

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' REPLY BRIEF

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INTRODUCTION

As Plaintiffs and Appellants'¹ (“Backcountry’s”) Opening Brief (“AOB”) (Dkt.18) makes clear, Defendants and Appellees United States Bureau of Indian Affairs, et al.’s (“BIA’s”) failure to comply 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.*, and the Bald Eagle and Golden Eagle Protection Act (“Eagle Act”), 16 U.S.C. section 668 *et seq.*, in approving the Campo Wind Project (“Project”) poses grave issues of environmental justice that should be resolved on the merits. Instead of addressing the merits and enforcing the federal environmental laws that were violated, however, the District Court improperly dismissed all the claims raised in Appellants’ First Amended and Supplemental Complaint (Tribe-SER-67-128; “Amended Complaint”) under Rule 19, Federal Rules of Civil Procedure.

The District Court’s Rule 19 dismissal foreclosed the public’s ability to challenge BIA’s decisionmaking process even as the Project – which will be constructed upon land that Appellee Terra-Gen, LLC (“Terra-Gen”) will lease on Appellee Campo Band of Diegueno Mission Indians’ (“Tribe’s”) Reservation, as well as on land outside that Reservation – threatens the health, safety and environmental quality of surrounding rural communities. Because that dismissal shuts the courthouse door to meritorious claims brought under the Administrative Procedure Act (5 U.S.C. section 706; “APA”) – despite the fact the Tribe’s interests *in the validity of the lease approvals* are sufficiently represented by

¹ Backcountry Against Dumps, Donna Tisdale and Joe E. Tisdale (collectively “Appellants”).

Terra-Gen and BIA -- it constitutes an abuse of discretion. None of Appellees' Answering Briefs² shows otherwise.

ADDENDUM

In accordance with Ninth Circuit Rule 28-2.7, all pertinent statutes and regulations are contained in the Addendum to Appellants' Opening Brief (Dkt. 18).

STATEMENT OF REBUTTAL FACTS

I. BACKCOUNTRY CHALLENGES BIA'S APPROVAL ONLY; BACKCOUNTRY HAS NEVER CHALLENGED THE LEASE

Appellees premise their arguments on the false claim that Backcountry's lawsuit challenges the Tribe's Lease with Terra-Gen. Tribe 57; TG 51. Not so. *The Tribe and Terra-Gen have refused to disclose their Lease to Backcountry, and it is not in the record before this Court. E.g., II-ER-95. This lawsuit is strictly a challenge to BIA's approvals under the APA and does not challenge the Tribe's Lease with Terra-Gen, a private contract over which Backcountry has never sought judicial review. Tribe-SER-67-128 (Amended Complaint). The relief sought is limited to vacation of BIA's approvals and an injunction against their implementation to remedy BIA's violations of NEPA, the MBTA and the BGEPA; no relief is sought against either the Tribe or Terra-Gen, let alone their Lease. Tribe-SER-127-128 (Prayer).*

The District Court's statement that "Plaintiffs *are* challenging the Tribe's extant Lease with Terra-Gen" (I-ER-18, original emphasis) is incorrect.

² Federal Appellees' Answering Brief (Dkt 28) ("BIA"); Appellees' Answering Brief filed by Campo Band of Diegueno Mission Indians (Dkt. 30) (Tribe"); Answering Brief of Intervenor-Defendant-Appellee Terra-Gen Development Company, LLC (Dkt. 32) ("TG").

Backcountry has never challenged the Lease. The Lease antedates BIA's approvals; the Tribe's receipt of benefits thereunder, such as the scholarship program started in 2019, commenced before BIA's approval of the Lease in April 2020. Tribe-SER-10.

II. BACKCOUNTRY'S ADVOCACY REFLECTS WORK IN THE PUBLIC INTEREST, NOT MERE SELF-INTEREST

The Tribe attacks Backcountry's decades of tireless environmental advocacy as "self-interest" and "interference" (Tribe 8-12). Yet, as the AOB established, Backcountry's continuing struggle to protect the rural environment in California's interior border communities arises not from self-interest but instead from a genuine concern that exploitative and damaging projects will irreparably degrade the areas' environmental integrity and the residents' health, safety and quality of life. AOB 11-12 (*citing* VI-ER-1291-1293); II-ER-63-69; III-ER-410-421; VI-ER-1288-1290, 1306-1313.

The Tribe even accuses Backcountry of leading "significant misinformation campaign[s]" against the Tribe, but fails to reference a single example of any supposed misstatement Backcountry ever made. Tribe 9, 12 (*citing* Tribe-SER-13, 63). As Ms. Tisdale's declarations below make plain, the Tribe's unseemly smears are readily refuted by the facts, which Ms. Tisdale recounts in detail and with documentation. II-ER-63-69; III-ER-410-421; VI-ER-1288-1293, 1306-1313. Backcountry's concerns are supported by research and evidence, and have been raised with broad community support – including from Tribal members who would be directly impacted. *Id.* Indeed, many of Backcountry's educational efforts were carried out jointly with Tribal elders and leaders. *Id.*

The Tribe attacks Backcountry's decades of representation of the "largely poor, minority, elderly and disadvantaged residents" of their rural community, claiming – again, without citation – "that is not who [Backcountry's members] are." Tribe 25. Actually, that is exactly who Backcountry's members are. Like most Backcountry members, Ms. Tisdale and her husband are elderly. Mr. Tisdale is in his eighties and has severe medical challenges. For many decades (Mr. Tisdale for 59 years, and Ms. Tisdale for 45 years) they have lived in the same double-wide trailer accessed by a long dirt road. VI-ER-1319-1320. For more than thirty years, Ms. Tisdale has been elected by the voters of her Boulevard community to the Boulevard Planning Group, where she has served tirelessly as its Chairwoman working for her constituents to maintain their quality of life. II-ER-63-69; III-ER-410-421; VI-ER-1289-1293. Ms. Tisdale has been re-elected over and over again precisely because she has done an outstanding job of representing the "largely poor, minority, elderly and disadvantaged" residents of this poor rural community. *Id.*

Intervenor-Defendant-Appellee Terra-Gen Development Company, LLC
Terra-Gen likewise resorts to *ad hominem* tactics, claiming Plaintiffs previously settled "similar lawsuits for pecuniary gain." TG 53, repeating misleading extra-record hearsay. The truth is: Backcountry helped farmers whose leaseholds were terminated by solar projects blanketing Imperial County secure funds to purchase alternate farmland, enabling them to continue feeding our nation, a noble accomplishment consistent with Backcountry's non-profit purposes. II-ER-68. Farming supports far more workers and agricultural supply businesses year in and year out than temporary solar and wind construction jobs, and remote monitoring.

III. APPELLEES MISSTATE THE BALANCE OF HARMS

A. THE PROJECT'S ENVIRONMENTAL HARMS ARE SIGNIFICANT

Appellees urge in their briefs, and the District Court mistakenly suggested, that Backcountry brought this case to protect its members' personal interests rather than the broader public interest in environmental quality. TG 19; Tribe 3, 25, 51. Appellees also argue that the BIA adequately addressed the Project's impacts on the environment. TG 6-14; BIA 8-11. Their arguments also implicate the proper application of Rule 19(b)'s "equity and good conscience" basis for allowing a case to proceed where a required party cannot be joined, and the public rights exception to Rule 19's requirement that indispensable parties be joined. Therefore Backcountry argued below, and argues again on appeal, that the Project's impacts on the public should be considered in applying Rule 19(b). AOB 37-48.

Contrary to Appellees' arguments and the District Court's premise, this 10-mile long Project poses significant environmental harms to surrounding communities. AOB 12-29. Because those harms impact the public's broad interests, they should be considered in applying both the equity and good conscience test, and the public interest exception. Backcountry demonstrated through extensive discussion of the record evidence that the Project would impact the public's environmental interests in nine distinct respects: noise (AOB 14-15), wildfire ignition and suppression (AOB 16-19), aviation safety including aerial firefighting (AOB 19-22), visual impacts including shadow flicker (AOB 23-24), water resources (AOB 24-25), impacts on avian species including golden eagles (AOB 25-26), impacts on the quino checkerspot butterfly (AOB 27-28), socioeconomic impacts (AOB 28), and global warming impacts (AOB 28-29).

Appellees trivialize or ignore these Project impacts. Terra-Gen downplays the Project's impacts on the grounds they were adequately addressed in BIA's NEPA review. TG 10-14. But Terra-Gen cannot have it both ways. It cannot rely on the BIA's supposedly sufficient environmental review to claim the Project will not harm the community, on the one hand, and then object to Backcountry's detailed expert evidence revealing the BIA's grave NEPA errors and omissions and the Project's severe impacts. As Backcountry's explains, in each instance BIA failed to take the required hard look, as detailed in Backcountry's Complaint (VI-ER-1331-1351) and First Amended and Supplemental Complaint (Tribe-SER-85-108), and thoroughly documented in Backcountry's expert and lay testimony. II-ER-278-321 (noise expert Dr. Richard A. Carman); II-ER-234-266 and 549-554 (noise engineer Steven Fiedler); II-ER-267-277 (hydrologist Scott Snyder); II-ER-402-409 (wildfire expert and retired CalFire Battalion Chief Mark Ostrander); II-ER-63-89, III-ER-410-554, VI-ER-1288-1313 (lay witness and planning expert Boulevard Planning Group Chairwoman Donna Tisdale).

First, as to the noise impacts, Backcountry has proven that the BIA's environmental review mistakenly examined much smaller (less than 2 MW) and thus much quieter turbines than the huge 4.2 MW turbines (with a rotor blade sweep of 460 feet) the Project would instead erect and operate, failed to utilize the appropriate baseline noise levels for comparison, and omitted consideration of many of the closest sensitive receptors such as residences among other failings, and that due to these mistakes, BIA's Final Environmental Impact Statement ("FEIS") substantially understated the Project's acutely disruptive and harmful noise impacts. AOB 14-16 and evidence therein cited, including (1) the testimony of Dr. Richard Carman (II-ER-278-306) and his extensive comments that

Appellants timely submitted to BIA in July 2019 (II-ER-307-321) long before the BIA's project approval on April 20, 2020 and (2) the testimony of noise engineer Steven Fiedler (II-ER-234-243) and his extensive comments that Appellants timely submitted to the BIA in July 2019 (II-ER-244-266) and March 2020 (II-ER-549-554), likewise before the BIA's project approval on April 20, 2020.

Backcountry's expert evidence thoroughly documenting the vastly understated noise impacts to neighboring residents, both on- and off-Reservation, strongly supports Backcountry's Rule 19 point that the public interest is served by allowing this lawsuit to proceed. AOB 14-16, 34-36 (*citing* II-ER-280-281, II-ER-287, II-ER-289-290, II-ER-294); *see also*, VI-ER-1339-1442; Tribe-SER-85-89 .

Second, Backcountry's expert evidence that the Project would substantially increase the risks of wildfire to the surrounding community – most notably, to residents of the Reservation – likewise is information vital to the informed balancing process that Rule 19 mandates. Limiting the factors to be balanced instead to potential financial gain as the primary if not sole Rule 19 criterion as the Tribe and Terra-Gen urged below, and as the District Court ruled, wrongly reduces quality of life to a simple monetary calculation. Surely the residents' health and safety must be given weight in the balancing process. Appellants proved through competent expert evidence that BIA's FEIS failed to take a hard look at the increased risk of wildfire that the Project will bring to the rural Project area, both through increased ignition sources and through other hazards. AOB 16-19 (*citing and quoting* II-ER-625 (EIR Excerpts), III-ER-406-409); VI-ER-1349-1350; Tribe-SER-104-106.

Third, Backcountry's expert evidence also included testimony that the Project posed hazards to, and the FEIS failed to study and disclose, the Project's

hazards to aerial navigation and aerial firefighting. II-ER-402-409 (testimony of wildfire expert and retired CalFire Battalion Chief Mark Ostrander); see also, VI-ER-1350; Tribe-SER-106-107. Backcountry's AOB appropriately presents the serious but undisclosed hazards posed by the Project's turbines and towers, with citations to evidence that support these allegations. AOB 19-22 (*citing* II-ER-65-66, 73-79, 91-92, 99, 140-141, III-ER-408-409, 418-419, 769, VI-ER-1196-1197). And these allegations and evidence show that Backcountry's lawsuit is brought in the public interest, not merely a private one.

Fourth, Backcountry has proven the Project poses substantial visual impacts, including "shadow flicker," on surrounding residents both within and outside the Reservation. The AOB appropriately discusses how these impacts were not adequately disclosed by the FEIS, and would harm local residents surrounding the Project, with citation to supporting evidence. AOB 23-24 (*citing* III-ER-410-411, 413, 415, 417, 492-541, 543-547, IV-ER-627, 747, VI-ER-1214-1215, 1229, 1345-1348); Tribe-SER-101-104.

Fifth, Backcountry has proven through the testimony of hydrologist Scott Snyder that FEIS and BIA's Record of Decision ("ROD") fail to adequately study the harms to the local sole-source aquifer that the Project's construction could cause. AOB 24-25, 33-34 (*citing* II-ER-267-277); see also VI-ER-1342-1344; Tribe-SER-97-99. Because this aquifer is a federally-designated sole-source aquifer, and thus the only source of water for the area surrounding the Project (both on- and off-Reservation), its contamination or depletion would have catastrophic impacts for all local residents, who are currently enduring the worst drought in 1200 years. *Id.* The AOB presents Backcountry's expert testimony and

record evidence to show the risks of harm to the local community from such a disaster. AOB 24-25 (*citing* II-ER-269-276).

Sixth and seventh, Backcountry has raised substantial questions whether the FEIS failed to take the requisite hard look at harms to biological resources such as golden eagles and other avian species, as well as the quino checkerspot butterfly (“QCB”). VI-ER-1331-1334; Tribe-SER-85-94. The AOB details the gaps in the FEIS’s analysis of these impacts to avian species, supported with citations to the record. AOB 25-26 (*citing* IV-ER-609,729-739, 743, 771, 857). The AOB further explains the ways in which the Project harms the QCB by destroying and occupying viable QCB habitat and the failure of BIA’s assumptions to adequately address this destruction. AOB 27-28 (*citing* IV-ER-593, 603, 606, 608, 685, 700, 705, 764). By attempting to prevent the Project’s harms to biological resources, including protected species, Backcountry seeks to vindicate public rights for the greater good.

Eighth, Backcountry has likewise raised substantial questions regarding whether the Project’s socioeconomic impacts were not appropriately addressed in BIA’s FEIS. VI-ER-1350-1351; Tribe-SER-107-108. The AOB shows that the FEIS’s analysis of the Project’s socioeconomic impacts improperly dismissed those impacts as speculative instead of engaging in the rigorous review that NEPA requires. AOB 28 (*citing* III-ER-326-329, 343, 349-351, 412-417, 420).

Ninth, Backcountry has similarly raised substantial questions regarding whether the Project’s global warming impacts were not adequately disclosed and studied in the FEIS. VI-ER-1344-1345; Tribe-SER-99-101. The AOB demonstrates, for example, that the FEIS omitted consideration of the full life-cycle impacts of manufacturing, transporting, installing and decommissioning the

Project's components when it considered whether the Project's impacts were outweighed by global warming benefits. AOB 28-29 (*citing* IV-ER-662-667, 751-752, 794, V-EIR-1095, 1105).

The harms that arise from the Project's construction and operation are potentially mitigable, and the AOB has explained that Backcountry has sought through required environmental reviews to mitigate them, where feasible, to improve the Project and benefit the surrounding community. AOB 32-37.

The Tribe simply ignores these impacts, consistent with its inaccurate characterization of Backcountry as self-interested and its view that under Rule 19, the Tribe's interest in financial gain defines the relevant universe of interests -- displacing even the public rights exception. Tribe 54-57.

BIA likewise ignores Backcountry's documentation of the Project's wide-ranging and significant environmental impacts, apparently viewing them as irrelevant under Rule 19. BIA 7-11.

But the position of the Tribe and BIA that a project's impacts on the public – including nearby communities both within and without the Reservation – are irrelevant under Rule 19 cannot be the law. If that were the case, then the public interest exception to Rule 19 that has been recognized by this Court in the context of NEPA compliance for 44 years since *Conner v. Burford*, 848 F.2d1441, 1459 was decided in 1988, and by the Supreme Court for more than 80 years since it decided *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 363-366 in 1940, would first have to be overruled. Neither the Tribe nor BIA suggests that to be the case.

Congress adopted federal environmental laws in the expectation they would be enforced to protect the public, not ignored whenever a mere rule of court

allowed a party to conveniently avoid their enforcement. BIA concedes its discomfiture with such an “anomalous” result, but reluctantly acquiesces because it feels bound by this Circuit’s ruling in *Dine Citizens Against Ruining Our Env’t v. Bureau of Indian Affairs* (“*Dine Citizens*”), 932 F.3d 843 (2019), cert. denied, 141 S.Ct. 161 (2020). BIA 23-27. Backcountry discussed *Dine Citizens* on pages 38-39 and 44-45 of its AOB and responds to Appellees’ arguments regarding this ruling below, and in sections IV and V of this brief.

Ignoring the Project’s impact on the public on the grounds it is not relevant, as the District Court did, misapplies the law. As this Court recognized in *Dine Citizens*, “[t]he inquiry under Rule 19(a) ‘is a practical one and *fact specific*,’ and ‘few categorical rules inform [] this inquiry.’” *Dine Citizens*, 932 F.3d at 851 (emphasis added). All the pertinent facts must be considered, including those that inform an understanding of the public, as well as private (or tribal), interests that may be impacted, as well as the Rule 19-mandated inquiry whether the “interests in the underlying merits” of “non-parties clothed with sovereign immunity . . . are adequately represented” by existing parties. *Southwest Center for Biological Diversity v. Babbitt* (“*Southwest Center*”), 150 F.3d 1152, 1154 (9th Cir. 1998). As to the latter issue, “[t]hree factors are relevant:” whether (1) “the interests of the existing parties are such that they will undoubtedly make all the absent 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.” *Id.* at 1153-1154 (emphasis added); *Dine Citizens*, 932 F.3d at 852. The focus is on the merits *arguments* (and their necessary elements) the existing parties will make, not on their far more amorphous and diffuse interests, because (1) those will always differ in some

respects, as no two parties are ever identical, and (2) they are not pertinent to the *specific* question posed under Rule 19: are the existing parties “capable of and willing” to make the same *arguments* as the absent party, and thereby prevent prejudice to it? *Southwest Center* at 1153-1154.

Backcountry demonstrated in its AOB that these three tests are met here (AOB 41), and Appellees have presented no facts showing otherwise. To the contrary, BIA has advised this Court that it “continue[s] to adhere to the position that the United States is generally the only required party in litigation challenging final agency action.” BIA 2. Indeed, BIA openly concedes that “the United States remains concerned about the *Dine Citizens* [contrary] decision.” BIA 27.

As for Terra-Gen, despite spending more than 20 pages of its brief trying to argue why this case must be dismissed, Terra-Gen utterly failed to identify a single merits *argument* in opposition to Backcountry’s NEPA, Migratory Bird Treaty Act (“MBTA”) and Bald and Golden Eagle Protection Act (“BGEPA”) challenges to BIA’s approval that it would be *unable or unwilling* to make. TG 28-50. It is obvious, actually, that there is no merits argument that Terra-Gen would be “unable or unwilling” to make to defeat Backcountry’s claims.

For this reason, Terra-Gen instead discussed the ways in which it and the Tribe had potentially differing *interests*. *Id.* But the only relevant inquiry under *Southwest Center* and *Dine Citizens* is whether Terra-Gen would be *unable or unwilling* to make any *arguments* in opposition to Backcountry’s NEPA, MBTA and BGEPA claims. It failed to state even one. *Id.*

Appellees fail to realize that their position that dismissal is mandated here – despite Terra-Gen’s ability to raise and advance all the arguments potentially needed to defend against Backcountry’s challenges – stretches Rule 19 beyond

recognition. It reduces the Rule 19 analysis to a meaningless exercise which inevitably results in dismissal whenever a tribe chooses to absent itself.

Moreover, and ironically, by overlooking this Project's profoundly harmful impacts on the Tribe members that Appellees purport to protect, Appellees' position – and the District Court's ruling – achieve a result diametrically opposed to the purposes of Rule 19's required balancing processes. Enforcing federal environmental laws as Congress intended assures that all citizens – tribal or not – receive the benefits of a safe, healthy and high quality environment, and full disclosure of the impacts of proposed resource development projects on those measures of their quality of life. And, the interests of the surrounding communities both within and without the Reservation should be considered in applying the "equity and good conscience" and "public interest exception" tests under Rule 19, because both are essential components of the "public" interest that exception protects.

Otherwise, the adequacy of BIA's environmental review of tribal applications for resource development projects is effectively removed from judicial review. Unless the affected tribe waives sovereign immunity, enforcement of the environmental laws BIA is required to implement is stymied.

Appellees have failed to show why the Rule 19 "equity and good conscience" and public interest exception balancing tests should not be applied in a manner that recognizes the full range of interests at play, rather than subordinating all of them to a simple monetary calculus. Just as they have failed to show why compliance with *Southwest Center's* and *Dine Citizen's* three-factor test for determining the absent party's adequacy of representation by the existing parties requires dismissal, so too they have not shown why, under Rule 19's

“equity and good conscience” test and the public interest exception, the court may not consider a broad range of public interests just as Backcountry has urged.

Recognizing the non-monetary interests of Tribal members would allow the court’s consideration of the full range of the Project’s impacts on the public, both on- and off the Reservation. The facts here cry out for that broad recognition. As noted previously, most of the Reservation’s residents support Backcountry’s efforts to enforce federal environmental laws as attested, in detail, by the sworn testimony of former Tribal Chairwoman Monique LaChappa (III-ER-323, 329) and former Vice-Chairwoman and Secretary Michelle Cuero (III-ER-338-339, 348-351). Both testified in this proceeding against the Project and in support of Backcountry. III-ER-323-326, 341-342.

**B. LACK OF SUPPORT FOR ECONOMIC HARMS
SHOULD CLAIMS SUCCEED**

Appellees rely heavily on the premise that the Tribe’s economic interests derive from and are dependent on strict implementation of the Lease. Tribe 13-16; Terra-Gen 3-6. But the actual Lease for whose approval BIA conducted its environmental review and issued its Record of Decision *has never been disclosed*. Tribe-SER-68. Its terms, including the conditions on which the Tribe is to receive economic benefits, are instead merely alluded to in the declarations of Chairman Marcus Cuero, and Terra-Gen executive Craig Popisil. *E.g.* Tribe-SER-10-11 (¶¶32-38); 2-TG SER-223 (¶ 9). Appellees, joined by the District Court, similarly place great weight on the Lease’s approval by BIA, but overlook the fact that the scholarship program they claim would cease if BIA’s approvals were vacated, existed in 2019, *before* BIA approved the Lease in April 2020. Tribe-SER-10.

Notably, neither Backcountry’s Complaint nor its First Amended and Supplemental Complaint requested *rescission of the Lease*, as opposed to vacation

of BIA's ROD and FEIS. VI-ER-1356-1357; Tribe-SER-127-128 (prayer for relief seeks to set aside BIA's approval of its "April 7, 2020 ROD" and "March, 2020 FEIS" and *not the executed Lease*). Yet Terra-Gen and the Tribe state that Backcountry's success in this litigation would categorically "invalidate the []lease" itself. *E.g.* TG 23, 29, 34; Tribe 55. And despite Backcountry's care in narrowly specifying the relief it sought, the District Court ruled – contrary to the actual relief Backcountry sought – that this litigation "would essentially destroy the Lease." I-ER-19.

But given that the terms of the Lease are not even in the record, such a conclusion does not follow from the record, let alone from Backcountry's requested relief which does *not* seek rescission of the Lease.

SUMMARY OF ARGUMENT

Backcountry's appeal raises 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 v. City of Los Angeles*, 637 F.3d 993, 996 n. 1 (9th Cir. 2011); AOB 30-32; *infra* at 17-19.
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 necessarily prevent, rather than improve, the Project. AOB 32-36; *infra* at 19.
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. AOB 36-37; *infra* at 20.

4. The District Court misapplied the “equity and good conscience test” by failing to acknowledge that the Tribe’s interest in defending the Project Terra-Gen intends to construct and operate is essentially identical to Terra-Gen’s interest in defending the same. AOB 37-45; *infra* at 21-29.

5. The District Court misapplied 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. AOB 45-48; *infra* at 29-30.

STANDARD OF REVIEW

The parties agree that, in resolving questions of law, this Court exercises its independent judgment, as the review is *de novo*. AOB 37 (*citing Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997)); BIA 22; Tribe 30; TG 20. In reviewing the District Court’s factual rulings, this Court must determine whether those factual rulings are “clear error.” AOB 37 (*citing Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002), *aff’d*, 540 U.S. 644, 124 S.Ct. 1221 (2004)); Tribe 30; TG 20.

Under Rule 12(b)(7), the District Court was required to “accept as true the allegations of Plaintiffs’ complaint and draw all reasonable inferences in Plaintiffs’ favor.” *Paiute-Shoshone Indians*, 637 F.3d 993, 996 n. 1 (9th Cir. 2011); AOB 30; Tribe 31. Accordingly, this Court exercises *de novo* review of this issue.

ARGUMENT

I. BY FAVORING THE TRIBES' EVIDENCE OVER BACKCOUNTRY'S THE COURT IMPROPERLY SHIFTED THE BURDEN AWAY FROM THE MOVING PARTY

The District Court failed to credit the allegations of Backcountry's Amended Complaint and "draw all reasonable inferences" in Backcountry's favor. AOB 3-4,9-10, 30-32; *Paiute-Shoshone Indians*, 637 F.3d at 996 n. 1. In so doing, the District Court relied heavily upon the evidence proffered by the Tribe while dismissing Backcountry's evidence as "irrelevant" to the issues before it. I-ER-9-12, 14 fn. 2, 15-23; TG 24. Yet, the evidence presented by Backcountry is highly relevant to the question of whether "in equity and good conscience" the case should be dismissed, including the question whether Backcountry's advocacy is made in the public interest instead of in self-interest, and the environmental impacts Backcountry has identified should be considered in applying the public interest exception to Rule 19. Fed.R.Civ.P., Rule 19(b).

A. THE TRIBE AND TERRA-GEN'S ATTEMPT TO REFRAME BACKCOUNTRY'S ARGUMENT MUST FAIL

The Tribe and Terra-Gen attempt to reframe Backcountry's argument as one targeting the District Court's *admission* of the Tribe's evidence, and on that basis they then attempt to discredit Backcountry for failing to challenge the District Court's evidentiary rulings. TG 24 fn. 3; Tribe 40-42. But the first issue raised by Backcountry's appeal is whether the District Court should have afforded that evidence the weight that it did, in light of the allegations and supporting evidence brought by Backcountry, and the applicable burden under Rule 19. By focusing on their own misstatement of Backcountry's position, Appellees fail to address the substance of Backcountry's actual arguments on this point. Because they fail to address them, they forfeit the issue.

**B. BACKCOUNTRY’S EVIDENCE IS PROPER
AND RELEVANT TO THE ISSUES AT HAND**

Both Terra-Gen and the Tribe acknowledge that the Court may “look[] beyond the pleadings” in determining whether dismissal is appropriate under Rule 19. TG 24 (quote); Tribe 31. Yet Terra-Gen argues that the evidence cited by *Backcountry* is “inappropriate[.]” TG 26 fn. 4. But in so doing, Terra-Gen asks this Court to “disregard” Backcountry’s evidence pursuant to the law governing Backcountry’s *merits* challenge under the APA, 5 U.S.C. section 706. *Id.* (citing *Friends of the Earth v. Hintz*, 800 F.2d 822, 828-829 (9th Cir. 1986)). Here, however, Backcountry cites relevant evidence intended to address whether “in equity and good conscience” dismissal was appropriate – and whether the public rights exception should apply. AOB 9-37, 46-48. Backcountry does not present this evidence to advance its merits claims, which are not before this Court and would only be resolved should Backcountry’s litigation be permitted to proceed.

Indeed, despite Backcountry’s clear recitation of these points Terra-Gen now claims that Backcountry has “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.” TG 26. Yet Backcountry’s AOB establishes the relevance of this evidence under Rule 19. AOB 9-37, 45, 47. Backcountry explained how this evidence shows the Project will have broad adverse impacts on the environment to the detriment of surrounding communities both within and without the Reservation, and equally important, how these impacts on the public could be lessened by fashioning appropriate relief (AOB 32-36), and why they should be considered in applying Rule 19’s “in equity and good conscience” test, as well as its public interest exception (AOB 37-48). Because

the AOB *does*, in fact, present and explain how these facts are relevant to the Court's analysis, there is no waiver as Terra-Gen claims. Terra-Gen 26.

The Tribe argues that the District Court properly determined that Backcountry's evidence regarding the Federal Aviation Administration's ("FAA's") review of the Project was not relevant. Tribe 42-43 (*citing* I-ER-23, n. 2). But the District Court's determination that "ultimately any FAA approvals are a separate question" simply overlooks the purpose for which Backcountry provided this evidence to the Court. I-ER-23. Indeed, when the District Court ruled, the Project's significant aeronautical hazards were still under review by the FAA, and the Project could not be constructed absent FAA sign-off. AOB 39. The benefits that the Tribe is to receive from the Project arise solely from payments and rents from Terra-Gen, which Terra-Gen has admitted are tied to Terra-Gen's "develop[ment], construct[ion], operat[ion], and maint[enance of] wind generation facilities" II-ER-199. Thus, the existence of other discretionary reviews by approving agencies, such as the FAA, was highly relevant to the District Court's consideration of the extent to which a harm to the Tribe's legally protect interests exists and could be reduced or lessened, as required by Rule 19. By failing to consider this evidence, the District Court erred.

II. THE DISTRICT COURT REFUSED TO CONSIDER WHETHER COMPLIANCE WITH FEDERAL ENVIRONMENTAL LAWS WILL IMPROVE RATHER THAN BLOCK THE PROJECT OR INVALIDATE THE LEASE

The District Court's Order of Dismissal assumed that *any* merits ruling for Backcountry requiring BIA's compliance with applicable environmental laws would necessarily harm rather than benefit the Tribe. I-ER-15-21. Indeed, the District Court assumed that such merits ruling would necessarily *extinguish* the

Lease that was the subject of BIA's environmental review. I-ER-19, 26. The AOB establishes five reasons, supported by competent evidence, that the District Court's assumption was mistaken: (1) the Project as currently proposed lacks support from the majority of Tribal members (III-ER-318-319, 333-340) (2) the Project as proposed will needlessly harm the Tribe's residential community, (3) Backcountry seeks 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 requires additional approvals and will be improved through application of the laws Backcountry seeks to enforce, and (5) BIA's compliance with environmental laws will benefit rather than harm the Tribe. AOB 32-35.

As discussed above, Terra-Gen and the Tribe treat Backcountry's discussion of these points, both in Backcountry's factual background and in its argument, as "irrelevant" to the inquiry before the Court. TG 26; Tribe 41-45. But nothing could be further from the truth. Indeed, the Project's impacts on the surrounding community, and BIA's failure to study and disclose the same, are central to harms that could befall the community should the BIA not be ordered to conduct additional environmental review and consider additional feasible mitigation.

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

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 this statement was mistaken. The AOB details the many ways that Backcountry suggested that relief could be tailored to lessen prejudice while allowing the Project to proceed in a way that reduces its harms overall, including "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.” AOB 36 (*citing* II-ER-108-109, 112-120).

Terra-Gen and the Tribe dismiss all of these factors on the assumption that their implementation would cause the Lease itself to be destroyed, preventing any of its benefits from accruing to the Tribe. Terra-Gen 44-45; Tribe 36; *see also* BIA 25 n. 12 (arguing that this factor may be addressed only by lessening harm to the Tribe’s financial and sovereign interests). Yet the AOB highlights the District Court’s failure to *consider* evidence, including evidence that the relief can be tailored to *maintain* legal entitlements. AOB 36 (noting that “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 Backcountry’s arguments and evidence in this regard was error.

IV. THE DISTRICT COURT’S RULE 19 ANALYSIS MISAPPLIED THE “EQUITY AND IN GOOD CONSCIENCE” TEST.

Rule 19 requires a multi-step, fact-specific analysis, and the AOB showed that the District Court failed to apply that applicable test appropriately. AOB 37-45. But Appellees advance an argument that essentially reduces the multi-factor test that governs Rule 19 dismissals to a blanket rule that demands dismissal *any* time a Tribe raises sovereign immunity, *regardless* of the facts before the Court. BIA 22-23, TG 38, Tribe 3, 26 (see also I-ER-19-21). In so doing, they ask this Court to disregard the fact-specific inquiry that Rule 19 requires. *Id.*

A. UNDER RULE 19(a), THE TRIBE IS NOT REQUIRED

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 “among existing parties” can be granted in the Tribe’s absence. *Id.*; Rule 19(a)(1)(A). Because Backcountry’s claims arise under the APA against a federal agency, BIA, they *do not implicate sovereign immunity at all* – and can be resolved without the Tribe – because Backcountry seeks an order correcting *BIA*’s unlawful FEIS, and remedying *BIA*’s violations of the MBTA and the Eagle Act. None of these actions are governed or otherwise controlled or protected by the Tribe’s sovereign immunity or right to self governance, as the Tribe cannot control the contents of *BIA*’s EIS, nor can it control *BIA*’s discretion to consider or shape its approval of the same, as it is purely *BIA*’s decision as to how it complies with applicable federal laws. Backcountry 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” that “will be impaired or impeded by the suit.” *PCFFA*, 929 F. Supp.2d at 1061 (*quoting Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)); Rule 19(a)(1)(B). The AOB makes clear that this is not the case here. AOB 37-42. 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 of Wintun Indians of the Colusa Indian Community v. California* (“*Cachil Dehe Band*”), 547 F.3d 962, 973 (9th Cir. 2008) (*quoting Makah*, 910 F.2d at 558); AOB 38. While the

District Court found (I-ER-31), and Appellees now argue (Tribe 35; TG 34-35; BIA 24), that the Tribe's interest in the *Lease* constitutes a "legally protected interest" rendering the Tribe a required party, the Lease itself is neither challenged, nor included in the requested relief. VI-ER-1356-1357; Tribe-SER-127-128.

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." *Dine Citizens*, 932 F.3d at 852 (quoting *Cachil Dehe Band*, 547 F.3d at 971); AOB 37. Appellees argue the Lease removes this matter from that category of cases, and that *Dine Citizens* compels dismissal here *regardless* of the facts before this Court. BIA 12-16, 22-27; Tribe 29, 36; TG 29-30. But Appellees' argument ignores critical distinctions between this case and *Dine Citizens*. As the AOB explains, in *Dine 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, which operated together since the 1960s. *Dine Citizens*, 932 F.3d at 848. The plaintiffs challenged approvals authorizing the *continued use* and expansion of an *existing coal mine*, which supplied the power plant. *Id.* The harms that could arise from allowing that suit to proceed are clear, because any decision that impaired these *existing* operations would remove *existing* revenue streams and cause workers to lose *existing* jobs. *Id.*; AOB 39. Here, by contrast, the lawsuit does not challenge the Lease at all; it only challenges BIA's approval and seeks only that approval's compliance with environmental laws. Tribe-SER-67-128.

Appellees liken any existing benefits that have accrued to the Tribe under the Lease to the rights discussed in *Dine Citizens*, but as noted, the Lease terms

and conditions governing Terra-Gen’s payments to the Tribe have never been disclosed. And while Terra-Gen and the Tribe point to job-placement priorities and existing payments as examples of existing benefits that might be extinguished, it remains true that the Tribe’s benefits arise from Terra-Gen’s payments for the “right to develop, construct, operate, and maintain wind generation facilities on Tribal land” – and thus are a *financial stake tied to operation of the Project*. II-ER-199.

This Court has held that “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). Appellees argue *Disabled Rights* does not apply here because there the relief requested – compliance with the Americans with Disabilities Act – would not invalidate any term of the existing contract which would remain binding. TG 35; Tribe 45 n. 11. But here, where Backcountry seeks BIA’s compliance with environmental laws, the Tribe’s potential loss of future revenue should BIA never reapprove the Lease are prospective and financial, exactly the type *Disabled Rights* addressed.

Appellees’ reliance upon *Jamul Action Committee v. Simermeyer*, 974 F.3d 984, 996 (9th Cir. 2020), *Kescoli v. Babbitt*, 101 F.3d 1304, 1307 (9th Cir. 1996), and *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir 1999) to evade *Disabled Rights*’s controlling precedent is misplaced. First, in *Jamul*, the plaintiffs contested the legitimacy and very existence of the absent Tribe and its Reservation, not simply the agency’s compliance with applicable law. 974 F.3d at 997. That is why this Court found the challenge posed “far-reaching retroactive effects” that would impair the absent Tribe’s interests. *Id.* Backcountry’s challenge to BIA’s

approvals, in contrast, does not pose any “far-reaching retroactive effects,” as it merely challenges BIA’s FEIS and ROD.

Second, *Kescoli*, like *Dine Citizens*, threatened changes to *existing, operating* coal mines governed by a settlement agreement arising from prior litigation. 101 F.3d at 1307; AOB 38-39. In contrast here, the Project has yet to be constructed. While the Tribe states it has received benefits under the Lease, it has not shown how the APA relief requested here would harm them.

Third, in *Clinton*, plaintiffs dissatisfied with a settlement agreement between the Hopi and Navajo Tribes sought an order setting aside the 1996 Settlement Act in which Congress ratified that agreement, and a declaration that the Interior Secretary was constitutionally barred from approving leases under that Act and agreement that contained specified terms. 80 F.3d at 1089. That is simply not comparable to Backcountry’s attempt to enforce BIA’s compliance with three environmental laws in reviewing the Project. Merely requiring BIA to comply with these laws does not implicate the Tribe’s sovereign interests.

Even if they were, however, under Rule 19(a)(1)(B)(i) the question before this Court is whether “disposing of the action” without the Tribe would “impair or impede the [Tribe’s] ability to protect that interest.” As a practical matter in the APA context, there is no action that the Tribe could take, should it waive sovereign immunity, that would alter the factual record, the legal arguments, or the available relief. Thus, the Tribe’s presence should not be required under Rule 19(a)(1)(B).

All the same, the District Court relied upon *Dine Citizens* to hold that the Tribe’s financial and sovereign interests would be harmed absent dismissal. I-ER-20-21. Yet, “[i]mpairment may be minimized if the absent party is adequately

represented in the suit.”” *PCFFA*, 929 F.Supp.2d at 1061 (*emphasis omitted*, quoting *Makah*, 910 F.2d at 558); AOB 39-42.

Appellees defend the Order, asserting neither Terra-Gen nor BIA can adequately represent the Tribe’s interests in defending the ROD and FEIS because they lack the Tribe’s interest in sovereign rule. But as shown above, the relevant issue is whether these parties are able and willing to make all arguments necessary to defend against Backcountry’s claims. Because they are, the Order is mistaken. *Southwest Center*, 150 F.3d at 1153-1154; *Dine Citizens*, 932 F.3d at 852; *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (similar analysis under Rule 24).

Appellees attempt to distinguish *Southwest Center* because this Court found that case did not implicate the absent tribe’s sovereign interests. Tribe 48-49; TG 46, 46 n. 9. Not so. The absent tribe had rights to store water – pursuant to a settlement – upstream of the dam whose expanded use was challenged under environmental laws. 150 F.3d at 1153-1154. Thus, as here, the existence of a contract providing benefits to the tribe was insufficient to implicate sovereign immunity even when a challenge prevented the tribe from receiving the benefits. *Id.* Any suggestion that *Dine Citizens* requires otherwise must be reconciled with *Southwest Center*.

Appellees argue that *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 139 F.Supp.3d 1141, 1151 (E.D.Cal. 2015) predates *Dine Citizens*, and the absent Navy’s interest was not “sovereign.” TG 41; Tribe 49. But *Lennar*’s analysis remains persuasive. The Court held the parties could raise all necessary arguments the Navy would be empowered to raise, and “[t]he Navy’s public or sovereign status does not lead to the opposite conclusion.” 139 F.Supp.3d 1154-1555.

Because the Navy's interests could be represented, the court refused to dismiss. Appellees' attempt to distinguish *Lennar* fails.

B. RULE 19(b)'S EQUITY AND GOOD CONSCIENCE TEST DOES NOT FAVOR DISMISSAL HERE

Backcountry's AOB explained that even if the Tribe's joinder were required under Rule 19(a), the Court must still determine under Rule 19(b) whether, in equity and good conscience, the action should nonetheless proceed. AOB 37-45. Appellees argue that under *Dine Citizens*, tribal sovereignty displaces the balancing otherwise required. Tribe 50-54; TG 42-49. But Rule 19(b) requires this Court to consider:

- (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.

Rule 19(b). These factors weigh strongly *against* dismissal here: (1) existing parties are able and willing to make all arguments to defend BIA's approval, (2) the judgment can be shaped to leave the Lease undisturbed, (3) judgment in the Tribe's absence would be adequate, and (4) Backcountry has no remedy except this proceeding. AOB 37-45.

Terra-Gen dismisses as mere out-of-circuit case law *Hayes, Trustee Etc. v. Bernhardt* ("Hayes"), 499 F.Supp.3d 1071, 1079 (N.D.Okla. 2020), *Dine Citizens Against Ruining Our Environment v. Klein* ("Klein"), 676 F.Supp.2d 1198, 1216-

1217 (D.Colo. 2009), and *Manygoats v. Kleppe*, 558 F.3d at 559. Terra-Gen 47 n.10. But Terra-Gen misses the persuasive value of these out-of-circuit authorities.

In *Hayes*, 499 F.Supp.3d at 1079 (N.D.Okla. 2020), the Court ruled 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 (emphasis added). Similarly here, Backcountry seeks to enforce laws aimed at reducing the Project’s impacts, not extinguish the leases. Applying the logic of *Hayes*, dismissal was improper.

Similarly, in *Klein*, 676 F.Supp.2d at 1216-1217, the Court allowed the action to “proceed in equity and good conscience in the Tribe’s absence.” *Id.* As in *Hayes* and *Klein*, so too in *West Flagler Assocs. v. Haaland*, __ F.Supp.3d __ (No. 21-CV-2192 (DLF), 2021 WL 5492996), at *7 (D.D.C. Nov. 22, 2021), the District Court ruled that a tribe need not be joined in a lawsuit challenging the Secretary’s approval of that tribe’s gaming compact. The Court recognized the tribe’s financial interest in the gaming compact but held this interest did not require joinder when other parties to the Compact could adequately defend it. *Id.*

All three district court cases recognize that Rule 19(b) acts to allow meritorious cases to proceed when an absent tribe’s interests are adequately protected by existing parties. They are consistent with the persuasive authority of *Manygoats v. Kleppe*, 558 F.3d at 559 (there is “nothing in NEPA which excepts Indian lands from national environmental policy”). Like in *Hayes*, *Klein*, and *West Flager*, this suit is directed at BIA’s failures to comply with the law, and any

relief should be tailored to address those failures, where the Tribe's interests can be protected by both Terra-Gen and BIA.

The District Court also relied upon *Deschutes River Alliance v. Portland General Electric Co.* (“*Deschutes*”), 1 F.4th 1153, 1163 (9th Cir. 2021) in concluding that the Tribe's sovereign immunity interests prevent a judicial resolution of the merits of Backcountry's claims. I-ER-21.³ But as the AOB makes clear, by elevating the Tribe's interests above all, the District Court allows BIA to evade judicial review of its approvals. AOB 44-45. Moreover, *Deschutes* and *Dine Citizens* appear to overlook *Southwest Center's* caution against rote application of tribal immunity to dismiss meritorious environmental litigation. 150 F.3d at 1154. The Tribe, in citing *Deschutes*, asks this Court to elevate tribal sovereign interests above the public's right to enforce environmental laws in all contexts. Tribe 38.

But under all in- and out-of circuit authority, this Court must carefully balance all the interests at stake under Rule 19(b), based on all the facts, to reach an equitable result. *Deschutes*, 1 F.4th at 1163; *Dine Citizens*, 932 F.3d 857-858; *Southwest Center*, 150 F.3d at 1154; *Manygoats v. Kleppe*, 558 F.3d at 559.

That is not what the District Court did. Instead, it deemed Backcountry's evidence of harm to the public should the Project proceed without BIA's compliance with environmental laws “irrelevant,” and deemed the Tribe's claims of potential pecuniary harm dispositive. I-ER-14 fn. 2. It never balanced the

³ The Tribe's claim that Backcountry mischaracterized the Order's citation to *Deschutes* is mistaken. Tribe 48 (citing AOB 44, I-ER-21). The District Court cited *Deschutes* to show why the Tribe's sovereign interests required dismissal. I-ER-21.

public's interests in environmental protection against the Tribe's claimed harm as Rule 19(b) requires.

V. THE DISTRICT COURT MISAPPLIED THE PUBLIC INTEREST EXCEPTION

The District Court erred when it ruled the “public rights exception” to Rule 19 was inapplicable. I-ER-26; AOB 45-48. Backcountry's allegations and evidence showed it was acting to vindicate the public's rights to informed agency decisionmaking, to protect both Backcountry members and the public impacted by the 10-mile wide expanse of this massive, 2500-acre, 60-turbine project. AOB 45-46 (*citing* II-ER-236-243, 269-276, 281-294; III-ER-326, 342, 405-409, 411-421; V-ER-1115.)

Pursuant to *Conner v. Burford*, 848 F.2d at 1459, when plaintiffs seek to enforce public rights to agency compliance with environmental laws, the rule requiring joinder of indispensable parties must yield to the public's paramount interest in enforcement of the public rights plaintiffs espouse. *Id.* at 1458-1462; II-ER-236-243, 269-276, 281-294; III-ER-326, 342, 405-409, 411-421; V-ER-1115. Yet because the District Court had already determined all of Backcountry's evidence to be irrelevant, it disregarded the public rights Backcountry sought to enforce.

The Order also rests on the mistaken assumption that requiring further environmental review would destroy the Tribe's legal entitlements. I-ER-25-26; Tribe 26-27. But as in *Conner v. Burford*, the Court here could enjoin implementation of the BIA approval without destroying the pre-existing lease, which is not challenged. 848 F.2d at 1461.

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

CONCLUSION

For these reasons, this Court should reverse the Judgment below.

Dated: July 15, 2022

Respectfully submitted,
/s/ Stephan C. Volker
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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: July 15, 2022

/s/ Stephan C. Volker
STEPHAN C. VOLKER

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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