[ORAL ARGUMENT REQUESTED]

No. 21-55869

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BACKCOUNTRY AGAINST DUMPS; DONNA TISDALE; JOE E. TISDALE,
Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS; DARRYL LACOUNTE, in his official capacity as Director of the U.S. Bureau of Indian Affairs; AMY DUTSCHKE, in her official capacity as Regional Director of the Pacific Region of the U.S. Bureau of Indian Affairs; UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA ANNE HAALAND, in her official capacity as Secretary of the U.S. Department of the Interior,
Defendants-Appellees,

and

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

On Appeal from the United States District Court
for the Southern District of California
3:20-cv-02343-JLS-DEB (Honorable Janis L. Sammartino)

ANSWERING BRIEF OF INTERVENOR-DEFENDANT-APPELLEE TERRA-GEN DEVELOPMENT COMPANY, LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee Terra-Gen Development Company, LLC certifies as follows:

Terra-Gen Development Company, LLC is a wholly-owned subsidiary of Terra-Gen Investments, LLC. Terra-Gen Investments, LLC is wholly-owned subsidiary of Terra-Gen, LLC, a wholly-owned subsidiary of Terra-Gen Power Holdings II, LLC. No publicly held corporation owns 10% or more of Terra-Gen Power Holdings II, LLC's membership interests.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

ABBREVIATION	DEFINITION
APA	Administrative Procedure Act, 5 U.S.C. § 701 et seq.
BIA	Bureau of Indian Affairs
EIS	Environmental Impact Statement
ESA	Endangered Species Act of 1973, 16 U.S.C. § 531 et seq.
FAA	Federal Aviation Administration
GHG	Greenhouse Gas
NEPA	National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq.
MBTA	Migratory Bird Treaty Act of 1918, 16 U.S.C. § 703 et seq.
ROD	Record of Decision
USFWS	U.S. Fish and Wildlife Service

INTRODUCTION

Plaintiffs' stated purpose for litigating this case is to immediately extinguish the Campo Band of Diegueño Mission Indians' (the "Tribe") and Terra-Gen Development Company, LLC's ("Terra-Gen") legal rights to construct and operate the Campo Wind Project (the "Project") on the Campo Indian Reservation ("Reservation"). Plaintiffs make that clear in their complaint, which seeks to invalidate the Federal Defendants' approvals of the Project and enjoin Federal Defendants from activities furthering the Project.

In seeking to halt the Project, Plaintiffs ask this Court to ignore binding precedent—the "wall of circuit authority" the district court relied on in correctly dismissing Plaintiffs' case. I-ER-24 (citation omitted). Plaintiffs also ask this Court to second guess a sovereign tribal nation's decision on how to manage its resources and support critical governmental functions through construction and operation of the Project.

The Tribe has long sought a means to provide for the economic, health, educational, and social needs of its members and, in recent years, adopted a strategic Energy Vision to use the Tribe's abundant wind resources as a means of sustainable economic support. Through the Tribe's 25-year lease with Terra-Gen ("Lease"), which Plaintiffs seek to invalidate, the Tribe is already reaping economic benefits (including income, scholarships, job opportunities, and hiring preferences),

exercising its sovereign authority, and providing for the welfare of its people, with the promise of additional significant revenue to come. Plaintiffs' suit directly threatens those sovereign interests. And an order invalidating the vested Lease approval would devastate the Tribe.

As the district court correctly concluded, the Tribe is a required party based on its vested and sovereign rights in the Tribally and federally approved Lease, which Plaintiffs seek to invalidate. Neither the Federal Defendants nor Terra-Gen can adequately represent those sovereign rights. In good conscience and equity the suit cannot proceed in the Tribe's absence—any order invalidating the approval of the Lease would destroy both the Tribe's vested sovereign rights in the Lease approval and its economic development plan. The Tribe's legal and sovereign rights lie at the heart of this case and longstanding, binding Ninth Circuit precedent dictates that those rights cannot be adjudicated in the Tribe's absence.

The district court's order dismissing the case should be affirmed.

STATEMENT OF JURISDICTION

Terra-Gen agrees with the jurisdictional statement in Plaintiffs' brief.

STATEMENT OF THE ISSUES

Whether the district court correctly concluded, under Federal Rule of Civil Procedure 19, that litigation seeking to invalidate the federal approval of the Tribe's Lease with Terra-Gen could not be litigated in the Tribe's absence.

PERTINENT STATUTES AND REGULATIONS

The only pertinent statute or regulation in this case is Federal Rule of Civil Procedure 19, which is reproduced in the Addendum to Plaintiffs' opening brief.

STATEMENT OF THE CASE

I. THE IMPORTANCE OF THE CAMPO WIND PROJECT AND ECONOMIC DEVELOPMENT TO THE TRIBE

The Campo Band of Diegueño Mission Indians is a federally-recognized sovereign Indian tribe and part of the Kumeyaay Nation. 2-TG.SER-233. The Tribe's Reservation spans more than 16,000 acres of land and is home to more than 300 enrolled Tribal members and their families. *Id.* The sovereign Tribe is governed by the Campo Constitution, which provides for a seven-member Executive Committee that oversees various governmental services provided to the Reservation community, including health, education, fire protection, environmental protection, and housing. *Id.*

Though the Tribe is a sovereign body with a strong cultural identity, a long history of mistreatment has left the Tribe involuntarily reliant on scant federal funds. SER-4–6 ¶¶ 10-16. The Reservation occupies windswept scabland, and there is little opportunity for self-generated economic development—available natural resources are limited to non-arable land, wind, and sun. SER-4 ¶ 8. Because of those limitations, many of the Tribe's basic needs go unmet—including housing, healthcare, social services, recovery programs, training, educational opportunities,

cultural programs, and other general welfare needs. *Id.* Unemployment and poverty are high. SER-6–7 ¶¶ 18-20.

Thus, the Tribe developed a long-term Energy Vision to use wind energy as a sustainable source of income to provide critical governmental services to its members. *Id.* ¶ 24. Consistent with the Tribe's heritage and traditional practices, this approach to development allows the Tribe to use nature's gifts to benefit Tribal members for current and future generations in a sustainable and environmentally responsible manner. *Id.*

To advance that strategic Energy Vision, the Tribe chose to partner with Terra-Gen to develop the Campo Wind Project on the Campo Indian Reservation. SER-8–9 ¶¶ 24, 28-29. Terra-Gen is a leading renewable energy developer that specializes in development, construction, and operation of utility-scale wind, solar, and energy storage facilities. 2-TG.SER-221 ¶ 2. Before the Lease agreement with the Tribe, Terra-Gen hired an environmental consultant to prepare surveys, analyses, and reports on a range of environmental and sustainability issues related to the Project proposal, including reports on endangered species, birds, vegetation, cultural resources, noise, water, and visual impacts. 2-TG.SER-222 ¶ 4.

The Tribe's General Council first approved pursuing the Project with Terra-Gen because (1) the Project would help realize the Tribe's short and long-term economic development goals, (2) the Project would help the Tribe maximize its

wind-energy resources, and (3) the Project would benefit the Tribe and the Tribal community. SER-9 ¶ 28. In April 2018, after a year of negotiations between the Tribe and Terra-Gen, the Council approved the Lease authorizing Terra-Gen to use reservation lands to build the Campo Wind Project on Tribal land. *Id.* ¶ 29; 2-TG.SER-222 ¶ 5.

The Lease negotiated by the Tribe benefits the Tribe in several ways. First, the Lease provides for various payments to the Tribe for the use of its land to construct, maintain, and operate the Project. SER-10 ¶ 33. The revenue from the Project will be the Tribe's primary source of funding—tens of millions of dollars from rent, royalties, and other payments. SER-10–11 ¶¶ 37-38. This funding multiplies the Tribe's total annual revenue to, for the first time, enable the Tribe to fully fund programs and services under its General Welfare Ordinance and to develop more infrastructure on the Reservation. SER-10 ¶ 37. The Lease also gives the Tribe the option to purchase the Project's infrastructure improvements after the expiration of the 25-year Lease term. SER-11 ¶ 42. And the Lease requires Terra-Gen to give preference to Tribal members for Project-related employment. *Id.* ¶ 40. These Project benefits are helping the Tribe fulfill the promise of self-determination. SER-6–7 ¶¶ 17, 22, SER-12 ¶ 44.

The Tribe is already benefiting from the approved Lease. As of last year, the Tribe had received over one million dollars from the Lease and was relying on those

payments and other Lease benefits to carry out its governmental functions. *See* SER-10 ¶¶ 33-34. The Tribe has used its income from the Lease to provide some general welfare benefits to Tribal members and has already funded 15 scholarships for members to pursue higher education and training. *Id.* ¶¶ 34-35. The Project is also already creating employment for Tribal members; 14 Tribal members have worked for the Project and earned hundreds of thousands of dollars of income. *Id.* ¶ 36.

The Project will also provide broad environmental benefits and economic benefits, including to the surrounding non-Tribal community. Once operational, the Project will displace 58,000 metric tons of carbon dioxide emissions per year and will provide renewable energy to over 70,000 San Diego Country residences. 2-TG.SER-225 ¶ 25. San Diego County reviewed the Project and determined the Project will "result in substantial tax benefits, job benefits, and broader economic benefits for the County of San Diego region." 2-TG.SER-224 ¶ 21 (citation omitted) (citing 2-TG.SER-229). Those benefits include short- and long-term jobs, including 560 jobs during Project construction. *Id.*

II. ROBUST FEDERAL ENVIRONMENTAL REVIEW AND APPROVAL OF THE CAMPO WIND PROJECT

Because the United States holds the Campo Reservation land in trust for the Tribe, federal law requires federal approval of the Lease for it to be valid and effective. *See* 25 U.S.C. § 415(a). In 2018, the Tribe submitted the Lease to the

Bureau of Indian Affairs ("BIA") within the Department of the Interior for approval. SER-9 ¶ 30.

Before approving the Lease, BIA led an extensive environmental review and public comment process under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq*. In November 2018, BIA published a Notice of Intent to prepare an Environmental Impact Statement ("EIS") for the proposed action in the Federal Register and local newspapers. V-ER-1124. BIA then held a public scoping meeting on the Project. *Id.* In May 2019, BIA issued the Draft EIS for public review and comment over a 45-day period and held another public meeting. *Id.* As a result of BIA's extensive outreach, numerous agencies, organizations, and individuals commented on the environmental review for the Project. V-ER-1124–25. BIA considered, responded to and addressed the public comments, and issued the Final EIS on January 31, 2020. V-ER-1124.

The Final EIS analyzed the Project's impacts on thirteen categories of environmental and other resources, including land resources, water resources, air quality, greenhouse gases, and climate change, biological resources, cultural resources, socioeconomic conditions, resource use patterns, traffic, and transportation, noise, visual resources, and public health and safety. *See* III-ER-561–65, 590; IV-ER-592–632; 2-TG.SER-234–305; 1-TG.SER-14–16. The Final EIS also contained detailed technical appendices supporting its analysis: those

appendices included a Final Biological Technical Report and related appendices (totaling 2,740 pages), additional analyses of traffic impacts (290 pages), noise impacts (172 pages), visual impacts (122 pages), cultural resources (212 pages), and cumulative scenario impacts (16 pages), as well as a five-part Preliminary Environmental Site Assessment (totaling 559 pages). *See* III-ER-565.

The United States Fish and Wildlife Service ("USFWS") separately prepared a Biological Opinion under Section 7 of the Endangered Species Act. That opinion addressed the potential effects of the proposed action on the federally endangered Quino Checkerspot Butterfly. 2-TG.SER-306. The opinion concluded that any anticipated take was not likely to jeopardize the continued existence of the species. 2-TG.SER-307.

In April 2020, after reviewing the Final EIS and the Biological Opinion, the Assistant Secretary for Indian Affairs issued the Record of Decision ("ROD") approving the 25-year Lease for the development, construction, operations, maintenance and decommissioning of the Campo Wind Project. V-ER-1174. The ROD identified five key benefits from approving the Lease. First, the "[c]reation of a new source of revenue will allow the Tribe to support needed government programs." *Id.* Second, "[r]evenue from the leasing of tribal trust lands will further tribal interests, including economic development, tribal governance, and self-determination." *Id.* Third, "[i]mprovement of economic conditions of the Tribe

through job creation and utilization of the renewable wind resource." *Id.* Fourth, "[i]ncrease of tribal and national renewable energy sources to increase federal energy independence and decrease greenhouse gas emissions." *Id.* And finally, "[p]rovision of renewable energy for existing and future regional electricity demands." *Id.*

Because of these benefits, the ROD concluded that approving the Lease would best "promote the long-term economic vitality, self-sufficiency, self-determination and self-governance of the Tribe," "further tribal interests, including economic development, revenue, tribal governance, and self-determination," and "increase national and tribal renewable energy sources, thus increasing federal energy independence and decreasing greenhouse gas emissions." V-ER-1173.

The ROD also described the extensive steps BIA took to respond to Plaintiffs Backcountry Against Dumps and Donna Tisdale's comments on the Final EIS. V-ER-1141–51. Indeed, Plaintiffs' comments on the Draft EIS, which BIA responded to in the Final EIS, and Plaintiffs' comments on the Final EIS, which BIA responded to in the ROD, mirror the allegations Plaintiffs raise to this Court, *see* Opening Br. 14-29.

Plaintiffs' substantive critiques of the EIS are irrelevant to the issue before this Court. Nonetheless, BIA's section-by-section response to Plaintiffs' comments

on the Draft and Final EIS shows that BIA thoroughly reviewed and responded to each claim, consistent with its obligations under NEPA.

1. Noise Impacts (Opening Br. 14-15)

BIA addressed Plaintiffs' assertions of inadequate noise impact assessment, explaining in response to comments on the EIS why the studies BIA relied on were representative of potential Project impacts, 1-TG.SER-42, how BIA determined that, although noise levels were unavoidable and adverse, they "would not exceed County standards or [Federal Transit Administration]-based guidance thresholds," 1-TG.SER-14–16, and generally how BIA appropriately considered relevant studies, used appropriate methods, and employed accurate industry-standard modeling. 1-TG.SER-41, 43–46, 48; *see also* II-ER-151–53 (describing BIA's investigation into noise impacts).

2. Wildfire Impacts and Aviation/Aerial Firefighting (Opening Br. 16-22)

Contrary to Plaintiffs' assertions, the Final EIS considered potential impacts, as well as mitigation measures, "[t]o ensure adequate response to the threat of wildfire during construction, *operation*, and decommissioning activities." IV-ER-622, 624–26 (emphasis added), including a Fire Protection Plan developed along with the Campo Reservation Fire Protection District identifying specific mitigation measures to minimize wildfire hazards. 1-TG.SER-33–34. The BIA noted applicable Federal Aviation Administration ("FAA") standards, 1-TG.SER-47, and

the FAA has since issued Determinations of No Hazard for each turbine in the Project.[1]

3. Visual Impacts (Opening Br. 22-23)

BIA analyzed the Project's potential visual impacts, including potential for shadow flicker, and identified Project mitigation measures to address those potential impacts. V-ER-1136–40, 1168–69. BIA considered and rejected other mitigation measures that BIA determined would "significantly impact the economic benefits of the Project to the Tribe, thereby undermining the key purpose of the Project." IV-ER-747. However, BIA required that Terra-Gen coordinate with any affected Tribal members or non-Tribal affected person to assess any shadow flicker issues and explore potential remedies, including financial assistance to install screening vegetation or window coverings. IV-ER-748.

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[1] The ROD recognized that the FAA needed to review the Project's turbines for the Project to proceed. V-ER-1150, 1169; *see also* IV-ER-618–19. The FAA has since issued Determinations of No Hazard for each turbine, confirming that the Project would not have a significant adverse effect on air navigation. Plaintiffs petitioned for the FAA to reconsider that decision, but the FAA denied Plaintiffs' petition. *See* FAA, Notice of Invalid Petition: Wind Turbine (Oct. 15, 2021), https://oeaaa.faa.gov/oeaaa/external/eFiling/location.do?getDocumentForView=true&blobId=497633778. Plaintiffs have since petitioned the Ninth Circuit for review of the FAA's denial of their petition. *See Backcountry Against Dumps v. FAA*, No. 21-71426 (9th Cir. Dec. 14, 2021), ECF No. 1. Terra-Gen requests that the Court take judicial notice of these developments regarding the Project's federal approvals as Plaintiffs raised the FAA proceedings in their opening brief. *See City of Las Vegas v. Fed. Aviation Admin.*, 570 F.3d 1109, 1113 n.1 (9th Cir. 2009) (taking judicial notice of administrative development).

4. Water Resource Impacts (Opening Br. 24-25)

The Final EIS analyzed in detail existing groundwater conditions and the effect of groundwater pumping for the Project on the watershed, considering all existing groundwater demand. 1-TG.SER-35–36; *see also* IV-ER-598–600; 2-TG.SER-271. The Final EIS concluded, based on this analysis, that the Project would have no adverse effect on groundwater storage or recharge. *See* IV-ER-598–600; 2-TG.SER-271.

5. Impacts on Golden Eagles and other Avian Species (Opening Br. 25-26)

BIA consulted with USFWS to investigate the Project's potential effects on Golden Eagles and other birds, and based on the consultation, BIA revised its analysis of the Project's potential effects on Golden Eagles. 1-TG.SER-31–32. After implementing these USFWS comments, BIA determined that "[t]he Project would be consistent with the USFWS guidance for golden eagles." IV-ER-609.

BIA's ROD requires Terra-Gen to develop a comprehensive Bird and Bat Conservation Strategy prepared by a qualified biologist, based on avian and bat surveys conducted in 2017, 2018, and 2019, at the Project site—including a risk assessment, mitigation measures, post-construction monitoring, and adaptive management actions. V-ER-1159. Terra-Gen must submit its proposed Strategy to USFWS for review. V-ER-1159. And the ROD requires Terra-Gen to consult with

USFWS if an avian species or bat is injured or dies because of the Project's operation. V-ER-1160.

6. Impacts on the Quino Checkerspot Butterfly (Opening Br. 27-28)

The Final EIS provides extensive details about mitigation measures designed to protect the Quino Checkerspot Butterfly, including measures requiring Terra-Gen to install construction flagging and signage when Project construction occurs adjacent to mapped occupied Butterfly habitat, and a requirement that construction clearing and vegetation management in mapped suitable Butterfly habitat occur when adult and larval butterfly activity is reduced and host plants are not flowering or germinating. *See* 1-TG.SER-29. Further, the Biological Technical Report for the Project fully describes the revegetation requirements and other mitigation measures designed to avoid and minimize Project impacts to the Butterfly. *See* 1-TG.SER-18–27.

7. Socioeconomic Impacts (Opening Br. 28)

The Final EIS thoroughly analyzed alleged impacts to individual Plaintiffs and other socioeconomic impacts, and BIA fully responded to Plaintiffs' comments on these issues. *See* 1-TG.SER-37–38. The Final EIS cites multiple case studies showing that wind turbines have a minimal effect on home values. 1-TG.SER-37. BIA noted that a determination of the Project's effects on property values is

speculative, based on the analysis BIA conducted of this issue, as documented in the Final EIS. *See* 1-TG.SER-37–38.

8. Global Warming Impacts (Opening Br. 28-29)

As here, Plaintiffs complained to BIA that the EIS should have quantified the Project's lifecycle greenhouse gas ("GHG") emissions, including the manufacture and transport of the Project components. Opening Br. 28–29. BIA explained in its response to Plaintiffs' comments that such an analysis is not required under NEPA in these circumstances—such information would have been speculative given the manufacturing specifics had not been determined, emissions would have occurred outside the United States, and such analysis was not required by then-existing NEPA guidance on GHG emissions. *See* 1-TG.SER-38–40.

9. Tribal Governance (Opening Br. 9-12)

Finally, BIA also specifically addressed the validity of the Tribal governmental process approving the Lease; documenting that the Tribe had confirmed to BIA that the Lease approval was in "full compliance with the Constitution, Laws, and Ordinances of the Tribe and remains valid and effective, subject to BIA approval." V-ER-1149.

* * *

Following BIA's ROD, the Tribe and Terra-Gen executed a Revised and Restated Lease to incorporate BIA-required terms allowing for development and

operation of the Project on Tribal lands for a 25-year period, with the option to extend the Lease for another 13 years. 2-TG.SER-223 ¶ 9. BIA signed that Revised and Restated Lease between Terra-Gen and the Tribe in May 2020. *See* SER-9–10 ¶ 31.

III. PLAINTIFFS' LITIGATION SEEKING TO INVALIDATE THE FEDERAL APPROVAL OF THE TRIBE'S LEASE

Plaintiffs Donna and Joe Tisdale and Backcountry Against Dumps (which Donna Tisdale founded and for which she serves as President, *see* III-ER-410–11 ¶ 1), have long-opposed the Tribe's economic development efforts. Having failed to persuade BIA to withhold necessary approvals for construction and operation of the Project, Plaintiffs sued BIA.

In July 2020, Plaintiffs filed a complaint in the U.S. District Court for the Eastern District of California, alleging that the United States Department of the Interior and its Secretary, the BIA, the BIA Director, the BIA Regional Director, and the Assistant Secretary of the Interior for Indian Affairs violated NEPA, the Migratory Bird Treaty Act ("MBTA"), the Bald Eagle and Golden Eagle Protect Act (the "Eagle Act"), and the Administrative Procedure Act ("APA") by approving the

Project and the Lease. *See* VI-ER-1314–57. In January 2021, Plaintiffs filed their Amended Complaint. SER-67–128.[2]

Plaintiffs are clear and unambiguous about the relief they seek: Their complaint asks the court to order the Federal Defendants "to withdraw their Project approvals" and "enjoin" the Federal Defendants from permitting the Project activities. SER-128 ¶ 181. This relief seeks to invalidate the Lease between the Tribe and Terra-Gen, which authorizes the construction and operation of the Campo Wind Project.

In August 2020, Terra-Gen moved for and was granted intervention as a matter of right under Federal Rule of Civil Procedure 24(a). *See Backcountry Against Dumps v. BIA*, No. 2:20-cv-1380 (E.D. Cal. Aug. 14, 2020), ECF No. 6; *id.* (E.D. Cal. Nov. 9, 2020), ECF No. 23.

In March 2021, the Tribe moved to intervene as of right under Federal Rule of Civil Procedure 24(a) solely to file a motion to dismiss under Federal Rules of Civil Procedure 19 and 12(b)(7). The district court granted the Tribe's motion in June 2021. SER-17–27. The Tribe then moved to dismiss under Rule 19. II-ER-232.

[2] The case was transferred to the U.S. District Court for the Southern District of California in November 2020. *See Backcountry Against Dumps v. BIA*, No. 2:20-cv-1380 (E.D. Cal. Nov. 6, 2020), ECF No. 22 (Minute Order).

The Tribe argued that it is a required party under Rule 19(a): if Plaintiffs obtained an order invalidating the approvals of the Lease and Project, that order "would impair the Tribe's legally protected interest in the Lease between the Tribe and Terra-Gen, stop the Project, prevent the Tribe from receiving its benefits, and frustrate the Tribe's ability to 'use its natural resources as it chooses.'" II-ER-223 (citation omitted).

The Tribe further argued that, under Rule 19(b), the case could not proceed in equity and good conscience without the Tribe. II-ER-226–29. The Tribe explained that Plaintiffs' requested relief would prejudice the Tribe by potentially depriving it of millions of dollars of revenue, many high-paying jobs, and the ability to manage Tribal land and natural resources. II-ER-227. And because Plaintiffs sought to invalidate the Federal Defendants' approval of the Lease and Project, there was no way to shape relief to avoid that prejudice. II-ER-227–28 (citing *Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 858 (9th Cir. 2019)). Given those facts, the Tribe argued Rule 19(b) required dismissal. II-ER-225–30.

The district court agreed. In August 2021, the court found that the Tribe had demonstrated a legally protected interest under Rule 19(a)(1)(B). I-ER-15–20. The court held that Plaintiffs' challenges to the federal approvals threatened the Tribe's "substantial and legally protected interest in the Lease, and the benefits it already

has derived and will continue to derive from the Lease, that extends beyond a simple financial stake, including the Tribe's sovereign ability to control its resources and the bargained-for hiring preference the Lease contains." I-ER-19–20.

The court also rejected Plaintiffs' contention that BIA and Terra-Gen could adequately protect the Tribe's interests. I-ER-20. The court observed that the Federal Defendants' interests "differ from the Tribe's, given that the Federal Defendants' overriding interest must be in complying with environmental laws, an interest that is meaningfully different from the Tribe's sovereign interest in ensuring that the Project is realized." *Id.* And the court held Terra-Gen could also not represent the Tribe's sovereign interest. I-ER-20–21.

Because the Tribe could not be joined as a required party due to its sovereign immunity, the court considered whether, in equity and good conscience, the case should proceed or if the court should dismiss Plaintiffs' complaint. I-ER-22. The court agreed that the Tribe would be prejudiced if the case "were to proceed and Plaintiffs were to prevail, as the Tribe would lose tens of millions of dollars in revenue that it plans to use to fund its governance and 'its ability to use its natural resources how it chooses.'" *Id.* (quoting *Diné Citizens*, 932 F.3d at 857). The court also agreed that it could not tailor the requested relief to mitigate the prejudice to the Tribe and that Plaintiffs had failed to propose any way that could be done. I-ER-23. And, although it could order adequate judgment in the Tribe's absence and Plaintiffs

may not have any remedy if the court dismissed the suit, the court rightfully noted that there was a "'wall of circuit authority' in favor of dismissing an action where a tribe is a necessary party." I-ER-24 (quoting *Diné Citizens*, 932 F.3d at 858). Balancing the Rule 19(b) factors, including the potential prejudice to the Tribe's sovereign interests, the court held the litigation could not continue "in good conscience" without the Tribe. *Id.*

The court also rejected Plaintiffs' argument that the court should apply the "public rights exception" to Rule 19 dismissal. The court held that the exception did not apply for two reasons. First, the exception does not apply when, as here, a judgment adverse to the Tribe would "destroy the Tribe's contractual rights under the Lease." I-ER-26. Second, the public rights exception applies only when litigation transcends private interests of litigants and advocates a public right, and the court found that Plaintiffs' private interests—not the public interest—was "a significant factor in the bringing of this litigation." *Id.* Given those independent findings, the court dismissed the case.

STANDARD OF REVIEW

This Court reviews a district court's Rule 19 decision for abuse of discretion. *Deschutes River Alliance v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1158 (9th Cir. 2021). "An abuse of discretion is 'a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of

the facts as are found.'" *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005) (quoting *Wing v. Asarco, Inc.*, 114 F.3d 986, 988 (9th Cir. 1997)). "The abuse of discretion standard requires that [an appellate court] 'not reverse a district court's exercise of its discretion unless [it has] a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached.'" *Id.* (quoting *SEC v. Coldicutt*¸ 258 F.3d 939, 941 (9th Cir. 2001)). "[T]o the extent that the district court's determination whether a party's interest is impaired involves a question of law," the Ninth Circuit reviews that determination under a *de novo* standard. *Deschutes*, 1 F.4th at 1158 (quoting *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1098 (9th Cir. 1994)).

SUMMARY OF ARGUMENT

The district court correctly dismissed this suit. Rule 19 (and this Court's precedent) is clear that an absent party must be joined when litigation may impair its interest. When a required party cannot feasibly be joined, equity and good conscience may require dismissal to avoid adjudicating the party's rights in its absence. In dismissing this case under Rule 19, the district court correctly held that it would be prejudicial and unfair to adjudicate the validity of the Tribe's Lease for the Project in the Tribe's absence. That decision should be affirmed.

Plaintiffs raise several issues on appeal; but most have nothing to do with the district court's holding that the Tribe is a required party, that neither the Federal Defendants nor Terra-Gen can adequately represent the Tribe's interest, and that the litigation could not continue in equity and good conscience without the Tribe. And a "wall of circuit authority" blocks Plaintiffs' arguments in favor of reversal.

First, Plaintiffs claim that the district court applied an "incorrect evidentiary standard of review." The district court did no such thing. Instead, it did what all courts do—it identified the relevant facts, applied the relevant law, and reached a conclusion on the questions before it. Plaintiffs chose to fill their brief opposing dismissal (as they do on appeal) with irrelevant facts and arguments, flyspecking the Federal Defendants' environmental review and the Tribe's internal governance. The district court's recognition that those facts and arguments had no bearing on the motion to dismiss cannot justify reversal.

Second, Plaintiffs perversely insist that their lawsuit will benefit the Tribe, not prejudice it, because of the changes Plaintiffs have identified to the Project that would purportedly benefit the Tribe. But the proof is in what Plaintiffs *seek*, the complete invalidation of BIA's approval of the Lease between the Tribe and Terra-Gen. That relief would decimate the Tribe's existing and vested future rights under the Lease and infringe on the Tribe's financial, educational, religious, economic, and sovereign interests.

Third, Plaintiffs mistakenly argue that BIA and Terra-Gen adequately represent the Tribe's interest because they are defending the challenged approvals and that Terra-Gen has an "essentially identical" interest in defending the Lease as the Tribe. Ninth Circuit precedent forecloses Plaintiffs' argument. This Court has held, under factual circumstances identical to the facts here, that the federal government's interest in complying with environmental law is meaningfully distinct from a Tribe's sovereign interest in managing resources and economic development. And in similar circumstances, this Court has recognized that a private party's interest in a financial endeavor with a tribal entity starts and ends with that transaction. Terra-Gen's interest in the Lease is that the Lease allows it to develop a wind power generating facility and market that power to customers. As explained, the Tribe's interest goes far beyond the Federal Defendants' interest in environmental compliance or Terra-Gen's pecuniary goals. The Tribe's interest in the Lease includes the sovereign interest of utilizing its own natural resources and providing for its members, consistent with its heritage. The Lease provides educational, employment, income, and other opportunities for the Tribe and its members. Neither the Federal Defendants nor Terra-Gen share those sovereign interests.

Finally, Plaintiffs argue (at 8) that the district court "misappl[ied]" the "public rights exception" to dismissal for failure to join a required party. This argument runs headlong into the Court's repeated holding that the public rights exception cannot

apply when litigation threatens to destroy the legal entitlements of the absent parties. Plaintiffs seek to decimate the Tribe's legal entitlements from the Lease. And Plaintiffs make no argument on appeal to the contrary. Thus, as the district court held, the public rights exception cannot apply.

The exception cannot apply for another reason too. When litigation is really about a party's private interest, rather than vindicating a public right, the public rights exception is inapplicable. *Kescoli v. Babbitt*, 101 F.3d 1304, 1311-12 (9th Cir. 1996). The district court recognized that Plaintiffs want to invalidate the Lease and stop the Project in its tracks because of their personal interests. Based on Plaintiffs' own allegations, the district court rightly determined that Plaintiffs' private interests were a "significant factor in the bringing of this litigation."

The district court's decision should be affirmed.

ARGUMENT

Federal Rule of Civil Procedure 12(b)(7) allows a defendant to move for dismissal of a complaint for failure to join a party under Rule 19. Rule 19, in turn, "requires joinder of parties . . . whose interests would be impeded were the action to proceed without them." *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 996 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 83 (2021). "When a required party cannot be joined, Rule 19(b) requires dismissal when the action cannot proceed in equity and good conscience in the absence of the required party." *Id.*

I. THE DISTRICT COURT APPLIED THE CORRECT EVIDENTIARY STANDARD

Plaintiffs begin their argument with a broad but ill-defined attack on the district court's decision, asserting (at 31) that the district court "applied an incorrect evidentiary standard of review." Not so. As they do in their opening brief to this Court, Plaintiffs included in their district court brief extensive facts and arguments, relying on many declarations and exhibits—all unrelated to the legal questions at issue in the Rule 19 analysis. The district court, while accepting those assertions as true, merely found that they were *irrelevant* to the issue before it.

First, as Plaintiffs acknowledged, the district court applied Rules 12(b)(7) and 19 when evaluating the Tribe's motion. Opening Br. 30. Plaintiffs do not argue that the district court erred by looking beyond the pleadings to decide the Rule 19 issue. Nor could they. *See McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960) (considering affidavit and document to determine whether absent parties were required); 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1359 (3d ed. Apr. 2022 update) (party may support Rule 12(b)(7) motion with affidavits and "other relevant extra-pleading evidence").[3]

[3] Plaintiffs do not challenge or even address the district court's conclusion that they likely waived their evidentiary objections and do not challenge the district court's denial of their evidentiary objections. I-ER-11; *see generally* Opening Br. (failing to raise issue).

Rather, Plaintiffs assert that the district court improperly "disregarded Plaintiffs' allegations." Opening Br. 31. But the court below actually treated Plaintiffs' allegations as true. I-ER-14 n.2. The district court then explained why Plaintiffs' allegations about the process to approve the Project, the FAA proceeding, and the alleged adverse environmental impacts of the Project on Tribal members and the community "have no bearing on the Court's Rule 19 analysis." I-ER-14 n.2. The court, noting that it had previously held that it "lack[ed] authority to rule on issues of tribal governance," *id.* (citing ECF No. 49 at 6 n.1), acknowledged Plaintiffs' assertion that not all Tribal members agree with the Tribe's position on the Project but observed that "the fact remains that the Tribe is representing that it has approved the Project, wishes it to go forward, and seeks dismissal of Plaintiffs' challenges via the present Motion." *Id.*; *see also In re Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003) ("Jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws, and issue tribal membership determinations lies with Indian tribes and not in the district courts."). In any event, Plaintiffs have waived any challenge to the district court's determination of that issue by choosing to not address that ruling in their opening brief. *See* SER-22 n.1.

The opinion demonstrates that the district court carefully considered the evidence and allegations that Plaintiffs put forward—but rightfully concluded that

much of it was irrelevant, as it was entitled to do. *Cf. Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 370-71 (6th Cir. 2011) ("disregard[ing]" "irrelevant portions of the Amended Complaint, so that [court could] focus [its] judicial inquiry on the precise issues to be decided"); *Laoye v. Att'y Gen. U.S.*, 624 F. App'x 791, 794 (3d Cir. 2015) ("The [agency] did not abuse its discretion by failing to expressly refute an irrelevant argument.").

As in the proceedings below, Plaintiffs have not explained how the facts asserted on pages 9 through 37 of their opening brief are in any way relevant to the Rule 19 joinder issue on which the district court ruled. By not doing so, they have waived that argument. *See Avila v. L.A. Police Dep't*, 758 F.3d 1096, 1101 (9th Cir. 2014) ("Arguments not raised clearly and distinctly in the opening brief are waived") (internal quotation marks and citation omitted). And, as they did below, Plaintiffs launch unfounded criticisms of BIA's analysis and largely base their critique on declarations that were never part of the administrative record.[4] In any event,

[4] Terra-Gen both objected to and moved to strike those declarations when Plaintiffs submitted them in support of their motion for a preliminary injunction, *see* 1-TG.SER-49–218; 1-TG.SER-4–12, but the district court denied Terra-Gen's motion to strike as moot when it dismissed the case, I-ER-26–27. Plaintiffs have again inappropriately cited extra-record declarations throughout their brief, including, for example, from Plaintiff Donna Tisdale (at 1, 6, 21-24, 28); Richard Carman (at 3, 6, 14-15); Steven Fiedler (at 6, 47); Mark Ostrander (at 16-19, 22); and Scott Snyder (at 6, 24-25, 34). As below, this Court should disregard these declarations and any citations to them because they (1) were never before BIA and (2) are irrelevant to the issues on appeal. *See Friends of the Earth v. Hintz*, 800 F.2d 822, 828-29 (9th Cir. 1986) (affirming district court's decision to limit review of

Plaintiffs' critiques are not only irrelevant to the issue before the Court, but unfounded. What is clear, however, is that the district court carefully and properly sorted through the evidence before it and applied the correct legal standard.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE ACTION FOR FAILURE TO JOIN A REQUIRED PARTY

The district court followed a well-worn path when it determined the Tribe was a required party[5] to the litigation. Under Rule 19, courts "first determine whether an absent party is a required party; then whether joinder is feasible; and finally whether the case can fairly proceed in the party's absence." *Deschutes River Alliance v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021) (quoting *Jamul*, 974 F.3d at 996).

Because this litigation seeks to invalidate the Lease between the Tribe and Terra-Gen, threatening the Tribe's interest in the approved Lease and its sovereign right to manage its resources, the Tribe is a required party. As the Ninth Circuit has repeatedly held, tribes are required parties where an action seeks invalidation of "a right already granted." *Diné Citizens Against Ruining Our Env't v. Bureau of Indian*

NEPA determinations to the administrative record); I-ER-14 n.2 ("Plaintiffs devote the bulk of their Opposition to arguments that are irrelevant to the present Motion.").

[5] Prior iterations of Rule 19 used "indispensable" and "necessary" instead of "required." *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 855-56 (2008) (explaining that the 2007 amendments to the Federal Rules of Civil Procedure replacing "necessary" with "required" did not change the "substance and operation of . . . Rule [19]").

Affairs, 932 F.3d 843, 852 (9th Cir. 2019). Additionally, "a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002) (citations omitted).

If successful, Plaintiffs' challenge would invalidate the vested federal approval of the Lease between the Tribe and Terra-Gen and "destroy the Tribe's contractual rights under the Lease." I-ER-26. This case thus falls into the class of cases the Ninth Circuit has identified as categorically requiring joinder when a party's preexisting rights will be affected. *See Diné Citizens*, 932 F.3d at 853 (tribal entity was required party because its "existing lease, rights-of-way, and surface mining permits would be impaired"); *Dawavendewa*, 276 F.3d at 1157 (tribe was required party because "the instant litigation threatens to impair the Nation's contractual interests"); *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996) (tribe was required party because plaintiff's "action would directly affect the parties' settlement agreement and indirectly affect the parties' lease agreements"). Because Plaintiffs seek to invalidate the Lease and joinder is not feasible due to the Tribe's sovereign immunity, this case cannot fairly proceed in the Tribe's absence.

A. The District Court Properly Determined That The Tribe Was Required To Be Joined Under Rule 19(a).

Under Rule 19(a), a party is required if it "claims an interest relating to the subject of the action" and disposing of the action in the party's absence may "as a

practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). "The inquiry under Rule 19(a) 'is a practical one and fact specific,' and 'few categorical rules inform [] this inquiry.'" *Diné Citizens*, 932 F.3d at 851. An interest satisfies that test if it is "legally protected," *id.*at 852 (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)), although it need not be "property in the sense of the due process clause," *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002). The district court correctly held that the Tribe has a legally protected interest in the federally approved Lease between it and Terra-Gen—an interest that is both vested and provides tangible benefits to the Tribe.

As this Court recognized in *Diné Citizens*, an absent party has a "legally protected interest at stake in procedural claims [like those here] where the effect of a plaintiff's successful suit would be to impair a right already granted." 932 F.3d at 852. The decision Plaintiffs seek to invalidate here—the approval of a Lease between the Tribe and Terra-Gen—is a vested right already granted.

Under that Lease—which the Federal Defendants have approved and on which the Project depends—the Tribe is entitled to and is receiving a stream of income. *See* SER-10 ¶¶ 33-34 The Lease also funds Tribal scholarships, requires hiring-preferences for Tribal members, and has already created jobs for 14 Tribal members. SER-10–11 ¶¶ 35-36, 40. Plaintiffs' action, which seeks to invalidate

BIA's Lease approval, directly threatens those interests and would have "retroactive effects on approvals already granted." *Diné Citizens*, 932 F.3d at 853. Ninth Circuit precedent makes clear that such interests qualify as legally protected for the purpose of Rule 19. *Id.* (holding absent tribe was a required party with a legally protected interest where plaintiffs sought invalidation of federal agency approvals of, among others things, leases, rights-of-way, and permits); *see also Kescoli*, 101 F.3d at 1310-11 (holding that absent tribes were required parties where litigation threatened the tribes' interests in their lease agreements and the ability to obtain the bargained-for royalties and jobs).

Plaintiffs' attempts to deny that the Tribe has a legally protected interest are unavailing.

First, Plaintiffs assert (at 38) that the Tribe does not have a legally protected interest because the Lease approval here does not involve an "ongoing" activity. That purported distinction is nowhere to be found in this Court's precedent and does not make sense as a practical matter given that the Tribe is *already* receiving benefits under the approved Lease.

In support of their argument that only "ongoing" activity is legally protected, Plaintiffs quote *Diné Citizens* for the proposition that "[a]n absent party has *no legally protected interest at stake* in a suit merely to enforce compliance with administrative procedures." Opening Br. 37 (quoting *Diné Citizens*, 932 F.3d at

852). But the full quote (including the portion omitted from Plaintiffs' opening brief) refutes Plaintiffs' contention. In *Diné Citizens*, this Court held that "[a]lthough an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, *our case law makes clear than an absent party may have a legally protected interest stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted.*" 932 F.3d at 852 (emphasis added); *see also Jamul*, 974 F.3d at 997 (distinguishing between claims that would have "retroactive effects" on rights already granted to a tribe and claims that would only affect future administrative processes).

Contrary to Plaintiffs' assertion, the distinction is not between ongoing and future activities but between vested rights and prospective agency action. In *Diné Citizens*, for example, as in this case, this Court considered a NEPA challenge and held that the Navajo Nation had a protected interest in the "approvals already granted," including "interest in the existing lease, rights-of-way, and surface mining permits that would be impaired." 932 F.3d at 853. The Court emphasized the distinction between future, potential rights and already vested rights. *Id.* at 852-53. In this context, the Court specifically addressed *Makah*, which Plaintiffs misconstrue (at 39-40). *Diné Citizens* explained that while *Makah* found that an absent tribe lacked a legally protected interest in relief that would affect future conduct of

administrative process for succeeding years' ocean fishing allotments, *Makah* found that absent tribes *did* have a legally protected interest in already allotted ocean fishing rights. 932 F.3d at 852-53; *see also id.* at 853 (noting that *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 973 (9th Cir. 2008) held that the absent tribes had legally protected interests in already issued gaming licenses and only permitted suit to go forward in tribes' absence as to "the issuance of future licenses" (emphasis omitted)).

The same distinction is reflected in *Kescoli* and *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999). In *Kescoli*, the interests at stake were existing "lease agreements and the ability to obtain the bargained-for royalties and jobs." 101 F.3d at 1310. The plaintiff there, in fact, made a similar argument to that raised by Plaintiffs here—specifically, that she did not "seek to challenge the validity of the lease agreement" but sought "only to enforce the . . . obligation to ensure mining does not occur within 100 feet of a burial site." *Id.* This Court explicitly rejected that argument because it would impact preexisting rights, including (as here) a lease. *Id.* The Court's analysis turned on the fact that a valid lease existed and the litigation could "affect the amount of royalties received by the Navajo Nation and the Hopi Tribe and employment opportunities for their members." *Id.* Similarly, in *Clinton*, members of the Navajo Nation sought to prevent the Secretary of the Interior from approving any leases between Navajo Nation members living on Hopi land and the

Hopi Tribe. 180 F.3d at 1083. At the time of suit, the Secretary had not approved any such leases. But because the plaintiffs' requested relief would have prohibited the Hopi Tribe from entering into such leases "and would deprive the Tribe of substantial compensation from the United States (over $25 million) and the creation of additional trust lands, which is conditioned on Secretary Babbitt's approval of certain numbers of such leases," the Hopi Tribe had "a legally protected interest relating to the subject of the action as defined by Rule 19(a)(2)." *Id.* at 1089. The Court's analysis thus turned on the Hopi Tribe's vested rights, not whether it had already engaged in leasing activity.

Post-*Diné* cases have followed the same path. For example, in *Jamul* and *Deschutes* this Court held the relevant tribes had an interest in the litigation because the litigation could affect their pre-existing legal interests in property and contract. *See Deschutes,* 1 F.4th at 1163 (affirming dismissal of a Clean Water Act challenge against a hydroelectric project because it could "impair the Tribe's interest as co-owner and co-operator of the Project" *and* that the stakes of the litigation extended "beyond the fate of the Project and implicate sovereign interests in self-governance and the preservation of treaty-based fishing rights"); *see also Jamul*, 974 F.3d 984 at 990, 996-97 (in challenge seeking to enjoin the construction and operation of a casino, absent tribe's interest would be affected because the claims could have "far-

reaching retroactive effects" on the tribe's "existing sovereign and proprietary interests").

Here, Plaintiffs' prayer for relief makes clear that they are not simply seeking "compliance with administrative procedures" (at 38), but seeking to invalidate Project approvals and enjoin further approval of Project activities. SER-128 (requesting that the court "[o]rder Defendants to withdraw their Project approvals"; "[p]reliminarily and permanently enjoin Defendants from initiating or permitting any activities in furtherance of the Project"). This is precisely the type of impairment of legally protected interests that this Court has uniformly found sufficient to make a party necessary under Rule 19(a).

In any event, Plaintiffs' purported distinction here does not make sense as a practical matter given that the Tribe is already receiving tangible benefits from the federally approved Lease. Those benefits include income streams, scholarships, job opportunities, and employment preferences. The relief Plaintiffs seek would affect those preexisting benefits. *See Dawavendewa*, 276 F.3d at 1157 (holding Navajo Nation was necessary party because lawsuit threatened hiring preference lease provision and "a judgment rendered in the Nation's absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the Navajo reservation") And the mere fact that the Tribe may receive *additional* benefits in the future (a fact true in all the cases in which this Court found a tribe was a required party) only

confirms that the Tribe has a legally protected interest in the approved Lease. *See Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975) (finding Hopi Tribe a necessary party because "the royalties to be paid under the [challenged] lease still amount to more than $20 million").

Second, relying on *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861 (9th Cir. 2004), Plaintiffs wrongly suggest (at 39) that the interest here is "a speculative financial stake." As discussed above, the Tribe's legally protected interest here is in a federally approved Lease and in its sovereign right to manage its resources—not just a financial stake in the outcome of litigation.

In any event, as the district court aptly explained, the challenge at issue in *Disabled Rights* would not have the effect of setting aside a contract or attacking its terms. I-ER-18 (quoting *Disabled Rights*, 375 F.3d at 881). If the challenge in that case had been successful, "the contract would not be invalidated or 'set aside,' but would remain legally binding." *Disabled Rights*, 375 F.3d at 881. As the district court made clear, Plaintiffs here request that the Federal Defendants "withdraw their Project approvals" and enjoin "activities in furtherance of the Project"—acts that would destroy the Tribe's rights in the federally approved Lease. I-ER-18–19.

Third, Plaintiffs broadly contend that the district court failed to "consider that compliance with federal environmental laws will improve rather than block the

project."[6] Opening Br. 32 (capitalization normalized). But the district court correctly concluded that Plaintiffs' requested relief would interfere with the Tribe's interest. Plaintiffs' requested relief would invalidate the federally approved Lease and enjoin the Project. SER-128. Once again, Plaintiffs ignore the true legally protected interest at stake here—the Tribe's vested rights in its Lease with Terra-Gen.

Perhaps recognizing the flaws in their position, Plaintiffs try to downplay the Tribe's existing rights by suggesting that the FAA is still reviewing the Project in some form. Opening Br. 19-22; *see also id.* at 45 ("[T]he FAA may require changes

[6] Plaintiffs' argument in this section is irrelevant and simply serves as an opportunity for them to advocate for their own view of the Project and the merits of the Federal Defendants' analysis. Plaintiffs made a similar ploy in opposing the Tribe and Terra-Gen's motion to dismiss, which the district court correctly rejected. *See* I-ER-14 n.2 ("Plaintiffs devote the bulk of their Opposition to arguments that are irrelevant to the present Motion."). Plaintiffs assert that the Project is opposed by Tribal members and otherwise not in the best interest of the Tribe. Opening Br. 32-36. But as the district court recognized, "the Tribe is representing that it has approved the Project, wishes it to go forward, and seeks dismissal of Plaintiffs' challenges via the present Motion [to Dismiss]." I-ER-14 n.2. Indeed, the Tribe confirmed its position with BIA during the approval process. V-ER-1149. *Further*, Plaintiffs are dead wrong that "the Project is not already fully approved." Opening Br. 32. The Project has received all required approvals. As noted, the FAA has already issued its final decision and denied Plaintiffs' petition for review. *See supra* at 11 n.1, *infra* at 37. Plaintiffs' appeal of the FAA's discretionary decision to decline to reconsider its approvals is just another last-ditch attempt to thwart the Tribe's economic development. And *finally*, Plaintiffs support their criticism of BIA's NEPA analysis with declarations never before BIA and which this Court should disregard. *See supra* at 26 n.4.

to the final configuration of the Project—including the height and locations of the Project's turbines—to avoid hazards to navigation."). That is wrong. Plaintiffs failed to disclose to this Court that the FAA has issued a determination that the Project poses "no hazard to air navigation," *see, e.g.*, FAA, Determination of No Hazard to Air Navigation, Aeronautical Study No. 2019-WTW-4517-OE (Aug. 31, 2021), https://oeaaa.faa.gov/oeaaa/external/searchAction.jsp?action=displayOECase&oeCaseID=404198091&row=0. The FAA also denied Plaintiffs' request for administrative reconsideration of that "no hazard" determination because Plaintiffs failed to comply with the procedural requirements to challenge it. And Plaintiffs know of that decision—indeed, they have petitioned for review of FAA's denial of their request for administrative reconsideration and that petition is pending before this very Court as a related case. *See Backcountry Against Dumps v. FAA*, No. 21-71426 (9th Cir.).

Fourth, Plaintiffs contend (at 39) that "BIA and Terra-Gen adequately represent the Tribe's interests here." That assertion is belied by this Court's precedent and the unique relationships between the Tribe, the Federal Defendants, and Terra-Gen. "Three factors are relevant to whether an existing party may adequately represent an absent required party's interests." *Diné Citizens*, 932 F.3d at 852. These factors include: (1) "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments";

(2) "whether the party is capable of and willing to make such arguments"; and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Id.* (quoting *Alto v. Black*, 738 F.3d 1111, 1127-28 (9th Cir. 2013)).

As this Court has repeatedly recognized, the Federal Defendants and private commercial parties are not positioned to adequately represent a tribe's sovereign interest in cases like this one. As the district court correctly concluded, the "Federal Defendants' interests differ from the Tribe's, given that Federal Defendants' overriding interest must be in complying with environmental laws, an interest that is meaningfully different from the Tribe's sovereign interest in ensuring that the Project is realized." I-ER-20.

That conclusion is amply supported by this Court's precedent. Take *Diné Citizens*, where this Court held that BIA could not be counted on to represent the Navajo Nation's interest because the federal defendants' overriding interest "must be in complying with environmental laws such as NEPA and the ESA" and that interest differed in a "meaningful sense" from the "Navajo Nation's sovereign interest in ensuring that the" projects at issue in that case "continue to operate and provide profits to the Navajo Nation." 932 F.3d at 855. This Court came to the same conclusion in *Jamul*. *See* 974 F.3d at 997 ("Applying that standard, we have held that federal defendants would not adequately represent an absent tribe where their

obligations to follow relevant environmental laws were in tension with tribal interests . . . .").

So too here. As in *Diné Citizens*, the Federal Defendants' interest here is limited to compliance with applicable environmental laws—in this instance NEPA, the MBTA, and the Eagle Act. The Tribe's interest is in protecting its exercise of sovereign authority by managing its own natural resources and facilitating economic support of core Tribal government functions by entering into the Lease. Just as in *Diné Citizens*, the complaint seeks to invalidate the Lease. SER-128 (requesting an order directing defendants to withdraw all approvals and the Final EIS). If the district court held that the Federal Defendants violated NEPA, the MBTA, or the Eagle Act, the Federal Defendants' "interest might diverge from that of" the Tribe. *See Friends of Amador Cnty. v. Salazar*, 554 F. App'x 562, 564-65 (9th Cir. 2014) (affirming district court's finding that the United States could not adequately represent the tribe because of the "divergent interests between the Tribe and the government"); *see also Ctr. for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1227 (D. Colo. 2012) ("The Nation has significant and important economic interests in the uninterrupted continuation of the Navajo Mine, which interests simply do not impel OSM or the Department of the Interior . . . . While a vacatur of the permit may be inconvenient for the federal defendants, contrastingly, it is potentially devastating for the Nation."). And as in *Diné Citizens*, a holding that

those statutes "required something other than what Federal Defendants have interpreted them to require could similarly change Federal Defendants' planned actions, affecting the lease" between the Tribe and Terra-Gen. 932 F.3d at 855.[7]

As the district court correctly held, Terra-Gen is also not an adequate representative of the Tribe's interest. As the Court observed in *Deschutes*, a private company defendant cannot adequately represent tribal interests, in a circumstance such as this one, because the company's "interests in this litigation begin and end with the Project." 1 F.4th at 1163. In contrast, "for the Tribe, the stakes of th[e] litigation extend beyond the fate of the Project and implicate sovereign interests in self-governance and the preservation of . . . rights." *Id.*; *see also Diné Citizens*, 932 F.3d at 856 (company that entered into lease with tribe was not adequate representative because it did not share the tribe's interest in the tribe's "ability to govern itself, sustain itself financially, and make decisions about its own natural resources").

Though both Terra-Gen and the Tribe share financial interest in the Project, Terra-Gen's interest ends there. Terra-Gen does not share the Tribe's "*sovereign*

[7] *Makah* is not to the contrary. There, as explained *supra* at 31-32, plaintiffs were permitted to proceed as to prospective allocation decisions only, but were not permitted to seek reallocation of already-granted tribal rights. 910 F.2d at 559. Here, BIA has already approved the Lease for the Project. Plaintiffs are not seeking to change BIA's procedures for future project or lease approvals. *See* SER-128.

interest in controlling its own resources" and in the "financial support" the Lease provides to the Tribe. *Diné Citizens*, 932 F.3d at 855-56. The Tribe's "interest is tied to its very ability to govern itself, sustain itself financially, and make decisions about its own natural resources." *Id.* at 856.

Plaintiffs' invocation of a district court case, *Lennar Mare Island, LLC v. Steadfast Insurance Co.*, 139 F. Supp. 3d 1141 (E.D. Cal. 2015), does not help their cause. First, that district court case predates the Ninth Circuit's rulings in *Diné Citizens*, *Jamul*, *and Deschutes*. Second, there, all the parties shared the same singular goal of "preserv[ing] the structure of [their contract]." *Lennar*, 139 F. Supp. 3d at 1154. Here, the Federal Defendants' goal is to comply with federal law. Terra-Gen's goal is to maintain its financial stake. And while the Tribe's goals include defending the Lease, its interests also include exercising its "*sovereign* interest in controlling its own resources." *Diné Citizens*, 932 F.3d at 856 (emphasis in original); *see also Deschutes*, 1 F.4th at 1163 (dismissing for failure to join because the litigation implicated "sovereign interests in self-governance"). That is an interest that the *Lennar* court specifically concluded *was not* at issue in the circumstance before it. 139 F. Supp. 3d at 1155 ("[N]o sovereign interests are implicated here.").

On these facts, no other party to the litigation can adequately represent the Tribe's sovereign interests, and the district court correctly concluded that the Tribe must be joined.

B. The District Court Correctly Decided The Action Cannot Proceed In Equity And Good Conscience Without The Tribe

Because "[t]ribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe," the Tribe cannot be joined as a party to this litigation. *Diné Citizens*, 932 F.3d at 856. Thus, the only remaining Rule 19 question is "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

To evaluate whether an action can fairly proceed without a required party, courts consider the following "non-exclusive" factors:

> (1) the extent to which a judgment rendered in the [party's] absence might prejudice that [party] 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 [party's] absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Republic of Philippines v. Pimentel, 553 U.S. 851, 862 (2008) (quoting Fed. R. Civ. P. 19(b)).

The Ninth Circuit recognizes that the third and fourth factors are not determinative in cases involving tribal sovereign immunity. That is because this Court has "recognized that the lack of an alternative remedy 'is a common consequence of sovereign immunity." *Diné Citizens*, 932 F.3d at 858 (citation omitted). So has the Supreme Court. *See Pimentel*, 553 U.S. at 872 (recognizing that sovereign immunity in the Rule 19 context "will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims"). Thus, in cases like this one, this Court "ha[s] regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Am. Greyhound*, 305 F.3d at 1025; *see also Diné Citizens*, 932 F.3d at 857 (recognizing the "wall of circuit authority" in favor of dismissing claims "regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity" (alteration in original) (quoting *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014))); *Jamul*, 974 F.3d at 998 ("The balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to sovereign immunity."); *Deschutes*, 1 F.4th at 1163 ("This case is no exception . . . [e]quity and good conscience thus do not permit [plaintiff's] suit to proceed when the action involves protected interests of the Tribe that could be impaired in its absence."); *White*, 765 F.3d at 1028 ("[V]irtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether

a remedy is available, if the absent parties are Indian tribes invested with sovereign immunity." (citation omitted) (collecting cases)).[8]

Plaintiffs object to two supposed aspects of the district court's analysis. First, Plaintiffs assert that the district court "failed to consider the many ways in which prejudice to the Tribe can be lessened." Opening Br. 36 (capitalization normalized). Second, Plaintiffs suggest that the district court engaged in a "rote application of tribal immunity." *Id.* at 44. Those arguments are misplaced.

First, the district court appropriately recognized that the Plaintiffs did not propose a way to tailor relief "in a way that would lessen the prejudice to the Tribe." I-ER-23. Plaintiffs argue that the court could fashion relief that would improve the Project, rather than block the Project, by ordering the Federal Defendants to conduct even more robust environmental analyses. Opening Br. 36-37. But, as below, Plaintiffs do not explain how that would lessen the prejudice to the Tribe of *invalidating* the approval of its Lease and risking that it is not subsequently re-approved or that it is re-approved with even more onerous requirements. *See Dawavendewa*, 276 F.3d at 1162 (court could not mitigate the prejudice to the

[8] As this Court has recognized, this may lead to a situation in which "no one could obtain [review of a tribal-related federal action] unless the tribe were willing to waive its immunity and participate in the lawsuit." *Diné Citizens*, 932 F.3d at 860-61. But that issue "is for Congress to address, should it see fit, as only Congress may abrogate tribal sovereign immunity." *Id.* at 861 (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014)). Congress has chosen not to do so.

interested tribe because any decision for the plaintiff "would prejudice the Nation in its contract . . . and its governance of the tribe"); *Kescoli*, 101 F.3d at 1311 (affirming district court's determination that shaping relief to lessen prejudice to tribes was impossible); *Lomayaktewa*, 520 F.2d at 1326 (no relief could lessen prejudice to tribe because plaintiffs sought to "deprive the Hopi Tribe of benefits under the lease on the order of tens of millions of dollars").

Plaintiffs' argument also ignores the actual relief they seek—an order that would invalidate the Lease entirely. Even if Plaintiffs had asked the district court to remand the approvals without vacatur (which they did not), prejudice to the Tribe would be unavoidable. For example, (1) if Plaintiffs ultimately succeed in their case and if, "after further NEPA . . . processes, Federal Defendants were not able to come to the same decisions without imposing new restrictions or requirements" on the Lease or Project, the Tribe would "inevitably . . . be prejudiced," *Diné Citizens*, 932 F.3d at 858, or (2) delay from litigation or additional NEPA process could result in the Project not moving forward *at all*. *See* 2-TG.SER-224 ¶ 18 (the approved Lease "is essential to the construction and operation of the Project"); 2-TG.SER-224–26 ¶¶ 22-24, 26 (granting Plaintiffs' requested relief could prevent the Project or put financing at risk, potentially cause breach of interconnection agreement, and hamper ability to market the power at all).

Second, Plaintiffs are simply wrong to suggest the district court (or this Court's prior decisions) engaged in a "rote application of tribal immunity." Opening Br. 44 (claiming this Court's decisions in *Deschutes* and *Diné Citizens* "overlook *Southwest Center's* caution against rote application of tribal immunity"). This Court has rightfully recognized that where a required party is immune from suit, there may be "very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *Diné Citizens*, 932 F.3d at 857 (quoting *Kescoli*, 101 F.3d at 1311). That case law recognizes the unique nature of "tribal sovereign immunity." *Id.* (citation omitted).[9]

But this Court has then balanced the factors. And that is just what the district court did here. On the prejudice factor, the district court noted that it "largely duplicates the considerations that made a party necessary under Rule 19(a)." I-ER-22 (quoting *Diné Citizens*, 932 F.3d at 857). Because the Tribe's interest here was in the approval of its Lease and the benefits to be gained under it, the district court properly concluded the Tribe would be prejudiced if absent from the litigation. I-ER-22; *see also Diné Citizens*, 932 F.3d at 857 (Navajo Nation would "be prejudiced

[9] Of course, *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998), did not "caution" against anything. In that case, the Court merely determined that the federal defendants, in the unique circumstances of that case, could adequately represent the tribe's interest, as this Court recognized in distinguishing the facts in *Diné Citizens*. *See* 932 F.3d at 854.

if this lawsuit were to proceed and Plaintiffs were to prevail—at stake is an estimated [tens of millions of dollars] in revenue for the Navajo Nation, as well as its ability to use its natural resources how it chooses.").[10]

The court correctly rejected Plaintiffs' argument that the Tribe would not be prejudiced because the Project had not been built yet. As stated, the Tribe's interest extends beyond the Project itself; it reaches the existing rights under the Lease and the Tribe's sovereignty. Because the Plaintiffs' requested relief would invalidate the Tribe's approved Lease and alter the Tribe's rights to current and future payments and employment preferences and opportunities for its members, "the relief requested

[10] Plaintiffs rely (at 42-43) on two out-of-circuit, district court cases, *Hayes, Trustee for the Paul B. Hayes Family Trust, Dated April 30, 2010 v. Bernhardt*, 499 F. Supp. 3d 1071 (N.D. Okla. 2020), and *Dine Citizens Against Ruining Our Environment v. Klein*, 676 F. Supp. 2d 1198 (D. Colo. 2009), to argue that this case can proceed in good conscience and equity. Both cases relied on the Tenth Circuit's decision in *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977). As a district court in this Circuit put it, "*Manygoats* is an out-of-circuit decision which has not been embraced by the Ninth Circuit in the many years that have followed. Instead, this Circuit has consistently dismissed actions under Rule 19 where it concludes an Indian tribe is 'necessary' yet not capable of joinder due to sovereign immunity." *White v. Univ. of Cal.*, No. 12-cv-1978, 2012 WL 12335354, at *11 (N.D. Cal. Oct. 9, 2012), *aff'd,* 765 F.3d 1010 (9th Cir. 2014). In any event, there are important distinguishing factors with both cases. *See Hayes*, 499 F. Supp. 3d at 1074 (private company, not tribe, moved to dismiss and plaintiff was the actual owner of the land where mineral extraction would occur); *see also Dine Citizens*, 676 F. Supp. 2d at 1217 (challenge there was not "to the Tribe's lease agreement with [a private party] or an attempt to enjoin all mining under that lease").

by Plaintiffs clearly would have an adverse impact on the Tribe." I-ER-23; SER-11–12 ¶¶ 43-44 (describing consequences of invalidating the Lease).

As the Tribe explained below, invalidating the Lease would deprive the Tribe of its current Lease and Project benefits, and the Tribe would also lose "the ongoing rights obtained through the Lease and vested with BIA's approval of the Lease, including ongoing revenue, the governmental services and programs such revenue will support, and the benefits to other economic development ventures of the Tribe." SER-11–12 ¶ 43. The Tribe "would lose construction, traffic control, monitoring and security jobs, fire and emergency services, increased education opportunities, and all financial support for its general welfare programs including housing, social services, education, meals, water and utility programs, elder programs, cultural education and development, and health and welfare programs." *Id.* And invalidating the Lease and infringing on the Tribe's sovereignty would "deter ongoing potential business interests from transacting with the Tribe, as they could be concerned that the Tribe is not provided the opportunity to self-govern, and make its own business decisions." *Id.* ¶ 44; *see also Dawavendewa*, 276 F.3d at 1157 (ruling that impairment of contract would affect tribe's sovereign capacity to negotiate contracts and therefore "undermine[] the Nation's ability to govern the reservation effectively and efficiently").

The district court also correctly concluded that "[t]he second factor, the court's ability to shape relief so as to avoid prejudice," *Diné Citizens*, 932 F.3d at 858, also favored dismissal. As in *Diné Citizens*, the court recognized that even remanding without vacatur of the Lease approval would prejudice the Tribe if Plaintiffs eventually succeeded. *See id.* ("[T]he Navajo Nation inevitably would be prejudiced if Plaintiffs ultimately succeeded and if, after further NEPA and ESA processes, Federal Defendants were not able to come to the same decisions without imposing new restrictions or requirements on the [projects]."). Moreover, delay would prejudice the Tribe by denying the benefits of the agreement with Terra-Gen and might lead to the loss of the Project altogether if Terra-Gen concluded the delay was too significant to justify moving ahead with the Project. As one Terra-Gen employee testified, if "Terra-Gen is unable to bring the Project online by [February 15, 2024], it could become in breach of [its interconnection] agreement if not cured." 2-TG.SER-225 ¶ 24. And any delay in the Project would also risk "Terra-Gen's ability to market power from the Project, even if the NEPA review and Record of Decision for the Project are ultimately upheld." *Id.* ¶ 23. Because the Lease provides royalties to the Tribe, any loss of energy sales will decrease the Tribe's revenues under the Lease.

Taking the factors together and in accordance with Ninth Circuit precedent, the district court properly determined that the action here could not proceed in equity

and good conscience without the Tribe. *See* I-ER-24; *Diné Citizens*, 932 F.3d at 857-58 (affirming finding that case could not proceed in equity and good conscience without tribal entity); *Kescoli*, 101 F.3d at 1310-11 (same); *Lomayaktewa*, 520 F.2d at 1325-27 (same).

III. THE DISTRICT COURT CORRECTLY HELD THAT THE PUBLIC RIGHTS EXCEPTION DOES NOT APPLY

The public rights exception is "a limited 'exception to traditional joinder rules' under which a party, although necessary will not be deemed 'indispensable,' and the litigation may continue in the absence of that party." *Diné Citizens*, 932 F.3d at 858 (quoting *Conner v. Burford*, 848 F.2d 1441, 1458-59 (9th Cir. 1988)). The exception arises in litigation that "transcend[s] the private interests of the litigants and seek[s] to vindicate a public right." *Id.* (alterations in original) (quoting *Kescoli*, 101 F.3d at 1311). Importantly, the exception "may apply in a case that could 'adversely affect the absent parties' interests,' but 'the litigation must not destroy the legal entitlements of the absent parties."' *Diné Citizens*, 932 F.3d at 858 (emphasis and citation omitted).

The district court correctly held that the public rights exception does not apply here for two independent reasons: First, the public rights exception did not apply because "the litigation would destroy the Tribe's contractual rights under the Lease." I-ER-26. Second, it did not apply because the litigation does not "transcend the litigants' private interests." *Id.* As the court concluded, the Amended Complaint

made clear that Plaintiffs' "private interests are a significant factor in the bringing of this litigation." *Id.*

Plaintiffs have waived any challenge to the district court's conclusion that this litigation would destroy the Tribe's entitlement by not addressing it on appeal. That alone is sufficient to affirm the district court's conclusion that the public rights exception does not apply—and ends the inquiry.

But, in any event, the district court was correct when it held that the public rights exception did not apply here because it would destroy the Tribe's legal entitlement. It rightly followed this Court's example in *Diné Citizens* and *Kescoli* in which the Court held the public rights exception did not apply because each litigation threatened to destroy the tribes' existing legal entitlements. *Diné Citizens*, 932 F.3d at 860; *see also Kescoli*, 101 F.3d at 1311-12 (holding public rights exception did not apply because litigation threatened tribes' rights under existing lease agreements). Because a ruling adverse to the Tribe would invalidate the Lease approval, "[the Tribe] would lose all associated legal rights." *Diné Citizens*, 932 F.3d at 860. For that reason, this litigation "threatens to destroy [the Tribe's] existing legal entitlements." *Id.* The mere threat of destroying an absent party's legal entitlements is enough to preclude application of the public rights exception. *Id.*

The district court also correctly concluded that the interests here were private. The district court recognized that Plaintiffs' interest in the case stemmed from the

claimed effect the Project would have on individuals "residing in Eastern San Diego County and Imperial County" who "use the area affected by the Project." I-ER-26 (quoting SER-73 ¶ 16). The district court also noted that the Amended Complaint focused on how the Project would harm the Tisdales' personal interest. *Id.* (quoting SER-73–74. ¶¶ 18–19). Because the Plaintiffs' private interests were a "significant factor in the bringing of this litigation," the district court found the litigation did not transcend the private interests of the parties. *Id.*

This Court upheld a similar determination in *Kescoli*. There, a Navajo Nation member challenged a mining lease as not adequately protective of sacred burial sites. *Kescoli*, 101 F.3d at 1308. As here, the plaintiff asserted the public rights exception as an attempt to avoid dismissal for failure to join the relevant tribes. This Court rejected the plaintiff's argument because it found "the essence of her dispute is her disagreement with the Tribal leaders over what is in the best interests of the Navajo Nation and the Hopi Tribe. . . . Kescoli's action is essentially private in nature, limited to a disagreement over the appropriate direction the Navajo Nation and the Hopi Tribe should take in relation to the mining." *Id.* at 1311.

The same reasoning applies here. *First*, the Project's public benefits reveal that Plaintiffs' challenge is, and has always been, about their own private interests. San Diego County unanimously approved the Project because of the public benefits that would flow from the Project to the region and beyond. 2-TG.SER-223 ¶ 11; 2-

TG.SER-228–30. The County found that the Project would have "economic, legal, social, technological" and other benefits that independently outweighed any unavoidable adverse environmental effect of approving the Project. 2-TG.SER-228. The Project would also "result in substantial tax benefits, job benefits, and broader economic benefits for the County of San Diego region," including short- and long-term benefits, over $400 million of direct capital investment, tens of millions of dollars of sales taxes, property taxes, and Tribal fees, and "significant economic benefits for the Campo Tribe and its members." 2-TG.SER-229.

Second, Plaintiffs have a history of filing and settling similar lawsuits for pecuniary gain. Between 2011 and 2013, Plaintiffs Donna Tisdale and Backcountry Against Dumps "settled lawsuits with six different solar and wind developers for more than $10 million, and 500 acres of public land worth $2.5 million." 1-TG.SER-3 n.4.

Third, even apart from any potential financial interest in this litigation, Plaintiffs have a history of opposing the Tribe's economic development decisions. Plaintiffs opposed the Tribe's decision in the 1990s to develop a landfill and organized a disinformation and opposition campaign. SER-13 ¶ 48. When the Tribe tried a second time to develop a similar landfill a decade later, Plaintiffs again thwarted that project. *Id.* ¶ 49. Plaintiffs also opposed the Tribe's opening of the Golden Acorn Casino in 2001 and the Tribe's decision to sell water to a large utility

project to generate temporary income. SER-13–15 ¶¶ 50, 55. And Plaintiffs opposed the Tribe's efforts to develop wind energy in 2006 and 2007. *Id.* ¶¶ 51, 54. At every turn, Plaintiffs have opposed the Tribe's economic development activities. Despite Plaintiffs' claims that they have sued to *protect* Tribal interests, it is clear that Plaintiffs' own personal interests are driving their litigation efforts. *Kescoli*, 101 F.3d at 1308. The district court rightly concluded the public rights exception does not apply.

CONCLUSION

The district court's order dismissing the case should be affirmed.

Dated: May 24, 2022

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Intervenor-Defendant-Appellee Terra-Gen Development Company, LLC states that this case is related to *Backcountry Against Dumps v. Federal Aviation Administration* (appeal pending, Ninth Cir. Case No. 21-71426).

Dated: May 24, 2022

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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