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No. 21-55869

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BACKCOUNTRY AGAINST DUMPS, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS, et al.,

Defendants-Appellees,

and

TERRA-GEN DEVELOPMENT COMPANY, LLC and CAMPO BAND OF DIEGUENO MISSION INDIANS

Intervenor-Defendants-Appellees.

ON APPEAL FROM THE SOUTHERN DISTRICT OF CALIFORNIA

No. 3:20-cv-02343 JLS (DEB)

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants Backcountry Against Dumps, Donna Tisdale and Joe E. Tisdale submit the following disclosure statement.

Appellant Backcountry Against Dumps is a non-profit corporation, and does not have any parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad. Appellants Donna Tisdale and Joe E. Tisdale are individuals suing in their individual capacity.

February 22, 2022

Respectfully submitted,

/s/ Stephan C. Volker
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I. INTRODUCTION

This is an environmental justice case. Contrary to popular misconceptions, huge wind turbines have enormous impacts. They emit constant loud pulsations and deep vibrations, their multi-ton rotors wear out and catch fire, igniting wildfires, their 200-foot long turbine blades break and fly hundreds of yards, posing risks of impalement, their shadow-flicker at sunrise and dusk mimics a disco ball's disorienting effects, their 600-foot tall towers dominate the skyline and pose aviation hazards, and accordingly they should never be sited near residential areas. Appellants' Excerpts of Record, Vol. II, pp. 281-294; III-ER-326-328, 350-351, 405-409, 412-420. Just as oil refineries, smelters, coal power plants and nuclear generators should not be sited where people live – and particularly not if those impacted are poor, minority, elderly and other vulnerable communities – so too, the subject wind Project's 600-foot tall wind turbines should not be placed in and near the largely poor, minority, and elderly residential communities in and near the Campo Reservation. Yet that is exactly what Defendant and Appellee United States Bureau of Indian Affairs ("BIA") allowed, over the strenuous objections of most of the Campo Band of Diegueno Mission Indians' ("Campo Band's") members and surrounding community residents, and without compliance with federal environmental laws. III-ER-323-329, 338-351.

Plaintiffs and Appellants Backcountry Against Dumps, Donna Tisdale and Joe E. Tisdale (collectively "Appellants") represent and are supported by the vast majority of the largely poor, minority, elderly and disadvantaged residents of the sparsely populated mountains and high desert of eastern San Diego County known as the "Backcountry." III-ER-323-329, 338-351, 410-412; VI-ER-1214. Appellant Ms. Tisdale has been elected each year for the past three decades as Chairwoman of the Boulevard Planning Group, San Diego County's official local

planning advisory body for this rural region whose Board repeatedly voted unanimously to oppose the Project. II-ER-64. Appellants seek reversal of the District Court's Order and Judgment of Dismissal filed August 6, 2021 on sovereign immunity grounds (I-ER-2-27) to restore the District Court's jurisdiction and thereby enforce compliance by the Federal Defendants and Appellees (collectively "BIA"), with the National Environmental Policy Act ("NEPA"), 42 U.S.C. section 4321 *et seq*., the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. section 703 *et seq*., the Bald Eagle and Golden Eagle Protection Act ("Eagle Act"), 16 U.S.C. section 668, and the Administrative Procedure Act ("APA"), 5 U.S.C. sections 701-706 in reviewing and approving the Campo Wind Project ("Project") proposed by Intervenor-Defendant and Appellee Terra-Gen Development Company, LLC ("Terra-Gen").

These laws are procedural, and will not permanently block this Project. Instead, their enforcement will make it a better project by identifying ways to reduce its impacts. II-ER-108-109, 112-120. Compliance with these laws will improve the Project's siting, design, construction and operation, and more fully mitigate its effects, and thus better serve both the Campo Band on whose Reservation the Project would be built, and the surrounding community. II-ER-108-109, 112-120. For this reason, the majority of the residents of the Campo Reservation oppose the Project – including its former Tribal Chairwoman Monique LaChappa (III-ER-323, 329) and its former Vice-Chairwoman and Secretary Michelle Cuero (III-ER-338-339, 348-351), who testified in this proceeding *against* the Project and in *support* of Appellants. III-ER-323-326, 341-342.

The current Tribal administration ("Tribe") invoked sovereign immunity to thwart the District Court's jurisdiction over this Project. Its Motion to Dismiss

filed June 17, 2021 ("Motion", II-ER-232-233) – the granting of which prompted this appeal – claimed financial harm from enforcement of federal environmental laws, based on vague allusions to undisclosed terms of its 25-year Lease with Terra-Gen. II-ER-210-211, 216-223, 229-230. The Tribe's arguments below ignored the needlessly adverse effects of the Project as currently configured on the surrounding community including residents of the Reservation, and now ask this Court to do likewise. II-ER-228-230. The Project's 600-foot tall wind turbines have severe vibration, noise, blade-toss, fire, aesthetic and public safety impacts on residents who live in and near the areas targeted for development, both within and adjacent to the Reservation. II-ER-281-294; III-ER-326-328, 350-351, 405-409, 412-420.

However, the Tribe has nonetheless chosen to side with Terra-Gen, solely to receive promised financial returns, rather than insist on BIA's compliance with environmental laws that would protect Tribal members' health and safety interests.

This Court should allow this case to proceed notwithstanding the Tribe's invocation of sovereign immunity. The Tribe's interests in defending its Lease with Terra-Gen will be adequately represented by Terra-Gen. Moreover, dismissing this action on sovereign immunity grounds would leave Plaintiffs with no remedy for BIA's unlawful approval. Accordingly, the Tribe is not an indispensable party, and the judgment of dismissal below should be reversed.

In ruling to dismiss this action on sovereign immunity grounds, the District Court erred in five respects. First, the Court applied an incorrect evidentiary standard of review. Whereas under Rule 12(b)(7) the court must "accept as true the allegations of Plaintiffs' complaint and draw all reasonable inferences in Plaintiffs' favor" (*Paiute-Shoshone Indians v. City of Los Angeles*, 637 F.3d 993, 996 n. 1 (9th Cir. 2011)), the District Court instead disregarded Plaintiffs'

allegations – let alone its extensive expert and lay witness testimony – and relied on contrary, vigorously disputed assertions made in two self-serving declarations submitted by the Tribe. I-ER-9-12 (denying Plaintiffs' objections to Mr. Cuero's two declarations), 15-23 (relying on Mr. Cuero's declarations and the Tribe's arguments based thereon). The effect of the District Court's rejection of Plaintiffs' allegations and acceptance of the Tribe's was to turn this settled evidentiary rule on its head, defeating its purpose.

Second, the District Court relied heavily on its conclusion that "the 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 . . . ." I-ER-22. But that conclusion is based on the erroneous premise that BIA's compliance with environmental law would prevent, rather than improve, the Project. In fact, as Plaintiffs repeatedly pointed out and documented, BIA's compliance with NEPA, the MBTA and the Eagle Act would reduce its impacts and thereby improve rather than block the Project. II-ER-108-109, 112-120. Thus, far from causing the Tribe to "lose tens of millions of dollars in revenue" as the District Court mistakenly asserted, BIA's compliance with applicable environmental laws as sought by Plaintiffs would improve the Project by relocating or redesigning parts of it to reduce their impacts on Tribal residents (as well as those living near the Reservation), and thus benefit rather than harm the Tribe. What legitimate purpose is served by ignoring impacts on Tribal residents, when options exist to relocate or redesign the Project?

Third, the District Court relied heavily on its conclusion that "Plaintiffs do not suggest how any relief can be tailored to address [the BIA's] failures [to comply with environmental laws] in a way that would lessen the prejudice to the Tribe." I-ER-23. But in fact, Plaintiffs did suggest how relief could be tailored in

a way that would avoid prejudice to the Tribe, by identifying ways to reduce the Project's impacts. II-ER-108-109, 113-120. For example, relocating some of the turbines away from residential areas, scenic vistas and high fire-hazard areas, lowering their height, utilizing smaller, less noisy turbines, and identifying less impactful sources of groundwater for their construction, would all help to reduce the Project's impacts on the Tribe's members and on the environmental resources that affect their quality of life including groundwater, scenery, noise, aviation and wildfire suppression. II-ER-112-120. Indeed, the District Court acknowledged elsewhere in its Order that "Plaintiffs argue that "their] claims can be tailored so that they do not destroy the legal entitlements of the absent Tribe." I-ER-25. The District Court's failure to consider Plaintiffs' evidence *at all* in this regard was plain error.

Fourth, the District Court misapplied the "equity and good conscience test" by ruling that this action could not proceed in the Tribe's absence notwithstanding the fact that the Tribe's interest in defending its lease with Terra-Gen is essentially identical to that of Terra-Gen, a party fully invested in defending that lease, and similar to that of BIA, the agency that approved the lease and is likewise committed to defending its validity.

Fifth, the District Court ruled that the "public rights exception" to Rule 19's requirement that indispensable parties by joined was inapplicable because two elderly Plaintiffs – Mr. and Mrs. Tisdale – lived adjacent to the Project site and thus the interests of the other members of Plaintiff Backcountry Against Dumps despite their documented injuries were so inconsequential that "the Court [is not] convinced that this litigation transcends the litigants' private interests." I-ER-26. In so ruling, the District Court completely failed to consider the undisputed facts that:

(1) the Project encompasses an enormous ridge-top expanse extending nine miles north to south and two miles east to west, impacting hundreds of community members both within and outside the Reservation;

(2) a *majority* of the enrolled members of the Tribe opposed the Project because of its environmental impacts on their community as documented by the declarations of the tribe's former Chair and Vice-Chair and the petitions attached to their declarations (III-ER-328-329, 343-350);

(3) the *entire* full membership of the Board of San Diego's official land use advisory body for this large mountainous region of the County, the Boulevard Planning Group, voted repeatedly and unanimously to oppose the Project because of its adverse environmental impacts on their rural community (III-ER-411, 424);

(4) four highly qualified environmental experts, including a retired Battalion Chief of the California Department of Forestry and Fire Protection ("CalFire") with four decades of experience, an engineer with four decades of experience and a Ph.D. in community noise evaluation, an acoustical engineer specializing in the assessment of industrial noise specific to eastern San Diego County, and a hydro-geologist with more than two decades experience in the measurement and evaluation of groundwater in eastern San Diego County, all testified, at length and based on extensive studies and documentation, that the Project posed broad and potentially severe adverse impacts to the residents of the *entire* region of eastern San Diego County extending up to 20 miles distant from the Project site (II-ER-236-243, 269-276, 281-294; III-ER-405-409, 411-421; V-ER-1115); and

(5) *all* of Plaintiffs' claims alleged BIA's failure to comply with federal environmental laws enacted by Congress to protect the *public's* interest in a safe and healthful environment and *none* alleged private rights of action such as nuisance or trespass to advance a private property or other individual right.

The fact that Plaintiffs properly alleged and proved that two of Backcountry's members would suffer substantial harm from the Project as necessary to establish their organization's standing to bring this action does not transform this public interest case into a purely private one. Thus, far from being limited to the private interests of just two individuals, the interests represented by Plaintiffs embrace the entire region of eastern San Diego County and represent exactly the community-based interests that the "public interest" exception to Rule 19's indispensable party rule was intended to protect. The District Court's failure to even acknowledge, let alone evaluate and respect, the broad public interests documented by Plaintiffs fails to apply the "public rights exception" in the manner required by the law of this Circuit. *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988).

For each of these compelling reasons, the District Court's Judgment dismissing this action is contrary to law and the facts and should reversed.

STATEMENT OF DISTRICT AND APPELLATE COURT JURISDICTION

The District Court exercised federal question jurisdiction under 28 U.S.C. section 1331. This Court has jurisdiction of this appeal from the District Court's final decision dismissing this action with prejudice under 28 U.S.C. section 1291.

ISSUES ON APPEAL

This appeal raises five issues.

1. Did the District Court apply an incorrect evidentiary standard of review?

2. Was the District Court's ruling that "the 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" based on the erroneous premise that BIA's

compliance with environmental law would prevent, rather than improve, the Project?

3. Was the District Court's ruling that "Plaintiffs do not suggest how any relief can be tailored to address [BIA's] failures [to comply with environmental laws] in a way that would lessen the prejudice to the Tribe" incorrect, because Plaintiffs did suggest how relief could be tailored to avoid prejudice to the Tribe?

4. Did the District Court misapply the "equity and good conscience test" by failing to acknowledge that the Tribe's interest in defending its lease with Terra-Gen is essentially identical to Terra-Gen's interest in defending that same lease?

5. Did the District Court misapply the "public rights exception" to Rule 19's requirement that indispensable parties be joined by ignoring the extensive, fully documented interests of the public in BIA's compliance with the law?

ADDENDUM

In accordance with Ninth Circuit Rule 28-2.7, Appellants have included an Addendum containing pertinent statutes and regulations.

STATEMENT OF THE CASE

This is a public interest case to enforce federal environmental laws brought by a rural grass-roots conservation organization, Backcountry Against Dumps, and two of its senior members, Mr. and Mrs. Tisdale, who have lived on Morningstar Ranch for over four decades. They appeal from the District Court's Judgment of Dismissal granting a motion to dismiss under Rule 12(b)(7) for failure to secure jurisdiction over an indispensable party, the Campo Band of Diegueno Mission Indians ("Tribe"), that asserted its sovereign immunity.

The action was filed in the Southern District of California on July 8, 2020 challenging Defendant United States Bureau of Indian Affairs' ("BIA's) approval

of a 25-year lease between the Tribe and Terra-Gen Development Company LLC ("Terra-Gen") allowing construction and operation of sixty 596-foot tall wind turbines along a 9-mile stretch of the crest of the coastal mountains in San Diego County.

The District Court dismissed the action on August 6, 2021 (Dkt. 93). VI-ER-1370. Plaintiffs timely filed their appeal on August 12, 2021 (Dkt. 95). VI-ER-1370.

STATEMENT OF FACTS

I. THE TRIBAL COUNCIL DID NOT APPROVE THE PROPOSED PROJECT, WHICH MOST TRIBAL MEMBERS OPPOSE.

Tribal leaders filed declarations averring the Tribal Council never approved the Project. VI-ER-1213-1214, 1227-1229, 1235. The District Court declined to consider this evidence as "irrelevant" because the Court "lacks authority to rule on issues of tribal governance." I-ER-14, fn. 2. However, this evidence is relevant to the Court's equitable determination under Rule 19 whether, "in equity and good conscience, should the case be dismissed?" Fed.R.Civ.P. Rule 19(b). If this case is dismissed, then the Tribal *majority* that opposed this Project – not just surrounding residents – will be denied the environmental protections that federal law requires they be given. How is that result consistent with "equity and good conscience"? Accordingly, this vital but ignored evidence is recounted here.

According to former Tribal Vice Chair Ms. Cuero, Article IV, Section 2(A) of [the Campo Band] Constitution provides that 'the Executive Committee shall not enter into any contract, lease or other arrangements unless specifically authorized by resolution of the General Council." VI-ER-1228. "Thus, the Band may not enter into any contract, lease, or right of way allowing use of Reservation

land unless the Campo Band General Council has voted to approve that use of Tribal land." VI-ER-1228.

The Tribal Council did not, by the required quorum, approve the Project. It is undisputed that "under Article VI, Section 1 [of the Campo Band Constitution], a quorum of the General Council is required to conduct business." VI-ER-1210, 1226. It is likewise undisputed that "as of April 3, 2018, the date of the Tribe's supposed approval of the Project, the total number of voting Tribal members was 319." VI-ER-1210. It is also undisputed that as of that time, under the Campo Band Constitution, "the required quorum was 20 percent times 319 equals 63.8, or 64," voting members. VI-ER-1210.

It is further undisputed that at the General Council meeting on April 3, 2018, two motions to approve the Project were made. VI-ER-1210. The first, by Tribal member Johnathan Mesa, "died for lack of a second." VI-ER-1210. The second was a "conditional motion for the Tribe to move forward with the wind turbine Project proposed by Terra-Gen *only if certain conditions*, which would change the configuration of the Project to protect Tribal residents from the adverse impacts, *were met."* VI-ER-1210 (emphasis added). That second motion, by former Tribal Chairwoman Monique La Chappa, "was seconded, and passed with 32 votes in favor, 12 against, and one abstention, *19 votes less than the minimum quorum of 64 votes required under the Constitution*." VI-ER-1210 (emphasis added), 1227. "[N]o other motions to move forward with the Project were made." VI-ER-1210. "Therefore, because the only motion to pass [by Ms. La Chappa] failed for lack of the required quorum, *no motion to move forward with the Project was approved*." VI-ER-1210. "At no time since April 18, 2018 has the General Council approved any motion to approve the Campo Wind Project." VI-ER-1227.

In early 2020 a quorum of the General Council – "64 qualified voting Tribal members" – signed a Petition "opposing the Campo Wind Project." VI-ER-1228. Pursuant to Article IV, Section 1(C) and (D) of the Tribal Constitution, this petition asked "the General Council to reconsider the Campo Band's attempted ([but] ineffectual and invalid) entry into the Lease with Terra-Gen . . . for the Campo Wind Project." VI-ER-1228. "A majority of the Campo Band General Council, and of the enrolled membership of the Campo Band, opposes, and has now vetoed and revoked, the Campo Wind Project and its Lease with Terra-Gen." VI-ER-1214. "They have done so in part because the Project's wind turbines would cut through the heart of [the] Reservation's residential areas, rendering [Tribal members'] homes uninhabitable due to the wildfire risks, risk of blade rupture and toss, and related health and safety effects." VI-ER-1214. How is this severe harm to Reservation residents consistent with "equity and good conscience"? It isn't.

The fact that a majority of Tribal members became opposed to the Project's location and design once they were apprised of its many impacts is not surprising. Plaintiffs have worked collaboratively with Tribal members for decades to promote smart land use planning and appropriate environmental protection both on- and off- the Reservation. For example, they worked together to defeat a massive dump, and expansion of a harmful wind project, both on Reservation land, and a proposal to pump and export scarce Reservation groundwater that Tribal members depend on for their water supply. "[E]ach of those projects was opposed by members of the Tribe" as well as Plaintiffs, and most were either rejected by the Tribe's General Council, or by the governmental permitting agencies because the projects did not meet health and safety standards and thus posed a risk to the local community. VI-ER-1291-1293. For example, "in the case of the landfill, [the

project was opposed] by San Diego County, which filed a lawsuit in federal court against the landfill due to the hazards it posed to groundwater which is reported at *County of San Diego v. Babbitt*, 847 F.Supp. 768 (S.D. Cal. 1994)." VI-ER-1292. Tribal members joined Plaintiffs in opposing this ill-conceived project. *Id.*, VI-ER-1306-1313.

This is not a case where the interests of a Tribe and the surrounding off-reservation communities are opposed. To the contrary, their interests are closely aligned in assuring that if there is a wind project on Reservation land, it is sited and operated to fully mitigate its impacts on human health and safety and the environment, both on, and off, the Reservation.

II. ABSENT COMPLIANCE WITH ENVIRONMENTAL LAWS, THE PROJECT WILL HARM RATHER THAN BENEFIT THE TRIBE'S RESIDENTIAL COMMUNITY

Subsequent to the ineffectual attempt to approve the Project on April 3, 2018, Tribal members reviewed scientific studies commissioned by Plaintiffs that show that "the Project's turbines and other structures and uses will significantly impact tribal households." VI-ER-1292. These studies were submitted to BIA, but it ignored them. II-ER-65-66. They include "a visual simulation of the Project'[s] turbines prepared by VisionScape Imagery in March 2020." VI-ER-1212, 1221-1222. "It shows that the Project's turbines will be a constant, looming, and disruptive presence over" homes of Tribal residents. VI-ER-1212, 1221-1222.

"The spinning blades will cause shadowflicker and constant rhythmic noises and vibrations." VI-ER-1212. The turbines will "pose a grave risk of blade fracture and toss, in which part or all of the blade, spinning at nearly 200 miles per hour, breaks off and hurdles through space, landing anywhere its momentum and

the often very strong prevailing winds carry it. This has already happened with the nearby Kumeyaay Wind Project, which tossed a blade several hundred yards onto the median of Interstate 8 near [the Campo] Reservation several years ago." VI-ER-1212-1213. This "notorious example of [wind turbine] failure occurred in 2009, when the Kumeyaay Wind Project suffered a catastrophic failure that required replacement of all electronic equipment and all 75 blades (three per turbine times the 25 turbines) from the 25, 2-megawatt ['MW'] wind turbines. . . . As a consequence of this and other local turbine failures, multi-ton turbine blades and/or parts of blades and other debris have detached and landed in or near the public right-of-way and on at least one Tribal member's property." VI-ER-1290.

As noted, BIA's Final Environmental Impact Statement ("FEIS") for the Project does not disclose and discuss these health and safety risks. II-ER-65-66. Plaintiffs brought this action to compel BIA to take a "hard look" at the Project's foreseeable environmental impacts. II-ER-65-66. As tribal leaders attested, "[t]he Campo Wind Project's adverse impacts would far outweigh its potential economic benefits to the Band for many reasons." III-ER-343. "Chief among them is the fact that this Project's wind turbines would cut through the heart of [the] Reservation's residential areas, rendering [these] homes uninhabitable due to the Project's extreme and unrelenting noise, shadow flicker, groundwater draw-downs, wildfire risks, and related adverse health and safety effects." III-ER-343.

The VisionScape Imagery depicting the location of the Project's wind turbines within the residential areas of the Reservation shows that they would tower over Tribal members' homes. VI-ER-1236, 1286-1287. According to former Tribal Vice-Chairwoman Michelle Cuero, "[d]estroying the safety and quality of our lives in exchange for promises of future monetary compensation is not a fair trade. The majority of our members do not believe the safety and quality

of their lives and futures, and those of their family members, should be sold in this reckless manner." VI-ER-1229.

Only through enforcement of NEPA's mandate that impacts be fully disclosed can the appropriate siting and design mitigations be formulated to reduce this Project's impacts.

III. NOISE IMPACTS

The Project's most profound impacts on Tribal residents and the surrounding community are from its unrelenting noise, particularly low-frequency and ultra-low frequency sound known as infrasound. According to Dr. Richard Carman, Ph.D., an acoustic expert with 35 years' experience evaluating noise-emitting projects including extensive monitoring and analysis of the noise effects of large-scale wind turbine projects like this one, "the DEIS and its Acoustical Analysis Report are seriously deficient, and understate to a substantial degree the significant noise impacts of the Campo Wind Project." II-ER-281. Dr. Carman pointed out that the DEIS' analysis of the turbines' noise relied on a "plainly inappropriate" study of wind turbines that were much smaller than the project's 4.2 Megawatt ("MW") turbines, explaining, "[o]bviously, there is a big difference between 1.5 MW and 4.2 MW and the relative amount of low frequency noise in particular is higher for large wind turbines (such as 4.2 MW) than for small wind turbines (such as those ≤2 MW)." II-ER-293.

Dr. Carman explained that "the DEIS and its Acoustical Analysis Report . . . prepared by [Terra-Gen's consultant] Dudek were deficient because they: (1) overlooked criteria required to evaluate noise impacts, (2) were skewed by Dudek's deficient noise logging instrumentation that ignored the site's existing very low background noise, (3) focused on construction noise rather than long-

term noise from the Project's operation, (4) failed to adequately address the effects of low frequency and infrasound noise on Noise Sensitive Land Uses ("NSLUs"), (5) largely ignored the deleterious effects of the Project's rhythmic fluctuations in noise levels ("amplitude modulation"), and (6) used a computer program to forecast Project noise that was not designed to predict large wind turbine noise. II-ER-281. As a consequence, Dr. Carman concluded that

> "the DEIS and FEIS are fundamentally flawed and understate the noise impacts of the Project, and that the Project will have significant adverse noise impacts on the Project area and the surrounding areas and their inhabitants. Those impacts have not been adequately analyzed and mitigated in the Project's DEIS and FEIS."

II-ER-294.

Dr. Carman explained these EIS failings were significant because the turbines' infrasound and low-frequency noise "can cause physiological changes in the ear," and their amplitude modulation can cause "adverse sleep effects." II-ER-289-290.

An acoustician with over 20 years' experience conducting noise and vibration analyses of energy production and other large projects in southern California, Steven Fiedler, likewise testified based on his "measurement and analysis of existing noise levels in the vicinity of the Project, and careful review of the [Acoustic Analysis Report (AAR)] and DEIS, and [Noise Addendum Memo (NAM)] and FEIS," that those documents "are incomplete[,] . . . . they likely overstate the existing noise levels in the areas surrounding the Project, and consequently, likely understate the increases in sound levels that the Project will cause." II-ER-280-281. Therefore Mr. Fiedler concluded that "operation of the proposed Project poses a significant and unacceptable risk of harm to surrounding

neighborhoods and the people who reside in them due to the Project's significant noise impacts." II-ER-287.

Only through enforcement of NEPA's mandate that impacts be fully disclosed can the appropriate preventive and mitigation measures be identified to reduce this Project's noise impacts.

IV. WILDFIRE IMPACTS

The Project would exacerbate wildfire dangers in an area where wildfire risk is already "extreme . . . due to heavy vegetation, aridity, high summer and fall temperatures, and frequent high winds," prompting its designation by CalFire as a "'High' to 'Very High' Fire Hazard Severity Zone." III-ER-406-407. The FEIS acknowledges the Project "would increase the potential for a wildfire . . . due to construction and decommissioning activities," but *ignores* the far greater risks of ignition posed by Project *operation*. III-ER-405-407 (attesting to "the known tendency of wind turbine motors to overheat due to mechanical failure, ignite and then disperse flaming debris onto surrounding vegetation"); IV-ER-625. The FEIS claims a non-existent Campo Fire Protection Plan will mitigate any risk. IV-ER-770. But its failure to address operational fire risks, and reliance on an unwritten plan, leave the public in the dark, violating NEPA. *Foundation for North American Wild Sheep v. U.S. Department of Agriculture*, 681 F.2d 1172, 1181 (9th Cir. 1982) (quote); *South Fork Band Council v. U.S. Department of Interior* ("*South Fork*"), 588 F.3d 718, 727 (9th Cir. 2009).

The FEIS also ignores the fact that the Project's turbines would directly interfere with both ground and aerial firefighting safety and effectiveness, due to electrification of the 600-foot towers and power lines, the towers' and lines' blockage of aerial application of water and retardant over vast areas, particularly

in smoky conditions, the fact that smoke conducts electricity from the towers and lines to the ground, and firefighters' inability to use solid-stream water applications around energized towers and lines. III-ER-408-409. The FEIS' completely inadequate three-paragraph discussion never addresses how to mitigate the Project's severely increased risks of wildfire, let alone its unmitigable impediments to firefighting. III-ER-408-409; IV-ER-625.

According to retired Calfire Battalion Chief Mark Ostrander, a Southern California wildfire expert with 36 years' experience, the Project as approved poses "not only a significant fire-ignition risk, but also an extremely hazardous impediment to effective wildfire suppression in the Campo area." III-ER-405. Chief Ostrander testified that "the Project poses a significant and unacceptable risk of wildfire ignition due to" four discrete impacts: (1) "the known hazard it presents to the frequent use by low-flying aircraft of the overlying airspace, resulting in airplane collisions, [(2)] the known hazards of wildfire ignition posed by its energized wind turbines and power lines, [(3)] the known hazard of placing a source of ignition in an area noted for its extreme wildfire risk due to heavy vegetation, aridity, high summer and fall temperatures, and frequent high winds, and [(4)] the known tendency of wind turbine motors to overheat due to mechanical failure, ignite and then disperse flaming debris onto surrounding vegetation." III-ER-406. As Chief Ostrander points out, "[s]everal of the worst conflagrations in San Diego County history, including the Pines and Witch fires, were ignited by power lines." III-ER-406. But "the FEIS completely ignores the risk of wildfires posed by the Project's *operation*." III-ER-406 (emphasis added).

Chief Ostrander testified further that

> "[t]he FEIS ignores the additional wildfire risk posed by the local weather and its high aridity and temperatures during the late summer and fall, and extremely high winds during the late summer, fall and early winter. The

> ignition threat is especially pronounced when the Santa Ana winds blow southwest through the Project area from the Great Basin."
>
> [For these reasons, the] Project area is classified by Cal Fire's Fire Resource and Assessment Program as a "High" to "Very High" Fire Hazard Severity Zone. Over the past 50 years, *the Boulevard area has experienced 29 wildfires* greater than 10 acres in size. And in recent years, the Project area has become even more fire prone, as the area has been invaded by non-native invasive weeds, which ignite more easily and tend to spread fires more rapidly than native mountain and desert vegetation."

III-ER-407 (emphasis added).

The Project's excessive height exacerbates its extreme wildfire risk:

> "Wind turbines can be the source of wildfire ignitions due to lightning strike, wind turbine collapse, power collection line failure, turbine malfunction or mechanical failure, and bird-related collisions. *The risk of lightning strikes is greatly exacerbated by the installation of this Project's very tall turbines–up to 600 feet–which act as lightning rods by attracting the strikes that hit them*. When mechanical or electrical failures cause turbines to catch fire, they may burn for many hours or even days due to the large quantity of combustible materials in the nacelle and the limited ability of fire suppression crews to effectively fight fires that are hundreds of feet above the ground. Once a fire starts in a turbine, it can be fueled by up to 200 gallons of hydraulic fluid and lubricants in the nacelle. The nacelle itself is constructed of flammable resin and glass fiber, and internal insulation can become contaminated by oil deposits, adding to the overall fuel load. Wind-blown flaming debris from a turbine fire can ignite vegetation over a wide swath of the surrounding area, particularly when high winds carry the debris hundreds or even thousands of feet down wind.

III-ER-407 (emphasis added).

Chief Ostrander testified that the Project will impede wildfire fighting for three reasons:

> "First, modern fire suppression response depends heavily on retardant and water drops by large aircraft and helicopters as close as possible to the leading edge of wildfires. To be effective, retardant and water drops must be low enough so that the retardant retains sufficient thickness and density to smother the fire, and is applied as quickly as possible following ignition. Delay in the delivery of retardant or water drops, or failure to deliver retardant or water directly to the leading edge of a wildfire, allows the fire to build heat, momentum, size, and speed. Once a wildfire has reached a critical size, temperature and speed, it is extremely difficult to contain, much less control.
>
> Second, the presence of structures nearly 600-feet in height above the ground surface makes aerial delivery of retardant or water to the Project site

> extremely difficult, if not impossible. The mere presence of the 600-foot-tall turbine towers would create a large zone in which it is dangerous for low-flying aircraft to operate, either for fire-spotting purposes or to drop retardant and water. . . . The end result is a severe impairment of aerial fire suppression abilities, which the FEIS completely ignores. FEIS at 131-132.
>
> Third, in addition to impeding aerial firefighting, construction of the Project would impede effective ground attack against any wildfires in the vicinity of the Project. The deployment of fire crews within 100 to 1,000 feet (depending on conditions) of electrified structures is unsafe and forbidden by applicable safety rules and regulations due to the serious hazard of electrical shock from the wind turbines, substations, gen-tie lines and other electrified facilities. These are well-established safety practices and procedures used by all of the major fire suppression agencies, including Cal Fire. . . .

III-ER-408 (paragraph numbers omitted).

Accordingly, Chief Ostrander concluded "the proposed construction and operation of the Project poses not only a significant fire-ignition risk, but also an extremely hazardous impediment to effective wildfire suppression in the area." III-ER-409. Better siting of the wind turbines would reduce this impedance.

Only through enforcement of NEPA's requirement that impacts be fully disclosed and alternatives that would reduce them – such as avoiding terrain inaccessible to fire-fighting equipment – be identified, can the appropriate preventive and mitigation measures be formulated to best reduce this Project's fire ignition and firefighting-impedance impacts.

V. IMPACTS ON AVIATION AND AERIAL FIREFIGHTING

As of the date of the District Court's Judgment of Dismissal, the Project had not been fully vetted and approved and thus could not begin operation soon. Although the Tribe may otherwise possess the federal agency approvals it believes it needs to begin construction of its Project (save for its agreement to stay construction until November 2021 in response to Plaintiffs' Motion for a Preliminary Injunction (II-ER-140-141), the Tribe no longer had approval from the

Federal Aviation Administration to operate its Project. This is because on December 2, 2020 the FAA granted Plaintiffs' August 17, 2020 Petition for Review of the FAA's July 16, 2020 Determinations of No Hazard to Air Navigation for the Project's 72 wind turbines after it found "errors in the aeronautical study process" regarding whether the Project's wind turbine "structures exceeded obstruction standards" and posed a hazard to aviation safety. II-ER-91-92, 99.

The Project's 586-foot turbines are so high they would interfere with established air traffic routes and associated radar pathways over the Coast Range. According to correspondence that Plaintiff Donna Tisdale obtained in February 2021from the FAA pursuant to her Freedom of Information Act request – information that is not disclosed in the Final EIS for the Project nor addressed in BIA's Record of Decision – the Project's turbines would block the flight path of aircraft flying across the Coast Range in San Diego County. An FAA Airspace and Procedures Support Specialist commented that the Project would increase the minimum safe east-west flight path over the coast range, causing "General Aviation fixed wing aircraft from all the San Diego area airports, and military rotary aircraft (who are very ice sensitive) from MCAS [Marine Corps Air Station] Miramar and NAS [Naval Air Station] North Island" to lose their use of the 7,000 feet air traffic pathway over the Coast Range. II-ER-65-66, 73-79. This obstruction is a "significant negative impact" because it would "force all [aircraft] along the route to 8,000 MSL [mean sea level] and higher," exposing these aircraft to dangerous icing. II-ER-74-76. The FAA specialist therefore "object[ed] to the proposed [Campo] wind farm." II-ER-74.

The Project's blockage of aircraft crossing the Coast Range is not its only aviation hazard. The turbines' enormous blade sweep also poses aviation hazards

because tower lights are more than 200 feet below (or to the side of) the blade tips, which are invisible at night. And, the turbines greatly exceed the FAA's 499-foot limit on the height of structures within commercial, military and private flyways – a fact the FEIS never discloses. II-ER-65-66. The FEIS claims the Project "would comply with any applicable FAA requirements" (IV-ER-769), but never discloses, nor analyzes, those requirements, let alone the Project's conflicts with them such as this icing hazard. It also ignores the Project's impacts to air traffic control and Department of Defense and Homeland Security radars, as documented by the FAA. II-ER-66 ("Impact highly likely to Air Defense and Homeland Security radars. Aeronautical study required").

The BIA's inadequate FEIS should have flagged and taken the required "hard look" at this issue, including the need to lower the turbine heights or move the turbines to lower elevations, instead of creating false expectations regarding the safety and viability of this Project. Had Plaintiffs not asked hard questions of the FAA about the Project's obstruction of critical airspace needed to avoid icing of aircraft during crossings over the Coast Range, impacts on public safety undisclosed in the BIA's deficient FEIS would ever have been identified. This is an example of why it is in the public interest to enforce federal environmental laws instead of disregarding them in unyielding deference to rigid and outmoded notions of sovereign immunity. An adequate EIS identifies impacts and formulates solutions that avoid or mitigate impacts, to the benefit of *all* including the Tribe. Aircraft safety affects those on the ground as well as those in the sky.

The Project's 600-foot tall turbines would create aviation hazards for several reasons. First, their blade tips extend about 230 feet higher (and wider) than the red blinking night lighting that would be affixed to the rotors' nacelles. III-ER-418-419. Consequently, at night when the blade tips would be invisible,

they would pose a hazard to aircraft in the vicinity. Second, they exceed the FAA's 499-foot limit on the height of structures within commercial, military and private flyways – a fact the FEIS never discloses. III-ER-418-419. For this reason among others, they would significantly increase the minimum safe elevation of flight over the coast range, forcing aircraft to fly higher and exposing them to dangerous wing and rotor blade icing conditions. III-ER-418-419. The FEIS claims the Project "would comply with any applicable FAA requirements to ensure that FAA, military, and emergency responders navigate the area safely" (IV-ER-769), but never discloses, let alone analyzes, those requirements. III-ER-418-419. It ignores the Project's impacts to air traffic control and Department of Defense and Homeland Security radars, as documented by the FAA. Https://oeaaa.faa.gov/oeaaa/external/gisTools/gisAction.jsp (Coordinates 32 41 28.72 N and 116 19 19.52 W) ("Impact highly likely to Air Defense and Homeland Security radars. Aeronautical study required.") III-ER-418-419. This required Aeronautical Study should have been included in the FEIS. The FEIS' vague and baseless claims of future compliance with "any applicable" FAA requirements cannot substitute for actual analysis of those very serious impacts.

Third, the Project's huge turbine towers would impede aerial firefighting and other emergency response. III-ER-408-409. The FEIS fails to disclose this hazard altogether. VI-ER-1196-1197.

Only by enforcing NEPA's requirements for full disclosure of the Project's impacts on aviation and aerial firefighting can those impacts be identified and avoided or mitigated.

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VI. VISUAL IMPACTS INCLUDING SHADOW FLICKER

The Project's enormous, unsightly industrial structures will destroy the natural beauty of the surrounding rural countryside. Plaintiff Donna Tisdale is eminently qualified to speak to this impact, as she has resided on her ranch in the vicinity of the Project for over 40 years, and spent the past 30 years as the annually-elected Chair of the Boulevard Planning Group, the regional land use advisory group for East San Diego County that reports to the San Diego County Planning Commission and Board of Supervisors. III-ER-410-411. In her professional capacity as Chair of the Boulevard Planning Group, Ms. Tisdale has studied and become familiar with the visual impacts of wind turbines not only locally, in San Diego and Imperial counties, but also throughout the United States and in other countries. III-ER-417. She has "inspected many wind turbines in East County" and experienced and photographed the beauty of Boulevard's rural landscapes from her own ranch, which looks west over the Reservation lands where the Project would be built. III-ER-413. She has described and attached to her declaration photographs she has taken and visual simulations she has had professionally prepared to illustrate the Project's horrendous visual impacts – as it is currently proposed to be located. III-ER-413, 492-541. These impacts include shadow flicker, which Ms. Tisdale has observed from existing wind turbine projects inside of impacted homes. III-ER-415. As she has explained, it "is akin to the strobe lighting used at disco nightclubs. The incessant dark/light flickering completely invades your home and surroundings and dominates your senses. Its distracting blinking makes it impossible to perform any tasks safely, let alone enjoy the serenity of our amazing country sunsets." III-ER-415. As she further attested, according to an analysis performed by the County of San Diego, her ranch will be "subject to more than 30 minutes of shadow flicker per day and

between 97 and 124 hours of shadow flicker per year." III-ER-415, 543-547. Tribal residents – who should never be forced to move from their remaining homeland to escape these incessant insults – will likewise bear these horrific visual impacts for decades if not indefinitely. VI-ER-1214-1215, 1229.

The FEIS admits the Project's spinning turbines will produce hazardous "shadow flicker" when the sun rises or sets behind them. IV-ER-627, 747 (residents "may experience nuisance-level shadow flicker effects for more than 30 hours" per year), 596 (on-Reservation impacts may exceed 30 minutes per day)]; III-ER-413. Yet the FEIS removed a promising mitigation – "programming to reduce or shut off turbines during times of shadow flicker potential"– from consideration. IV-ER-747.

Only by enforcing NEPA's requirement that measures to mitigate impacts be identified and assessed will the Project's visual impacts be avoided or reduced.

VII. WATER RESOURCE IMPACTS

Absent adequate environmental review and mitigation, the Project likewise poses unacceptable impacts to groundwater supplies for both the Reservation and the surrounding community. Scott Snyder, a Registered Professional Geologist and Certified Hydrogeologist with 27 years' experience evaluating groundwater in Southern California, "conclude[d] that [Terra-Gen's Groundwater Resource Evaluation ("GRE") and BIA's] DEIS and FEIS are incomplete and understate the Project's groundwater impacts, and that the Project is likely to cause significant adverse impacts on groundwater resources in the vicinity of the Project, and thereby harm surrounding residential and other existing and permissible groundwater uses." II-ER-269. Geologist Snyder testified that the GRE, which BIA attached as Exhibit F to its DEIS:

> "understates the Project's likely impacts on groundwater resources in five principal respects . . . . [in that it] understates existing groundwater demand[,] . . .understates the Project's groundwater demand[,] . . . . omits or missapplies principles of hydrogeological analysis[,] . . . . ignores the impact of past groundwater use by the [East County] Substation Project[,] . . . . [and] failed to examine the drawdown impacts of using the closest, on-site [i.e., on-Reservation] wells . . . ."

II-ER-269-276. Accordingly, Geologist Snyder testified that "the Project's DEIS and FEIS and their Appendix F, Groundwater Resource Evaluation (GRE) fail to accurately and completely disclose, discuss and assess the Project's potential adverse impacts on groundwater and the surrounding landowners and residents who depend on that groundwater for their domestic, agricultural, commercial, industrial and recreational needs." II-ER-276. Therefore, Mr. Snyder concluded that "The proposed construction and operation of the Project pose a significant and unacceptable risk to the groundwater resources of the Project Area and the surrounding lands, and to the surrounding communities that depend on this essential resource." II-ER-276.

Only by enforcing NEPA's requirements for full disclosure of the Project's impacts on groundwater can those impacts be identified and avoided or mitigated.

VIII. BIOLOGICAL RESOURCE IMPACTS

A. Golden Eagles and Other Avian Species

A wealth of bird species inhabit the Project area, including sensitive species like golden eagles. IV-ER-683, 689-693. Although the FEIS admits wind turbines pose a "risk to avian species for collision," it claims that "there would be *no* adverse effects on eagles" because "[e]agle use on site is infrequent and the chance for collisions is low." IV-ER-609, 743 (emphasis added). But "infrequent" use and "low" risk for collisions mean eagles *are* present, and that collisions *are* foreseeable. Even a "low" risk of collisions with golden eagles is

nonetheless significant because they are "known to be at risk of population-level effects from [wind turbine] collisions." IV-ER-857. The U.S. Fish and Wildlife Service ("FWS") informed BIA that its DEIS lacked sufficient evidence to support its claim that the Project would have no adverse effect on eagles. IV-ER-771. And, FWS confirmed that the incomplete evidence BIA *had* provided showed that "there is *regular and consistent Golden Eagle use of the Project area*." IV-ER-771 (emphasis added).

Since collisions are foreseeable, they must be addressed in a "thorough investigation." *National Audubon Society v. Department of Navy*, 422 F.3d 174, 185 (4th Cir. 2005); *WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920, 924 (9th Cir. 2015). The adequate FEIS Plaintiffs seek would provide the required "thorough investigation," and either quantify the foreseeable collisions and resulting bird deaths, or if this information is not available, provide "a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment [and] a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment." 40 C.F.R. § 1502.22.

The adequate FEIS that Plaintiffs seek would also provide an effective "Bird and Bat Conservation Strategy ("BBCS")" that would prevent rather than merely record collisions. IV-ER-609, 729-730.

An adequate FEIS would also recognize that in addition to direct mortality, the turbines may cause birds to avoid the area, as turbine studies have shown. IV-ER-880.

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B. Quino Checkerspot Butterfly

The Project area provides habitat for the endangered Quino checkerspot butterfly (*Euphydryas editha quino*; "QCB"), whose La Posta/Campo Core Occurrence Complex includes this site. IV-ER-608. FWS warns that preservation of these core occurrence complexes is essential to QCB recovery. *Id*. Yet, the Project "would permanently remove 242.1 acres of suitable [QCB] habitat." VI-ER-1190. Ignoring FWS's warning, the FEIS devotes less than one page to the QCB. IV-ER-608. It directs the reader to FEIS Appendix H, but Appendix H never evaluates how this Project would impact QCB survival and recovery. IV-ER-608, 700, 705. The FEIS' scant discussion is replete with contradictions. The FEIS claims only 699 acres within the Project Area are suitable QCB habitat, but Appendix H admits 1,216 acres are. IV-ER-593, 685. The FEIS claims "the Project would not adversely affect any federally listed plants or wildlife, because *none* are present," but in fact, at least five QCB were identified in the off-reservation surveys of the Project Area. IV-ER-603, 685. Moving portions of the Project site would avoid these conflicts.

The FEIS claims that "[b]ecause decommissioning would include restoration of the area to pre-Project conditions, it would ultimately not result in adverse effects on [QCB]." IV-ER-603. But the Project would operate – and deprive QCB of their essential habitat – for decades, rendering any attempted restoration thereafter too late to prevent extinction. The FEIS claims adverse impacts "would be reduced to less than adverse with implementation of recommended [Mitigation Measures] MM-BIO-1 and MM-BIO-3" (*id*.), but those "measures" are just vague slogans – e.g., "revegetation"– devoid of any actual text explaining what each measure entails. IV-ER-606. The FEIS acknowledges that "mitigation [must] be discussed in sufficient detail to ensure that environmental

consequences have been fully evaluated." IV-ER-764. An adequate EIS would describe mitigation measures with enough detail so the public can assess how well they "will serve to mitigate the potential harm" they target. *Wild Sheep*, 681 F.2d at 1181 (quote); *South Fork*, 588 F.3d at 727. The FEIS provides no detail, let alone how these "measures" would mitigate the Project's impacts to insignificance, leaving the public guessing as to the Project's impacts to the QCB's survival and recovery.

Only by enforcing NEPA's requirements that biological impacts be fully disclosed can those impacts be identified and avoided or mitigated.

IX. SOCIOECONOMIC IMPACTS

"[W]hen . . . economic or social and natural or physical environmental effects are interrelated, then the [EIS] will discuss all of these effects on the human environment." 40 C.F.R. § 1508.14. The Project's round-the-clock visual and noise impacts are physical changes causing adverse economic and social effects on the impacted community. III-ER-412-417, 420. The Project will wreak immense impacts on the public, including residents living both within and near the Reservation. III-ER-326-329, 343, 349-351, 412-417, 420. But the FEIS dismisses these impacts as speculative. IV-ER-750. The adequate EIS Plaintiffs seek would provide sufficient information about these impacts to enable informed choices about reconfiguring the Project to reduce or avoid them.

X. GLOBAL WARMING IMPACTS

The FEIS' global warming analysis (IV-ER-662-677) omits the Project's *life cycle* greenhouse gas ("GHG") emissions. IV-ER-751 (FEIS admits it "did not account for the full life-cycle of GHG emissions from construction activities").

Although BIA considered some "directly-related GHG impacts" (IV-ER-752), it ignored emissions from the manufacture and transport of the turbines. IV-ER-794; V-ER-1095, 1105. NEPA requires analysis of *all* project impacts, including both direct and indirect effects. 40 C.F.R. § 1508.8.

BIA's excuse that "a turbine model has not been selected for the Project" fails. IV-ER-752. Unless the cost of estimating the missing information is "exorbitant," BIA "shall include" it. 40 C.F.R. § 1502.22(a). Even if the cost were "exorbitant"– which the FEIS neither claims nor shows – BIA would still have to provide "a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts." 40 C.F.R. § 1502.22(b)(3). An adequate EIS would provide this information to facilitate informed design and location of the Project to reduce these impacts.

SUMMARY OF ARGUMENT

Plaintiffs raise five issues:

1. The District Court applied an incorrect evidentiary standard of review under Rule 12(b)(7) by failing to "accept as true the allegations of Plaintiffs' complaint and draw all reasonable inferences in Plaintiffs' favor." *Paiute-Shoshone Indians, supra*, 637 F.3d at 996 n.

2. The District Court's ruling that "the 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" was based on the erroneous premise that BIA's compliance with environmental law would prevent, rather than improve, the Project.

3. The District Court 's ruling that "Plaintiffs do not suggest how any relief can be tailored to address [BIA's] failures [to comply with environmental laws] in

a way that would lessen the prejudice to the Tribe" was incorrect, because Plaintiffs did suggest how relief could be tailored to avoid prejudice to the Tribe.

4. The District Court misapplied the "equity and good conscience test" by failing to acknowledge that the Tribe's interest in defending its lease with Terra-Gen is essentially identical to Terra-Gen's interest in defending that same lease.

5. The District Court misapplied the "public rights exception" to Rule 19's requirement that indispensable parties by joined by ignoring the extensive, fully documented interests of the public in BIA's compliance with the law.

STANDARD OF REVIEW

This Court's standard of review is twofold. First, on questions posing purely or predominantly legal issues, this Court must exercise its independent judgment, as the review is *de novo*. *Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997). Second, on questions of fact, the standard of review is whether the trial court's rulings are "clear error." *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002), aff'd, 540 U.S. 644, 124 S.Ct. 1221 (2004).

A question of law is presented as to whether the District Court applied the correct standard of review under Rule 12(b)(7), pursuant to which the Court must "accept as true the allegations of Plaintiffs' complaint and draw all reasonable inferences in Plaintiffs' favor." *Paiute-Shoshone Indians,*637 F.3d at 996 n. 1. Accordingly, this Court exercises *de novo* review of this issue.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED THE STANDARD OF REVIEW

The District Court applied Federal Rules of Civil Procedure 12(b)(7) and 19 in rendering her Order of Dismissal. Rule 12(b)(7) authorizes defensive motions for "failure to join a party under Rule 19." Rule 19(a)(1) directs:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Id. If party must be joined under 19(a)(1), then the Court "must order that person be made a party." *Id*., subd. (a)(2). Only when "a person who is required to be joined if feasible cannot be joined" must the court "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. *Id*., subd.(b). In reviewing a 12(b)(7) motion, the court should "accept as true the allegations in Plaintiff[s'] complaint and draw all reasonable inferences in Plaintiff[s'] favor." *Paiute-Shoshone Indians,* 637 F.3d at 996 n. 1.

The District Court applied an incorrect evidentiary standard of review. Whereas under Rule 12(b)(7) the court must "accept as true the allegations of Plaintiffs' complaint and draw all reasonable inferences in Plaintiffs' favor" (*Paiute-Shoshone Indians, supra,* 637 F.3d at 996 n. 1), the District Court instead disregarded Plaintiffs' allegations – let alone its extensive expert and lay witness testimony – and relied extensively on contrary and highly disputed assertions made in two self-serving declarations submitted by the Tribal Administration. I-ER-9-12 (denying Plaintiffs' objections to Mr. Cuero's two declarations), 15-23 (relying on Mr. Cuero's declarations and the Tribe's arguments based thereon). The effect of the District Court's rejection of Plaintiffs' allegations and acceptance

of the Tribe's was to turn this settled evidentiary rule on its head, defeating its purpose.

II. THE DISTRICT COURT FAILED TO CONSIDER THAT COMPLIANCE WITH FEDERAL ENVIRONMENTAL LAWS WILL IMPROVE RATHER THAN BLOCK THE PROJECT

The District Court's Order of Dismissal is based on the Tribe's erroneous narrative that BIA's compliance with environmental laws will harm rather than benefit the Tribe. I-ER-15-21. That narrative is false for five reasons: (1) most of the Tribe's members oppose, and a majority of the Tribal Council voted to oppose, the Project as currently proposed (III-ER-318-319, 333-340) (2) the Project as proposed will needlessly harm the Tribe's residential community, (3) Appellants seek enforcement of laws that protect the Tribe's members and their Reservation from needless environmental harm, safeguards that would benefit the Tribe, (4) the Project is not already fully approved, and will be improved through application of the laws Appellants seek to enforce, and (5) BIA's compliance with environmental laws will benefit rather than harm the Tribe. As Appellants detail below, (1) the Tribal Council was unable to muster the quorum required to approve the Project because most Tribal members oppose the Project as it is currently proposed, (2) they do so because it will needlessly disrupt and industrialize their residential community and harm their health, safety and environmental quality, (3) Tribal members joined with Appellants in successfully terminating several harmful past projects in the area, demonstrating that the Tribe and its neighbors can work together to achieve informed and mutually beneficial environmental planning, (4) the Project's approval by the Federal Aviation Administration ("FAA") is currently under this Court's review in a separate proceeding (No. 21-71426) because its proposed 586- to 604-foot towers pose hazards to aviation, and thus

need to be reduced in size or relocated after further environmental review occurs, (5) BIA's compliance with environmental laws will benefit rather than harm the Tribe and the community. These facts are documented below.

Most Tribal members oppose the Project. As tribal leaders attested, "[t]he Campo Wind Project's adverse impacts would far outweigh its potential economic benefits to the Band for many reasons." III-ER-343. "Chief among them is the fact that this Project's wind turbines would cut through the heart of [the] Reservation's residential areas, rendering [these] homes uninhabitable due to the Project's extreme and unrelenting noise, shadow flicker, groundwater draw-downs, wildfire risks, and related adverse health and safety effects." III-ER-343.

The VisionScape Imagery depicting the location of the Project's wind turbines within the residential areas of the Reservation shows that they would tower over Tribal members' homes. VI-ER-1236, 1286-1287. According to former Tribal Vice-Chairwoman Michelle Cuero, "[d]estroying the safety and quality of our lives in exchange for promises of future monetary compensation is not a fair trade. The majority of our members do not believe the safety and quality of their lives and futures, and those of their family members, should be sold in this reckless manner." III-ER-343.

Extensive expert testimony was presented below documenting the Project's adverse environmental impacts. For example, without adequate environmental review and mitigation, the Project poses unacceptable impacts to groundwater supplies for both the Reservation and the surrounding community. Scott Snyder, a Registered Professional Geologist and Certified Hydrogeologist with 27 years' experience evaluating groundwater in Southern California, "conclude[d] that [Terra-Gen's Groundwater Resource Evaluation ("GRE") and BIA's] DEIS and FEIS are incomplete and understate the Project's groundwater impacts, and that

the Project is likely to cause significant adverse impacts on groundwater resources in the vicinity of the Project, and thereby harm surrounding residential and other existing and permissible groundwater uses." II-ER-269. Geologist Snyder testified that the GRE, which BIA attached as Exhibit F to its DEIS:

> "understates the Project's likely impacts on groundwater resources in five principal respects . . . . [in that it] understates existing groundwater demand[,] . . .understates the Project's groundwater demand[,] . . . . omits or missapplies principles of hydrogeological analysis[,] . . . . ignores the impact of past groundwater use by the [East County] Substation Project[,] . . . . [and] failed to examine the drawdown impacts of using the closest, on-site [i.e., on-Reservation] wells . . . ."

II-ER-269-276.

Accordingly, Geologist Snyder testified that "the Project's DEIS and FEIS and their Appendix F, Groundwater Resource Evaluation (GRE) fail to accurately and completely disclose, discuss and assess the Project's potential adverse impacts on groundwater and the surrounding landowners and residents who depend on that groundwater for their domestic, agricultural, commercial, industrial and recreational needs." II-ER-276. Therefore, Mr. Snyder concluded that "The proposed construction and operation of the Project pose a significant and unacceptable risk to the groundwater resources of the Project Area and the surrounding lands, and to the surrounding communities that depend on this essential resource." II-ER-276.

The Project will impact residents of the Reservation and the surrounding community with disruptive low-frequency noise (including very low frequency infrasound) that travels many miles. According to Dr. Richard Carman, Ph.D., an acoustician with 35 years' experience evaluating noise-emitting projects including large-scale wind turbine projects like this one, "the DEIS and its Acoustical Analysis Report are seriously deficient, and understate to a substantial degree the significant noise impacts of the Campo Wind Project." II-ER-281. Dr. Carman

testified that "the DEIS and its Acoustical Analysis Report dated May 2019 and prepared by [Terra-Gen's consultant] Dudek were deficient because they overlooked: (1) relevant criteria required to evaluate noise impacts, (2) the limitations of Dudek's noise logging instrumentation, including its "noise floor" that skewed Dudek's evaluation, (3) the substantial increase in ambient noise from the Project's operation and its impacts on Noise Sensitive Land Uses ("NSLUs"), (4) many of the effects of low frequency noise, including infrasound, on NSLUs, (5) many of the effects of "amplitude modulation" associated with low frequency turbine noise, and (6) the inapplicability of the computer program they used to forecast the Project's noise because it was not designed to predict wind turbine noise. II-ER-281. As a consequence, Dr. Carman concluded:

> "the DEIS and FEIS are fundamentally flawed and understate the noise impacts of the Project, and . . . the Project will have significant adverse noise impacts on the Project area and the surrounding areas and their inhabitants. Those impacts have not been adequately analyzed and mitigated in the Project's DEIS and FEIS."

II-ER-294.

Dr. Carman also testified that turbines' infrasound and low-frequency noise "can cause physiological changes in the ear," and their rhythmic fluctuation in noise levels ("amplitude modulation") can cause "adverse sleep effects." II-ER-289-290.

An acoustician with over 20 years' experience conducting noise and vibration analyses of energy production and other large projects in southern California, Steven Fiedler, likewise testified, based on his "measurement and analysis of existing noise levels in the vicinity of the Project, and careful review of the [Acoustic Analysis Report (AAR)] and DEIS, and [Noise Addendum Memo

(NAM)] and FEIS," that those documents "are incomplete[,] . . . . they likely overstate the existing noise levels in the areas surrounding the Project, and consequently, likely understate the increases in sound levels that the Project will cause." II-ER-280-281. Therefore Mr. Fiedler concluded that "operation of the proposed Project poses a significant and unacceptable risk of harm to surrounding neighborhoods and the people who reside in them due to the Project's significant noise impacts." II-ER-287.

Enforcement of NEPA would improve the Project by identifying the noise impacts that the EIS overlooked, and thereby lead to their avoidance or mitigation.

III. THE DISTRICT COURT FAILED TO CONSIDER THE MANY WAYS IN WHICH PREJUDICE TO THE TRIBE CAN BE LESSENED

The District Court stated that "Plaintiffs do not suggest how any relief can be tailored to address [the BIA's] failures [to comply with environmental laws] in a way that would lessen the prejudice to the Tribe." I-ER-23. But in fact, Plaintiffs did document, in detail, how relief could be tailored in a way that would avoid prejudice to the Tribe, by relocating some of the turbines away from residential areas, high fire hazard areas and scenic vistas, lowering their heights, utilizing smaller, less noisy turbines, and identifying less impactful sources of groundwater for their construction, thereby reducing the Project's impacts on the Tribe's members and on the environmental resources that affect their quality of life including groundwater, scenery, noise, aviation and wildfire suppression. II-ER-112-120. II-ER-108-109, 113-120. These are all well-recognized means of utilizing environmental review to design and operate a better project with fewer adverse impacts. They work, and they should not have been disregarded in the Court's analysis.

Indeed, the District Court acknowledged elsewhere in its Order that "Plaintiffs argue that [their] claims can be tailored so that they do not destroy the legal entitlements of the absent Tribe." I-ER-25. The District Court's apparent failure to consider Plaintiffs' evidence in this regard was error. Plaintiffs demonstrated that the Project poses substantial adverse impacts on public health and safety and environmental resources, all of which could be reduced through better environmental review and analysis. II-ER-108-109, 113-120. Enforcing NEPA, the MBTA and the Eagle Act will ensure a safer and less impactful Project that better serves both the Tribe and the surrounding community.

IV. THE DISTRICT COURT MISAPPLIED THE "EQUITY AND IN GOOD CONSCIENCE" TEST.

Under Rule 19(a)(1), "[t]he first inquiry is whether the absent [Tribe is a] 'necessary' part[y] to this lawsuit. This inquiry proceeds in two steps." *Pacific Coast Federation of Fishermen's Association v. U.S. Department of Interior*, 929 F.Supp.2d 1039, 1061 (E.D. Cal. 2013) ("*PCFFA*"). First, this Court must determine whether complete relief can be granted in the Tribe's absence. *Id*. Because Plaintiffs' claims arise under the APA, 5 U.S.C. sections 701-706, against a federal agency, BIA, they can be resolved without the Tribe because Plaintiffs seek an order correcting *BIA's* unlawful FEIS, and remedying BIA's violations of the MBTA and the Eagle Act. Plaintiffs can thus secure complete relief without the absent Tribe.

"Next, the court must determine whether the absent party has a legally protected interest in the suit." *PCFFA*, 929 F. Supp.2d at 1061 (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). This Court has held that "'an absent party has *no legally protected interest at stake* in a suit merely to enforce compliance with administrative procedures.'" *Diné Citizens Against*

Ruining Our Env't v. Bureau of Indian Affairs ("*Diné Citizens*"), 932 F.3d 843, 852 (9th Cir. 2019) (quoting *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California* ("*Cachil Dehe Band*"), 547 F.3d 962, 971 (9th Cir. 2008)). In making this "'practical' and 'fact-specific' Rule 19 inquiry . . . [the Court requires] more than mere 'but-for' causation before recognizing a legally protected interest." *Cachil Dehe Band*, 547 F.3d at 973 (quoting *Makah*, 910 F.2d at 558). Notably "a financial stake in the outcome of the litigation is not a legally protected interest giving rise to § 19(a)(2) necessity." *Disabled Rights Action Comm. v. Las Vegas Events, Inc*. ("*Disabled Rights*"), 375 F.3d 861, 883 (9th Cir. 2004).

Under a rigorous "fact-specific" inquiry, it is clear that neither the nature of the suit – to enforce compliance with administrative procedures – nor the interests asserted by the Tribe lead to a conclusion that the Tribe's legally protected interests are at stake. As discussed, Plaintiffs seek BIA's administrative compliance under the APA. Even if, in the future, Terra-Gen threatened to build its Project before BIA corrected its violations of the APA, any request Plaintiffs might then make to prevent irreparable harm arising from the Project's construction absent such compliance, would not stop any activities *now existing*. This distinction sets this Project apart from the *ongoing* mining activities challenged in *Kescoli v. Babbitt*, 101 F.3d 1304, 1307 (9th Cir. 1996) or in *Diné Citizens*, 932 F.3d at 848.

Neither case mandates dismissal here, contrary to the District Court's ruling. First, as the Tribe concedes, in *Kescoli*, the lawsuit challenged the Interior Department's approval of changes to existing coal mining leases that would impact *existing* mining operations. 101 F.3d at 1307 (mining commenced in 1970); II-ER-222 (challenge "affect[ed] the mining operator's mining operations").

Likewise in *Diné Citizens*, the "lawsuit stem[med] from changes and renewals to the lease agreements, rights-of-way, and [a] government-issued permit" for a coal mine and power plant. *Diné Citizens*, 932 F.3d at 848. The "[coal] mine, [p]ower [p]lant, and transmission lines were built in tandem and have operated since the early 1960s." *Id.* The plaintiffs challenged the approvals that authorized the *continued use* and expansion of an existing coal mine, which supplied the power plant with coal. *Id.* A decision that would impair these *existing* operations would remove *existing* revenue streams and cause workers to lose *existing* jobs.

In contrast here, the Project has not yet been constructed and there is no existing operation to be shut down. Indeed, it had not even received all required clearances because as noted above, when the District Court ruled the Project's significant aeronautical hazards were still under review by the FAA. Thus, the Tribe's interest in the Project was at that point limited to the potential revenue it might receive from Terra-Gen's "develop[ment], construct[ion], operat[ion], and maint[enance of] wind generation facilities . . . ." II-ER-199. This future *potential* revenue – "payments and rent" – is simply a speculative financial stake in the outcome of the litigation, not a legally protected interest. II-ER-199 (quote); *Disabled Rights*, 375 F.3d at 883. But, even if the Tribe shows "'a legally protected interest exists, the court must further determine whether that interest will be impaired or impeded by the suit.' [*Makah,* 910 F.2d at 558]. 'Impairment may be minimized if the absent party is adequately represented in the suit.' *Id.*" *PCFFA*, 929 F.Supp.2d at 1061 (emphasis omitted). As shown below, BIA and Terra-Gen adequately represent the Tribe's interests here.

Like in *Makah*, Plaintiffs seek BIA's compliance with a lawful administrative process under the APA. *Id.,* 910 F.2d at 559. Plaintiffs have not sought to prevent BIA from approving all activities at the Tribe's Reservation –

despite the Tribe's contrary claims. Instead Plaintiffs ask only that BIA comply with applicable law in its statutory and fiduciary roles in reviewing those approvals, to protect both on- and off-Reservation resources and residents from uninformed and arbitrary environmental decisionmaking. And, like in *Makah*, Plaintiffs' prospective APA claims, which affect "the future conduct of the administrative process," are of the type that the Ninth Circuit has expressly held is "reasonably susceptible to adjudication without the presence of other" parties to the administrative process. *Makah*, 910 F.2d at 559; *see also Cachil Dehe Band*, 547 F.3d at 977. Thus, Terra-Gen – as the recipient of the lease approval, and as the future developer and operator of the challenged Project – fully shares the Tribe's interest in upholding the BIA's approvals here.

The District Court stated that "the 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 . . . ." I-ER-22. But that conclusion is based on the erroneous premise that BIA's compliance with environmental law would prevent, rather than improve, the Project. In fact, as Plaintiffs demonstrated below, BIA's compliance with NEPA, the MBTA and the Eagle Act would identify the Project's impacts and ways to reduce them, and thus improve rather than block the Project. VI-ER-1188-1202. Thus, far from causing the Tribe to "lose tens of millions of dollars in revenue" as the District Court mistakenly asserted, BIA's compliance with applicable environmental laws as sought by Plaintiffs would improve the Project and thus benefit rather than harm the Tribe.

Moreover, even if the absent Tribe were a necessary party under Rule 19, it is still not an indispensable party requiring joinder or dismissal, as BIA and Terra-Gen can adequately represent the interests of the absent Tribe:

A non-party is adequately represented by existing parties if:

> (1) the interests of the existing parties are such that they would undoubtedly make all of the non-party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect.

Southwest Center for Biological Diversity v. Babbitt ("*Southwest Center*"), 150 F.3d 1152, 1153-1154 (9th Cir. 1998); *see also Arakaki v. Cayetano* ("*Arakaki*"), 324 F.3d 1078, 1086 (9th Cir. 2003).

Each factor exists here. BIA and Terra-Gen each have a strong interest in defending the validity of BIA's approvals, and are capable of making all necessary arguments to defend BIA's actions. II-ER-136-138, 157-159, 168-171. Moreover, under the APA, the court's review is limited to reviewing BIA's actions using its *existing and fixed* Administrative Record. Accordingly, any absent party would not be able to supply any new or novel "necessary element" that would otherwise be neglected. *See also Southwest Center,* 150 F.3d at 1154 (finding no categorical conflict between Federal Government's duty to uphold environmental laws and tribal interest sufficient to render government unable to represent tribe where no showing made of actual conflicts).

Lennar Mare Island, LLC v. Steadfast Ins. Co., 139 F.Supp.3d 1141, 1151 (E.D. Cal. 2015) is instructive. There, the Navy was not a party to litigation but was one of three insured entities under an insurance contract. The court determined that the Navy's rights differed from those of the other insured parties but those parties were still able to represent the Navy's interests. *Id.* at 1151-1155. There, the other insured parties' interests were sufficiently aligned because all shared the goal of "preserv[ing] the structure" of their contract." *Id*. at 1154. The court noted that the present parties were capable of presenting the evidence and arguments that the Navy would make had it been a party. *Id.* at 1155. And the court observed that "[t]he Navy's public or sovereign status does not lead to the

opposite conclusion." *Id.* Because the Navy's interests could be represented, the court determined that it need not dismiss due to the Navy's absence. Like the Navy whose interests could be adequately represented by another party, so too the Tribe's interests here can be adequately represented by Terra-Gen, the recipient of BIA's approval, who will be developing, operating, and maintaining the Campo Wind Project.

Finally, even if the Tribe were otherwise required to be joined under Rule 19(a), that is not the end of the inquiry. Instead, the Court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the Court to consider include:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by:
> (A) protective provisions in the judgment;
> (B) shaping the relief; or
> (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed.R.Civ.P. Rule 19(b). Here, when examined together, these factors weigh strongly *against* dismissal.

Hayes, Trustee for Paul B. Hayes Fam. Trust, Dated Apr. 30, 2010 v. Bernhardt ("*Hayes*"), 499 F. Supp. 3d 1071, 1079 (N.D. Okla. 2020) addresses a similar situation. There, a landowner brought a NEPA claim against BIA and other federal defendants, challenging the sufficiency of its environmental review and its approval of leases of the mineral estate – which was held in trust for a tribe – underlying the land. In denying the tribe's motion to dismiss, the Court determined that the plaintiff was "seeking relief against the government, not the

[tribal interest]. [Plaintiff] seeks only to invalidate the approval of the leases, not the leases themselves, and [plaintiff] would be left without an adequate remedy if this action is dismissed. In equity and good conscience, this action should not be dismissed, but should proceed." *Id*., 499 F. Supp. 3d at 1079. Similarly here, Plaintiffs seek to enforce laws aimed at reducing the Project's impacts.

Equally instructive is *Dine Citizens Against Ruining Our Environment v. Klein* ("*Klein*"), 676 F. Supp. 2d 1198, 1216-1217 (D. Colo. 2009). There "the challenge [wa]s to a federal government decision based on the federal decision-maker's alleged non-compliance with NEPA's environmental review and other requirements, and the relief sought [wa]s an injunction until such compliance is achieved." The court reasoned that "the Tribe plays no role in [the federal government's] permitting decisions or related NEPA review except that of commentator . . . . Nor can Plaintiffs, or others aside from the Tribe itself, obtain relief for [the federal government's] alleged NEPA violations if this action cannot proceed in the Tribe's absence." *Id.* For these reasons, it allowed the action to "proceed in equity and good conscience in the Tribe's absence." *Id.* Like in *Hayes* and *Klein*, this suit is directed at BIA's failures to comply with the law, and any relief can and should be tailored to address those failures.

This Court has cautioned against categorically applying Rule 19 to bar suits where tribes cannot be joined. In *Southwest Center*, it observed that such a categorical and rote application of Rule 19 "would . . . create a serious risk that non-parties clothed with sovereign immunity . . . whose interests in the underlying merits are adequately represented could defeat meritorious suits simply because the existing parties representing their interest opposed their motion to dismiss. *Id.* at 1154; *see also Arakaki*, 324 F.3d at 1086 (where "ultimate objective" is shared, "differences in litigation strategy" insufficient to require joinder). And there is

"nothing in NEPA which excepts Indian lands from national environmental policy." *Manygoats v. Kleppe,* 558 F.3d 556, 559 (10th Cir. 1977); *Klein*, 676 F. Supp. 2d 1216-1217. This logic applies equally here, where the Tribe's interests can be protected by both Terra-Gen and BIA.

The District Court cited *Deschutes River Alliance v. Portland General Electric Co.* ("*Deschutes*"), 1 F.4th 1153, 1163 (9th Cir. 2021) in concluding that sovereign immunity prevents the court from addressing Plaintiffs' merits claims. I-ER-21. In *Deschutes*, the plaintiffs brought a citizen-suit under the Clean Water Act, alleging that a dam operator was failing to comply with applicable water quality requirements. This Court first found that the citizen-suit provision of the Clean Water Act did not abrogate the tribal sovereign immunity of the tribal co-operator of the dam. 1 F.4th at 1160-1162. It also found that the tribe's "sovereign interests in self-governance and the preservation of treaty-based fishing rights throughout the Deschutes River Basin" were divergent from the interests of the present dam operator, and were implicated by the Clean Water Act suit. *Id*. at 1163. On this basis it found that equity and good conscience could not allow the suit to proceed. *Id.* In reaching this conclusion, the *Deschutes* Court cites the observation *in Diné Citizens*, 932 F.3d at 857, that in most instances, the balance tips in favor of dismissing if a necessary party cannot be joined due to tribal sovereign immunity. *Deschutes*, 1 F.4th at 1163.

But both *Deschutes* and *Diné Citizens* overlook *Southwest Center's* caution against rote application of tribal immunity to dismiss meritorious environmental litigation. 150 F.3d at 1154. Under all applicable authority, this Court must carefully balance the interests at stake under Rule 19(b), based upon the facts at hand. *Deschutes*, 1 F.4th at 1163; *Diné Citizens*, 932 F.3d 857-858; *Southwest Center*, 150 F.3d at 1154.

In doing so here, it is apparent that equity and good conscience require this case to proceed. As discussed above, unlike in *Deschutes*, *Diné Citizens*, and *Kescoli v. Babbitt*, here the challenged Project is not an ongoing, operating venture already providing jobs, generating power, and supplying revenue. Indeed, the FAA may require changes to the final configuration of the Project – including the height and locations of the Project's turbines – to avoid hazards to navigation. Thus, regardless of this litigation, the Project may never provide the benefits the Tribe assumes will come from its approval.

At the same time, the harms that would arise from this Project's construction and subsequent operation, should it eventually be fully authorized, will occur both inside and outside the boundaries of the Reservation. Absent adequate NEPA review and compliance with the MBTA and Eagle Act, these harms – including noise-related health impacts such as adverse sleep effects, harm to protected bird species, increased local fire dangers, diminished groundwater supplies, and omnipresent, incessant and invasive visual impacts including morning and evening shadow flicker – could devastate the Project area.

While there is "nothing in NEPA which excepts Indian lands from national environmental policy" (*Manygoats,* 558 F.3d at 559; *Southwest Center*, 150 F.3d at 1154), the Tribe and Terra-Gen seek just such an exemption here. Yet, when the harms are appropriately balanced, equity and good conscience require this Court to reach the merits of Plaintiffs' claims. And if Plaintiffs prevail, a better, less impactful Project will result.

V. THE DISTRICT COURT MISAPPLIED THE PUBLIC INTEREST EXCEPTION

The District Court ruled that the "public rights exception" to Rule 19's requirement that indispensable parties by joined was inapplicable because two

Plaintiffs – Mr. and Mrs. Tisdale – lived near the Project site and thus the interests of Backcountry's other members were so inconsequential that "the Court [is not] convinced that this litigation transcends the litigants' private interests." I-ER-26. In doing so the District Court overlooked several dispositive and undisputed facts.

First, the District Court failed to consider that a *majority* of the enrolled members of the Tribe opposed the Project because of its environmental impacts on their community as documented by the declarations of the tribe's former Chair and Vice-Chair and the petitions attached to their declarations. III-ER-328 ("it is now clear that a majority of the General Council opposes the Campo Wind Project and the proposed Lease with Terra-Gen"),326-329, 342 (petition opposing Project).

Second, the District Court failed to consider that the *entire* full membership of the Board of San Diego's official local land use advisory body, "the Boulevard Planning Group, has repeatedly voted unanimously to oppose this [P]roject" because it "is opposed by the overwhelming majority of residents it would impact in the Boulevard Community" due to its adverse environmental impacts on them. III-ER-411.

Third, the District Court failed to consider that four highly qualified environmental experts, including a retired Battalion Chief of the California Department of Forestry and Fire Protection ("CalFire") with four decades of experience, a Ph.D. scholar and consultant with four decades of experience in the rarefied field of community noise evaluation, a sound engineer highly experienced in the measurement and evaluation of industrial noise specific to eastern San Diego County, and a highly qualified geologist and hydrologist with more than two decades experience in the measurement and evaluation of groundwater in eastern San Diego County all testified, at length and based on extensive studies and documentation, that the Project posed broad and potentially severe adverse

impacts to the residents of the *entire* region of eastern San Diego County extending up to 20 miles distant from the Project site. II-ER-236-243, 269-276, 281-294; III-ER-405-409, 411-421; V-ER-1115.

Fourth, the District Court failed to consider that *all* of Plaintiffs' claims alleged BIA's failure to comply with federal environmental laws enacted by Congress to protect the *public's* interest in a safe and healthful environment and *none* alleged private rights of action such as nuisance or trespass to advance a private property or other individual right. The fact that Plaintiffs properly alleged and proved that two of their members had tangible injuries as necessary to establish their standing to bring this action does not transform this public interest case into a purely private one. Thus, far from being a case limited to the private interests of just two individuals, the interests represented by Plaintiffs embrace the entire region of eastern San Diego County and represent a classic example of a broad community-based interest that the "public interest" exception to Rule 19's indispensable party rule was intended to protect.

The District Court's failure to even acknowledge, let alone evaluate and respect, the broad public interests documented by Plaintiffs fails to apply the "public rights exception" in the manner required by the law of this Circuit. *Conner v. Burford*, *supra*, 848 F.2d at 1459. In *Conner v. Burford*, as here, an environmental organization challenged an agency's leases that allowed uses that impacted the environmental interests of the organization's members. *Id*. at 1443-1445. This Court rejected the lessees' Rule 19 motion to dismiss on indispensable party grounds because the plaintiffs sought to enforce public rights to agency compliance with federal environmental laws, holding that "this case is amenable to the application of the *National Licorice* [*Co. v. National Labor Relations Board*, 309 U.S. 350, 363-366 (1940)] public rights doctrine. Under that doctrine, the

rule requiring joinder of indispensable parties had to yield to the paramount interest of the public in enforcement of the public rights represented by the plaintiffs. 848 F.2d at 1458-1462.

So too here, the Tribe's Rule 19 motion to dismiss must give way to Appellants' public rights to BIA's compliance with NEPA and other federal environmental laws. Since the Tribe's interests are adequately represented by other parties, and the public's interest in BIA's compliance with environmental laws would otherwise be thwarted, on balance, the public rights doctrine tips the scales in favor of judicial review.

CONCLUSION

For the foregoing reasons, this Court should reverse the Judgment below and direct the District Court to exercise its jurisdiction over the merits of Plaintiffs' environmental claims.

Dated: February 22, 2022

Respectfully submitted,
/s/ Stephan C. Volker
STEPHAN C. VOLKER
Attorney for Plaintiffs and Appellants
Backcountry Against Dumps, et al.

STATEMENT OF RELATED CASE

This case is related to *Backcountry Against Dumps v. Federal Aviation Administration* (*appeal pending*, Ninth Cir. Case No. 21-71426).

Dated: February 22, 2022

/s/ Stephan C. Volker
STEPHAN C. VOLKER

NOTICE IS HEREBY GIVEN that the court below, the District Court for the Southern District of California, did not hold a hearing before entering its Judgment of Dismissal and Orders granting Campo Band of Diegueno Mission

Indians' Motion to Dismiss, Overruling Plaintiffs' Evidentiary Objections, Denying Plaintiffs' Motion to Strike, and Denying as Moot Plaintiffs' Motion for Preliminary Injunction, filed August 6, 2021 (ECF Nos. 94 and 93). Therefore, no transcript is available for the Court's use in this appeal.

Dated: February 22, 2022 Respectfully submitted,

/s/ *STEPHAN C. VOLKER*
STEPHAN C. VOLKER
Attorney for Plaintiffs and Appellants
Backcountry Against Dumps, et al.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 21-55869

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5 U.S.C.A. § 701

§ 701. Application; definitions

Effective: January 4, 2011
Currentness

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

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(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; [1] and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 103-272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub.L. 111-350, § 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

Footnotes

1 See References in Text note set out under this section.

5 U.S.C.A. § 701, 5 USCA § 701

Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

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Title 5. Government Organization and Employees (Refs & Annos)
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Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 702

§ 702. Right of review

Currentness

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

5 U.S.C.A. § 702, 5 USCA § 702
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5 U.S.C.A. § 703

§ 703. Form and venue of proceeding

Currentness

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

5 U.S.C.A. § 703, 5 USCA § 703
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5 U.S.C.A. § 704

§ 704. Actions reviewable

Currentness

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

5 U.S.C.A. § 704, 5 USCA § 704
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5 U.S.C.A. § 705

§ 705. Relief pending review

Currentness

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

5 U.S.C.A. § 705, 5 USCA § 705
Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

5 U.S.C.A. § 706, 5 USCA § 706

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Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 16. Conservation
Chapter 5A. Protection and Conservation of Wildlife
Subchapter II. Protection of Bald and Golden Eagles (Refs & Annos)

16 U.S.C.A. § 668

§ 668. Bald and golden eagles

Currentness

(a) Prohibited acts; criminal penalties

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: *Provided,* That in the case of a second or subsequent conviction for a violation of this section committed after October 23, 1972, such person shall be fined not more than $10,000 or imprisoned not more than two years, or both: *Provided further,* That the commission of each taking or other act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section: *Provided further,* That one-half of any such fine, but not to exceed $2,500, shall be paid to the person or persons giving information which leads to conviction: *Provided further,* That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle.

(b) Civil penalties

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, may be assessed a civil penalty by the Secretary of not more than $5,000 for each such violation. Each violation shall be a separate offense. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. In determining the amount of the penalty, the gravity of the violation, and the demonstrated good faith of the person charged shall be considered by the Secretary. For good cause shown, the Secretary may remit or mitigate any such penalty. Upon any failure to pay the penalty assessed under this section, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found or resides or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. In hearing any such action, the court must sustain the Secretary's action if supported by substantial evidence.

(c) Cancellation of grazing agreements

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The head of any Federal agency who has issued a lease, license, permit, or other agreement authorizing the grazing of domestic livestock on Federal lands to any person who is convicted of a violation of this subchapter or of any permit or regulation issued hereunder may immediately cancel each such lease, license, permit, or other agreement. The United States shall not be liable for the payment of any compensation, reimbursement, or damages in connection with the cancellation of any lease, license, permit, or other agreement pursuant to this section.

CREDIT(S)

(June 8, 1940, c. 278, § 1, 54 Stat. 250; Pub.L. 86-70, § 14, June 25, 1959, 73 Stat. 143; Pub.L. 87-884, Oct. 24, 1962, 76 Stat. 1246; Pub.L. 92-535, § 1, Oct. 23, 1972, 86 Stat. 1064.)

16 U.S.C.A. § 668, 16 USCA § 668
Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 16. Conservation
Chapter 7. Protection of Migratory Game and Insectivorous Birds (Refs & Annos)
Subchapter II. Migratory Bird Treaty (Refs & Annos)

16 U.S.C.A. § 703

§ 703. Taking, killing, or possessing migratory birds unlawful

Effective: December 8, 2004
Currentness

(a) In general

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972, and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

(b) Limitation on application to introduced species

(1) In general

This subchapter applies only to migratory bird species that are native to the United States or its territories.

(2) Native to the United States defined

(A) In general

Subject to subparagraph (B), in this subsection the term “native to the United States or its territories” means occurring in the United States or its territories as the result of natural biological or ecological processes.

(B) Treatment of introduced species

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For purposes of paragraph (1), a migratory bird species that occurs in the United States or its territories solely as a result of intentional or unintentional human-assisted introduction shall not be considered native to the United States or its territories unless--

(i) it was native to the United States or its territories and extant in 1918;

(ii) it was extirpated after 1918 throughout its range in the United States and its territories; and

(iii) after such extirpation, it was reintroduced in the United States or its territories as a part of a program carried out by a Federal agency.

CREDIT(S)

(July 3, 1918, c. 128, § 2, 40 Stat. 755; June 20, 1936, c. 634, § 3, 49 Stat. 1556; Pub.L. 93-300, § 1, June 1, 1974, 88 Stat. 190; Pub.L. 101-233, § 15, Dec. 13, 1989, 103 Stat. 1977; Pub.L. 108-447, Div. E, Title I, § 143(b), Dec. 8, 2004, 118 Stat. 3071.)

16 U.S.C.A. § 703, 16 USCA § 703
Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 83. Courts of Appeals (Refs & Annos)

28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; Pub.L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub.L. 97-164, Title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

28 U.S.C.A. § 1291, 28 USCA § 1291
Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1331

§ 1331. Federal question

Currentness

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 930; Pub.L. 85-554, § 1, July 25, 1958, 72 Stat. 415; Pub.L. 94-574, § 2, Oct. 21, 1976, 90 Stat. 2721; Pub.L. 96-486, § 2(a), Dec. 1, 1980, 94 Stat. 2369.)

28 U.S.C.A. § 1331, 28 USCA § 1331
Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)

42 U.S.C.A. § 4321

§ 4321. Congressional declaration of purpose

Currentness

<For Executive Order No. 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis" (revoking permit for Keystone XL Pipeline), see Executive Order No. 13990, January 20, 2021, 86 F.R. 7037.>

<For Executive Order No. 14008, "Tackling the Climate Crisis at Home and Abroad", see Executive Order No. 14008, January 27, 2021, 86 F.R. 7619.>

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

CREDIT(S)

(Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.)

42 U.S.C.A. § 4321, 42 USCA § 4321
Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Subchapter A. National Environmental Policy Act Implementing Regulations (Refs & Annos)
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.22

§ 1502.22 Cost-benefit analysis.

Effective: September 14, 2020
Currentness

If the agency is considering a cost-benefit analysis for the proposed action relevant to the choice among alternatives with different environmental effects, the agency shall incorporate the cost-benefit analysis by reference or append it to the statement as an aid in evaluating the environmental consequences. In such cases, to assess the adequacy of compliance with section 102(2)(B) of NEPA (ensuring appropriate consideration of unquantified environmental amenities and values in decision making, along with economical and technical considerations), the statement shall discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, agencies need not display the weighing of the merits and drawbacks of the various alternatives in a monetary cost-benefit analysis and should not do so when there are important qualitative considerations. However, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, that are likely to be relevant and important to a decision.

SOURCE: 85 FR 43357, July 16, 2020; 85 FR 43363, July 16, 2020, unless otherwise noted.

AUTHORITY: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

Current through February 18, 2022; 87 FR 9424.

End of Document

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Code of Federal Regulations - 2020

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

40 C.F.R. § 1508.8

§ 1508.8 Effects.

Currentness

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Current through July 2, 2020; 85 FR 40078.
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40 C. F. R. § 1508.8, 40 CFR § 1508.8

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Code of Federal Regulations - 2020

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

40 C.F.R. § 1508.14

§ 1508.14 Human environment.

Currentness

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Current through July 2, 2020; 85 FR 40078.
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40 C. F. R. § 1508.14, 40 CFR § 1508.14

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United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 12

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing [Rule Text & Notes of Decisions subdivisions I, II]

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 12 are displayed in multiple documents. >

(a) Time to Serve a Responsive Pleading.

(1) ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

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(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court

orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) ***Right to Join.*** A motion under this rule may be joined with any other motion allowed by this rule.

(2) ***Limitation on Further Motions.*** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) ***When Some Are Waived.*** A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) ***When to Raise Others.*** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

Fed. Rules Civ. Proc. Rule 12, 28 U.S.C.A., FRCP Rule 12
Including Amendments Received Through 2-1-22

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United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 19

Rule 19. Required Joinder of Parties

Currentness

(a) Persons Required to Be Joined if Feasible.

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

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

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

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

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

(2) ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) ***Venue.*** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

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

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

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

(A) protective provisions in the judgment;

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(B) shaping the relief; or

(C) other measures;

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

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

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

Fed. Rules Civ. Proc. Rule 19, 28 U.S.C.A., FRCP Rule 19
Including Amendments Received Through 2-1-22

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NINTH CIRCUIT RULE 28-2.7. ADDENDUM TO BRIEFS

Statutory. Pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules must be set forth verbatim and with appropriate citation either (1) following the statement of issues presented for review or (2) in an addendum introduced by a table of contents and bound with the brief or separately; in the latter case, a statement must appear referencing the addendum after the statement of issues. If this material is included in an addendum bound with the brief, the addendum must be separated from the body of the brief (and from any other addendum) by a distinctively colored page. A party need not resubmit material included with a previous brief or addendum; if it is not repeated, a statement must appear under this heading as follows: [e]xcept for the following, all applicable statutes, etc., are contained in the brief or addendum of _____. (Rev. 12/1/09)

Orders Challenged in Immigration Cases. All opening briefs filed in counseled petitions for review of immigration cases must include an addendum comprised of the orders being challenged, including any orders of the immigration court and Board of Immigration Appeals. The addendum shall be bound with the brief, both when it is filed electronically and, when ordered, in hard copies. When paper copies of the brief are ordered, the addendum shall be separated from the brief by a distinctively colored page. (New 7/1/07; Rev. 12/1/09; Rev. 12/1/21)

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 28-2.7

The purpose of the statutory addendum is to provide the Court with convenient access to statutory or other authority that is either specifically at issue or is not already commonly known, not to provide every statute or legal authority that is cited in the brief. For example, when the parties are debating the meaning of a specific clause or portion of a statute, regulation, constitutional provision, or other legal authority, or when they are discussing authority that is not commonly cited, the addenda should include the pertinent provisions of that legal authority. (New 12/1/21)