovereignty over the Reservation and its Tribal Members is more than just exercising political or governmental power, rather it is the key to the Tribe preserving, revitalizing and perpetuating its cultural identity."

[SER 4-5 and 54-55, ¶10.]

B. The Tribe's Efforts to Develop Its Land and Improve Its Economic Condition Have Been Stymied by Its Remote Location and Backcountry Against Dumps' Self-Interested Interference

The Tribe has not passively submitted to the circumstances of its geography and social and economic difficulties. It has proactively sought federal funding, tribal gaming opportunities, a landfill project, wind projects and a water sale to local utility providers to obtain funding to support its community. [SER 12-15 and 62-65, ¶¶47-55.] Most of these efforts were delayed or frustrated by opposition from the Tribe's neighbors Appellant Backcountry Against Dumps, while others were unsuccessful as a consequence of the Tribe's inherent geographical difficulties. [*Id*.]

1. Backcountry Against Dumps' Interference with Two Landfill Opportunities

In the 1990's, the Tribe was unified in its support of development of a landfill to use its non-arable land for economic development. [SER 13 and 63, ¶48.] The Tribe developed its own environmental programs to regulate a new landfill project, only to be frustrated by the neighbors in opposition which created "Backcountry Against Dumps." [*Id.*] Ten years later, the Tribe tried again to develop a similar landfill on the reservation. [*Id.* at ¶49.] During the environmental review process, Backcountry Against Dumps repeatedly stated it would support any projects by the Tribe other than a landfill. [*Id.*] The second landfill project ultimately failed due largely to a significant misinformation campaign by Backcountry Against Dumps causing delays and the frustration of the Tribe's economic partner for the project. [*Id.*]

2. The Tribe's Gaming Opportunities Are Limited Because of Its Remote Location

The Tribe also sought in the late 1990's to take advantage of tribal gaming opportunities, and in 2001 the Tribe opened the small Golden Acorn Casino. [*Id.* at ¶50.] The success of the casino, however, is curtailed by the Tribe's isolated rural location, which has similarly impacted other rural casinos in the county causing them to close. [SER 7, 13 and 57, 63, ¶¶21, 50.] The COVID-19 pandemic further diminished the Tribe's income from the casino underscoring the Tribe's urgent need

to diversify its economy. [*Id.*] As a result, the Tribe was forced to operate less than 350 Class III gaming devices, which classifies the Tribe as a "Non-Compact Tribe" due to the limited revenue received. [*Id.*]

3. Backcountry Against Dumps' Opposition to the Tribe's Kumeyaay Wind Project

Following the Tribe's unsuccessful landfill pursuits, the Tribe turned to its only other resource in abundance—wind—as a source for economic development. [SER 13-14 and 63-64, ¶51.] After the reservation became part of a hub of the area's renewable energy resource zone identified by the Western Governors' Association, the Tribe developed an energy vision to utilize the natural wind resources on the reservation to benefit the needs of the Tribal Members for current and future generations in a sustainable and environmentally responsible manner. [*Id.*] In 2006, in a lease agreement with a private company, the Tribe commissioned a small (50 MW) wind energy project called Kumeyaay Wind on the Reservation. [*Id.*] Despite Backcountry Against Dumps' representation that it would support any Tribal project other than a landfill, it opposed the wind project. Notwithstanding, the Tribe was able to complete its project. [*Id.* at ¶¶51-52.]

While the Kumeyaay Wind project demonstrated that the reservation lands could facilitate viable wind generation, the project did not provide a significant financial boost to the Tribe. [*Id.* at ¶52.] Only 20% of the net revenue created by the project is payable to the Tribe through land lease payments with much of the

remainder going to the lessee's federal, state, and local personal property and income taxes. [*Id.*] Further limiting Kumeyaay Wind project's capabilities, that project did not have the benefit of a connection to the larger southern California grid, as the Sunrise Powerlink, a high voltage transmission line, had not yet been constructed. [*Id.*]

4. Backcountry Against Dumps' Opposition to the Tribe's Expansion of Its Kumeyaay Wind Project

In 2007, the Tribe planned to expand the Kumeyaay Wind project in the context of a larger, more comprehensive plan for the reservation that blends development of the wind resources and other community goals. [*Id.* at ¶53.] The Kumeyaay Wind II project was designed to use the Tribe's long-term energy vision, which is to maximize the development of its wind resources in a manner that sustains and enhances the community environmentally, culturally, socially and economically. [*Id.*]

In preparing for the Kumeyaay Wind II project, the Tribe selected and worked with private partners for years to develop necessary environmental studies, permitting and clearances; testing of wind speed and direction for turbine size and efficiency; engineering and design drawings (power purchase, interconnection and build-own transfer agreements); gaining California Public Utilities Commission and BIA approvals; financing agreements; developing a Tribal Energy Resources Agreement for environmental and leasing authority; cooperative agreements with

state and local governments; land use and master plan amendments; business and job training; and operational and maintenance planning. [*Id.* at ¶54.] Throughout this process, Backcountry Against Dumps tried to stop the project and preclude the Tribe from developing its wind energy despite its former representation that it would not oppose any non-landfill Tribal projects. [*Id.* at ¶49.] Once again, the project ultimately failed due largely to a significant misinformation campaign led by Appellant Backcountry Against Dumps . [*Id.*]

5. Backcountry Against Dumps' Opposition to the Tribe's Sale of Water to a Utility Project

The Tribe also pursued a water sale to a large utility project to increase its income, but was met with opposition from Backcountry Against Dumps. [*Id.* at ¶54.] The constant (and costly) opposition by local self-interested individuals to prevent tribal economic development on the reservation has kept the tribal community in a state of poverty and despair. [*Id*.]

C. The Lease and Project with Terra-Gen Are the Realization of the Tribe's Energy Vision and the Primary Source of Funds for the Tribe's Operations

1. The Lease and Project

Those willing to develop projects on the reservation, given the uncertainties and limited infrastructure, are few, and the types of economic development projects that can succeed on the reservation are rare. [SER 7 and 57, ¶22.] Those projects that are consistent with the Tribe's values and policies to engage in economic

development that supports renewable energy and self-determination, are even more so. [*Id.*]

Notwithstanding, in April 2018, the Tribe finally realized its long-term energy vision when the Tribe's General Council adopted General Council Resolution No. 04-03-2018-01, which approved the 25-year Lease with Terra-Gen for the Project. [SER 9 and 59, ¶29.][3] Because the Project is located on trust land, the Lease was submitted to the BIA for review and approval in accordance with 25 U.S.C. § 415 and 25 C.F.R. Part 162 (Leasing Regulations). [*Id.* at ¶30; 1 ER 15.][4] On April 7, 2020, appellee U.S. Department of the Interior's Assistant Secretary for Indian Affairs signed the Record of Decision authorizing BIA approval of the Lease, and then approved the revised and restated Lease between Terra-Gen and the Tribe on May 4, 2020. [*Id*. at ¶31.]

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[3] Terra-Gen is an owner, operator and developer of utility-scale renewable and clean energy assets, operating twenty-six facilities throughout the Western United States which include wind, solar thermal and geothermal plants. Upon completion, the Project will generate an estimated 252 megawatts of electrical power from renewable wind resources generated by sixty wind turbines and supported by associated infrastructure within a 2,200-acre corridor of the reservation. [SER 68, 76, ¶¶2, 27.]

[4] BIA undertook an extensive environmental review and published a Draft Environment Impact Statement (DEIS), and thereafter a Final Environmental Impact Statement (FEIS), under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (NEPA). BIA also hosted public meetings and responded to public comments on the DEIS and FEIS. In the process, and consistent with tribal sovereignty and self-governance, BIA defers to the Tribe's determination that the Lease is in their best interest. [*Id.*]

The Project to be constructed by Terra-Gen is unique in that it is one of the few economic development projects where the reservation's rural location is an asset, not an impediment to success, and is a project that aligns with the Tribe's values and renewable energy policies. [SER 8-9 and 58-59, ¶27.] The Project will develop and diversify the Tribe's economy and it has already, and will continue to, generate significant economic benefits for the Tribe. [SER 10 and 60, ¶32.]

2. Benefits Already Received by the Tribe Due to the Lease and Project

The Lease immediately began payments to the Tribe as the subsequent regulatory approvals were gained for the Project. [*Id.* at ¶¶32-33.] Since approved by the General Council in 2018 and the federal government in 2020, the Tribe has received over one million dollars in direct rents and payments, which have been allocated to its General Welfare Program from the Lease. The income provided general welfare benefits under the Tribe's General Welfare Ordinance, which was especially critical during the COVID-19 pandemic. [*Id.* at ¶34.] The Project has also resulted in a scholarship program for tribal youth to pursue higher education and training; fifteen scholarships have been issued to Tribal Members. [*Id.* at ¶35.] Additionally, the Project has resulted in increased job opportunities and currently employs approximately fourteen Tribal Members, providing hundreds of thousands of dollars in wages to date from jobs involving environmental review, protection of cultural resources, and other preliminary field investigations. [*Id.* at ¶36.]

3. The Tribe Will Receive Additional Benefits Due to the Lease and Project

The Lease for the Project requires Terra-Gen to give hiring preference to Tribal Members. [SER 11 and 61 at ¶40.] Thus, the Project will provide continuing job opportunities for Tribal Members including operational, monitoring, management and skilled maintenance jobs as construction progresses and the Project becomes operational. [*Id.* at ¶39.] Construction of the Project will also provide ancillary tribal benefits, including the development and use of a tribal batch plant, traffic control, temporary housing for workers, licensing of temporary businesses, and Project biological and cultural monitoring jobs. [*Id.*] The Project will provide a Fire Protection Plan that will provide funds for firefighting and emergency medical resources, and significant new equipment to the Campo Reservation Fire Department to increase its fire and emergency readiness for incidents on and near the reservation. [*Id.* at ¶41.]

The Project will generate tens of millions of dollars for the tribal government in rent, royalties, and other payments, including most that only accrue upon Project operation. [*Id.* at ¶38.] The Tribe estimates that it will receive sufficient monies to fund the Tribe's programs and services through its General Welfare Ordinance as a result of the Project and that the expected revenue will become the primary funding source for the tribal government, increased infrastructure on the reservation, and further economic development ventures. [SER 10-11 and 60-61, ¶¶37-38.] The

Lease also provides for an option to purchase the improvements upon the expiration of the 25-year term, thus providing continual long-term benefits to the Tribe and securing the Tribe's long-term commitment to using its land to generate renewable energy for current and future generations. [*Id.* at ¶42.]

In short, the Project is critical to the Tribe's economic and overall well-being since it will finally allow the Tribe to carry out desperately needed social and governmental services for its members which it is responsible for as a self-governing Tribe. An order invalidating these approvals—and thereby preventing the construction and operation of the Project—would cause the Tribe to lose substantial financial payments due under the Lease, and the loss of intended social and government benefits for its Tribal Members, thereby frustrating the Tribe's strategic management of its land and wind resources and self-governing capabilities.

II. PROCEEDINGS IN THE DISTRICT COURT

A. Plaintiffs' Complaint Seeks to Vacate the Federal Approvals and Halt the Project

On July 8, 2020, Plaintiffs filed their initial Complaint in the United States District Court for the Eastern District of California [Dkt. 1.] Federal Defendants moved to transfer venue to the Southern District. [Dkt. 5.] Shortly thereafter, Terra-Gen filed a motion seeking to intervene as a defendant in the action. [Dkt. 6.] Both motions were granted and the action was transferred to the Southern District. [Dkts.

22–23; SER 17-18.] Both Terra-Gen and Federal Defendants then moved to dismiss. [Dkts. 34, 40.]

Plaintiffs filed the operative First Amended Complaint (complaint) in lieu of opposing the motions. The motions to dismiss were then denied as moot. [Dkt. 43.][5] The complaint asserts three claims: (1) violation of the National Environmental Policy Act; (2) violation of the Migratory Bird Treaty Act; and (3) violation of the Bald Eagle and Golden Eagle Protection Act. [SER 67-128.] Plaintiffs' lawsuit seeks to invalidate the BIA-approved Lease and prevent the construction and operation of the Project. [SER 67-128; *see, e.g.*, SER 74, ¶18 ("Ms. Tisdale therefore seeks this Court's review and invalidation of Defendants' Project approvals."); SER 109, ¶129 ("the FEIS is deficient and the Project approval must be set aside.").]

Specifically, Plaintiffs claim "the Project is a dangerous and completely unnecessary industrialization of low-density rural neighborhoods" and that instead of any project utilizing the abundant wind power on the reservation, the Tribe should realize its renewable energy vision by being limited to "small scale" "roof-top solar arrays." [SER 69-70, ¶¶4-5.] Accordingly, Plaintiffs seek orders declaring that the "Project approvals – including their April 7, 2020 [Record of Decision] authorizing the Project and the Land Lease, and their March, 2020 FEIS, violate NEPA, the

[5] Terra-Gen and the Federal Defendants also filed motions to partially dismiss the First Amended Complaint, which were later deemed moot. [Dkts. 46, 60; 1-ER 14.]

MBTA, the Eagle Act and the APA" and "[o]rdering; Defendants to withdraw their Project approvals…" [SER 128.][6] Plaintiffs also request that the district court "[p]reliminarily and permanently enjoin Defendants from initiating or permitting any activities in furtherance of the Project that could result in any change or alteration of the physical environment unless and until the Defendants comply with the requirements of NEPA, the MBTA, the Eagle Act, and their implementing regulations." [*Id*.]

B. Order Granting the Tribe's Motion to Intervene and Sustaining Evidentiary Objections to Plaintiffs' Evidence Relating to Tribal Governance

In response to Plaintiffs' lawsuit, the Tribe moved to intervene because Plaintiffs' complaint seeks to invalidate the Tribe's BIA-approved Lease with Terra-Gen—a Lease which currently provides revenue and employment to the Tribe and its members and will continue to provide significant future revenue. [Dkt. 49.] Plaintiffs opposed claiming that "the [Tribe]'s decision-making body, its General Council, has never approved the [Project], nor the Lease that would implement it," and therefore "the [Tribe] has no legally protectable interest in the Lease." [Dkt. 55 at 3-4.]

[6] Federal Defendants' and Terra-Gen's oppositions to Plaintiffs' motion for a preliminary injunction outlined in detail how BIA addressed and accounted for each of the environmental allegations raised by Plaintiffs. [Dkt. 77 at 15-20; Dkt. 78 at 16-21.] Although not relevant to the Rule 19 analysis, Plaintiffs' allegations and arguments on appeal based thereon are baseless.

In rejecting Plaintiffs' argument and granting the Tribe's motion to intervene, the district court found that "'the injunctive relief sought by the plaintiffs will have direct, immediate, and harmful effects upon a third party's legally protectable interests'"—i.e., the Tribe's contract rights under the Lease. [SER 21.] The district court also sustained the Tribe's separate objection to declarations filed by Plaintiffs making various statements concerning the approval process for the Lease, and to the admission of a copy of the Constitution of the Campo Band of Mission Indians (1976) attached as an exhibit, on the ground that they are irrelevant given that "[m]atters of the Tribe's internal self-government is not an issue before the Court." [SER 31 (*citing Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1185–86 (E.D. Cal. 2009).) The district court found that it lacks authority to rule on issues of tribal governance and sustained all evidentiary objections premised on that ground. [SER 22, n.1 ("The Court agrees that it lacks authority to rule on issues of tribal governance and SUSTAINS any evidentiary objections premised on this ground."); *see* 25 C.F.R. § 162.003 (Tribal law means the body of non–Federal law that governs lands and activities under the jurisdiction of a tribe, including ordinances or other enactments by the tribe, and tribal court rulings.).]

C. The District Court Dismisses the Action Under Rule 19(b) Based on Its Determination That the Tribe Is a Required and Indispensable Party That Cannot Be Joined Due to Sovereign Immunity

After its motion to intervene was granted, the Tribe moved to dismiss the action under Rule 19 on the ground that it was a required and indispensable party that cannot be joined due to its sovereign immunity. [Dkt. 75.] After full briefing by the parties, the district court determined that Rule 19 required dismissal. [1-ER 13.]

As an initial matter, the district court overruled Plaintiffs' evidentiary objections to the declaration of Marcus Cuero in support of the Tribe's motion and Plaintiffs' motion to strike the declaration. [1-ER 14, 18-11; Dkts. 75-2, 85, 86.] A substantively identical declaration had been submitted by Chairman Cuero in support of the Tribe's motion to intervene *without objection*. [1-ER 15, n.1; SER 3, 39.] The district court also rejected—as it did in ruling on the Tribe's motion to intervene—irrelevant arguments and evidence offered by Plaintiffs regarding issues of tribal governance:

> "Plaintiffs devote the bulk of their Opposition to arguments that are irrelevant to the present Motion. For example, Plaintiffs argue that the Tribal Council did not approve the Project, *See* Opp'n at 7-9; however, as the Court noted in the Intervention Order, the Court lacks authority to rule on issues of tribal governance, *See* Intervention Order at 6 n.1."

[1-ER 23, n.2; SER 22, n.1; 2-ER 215-217.] And similarly, the district court rejected Plaintiffs' attempt to offer evidence regarding the status of the Federal Aviation Administration's (FAA) Determinations of No Hazard for the Project and the "many

pages" Plaintiffs devoted to "the allegedly adverse environmental impacts of the Project on both Tribal Members and the community,. . .[because] those issues have no bearing on the Court's Rule 19 analysis." [1-ER 23, n.2; 2-ER 217-218, 222-229.] Finally, the district court noted that "to the extent that Plaintiffs purport to speak on behalf of Tribal Members and their interests . . . the Court acknowledges that not all Tribal Members may agree with the Tribe's position, but the facts remains that the Tribe is representing that it has approved the Project, wishes it to go forward, and seeks dismissal of Plaintiffs' challenges via the present Motion." [*Id.;* 2-ER 233-234.]

The district court then determined that the Tribe qualified as a required party under Rule 19(a), observing that the Tribe "adequately claims a legally protected interest relating to this action" based on the Lease between the Tribe and Terra-Gen and rejected Plaintiffs' argument that the Project must be built or operational because the "law in the Ninth Circuit is clear that an *interest*, rather than a formal property right is sufficient . . . ." [1-ER 25, emphasis orig.]

The district court further found that "Plaintiffs *are* challenging the Tribe's extant Lease with Terra-Gen, are seeking to enjoin the Project, and are challenging the BIA's approval of the Project, thus clearly and substantially affecting the Tribe." [1-ER 27, emphasis orig.] "[T]he Tribe would be prejudiced if this case were to proceed and Plaintiffs were to prevail, as the Tribe would lose tens of millions of

dollars in revenue that it plans to use to fund its governance and 'its ability to use its natural resources how it chooses.'" [1-ER 31.] Additionally, the district court emphasized that "the Tribe has already realized benefits from the Lease." [1-ER 26, citing to SER 60, ¶¶34-36 (detailing evidence).]

After considering the relevant interests of the parties to this litigation, the district court found that in this case no other existing party represented the Tribe's interests adequately or would assert the same arguments to protect its interest. [1-ER 29-30.] "Federal Defendants' interests differ from the Tribe's, given that Federal Defendants' overriding interest must be in complying with environmental laws, an interest that is meaningfully different from the Tribe's sovereign interest in ensuring that the Project is realized." [1-ER 29; *see also* SER 25-26.] The district court likewise found that Terra-Gen, which may share the Tribe's pecuniary interests, does not share the Tribe's sovereign interests and therefore cannot adequately represent the Tribe's interests. [1-ER 30.]

Having determined that the Tribe was a necessary party, the district court then determined that its joinder was not feasible due to the Tribe's sovereign immunity—an issue that is uncontested in this appeal. [1-ER 30.] The district court next considered whether, "in equity and good conscience" under Rule 19(b), the action may proceed without the Tribe. [1-ER 31.] Even assuming that no other avenues existed to challenge the federal approval decisions, the district court found that the

importance of the Tribe's sovereign immunity strongly outweighed any other equitable considerations. [1-ER 33 ("In light of the unmitigable prejudice the necessary yet immune Tribe would suffer should this case not be dismissed, the Court concludes that this litigation cannot, in good conscience, continue in the Tribe's absence.").] Accordingly, the district court determined that the Tribe was an indispensable party and that dismissal was proper under Rule 19. [*Id*.][7]

Finally, the district court rejected Plaintiffs' argument that the public rights exception should apply because "the relief sought is focused upon BIA's approval activities, and not the *Tribe's* underlying decisions…" [1-ER 34, emphasis orig.] Instead, the district court found that "[b]ecause the litigation would destroy the Tribe's contractual rights under the Lease, the public rights exception cannot apply." [1-ER 35.] Similarly, the district court rejected Plaintiffs' assertion that this litigation transcends the litigants' private interests given the allegations in Plaintiffs' complaint indicating their private interests are a significant factor in bringing this litigation. [*Id*., citing SER 73-75, ¶¶16-20.]

[7] Given the district court's dismissal of the action, it was unnecessary for it to rule on Plaintiffs' motion for preliminary injunction. Nonetheless, Plaintiffs have filed a voluminous excerpts of record containing pleadings and evidence related to their irrelevant filing. [*See* 1-ER 130-160, 234-321, 2-5 and 6-ER 886-1207.]

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in determining that dismissal was required under Rule 19 because the Tribe is a required and indispensable party that cannot be joined. Plaintiffs do not challenge the Tribe's sovereign rights or that the Tribe cannot be joined due to its sovereign immunity. Instead, Plaintiffs argue that the district court applied an incorrect standard of review because the court did not consider Plaintiffs' irrelevant evidence. Plaintiffs have waived challenge of this issue because they have not addressed the district court's evidentiary rulings in their opening brief. Even if considered, Plaintiffs' challenges to the Tribe's decision-making, claims that the FAA is still reviewing the Project, and arguments regarding whether the Project will have adverse environmental impacts were appropriately rejected by the district court. [1-ER 23, n.2; *see also* SER 22 n.1.] Under Rule 19(a), the determination of whether an absent party has a protected interest that potentially may be impaired in an action "is a practical one and fact specific." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (*Makah*); *see* AOB 38. The district court's finding that the Tribe had a legally supported interest that may be impaired by this action is well-supported.

The district court also correctly determined that neither the Federal Defendants, nor Terra-Gen can adequately protect the Tribe's unique sovereign interests. There can be no question that in this case the Tribe has a unique role in

relation to its Tribal Members and to the management and governance of its own land. The Federal Defendants' overriding interest in complying with environmental laws and Terra-Gen's shared pecuniary interest in the Project are meaningfully different from the Tribe's sovereign interest in using its land to support current and future generations in a sustainable and environmentally responsible manner.

Having found that the Tribe has a legally protected interest that neither the Federal Defendants nor Terra-Gen can adequately protect, the district court appropriately found under Rule 19(b) that this case in "equity and good conscience" may not proceed without the participation of the Tribe. While Plaintiffs attempt to portray their lawsuit as an "environmental justice case" wherein they represent "largely poor, minority, elderly and disadvantaged residents" (AOB 1), that is not who they are, and they ignore the demographic of the tribal community that voted to gain the benefit from this Project. Notwithstanding this false portrayal, Plaintiffs' arguments ignore the relevant Rule 19 inquiry and the controlling authority from this circuit. The district court aptly noted "that the Tribe has a substantial and legally protected interest in the Lease, and the benefits it already has derived and will continue to derive from the Lease, that extends beyond a simple financial stake, including the Tribe's sovereign ability to control its resources and the bargained-for hiring preference the Lease contains." [1-ER 28-29.] The district court was also correct in rejecting Plaintiffs' arguments that they are seeking to benefit the Tribe

and Plaintiffs' attempt to obfuscate the relevant inquiry regarding whether the Tribe could suffer prejudice if this matter were permitted to proceed in its absence given that "should Plaintiffs prevail, the relief they seek would essentially destroy the Lease." [*Id*.]

As previously recognized by this Court, there is a "'wall of circuit authority' in favor of dismissing an action where a tribe is a necessary party." *Dine Citizens*, 932 F.3d at 858 (quoting *White v. University of California*, 765 F.3d 1010, 1028 (9th Cir. 2014)). Additionally, this Court " 'ha[s] regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.' " *Id.* (quoting *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) (*Hull*)). Accordingly, "[a]lthough Rule 19(b) contemplates balancing the factors, when the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *White*, 765 F.3d at 1028 (quoting *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994)) (internal quotation marks omitted). Accordingly, the district court acted well within its discretion under Rule 19(b) in determining that the Tribe was an indispensable party and that this case should not "in equity and good conscience" proceed without it. [1 ER 31.]

Finally, the limited "public rights" exception to joinder does not apply in cases where the requested relief would operate to "destroy the legal entitlements of the

absent parties." *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988). Given the district court's findings that Plaintiffs are pursuing their private interests, and that an order vacating the BIA approvals would destroy the Tribe's legal entitlements, multiple grounds support the determination that the public interest exception does not apply. [1-ER 33-35.] This Court should affirm the district court's dismissal.

LEGAL STANDARDS

A. Rule 19 Involves a Case-Specific Determination About Whether an Action, "in Equity and Good Conscience," May Proceed Without a Required Absent Party

Rule 19 provides the framework for determining whether an action may proceed without an absent party or requires dismissal. Under Rule 19(a), a court first must determine whether the absent party qualifies as a "required party" that must be joined if feasible. *See* Fed. R. Civ. P. 19(a)(1) and (2). As relevant here, a "required party" is any person "subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction" if "[t]he party claims 'an interest in the action and resolving the action in [the party's] absence may as a practical matter impair or impede [its] ability to protect that interest[.]'" Fed. R. Civ. P. 19(a)(1)(B). In deciding whether an absent party has an interest that may be impaired or harmed by the nature of the claims in an action, the court's inquiry turns on the specific facts and circumstances at issue in the case. *See Bakia v. County of Los Angeles*, 687 F.2d

299, 301 (9th Cir. 1982) (determination whether a party is required under Rule 19 "is heavily influenced by the facts and circumstances of each case").

If the joinder of a required absent party is not feasible—such as where the party cannot be joined due to sovereign immunity—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). To guide that equitable determination, Rule 19(b) provides a non-exhaustive list of factors for a court to consider, including: (1) the extent to which the absent party would be prejudiced by a judgment rendered in its absence; (2) the extent to which any such prejudice could be lessened or avoided in the terms of the judgment or through other measures, (3) whether a judgment rendered in the party's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action is dismissed for nonjoinder. *Dine Citizens*, 932 F.3d at 857 (*quoting* Fed. R. Civ. P. 19(b))*; Republic of Philippines v. Pimentel*, 553 U.S. 851, 862 (2008).

The weight of the different factors under Rule 19(b) necessarily turns on the facts and circumstances of the particular case, with "some compelling by themselves, and some subject to balancing against opposing interests." *Republic of Philippines*, 553 U.S. at 864 (quoting *Provident Tradesmens Bank & Trust Co. v.*

Patterson, 390 U.S. 103, 119 (1968))[8]; *see also Makah*, 910 F.2d at 558 (Rule 19 requires fact-specific inquiry). As a general matter, "when the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity by itself may be viewed as the compelling factor," even if the dismissal leaves the plaintiff without a remedy. *White*, 765 F.3d at 1028 (collecting cases); *see also Hull*, 305 F.3d at 1025 (observing this Court has "regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs"); *Dine Citizens*, 932 F.3d at 857 ("virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity." [Citation omitted].)

Finally, there is a limited "public rights" exception to joinder requirements under Rule 19 in cases where the requested relief is "narrowly restricted to the protection and enforcement of public rights[.]" *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 363 (1940). For the "public rights" exception to apply, however, "the litigation must transcend the private interests of the litigants and seek to vindicate a

[8] As noted by the Supreme Court, some degree of deference to the district court is necessarily implied. However, because the Court of Appeals in that case erred as a matter of law by considering the merits of plaintiffs' claims without "giving the necessary weight to the absent entities' assertion of sovereign immunity" the judgment was required to be reversed irrespective of the standard of review.

public right," and "the litigation must not 'destroy the legal entitlements of the absent parties.'" *Kescoli*, 101 F.3d at 1311 (quoting *Conner*, 848 F.2d at 1459); *see also Shermoen v. U.S.*, 982 F.2d 1312, 1319 (9th Cir. 1992) ("The public rights exception to joinder rules is an acceptable intrusion upon the rights of absent parties only insofar as the adjudication does not destroy the legal entitlements of the absent parties" (internal citation, quotation marks, and alterations omitted)). Thus, where an action seeks relief that creates a "threat to the absent tribes' legal entitlements, and indeed to their sovereignty,... application of the public rights exception to the joinder rules would be inappropriate." *Shermoen*, 982 F.2d at 1319.

B. Standard of Review: the District Court's Decision to Dismiss Is Reviewed for Abuse of Discretion and Its Weighing of Factors Is Reviewed for Clear Error

This Court reviews a district court's decision to dismiss an action for failure to join a required party for abuse of discretion; however, underlying legal conclusions are reviewed de novo. *Dine Citizens*, 932 F.3d at 851; *Hull*, 305 F.3d at 1022 (outlining steps of Rule 19 analysis and reviewing "these determinations of the district court for an abuse of discretion.") Under the abuse of discretion standard, this Court will affirm the district court unless the Court has "a definite and firm conviction that the court below committed clear error of judgment in the conclusion it reached upon a weighing of relevant factors." *Nealey v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1278 (9th Cir. 1980) (internal citations omitted).

When reviewing an order dismissing a case under Rule 12(b)(7) for failure to join a party, the Court accepts as true the complaint's allegations and draws all reasonable inferences in a plaintiff's favor. *Paiute-Shoshone Indians of Bishop Community of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 996, n.1 (9th Cir. 2011). However, "the court may consider evidence outside the pleadings[.]" *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960) (Maps showing the interests of absent landowners and affidavits were used as evidence to establish that the absent parties must be joined.); *see also* Wright & Miller, 5C Fed. Prac. & Proc. § 1359 (3d ed.); *Tinoco v. San Diego Gas & Electric Co.*, 327 F.R.D. 651 (S.D. Cal. 2018) ("A court may consider extraneous evidence when deciding a Rule 12(b)(7) motion without converting it into a motion for summary judgment.") (citation omitted). A district court's rulings on evidentiary objections are reviewed for abuse of discretion. *Balla v. Idaho*, 29 F.4th 1019, 1024 (9th Cir. 2022).

C. Plaintiffs Have Waived Arguments Not Adequately Raised in Their Opening Brief

This Court has repeatedly admonished that it cannot "manufacture arguments for an appellant" and therefore will not consider any claims that were not actually argued in appellant's opening brief. *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003), quoting *Greenwood v. F.A.A*, 28 F.3d 971, 977 (9th Cir. 1994). Instead, the Court will "review only issues which are argued specifically and distinctly in a party's opening brief." *Id.* "A bare assertion

of an issue does not preserve a claim." *D.A.R.E. America v. Rolling Stone Magazine*, 270 F.3d 793, 793 (9th Cir. 2001).

"The art of advocacy is not one of mystery." *Independent Towers of Washington*, 350 F.3d at 929. As explained by this Court,

> "Our adversarial system relies on the advocates to inform the discussion and raise the issues to the court. Particularly on appeal, we have held firm against considering arguments that are not briefed. But the term 'brief' in the appellate context does not mean opaque nor is it an exercise in issue spotting. However much we may importune lawyers to be brief and to get to the point, we have never suggested that they skip the substance of their argument in order to do so. It is no accident that the Federal Rules of Appellate Procedure require the opening brief to contain the 'appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.' Fed. R. App. P. 28(a)(9)(A). We require contentions to be accompanied by reasons."

Id. at 929-930. Thus, it is Plaintiffs' burden on appeal to present the Court with legal arguments to support its claims. *See Brookfield Communications, Inc. v. West Coast Entertainment Corp*., 174 F.3d 1036, 1046, n.7 (9th Cir. 1999) (failure to raise issue in opening brief waives issue on appeal). An argument waived by failure to raise it in appellant's opening brief also cannot be raised for the first time in appellant's reply brief. *Maljack Productions, Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 886 n.7 (9th Cir. 1996) (Court declines to consider argument raised for first time in reply brief).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion Under Rule 19 in Determining That the Tribe Was a Required and Indispensable Party

A. The Tribe's Sovereign Immunity Is Uncontested

Indian tribes are "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Although Indian tribes have yielded some aspects of their previous inherent sovereignty as part of their relationship with the United States, "[t]he powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.' " *U.S. v. Wheeler*, 435 U.S. 313, 323-24 (1978) (citations and quotation marks omitted). Indian tribes possess common law immunity from suit, *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014), and may only be sued "where Congress has authorized the suit or the tribe has waived its immunity," *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *see also Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (noting Congress consistently has approved tribal sovereign immunity and the "goal of Indian self-government, including...encouraging tribal self-sufficiency and economic development" (citations omitted)); *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (stating "unless and until Congress acts, the tribes retain their historic sovereign authority" (citations and internal quotation marks omitted)).

Here, Plaintiffs do not contest the Tribe's sovereign immunity and do not claim any waiver or abrogation of tribal sovereign immunity relative to the claims in this case.

B. The District Court Correctly Refused to Decide Issues of Internal Tribal Governance

Tribes possess inherent and exclusive power over matters of internal tribal governance, and claims that a tribal government's action is invalid under the Tribe's constitution can be brought only in tribal court. *See* 1 *Cohen's Handbook of Indian Law* §§ 4.04, 4.06, 7.04 (2019) ("Challenges to the validity of a tribal council's action under the tribe's constitution must be brought in tribal court."); *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1185-86 (E.D. Cal. 2009) ("[i]nternal matters of a tribe are generally reserved for resolution by the tribe itself, through a policy of Indian self-determination and self-government as mandated by the Indian Civil Rights Act . . . without authority, this Court will not interfere in the internal affairs of the Tribe"); *see also* 1-ER 23, n.2; SER 22, n.1 (sustaining any evidentiary objections to issues of tribal governance). Accordingly, the district court was correct in refusing to address issues of tribal self-governance.

Plaintiffs' opening brief does not address this ruling or the authorities relied upon by the district court and therefore has waived challenge on appeal. [*See* Legal Standards, C, *supra*.] Plaintiffs' blanket assertion in their "Statement of Facts" that their declarations averring the Tribal General Council never approved the Project

were relevant to whether the case should 'in equity and good conscience' be dismissed" does not establish the district court erred in refusing to interfere with matters of internal tribal governance. [AOB 9.][9] Any such arguments have been waived and, in any event, were appropriately rejected by the district court.

C. The District Court Did Not Abuse Its Discretion in Determining That the Tribe Is a Required Party Under Rule 19(a)

Plaintiffs cannot genuinely challenge the district court's finding that the Tribe has protected legal interests at issue in this action by virtue of the BIA's approval of the Lease—an entitlement that has already been granted. As the district court recognized, Plaintiffs' requested relief seeks to destroy the Tribe's Lease with Terra-Gen, causing the Tribe to "lose tens of millions of dollars in revenue that it plans to use to fund its governance and 'its ability to use its natural resources how it chooses.'" [1-ER 31.] Nonetheless, Plaintiffs try to distinguish controlling authority from this circuit to argue that their lawsuit merely seeks to enforce compliance with administrative procedures and that they are not seeking to "stop any activities *now existing*." [AOB 37-39, emphasis orig.] This Court has repeatedly rejected similar arguments in finding that absent Indian tribes are required parties under Rule 19(a) when their legal interests or entitlements are at stake.

[9] The basis for Plaintiffs' challenge to the legitimacy of the Tribal government's decision-making is also untrue. [*See* Dkt. 56 at 3.]

In *Dine Citizens*, the plaintiffs challenged federal agency actions granting entitlements for a power plant and coal mine on land reserved to the Navajo Nation, and alleged that the agencies' actions violated NEPA and the Endangered Species Act. 932 F.3d at 847. Like in this case, the *Dine Citizens* plaintiffs sought to invalidate BIA approval of a lease amendment extending the term by 25 years and rights-of-way (in addition to other permits). *Id*. at 853. This Court found that the tribe had "a legally protected interest in the subject matter of [the] suit that would be impaired in its absence." *Id.* at 852.

This Court further recognized, that "(a)lthough Plaintiffs' challenge is to Federal Defendants' NEPA and ESA processes (rather than to anything that [the tribe] has done), it does not relate only to the agencies' future administrative process, but instead may have retroactive effects on approvals already granted for mining operations." *Id.* at 853. Rejecting the plaintiffs' attempt to characterize the relief they sought as solely prospective in nature, the Court found that, "[i]f Plaintiffs succeeded in their challenge and the agency actions were vacated, [tribal] interest in the existing lease, rights-of-way, and surface mining permits would be impaired," the Project could not operate, and the tribe "would lose a key source of revenue." *Id*.

Although Plaintiffs characterize their requested relief as only "prospective" (AOB 40), citing *Makah*, 910 F.2d 555, this is precisely the argument this Court rejected in *Dine Citizens* when it distinguished *Makah*, which held the absent tribes

lacked a legally protected interest because certain relief "would affect only the *future conduct* of the administrative process." 932 F.3d at 852-53 (citing *Makah*, 910 F.2d at 559) (emphasis in orig.). The Court noted that *Makah* also held "that absent tribes *did* have a legally protected interest" related to the relief sought to upset allocation decisions that had already been made. *Id.* at 852 (emphasis in orig.). The retroactive effects on approvals already granted is distinct from relief seeking to shape "future conduct" of administrative proceedings. *Id*. at 852-53.

Similarly, in *Kescoli*, the plaintiff challenged the Department of the Interior's modification of a special condition related to leases for mining operations entered into with the Navajo Nation and the Hopi Tribe. 101 F.3d at 1307. Although the plaintiff expressly did not seek to disturb the mining lease agreements, this Court recognized that plaintiff's action nevertheless "could affect the [absent tribes'] interests in their lease agreements and the ability to obtain the bargained-for royalties and jobs" and could "indirectly affect the parties' lease agreements by challenging the conditions under which [the company] may mine" on the trust lands. *Id*. at 1310. In view of those potential impacts on the absent tribes' contractual benefits and sovereignty interests in protecting its tribal members, this Court held that the absent tribes had protected legal interests and were required parties under Rule 19(a). *Id*.

Here, the district court correctly applied this controlling Ninth Circuit authority in finding that Plaintiffs' action, if successful, will impair the Tribe's

legally protected interest in the Lease between the Tribe and Terra-Gen, stop the Project, prevent the Tribe from receiving its benefits, and frustrate the Tribe's ability to use its land and natural resources as it chooses. Like in *Dine Citizens* and *Kescoli*, Plaintiffs' action will affect the already-negotiated and approved Lease and ongoing and expected jobs and revenue. Plaintiffs' arguments to the contrary ignore the facts in this case.

Plaintiffs' lawsuit does not seek to merely "enforce compliance with administrative procedures", nor can it be argued that there are no "existing activities" that would be disrupted. [AOB 38.] Again, this Court has squarely held that there is a sufficient legally protected interest where the requested relief would "impair a right already granted," such as the federally approved Lease already granted here. *See Dine Citizens*, 932 F.3d at 852-853. *Kescoli* similarly hinged on the fact that the relief sought "could affect the [Tribes'] interests in their lease agreements and the ability to obtain the bargained-for royalties and jobs." 101 F.3d at 1310. There is no daylight between the facts here and the operative facts of *Dine Citizens* and *Kescoli*.

Plaintiffs' argument that "the Project has not been constructed and therefore there is no existing operation to be shut down" (AOB 39), is equally unavailing. In *Jamul Action Committee*, this Court upheld dismissal of litigation under Rule 19 for failure to join a necessary sovereign tribal entity, even though the at issue casino was not yet fully constructed or operational. *Id*. at 990. Other cases also have reached the

same conclusion where the plaintiff's requested relief would upset a tribe's contractual benefits or property rights, or would cause harm to a tribe's sovereignty interests. *See Hull*, 305 F.3d at 1023 (concluding tribe had cognizable and substantial interest in bargained land leases not yet approved by Secretary of the Interior); *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999) (rejecting argument that at issue leases between Indian tribes "do not become effective until the leases are approved by Secretary Babbitt," and because "[n]one of the leases has been approved as yet..., the Tribe lacks a vested interest in the leases and lacking such an interest it has no legally protected interest that may be impaired or impeded by the present action"); *Lomayalaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975) (tribe was required party in action seeking to void a mining lease agreement with a non-Indian company, finding the requested relief "most surely would be prejudicial to [the tribe], for the royalties to be paid under the lease still amount to more than $20 million and cancellation of the lease would eliminate the employment of many of the [tribal members]").

Contrary to Plaintiffs' assertion (AOB 39), there is nothing "speculative" about the Tribe's interest here—the Tribe has contractual rights under the Lease that this litigation would impair and the district court correctly recognized that the Tribe is already receiving benefits as a result of the Lease. [*See* Statement of Case, I.C.2.] Without the Project, the Tribe is unable to fund its governmental programs, including

its General Welfare Program and a large percentage of Tribal Members will continue to live below the poverty line and without assistance because the relief Plaintiffs seek will prevent the Tribe from providing sufficient aid. [SER 55, 57, ¶¶11-14, 18-20; SER 5, 7, ¶¶11-14, 18-20.] Given the important sovereign rights and interests at stake in this action, the district court did not abuse its discretion in determining that the Tribe was a required party under Rule 19(a).

D. The District Court Applied the Correct Standard of Review

Plaintiffs generally argue that the district court applied the wrong standard of review because it was required to accept all of Plaintiffs' allegations as true and therefore erred in disregarding Plaintiffs' "extensive expert and lay witness testimony" and instead relying on "highly disputed assertions made in two self-serving declarations submitted by the Tribal Administration." [AOB 31-32.] Plaintiffs' general statement is insufficient to preserve challenge of this issue on appeal. Regardless, the district court acknowledged and applied the correct standard. [1-ER 18.] The district court was permitted to consider evidence from outside the pleadings to determine if the Tribe had a legally protected interest at stake in this litigation and appropriately did so. [*See* Legal Standards, B, *supra*.] By contrast, the district court was not required to consider allegations or evidence irrelevant to the Rule 19 analysis. [*See* Legal Standards, A, *supra*.] Plaintiffs' arguments to the contrary should be rejected.

1. The District Court Did Not Abuse Its Discretion in Considering the Cuero Declaration

Plaintiffs do not address the standard of review applicable to the district court's finding that they waived objection to the Cuero declaration (1-ER 8, 15. n.1) and instead merely argue that the district court's rejection of Plaintiffs' allegations and acceptance of the Tribe's evidence turned a "settled evidentiary rule on its head." [AOB 4.] Plaintiffs also fail to address any of their specific evidentiary objections that were overruled by the district court. [1-ER 15, n.1, 20-21.] Regardless, of the standard of standard of review that applies, Plaintiffs' bare assertion of district court error without further explanation or citation to authority does not preserve their challenges on appeal. Plaintiffs' challenge should be deemed waived. [*See* Legal Standards, C, *supra*.]

Even if considered on the merits, Plaintiffs' arguments fail. A trial court may consider evidence outside the pleadings in determining whether an absent party must be joined. Plaintiffs offer nothing to counter the district court's discussion of the applicable legal authorities and finding to the contrary. [1-ER 18.] The district court also had discretion to find that Plaintiffs' failure to object to the first filed declaration of Marcus Cuero waived later objection to a re-filing of substantially the same declaration. [1-ER 20; *see Federal Deposit Ins. Corp. v. New Hampshire Ins. Co*., 953 F.2d 478, 484 (9th Cir. 1991) (objections untimely); *CSL, L.L.C. v. Imperial Bldg. Products, Inc.*, 2006 WL 3526924, at *9 (N.D. Cal., Nov. 21, 2006) (objections

are untimely to the extent they address declarations that were filed long before the hearing). Again, Plaintiffs' unsupported argument that the district court erred in considering the Tribe's evidence should be rejected.

2. The District Court Did Not Abuse Its Discretion in Ruling That Argument Regarding the Status of the FAA's Determinations of No Hazard Is Irrelevant

The district court was correct in finding Terra-Gen's ongoing process to secure FAA Determinations of No Hazard for each turbine in the Project has no bearing on the Tribe's motion to dismiss. [1-ER 23, n.2.] As noted by the district court, Plaintiffs point out that the FAA granted Plaintiffs' Petition for Review of the FAA's Determinations of No Hazard to Air Navigation for the Project, "but ultimately any FAA approvals are a separate question from Plaintiffs' instant challenges to the Lease and the BIA's approval of the same." [*Id*.] The documents that Plaintiffs attached as exhibits to declarations merely showed certain steps in that process to require further FAA review. [2-ER 100-101, ¶¶4-5 and 108; 2-ER 74-75, ¶¶10-11, and 82-88.] In fact, the FAA has since issued Determinations of No Hazard for each turbine in the Project.[10] Regardless, Plaintiffs fail to offer any authority that

[10] Plaintiffs petitioned for the FAA to reconsider that decision, but the FAA denied Plaintiffs' petition. *See* FAA, Notice of Invalid Petition: Wind Turbine (Oct. 15, 2021), https://oeaaa.faa.gov/oeaaa/external/eFiling/location.do?getDocumentForView=true&blobId=497633778. Plaintiffs have petitioned the Ninth Circuit for review of the FAA's denial of their petition. *See Backcountry Against Dumps v. FAA*, No. 21-71426 (9th Cir. Dec. 14, 2021), Dkt. 1. The Tribe requests that the Court take judicial notice of these developments as

FAA review impacts the district court's finding that the Tribe has significant legal interests at stake.

3. The District Court Did Not Abuse Its Discretion in Refusing to Consider the Merits of Plaintiffs' Environmental Challenges

Plaintiffs also argue that compliance with environmental laws will "improve" rather than "prevent" the Project and "benefit" rather than "harm" the Tribe, and therefore the district court abused its discretion under Rule 19(a) in determining that the Tribe has legally protected interests that could be impaired if the Project approvals are vacated. [AOB 4, 32.] Plaintiffs' stated purpose for this litigation is to extinguish the Tribe's and Terra-Gen's legal rights to construct and operate the Project. Plaintiffs make this clear in their complaint, which asks this Court to invalidate the Record of Decision "authorizing the Project." [SER 128.] They specifically ask the Court to "set aside" the "Project approval," (SER 109, ¶129), order Federal Defendants to "withdraw Project approvals" and to "enjoin" Federal Defendants from "permitting any activities in furtherance of the Project that could result in any change or alteration of the physical environment[.]" [SER 128.]

Even if an action challenges only federal decisions, Rule 19(a) requires examination of the protected interests of the absent party and the practical effect of

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Plaintiffs raised the FAA proceedings in their opening brief. *See City of Las Vegas v. Fed. Aviation Admin.*, 570 F.3d 1109, 1113 n.1 (9th Cir. 2009) (judicial notice of administrative development).

the requested relief on those interests. *See* Fed. R. Civ. P. 19(a)(1)(B)(i) (providing same). Applying that rule, this Court repeatedly has held that a plaintiff cannot defeat the protected interests of an absent party simply by characterizing the action as unrelated to those interests. *See, e.g.*, *Dine Citizens*, 932 F.3d at 852 (tribe had a legally protected interest in suit challenging BIA approval of lease); *Kescoli*, 101 F.3d at 1311 (rejecting plaintiff's attempt to characterize action as seeking "only to enforce the [federal agency's] obligations" under federal laws when the requested relief would affect the tribe's sovereignty interests in royalty payments and employment of tribal members); *Quileute*, 18 F.3d at 1458 ("necessity [of a party]...cannot be avoided by characterizing the issue as constitutionality [of the statute]" when invalidation of the statute "would affect the property interests of the [absent tribes]"); *Hull*, 305 F.3d at 1024 (tribes were required parties in action challenging state's authority to enter gaming compacts because "sovereign power of the tribes to negotiate compacts [would be] impaired by the ruling" as a practical matter); *Manybeads v. U.S.*, 209 F.3d 1164 (9th Cir. 2000) ("[Plaintiff] argues that she is not attacking the two Agreements, only the 1974 statute that led to them. The practical effect, however, of what she seeks in having the 1974 statute invalidated would be the undoing of the Agreements to the substantial prejudice of the Hopi Tribe.").

The district court correctly found that Plaintiffs' action will not benefit the Tribe if Plaintiffs' requested relief is granted and the Project approvals are vacated and the Project permanently enjoined. [1-ER 27-28.][11] An order invalidating the Record of Decision—and thereby halting the Project—would deprive the Tribe of a much needed source of revenue to fund government functions and would interfere with the Tribe's sovereign control over its resources and land. [1-ER 28-29.]

E. No Other Existing Party Represents the Sovereignty and Socioeconomic Interests of the Tribe

A determination under Rule 19(a)(1) that an absent party's ability to protect its interest will be impaired, requires evaluation of whether the existing parties will adequately represent the absent party's interest. *Dine Citizens*, 932 F.3d at 852. The Court considers three factors in this analysis:

> [1] whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments; [2] whether the party is capable of and willing to make such arguments; and [3] whether the absent party would offer any necessary element to the proceedings that present parties would neglect.

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[11] For the same reason, *Disabled Rights Action Committee v. Las Vegas Events, Inc*., relied upon by Plaintiffs is distinguishable. 375 F.3d 861 (9th Cir. 2004). As noted by this Court, the suit in question was "not an action to set aside . . . a contract, an attack on the terms of a negotiated agreement, or litigation seeking to decimate [a] contract." *Id*. at 881 (citations and internal quotation marks omitted) (ellipses and alteration in original). Because the plaintiff only sought the defendants' compliance with the ADA, and "[n]o term of the contract requires discrimination on the basis of disability or precludes [the defendants] from accommodating disabled individuals to the extent Title III requires them to do so," a successful suit would not invalidate or set aside the contract. *Id*.

Id. (quoting *Alto v. Black*, 738 F.3d 1111, 1127-28 (9th Cir. 2013)). The burden of making a showing of inadequate representation is minimal. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538, n.10 (1972).

Plaintiffs argue that the Tribe is not a required party under Rule 19(a) because, even if it has protected interests that may be impaired in this action, Terra-Gen and the Federal Defendants can adequately represent its interests. [AOB 5 ("[T]he Tribe's interest in defending the Lease with Terra-Gen is essentially identical to that of Terra-Gen. . . and similar to that of BIA, the agency that approved the lease and is likewise committed to defending its validity.").] The district court correctly rejected those claims under the facts of this case.

The Tribe, Gen-Terra and the Federal Defendants may share a common goal in defeating Plaintiffs' lawsuit, but that commonality alone does not establish the Tribe's interests can be adequately represented for Rule 19 purposes. *Dine Citizens*, 932 F.3d at 855-56. In *Dine Citizens*, the Interior Department shared an interest in defending the federal decisions at issue; nonetheless, this Court found that the federal defendants' "overriding interest . . . must be in complying with environmental laws such as NEPA and the ESA. This interest differs in a meaningful

sense from [Navajo's] sovereign interest in ensuring that the Mine and Power Plant continue to operate and provide profits to the Navajo Nation." *Id*. at 855.[12]

As in *Dine Citizens*, the evidence establishes that neither Terra-Gen nor the Federal Defendants share the Tribe's interest in the outcome of the Project approvals. *Id*. at 855 ("Although the federal defendants share 'an interest in defending their own analyses that formed the basis of the approvals,' those defendants also are obligated to represent the broader interests of the public, and they "do not share an interest in the *outcome* of the approvals--the continued operation of the Mine and Power Plant." emphasis original); *see also Trbovich v. United Mine Workers of Am*., 404 U.S. 528, 539 (1972) (recognizing that such competing interests "may not always dictate precisely the same approach to the conduct of the litigation" to allow adequate representation).

Neither Terra-Gen nor any Federal Defendant will suffer, directly or indirectly, the consequences that the Tribe will suffer if Plaintiffs prevail and obtain

[12] While the "BIA holds a fiduciary relationship to Indian tribes, and its management of tribal [interests] is subject to the same fiduciary duties," (*McDonald v. Means*, 309 F.3d 530, 538 (9th Cir. 2002)), the BIA's obligations to act in furtherance of the Tribe's interest does not extend to the Tribe's contractual obligations or management duties for its tribal land. *See, e.g.*, *U.S. v. Algoma Lumber Co.*, 305 U.S. 415, 419-22 (1939) (recognizing that the United States has "no beneficial ownership in the tribal lands or their proceeds, and however we may define the nature of the legal interest acquired by the government as the implement of its control, substantial ownership remained with the tribe as it existed before the treaty").

their requested relief. As a self-governing Tribe, the Tribe strategically decided to develop its wind resources which will provide the primary source of funding for the Tribe for the next 25 years. While Terra-Gen undoubtedly has a financial interest in the outcome of the Project and this litigation, Terra-Gen does not share the Tribe's sovereign interest in controlling its resources for the benefit of the Tribe's economic development decisions. *See Dine Citizens*, 932 F.3d at 855-56 (explaining that although commercial operator and co-owner of the project at issue shared a financial interest in the outcome of the case, it could not represent the tribe's sovereign interests); *see also Deschutes*, 1 F.4th at 1163 (rejecting argument that electric company could represent (the absent) tribe's interests: "PGE's interests in this litigation begin and end with the Project. By contrast, for the Tribe, the stakes of this litigation extend beyond the fate of the Project and implicate sovereign interests in self-governance and the preservation of treaty-based fishing rights throughout the Deschutes River Basin.").[13]

Plaintiffs cite to *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998) and argue against categorically applying Rule 19 to

[13] Plaintiffs assert that the district court relied on *Deschutes* in concluding sovereign immunity prevents the court from addressing Plaintiffs' merits claims despite that the order says no such thing. [AOB 44, citing 1-ER 21.]

bar suits where tribes cannot be joined. [AOB 43.][14] The district court did not mechanically apply Rule 19 or determine that all suits against tribes are categorically barred. Instead, the court engaged in a factually intensive and practical analysis of the differing interests in this case. Moreover, in *Southwest Center*, the Court held that the government could adequately represent a tribe's interest, in part, because there was no explanation of "how the Community's sovereignty would be implicated" in the suit. *Id.* at 1154–55. Similarly, in *Lennar Mare Island, LLC v. Steadfast Insurance Company*, 139 F.Supp.3d 1141, 1151 (E.D. Cal. 2015), relied upon by Plaintiffs, the district court noted that the parties had not satisfied the "fact-specific standard of Rule 19" in making general and abstract arguments for why the Navy needed to be joined to an insurance coverage dispute. *Id*. at 1151. Moreover, no sovereign interests were implicated in that case. *Id*. at 1155. Plaintiffs' failure to acknowledge the divergent interests of the Tribe does not mean that they do not exist or that the district court applied an impermissibly mechanical approach.

Plaintiffs' citation to *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977), for the proposition that there is "nothing in NEPA which excepts Indian lands from national environmental policy" is also misplaced. [AOB 44.] The Court in

[14] Plaintiffs also cite *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003), but that case decided intervention under Rule 24 and did not address dismissal under Rule 19(b).

Manygoats held that the government could *not* adequately represent a tribe's interests. *Id*. at 557-558. ("The Secretary must act in accord with the obligations imposed by NEPA," and the environmental goals of that statute were "not necessarily coincidental with the interest of the Tribe in the benefits which the Exxon agreement provides.")[15] Here, the Tribe provided detailed evidence supporting the same finding. If the Project approvals are vacated, the impact on the Tribe will be devastating to the solvency of its people, its control over its own natural resources, and its ability to govern and provide vital public services. Given the different interests at stake, Terra-Gen and the Federal Defendants may not approach this action with the same vigor to protect the Tribe's interests. There likewise could be differing views on the proper legal standards governing the approvals, or the proper remedy for any identified violations. Plaintiffs' argument that the interests of the parties in this case are identical was properly rejected.

F. The District Court Did Not Abuse Its Discretion Under Rule 19(b) in Deciding That "in Equity and Good Conscience" This Action Should Not Proceed Without the Tribe

After determining that the Tribe was a required party under Rule 19(a) that cannot be joined due to sovereign immunity, the district court did not abuse its

[15] *See also White v. University of Californ*ia (N.D. Cal., Oct. 9, 2012, No. C 12-01978 RS) 2012 WL 12335354, at *11, aff'd (9th Cir. 2014) 765 F.3d 1010 (Rejecting the indispensability analysis of the Tenth Circuit: "*Manygoats* is an out-of-circuit decision which has not been embraced by the Ninth Circuit in the many years that have followed.")

discretion in determining that dismissal was required under Rule 19(b). Plaintiffs argue that the district court applied an incorrect standard and failed to adequately consider all factors under Rule 19(b), including excluded evidence asserting that the Campo Tribal Council did not approve the Project. [AOB 9; *see* Legal Standards, C, *supra*.] But, contrary to those arguments, the district court properly considered the equities and determined that the severe risk of prejudice to the sovereignty interests of the Tribe was a compelling consideration that outweighed all other considerations in this case. [1-ER 31-33.]

As this Court has recognized, when the absent party is a tribe asserting sovereign immunity, "there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as one of those interests compelling by themselves, which requires dismissing the suit." *Dine Citizens*, 932 F.3d at 857 (citation and quotation marks omitted). Although this Court still considers any other relevant equitable considerations under Rule 19(b), dismissal for nonjoinder generally is required "where there is a potential for injury to the interests of the absent sovereign." *Republic of Philippines*, 553 U.S. at 867. And, even though dismissal may leave the plaintiff without a remedy, that "result is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *Hull*,

305 F.3d at 1025; *see also Pit River Home and Agr. Co-op. Ass'n v. U.S.*, 30 F.3d 1088, 1102-03 (9th Cir. 1994) (stating same).

Plaintiffs argue that the district court erred in finding relief could not be tailored to avoid prejudice to the tribe. [AOB 4-5, 36.] However, in *Dine Citizens*, the Court recognized that the tribe would be prejudiced if the plaintiffs were likely to prevail—at stake was millions of dollars in revenue for the tribe, as well as the tribe's ability to use its natural resources how it chooses. *Id.* When reviewing similar claims arising from NEPA and the ESA, the *Dine Citizens* Court recognized, that although remanding the challenged decisions without vacatur could potentially "avoid prejudice in the short term," "the [tribe] inevitably would be prejudiced if Plaintiffs ultimately succeeded and if, after further NEPA and ESA processes, Federal Defendants were not able to come to the same decisions without imposing new restrictions or requirements on the [project]." 932 F.3d at 858.

Similarly, here, the district court correctly found that the Tribe would suffer the same prejudice, including the loss of millions of dollars in continued revenue, significant high-paying jobs, and loss of the opportunity to use its land and its natural resources how it chooses—to produce renewable energy to support the Tribe and the surrounding community. [1-ER 28, 31.] Additionally, the delay associated with further review of the Project will prejudice the Tribe, which is reliant on the existing and future income from the Project. As noted by the district court, the Tribe had

already received significant benefits from the Project, which it is relying on in order to fund the programs designed to ensure the welfare of Tribal Members. [1-ER 26.]

Just as in *Dine Citizens*, it is not possible to "tailor the scope of relief available to being prospective only, preventing any impairment to a legally protected interest. *Id*. at 853. Any changes to the conditions of the Project, timing of Project development, or determination that the Federal Defendants' approvals must be vacated and remanded for further determination, will directly impact Terra-Gen's ability to construct and operate the Project as contemplated under the Lease. In turn, as found by the district court, the Tribe will lose a substantial source of revenue (tens of millions of dollars), and will be deprived of a new, significant source of jobs for the Tribe's members.

Even if no alternative forum exists for Plaintiffs to challenge the federal approvals, the tribal interests in protecting immunity outweighs any interests of Plaintiffs in pursuing their "procedural" claims. *See Hull*, 305 F.3d at 1025 (observing this Court has "regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs"); *Makah*, 910 F.2d at 560 ("[s]overeign immunity may leave a party with no forum for its claims"); *Kescoli*, 101 F.3d at 1311 ("we have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity" (citation and quotation marks omitted)); *Republic of*

Philippines, 553 U.S. at 867 ("dismissal of the action must be ordered [under Rule 19] where there is a potential for injury to the interests of the absent sovereign"). Indeed, because of the importance of the right of sovereign immunity, "virtually all the cases" are in favor of dismissal under Rule 19(b), "regardless of whether [an alternative] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity." *See Dine Citizens*, 932 F.3d at 858 (quoting *White*, 765 F.3d at 1028).[16] Accordingly, the district court correctly concluded that protection of tribal sovereign immunity strongly outweighed any other equitable considerations under Rule 19(b) under the circumstances of this case.

II. The Public-Rights Exception to Rule 19 Is Inapplicable Because Plaintiffs Are Self-Interested and Their Requested Relief Would Destroy Legally Protected Rights of the Tribe

Plaintiffs' litigation threatens to destroy the Tribe's approvals such that the Tribe's interest in its own self-governance, economic development and General Welfare Program could be significantly affected. Notwithstanding the risk of undue prejudice to the Tribe and the Plaintiffs' own private self-interests, Plaintiffs contend

[16] Plaintiffs' reliance on the District of Colorado's decision in *Dine Citizens Against Ruining Our Environment v. Klein*, 676 F. Supp. 2d 1198, 1216-1217 (D. Colo. 2009), does not change this result. The decision is just one fact-specific outcome in that district. Indeed, a subsequent District of Colorado decision, addressing a challenge to the same project, dismissed the challenge because the "weight to the [Navajo] Nation's sovereign immunity" was "dispositive and requires dismissal." *See Center for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1230 (D. Colo. 2012).

that the district court erred in not applying the "public rights" exception to joinder requirements.

"The public rights exception is a limited 'exception to traditional joinder rules' under which a party, although necessary, will not be deemed 'indispensable,' and the litigation may continue in the absence of that party." *Dine Citizens*, 932 F.3d at 858 (quoting *Conner*, 848 F.2d at 1459). "The public rights exception is reserved for litigation that 'transcend[s] the private interests of the litigants and seek[s] to vindicate a public right." *Id.* (quoting *Kescoli*, 101 F.3d at 1311). "The public rights exception may apply in a case that could adversely *affect* the absent parties' interests, but 'the litigation must not *destroy* the legal entitlements of the absent parties for the exception to apply'." *Id.* (internal quotations omitted; emphasis in orig.).

This Court has routinely declined to apply the public rights exception in actions involving impairment to existing leases of tribal land. *See Dine Citizens*, 932 F.3d at 859-60; *see also Kescoli*, 101 F.3d at 1311-12. Like the legal entitlements threatened in *Kescoli* and *Dine Citizens*, Plaintiffs seek to invalidate the Lease the Tribe has entered into with Terra-Gen for the development of renewable energy facilities on the Tribe's property. The Tribe has determined what is in its best interests by balancing the potential harm caused by the Project with the benefits of the royalty payments and jobs the Tribe will receive under the Lease. Plaintiffs' characterization of its lawsuit as seeking to benefit the Tribe does not change the

fact that the litigation "*threatens* to destroy" the Tribe's approvals. *Dine Citizens*, 932 F.3d at 860 (emphasis in original); *see also Shermoen*, 982 F.2d at 1319 (9th Cir. 1992) ("Because of the threat to the absent tribes' legal entitlements, and indeed to their sovereignty, posed by the present litigation, application of the public rights exception . . . would be inappropriate").

In holding that the public rights exception is inapplicable to litigation that would invalidate entitlements already granted and therefore threaten existing legal rights, the Court in *Dine Citizens* expressly distinguished *Conner*, 848 F.2d 1441, the case principally relied upon by Plaintiffs. This Court explained that in *Conner*, the contracts at issue themselves were not invalidated. *Dine Citizens*, 932 F.3d at 859; *see also Conner*, 848 F.2d at 1462 ("[T]he lessees remain free to assert whatever claims they may have against the government" for damages arising from any impairment of their contractual rights.) In contrast, the leases and rights-of-way at issue in *Dine Citizens* (as here) "are valid only with approval by BIA." *Dine Citizens*, 932 F.3d at 860. "If the Record of Decision that granted such approval were vacated, then those agreements would be invalid and [the tribal entity] would lose all associated legal rights." *Id.*[17]

[17] The Ninth Circuit also recognized that refusing to apply the public rights exception "arguably 'produce[s] an anomalous result' in that '[n]o one, except [a] Tribe, could seek review of an environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on [that tribe's] lands'." *Dine Citizens*, 932 F.3d at 860-61 (quoting *Manygoats*, 558 F.2d at 559.)

If Plaintiffs succeed in obtaining vacatur of the Record of Decision that granted BIA's approval of the Lease between Terra-Gen and the Tribe, the Lease will be invalid and the Tribe will lose all associated legal rights. Unlike *Conner*, there would be no remedy for damages against government for those losses. The district court correctly determined that under the circumstances of this case, the public-rights exception to joinder requirements is inapplicable.

CONCLUSION

The district court did not abuse its discretion in determining that the Tribe was a required and indispensable party under Rule 19 that cannot be joined due to its sovereign immunity. Because Plaintiffs are self-interested and the Tribe has legally protected interests that potentially would be destroyed if this action proceeded without it, the "public interest" exception to joinder is inapplicable. This Court should affirm the district court's dismissal for failure to join a required and indispensable party under Rule 19.

"This result, however, is for Congress to address, as it should see fit, as only Congress may abrogate tribal sovereign immunity." *Id.* at 861 (citing *Michigan*, 572 U.S. at 790). Congress has not done so, and the public rights exception does not apply where, as here, the litigation threatens to destroy the Tribe's legal approvals. *Id.*

DATED: May 24, 2022

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Intervenor-Defendant-Appellee Campo Band of Diegueno Mission Indians states that this case is related to *Backcountry Against Dumps v. Federal Aviation Administration* (appeal pending, Ninth Cir. Case No. 21-71426).

DATED: May 24, 2022

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,975words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

DATED: May 24, 2022

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CERTIFICATE OF SERVICE

I am employed in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 525 B Street, Suite 2200, San Diego, California 92101.

☑ I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 24, 2022.

APPELLEE'S ANSWERING BRIEF

☑ (Federal) I declare that I am a member of the Bar of this Court at whose direction the service was made.

Executed on May 24, 2022, San Diego, California.

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