IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:11-cv-00243-REB -CBS

CENTER FOR BIOLOGICAL DIVERSITY, DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, SAN JUAN CITIZENS ALLIANCE,

Plaintiffs,

v.

JOSEPH PIZARCHIK, in his official capacity as Director, Office of Surface Mining Reclamation and Enforcement, WESTERN REGION OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, a federal agency within the U.S. Department of Interior, KEN SALAZAR, in this official capacity as U.S. Secretary of Interior,

Defendants.

RESPONSE IN OPPOSITION TO THE NAVAJO NATION'S AMENDED MOTION TO DISMISS (Doc. 47)

Plaintiffs Center for Biological Diversity, Dine Citizens Against Ruining Our Environment ("CARE"), and San Juan Citizens Alliance respectfully file this response in opposition the Navajo Nation's *Amended Motions to Dismiss* (Doc. 47). The Navajo Nation (or "Tribe") has moved to dismiss Plaintiffs' Endangered Species Act ("ESA") challenge on the theory that Plaintiffs' ESA claim against a Federal agency with exclusive permitting authority and regulatory jurisdiction over a mine on tribal lands and brought by public interest organizations on behalf of their affected membership which includes Navajo Nation tribal members (*i.e.* Dine or "the People"), cannot be heard by this Federal Court.

For the reasons set forward herein, the Tribe's *Motion to Dismiss* pursuant to Rule 19 and 12(b)(7) should be rejected. Rejection of the Tribe's *Motion to Dismiss*,

however, would not necessarily end the Tribe's ability to participate in this litigation. *See* Tribe's *Limited Motion to Intervene* (Doc. 46) at 11 (noting Plaintiffs' non-opposition to Tribe's participation in this matter to address merits).

STANDARD OF REVIEW

Rule 12(b)(7) governs motions to dismiss based on the defense of failure to join a party under Rule 19. Fed.R.Civ.P. 12(b)(7); *accord Dine Citizens Against Ruining Our Environment, et al. v. Klein,* 676 F. Supp. 2d 1198, 1215, ftnt. 12 (D. Colo. 2009)("*Klein*")(rejecting Rule 19 challenge where OSM has exclusively permitting authority over Navajo Mine on tribal lands).[1] The Tribe, as the proponent of this Rule 12(b)(7) defense, has "the burden of producing evidence" showing both that the Tribe is a required party and that dismissal is required in its absence. *Citizen Band Potawatomi Indian Tribe v. Collier,* 17 F.3d 1292, 1293 (10th Cir. 1994).

Further, Rule 19 questions are not jurisdictional, but are within the equitable discretion of the district courts. *Thunder Basin Coal v. Southwestern Public Service*, 104 F.3d 1205, 1211 FN4 (10th Cir. 1997). For this reason, the case-specific inquiry that must be followed in applying the standards set forth in Rule 19(b) is a matter for the district court's discretion. *Id.* (weight to be accorded each factor is matter for district court's discretion). Finally, a Rule 12(b)(7) motion will not be granted on the "vague possibility that persons who are not parties may have an interest in the action." *Swartz v. Beach*, 229 F.Supp.2d 1239, 1250-51 (D. Wyo. 2002).

[1] The *Klein* decision, as well as the district court's decision on the merits (*Dine CARE v. Klein*, 747 F. Supp. 2d 1234 (D.Colo. 2010)(hereinafter, "*Klein II*"), has been appealed to the 10th Circuit Court of Appeals by Intervenor BHP Navajo Coal Company ("BNCC"). *See Dine CARE v. Klein*, Case No. 11-1004 (10th Circuit). BNCC's appeal does not challenge and would not disturb the district court's decision as it relates to Rule 12(b)(7) and Rule 19.

BACKGROUND

This case involves Plaintiffs challenge to the Federal Office of Surface Mining's ("OSM's") renewal of permit to mine to BHP Navajo Coal Company ("BNCC") without complying with the procedural and substantive requirements of the ESA. *See generally, Amended Complaint* (Doc. 11). No tribal authorizations are challenged by this litigation.

OSM, and not the Tribe, is the regulatory authority with jurisdiction over all aspects of permitting for the Navajo Mine operated by BHP. *See* Plaintiffs' *Amended Complaint* (Doc. 11), ¶3; OSM *Answer* (Doc. 23), ¶3; 30 C.F.R. §750.6(a)(1)(which states that OSM "shall" "[b]e the regulatory authority on Indian lands"); *accord*, *Klein* at 1215 ("[t]he Tribe plays no role in in OSM's permitting decisions" for the Navajo Mine). Further, OSM is required to comply with the ESA in issuance of a renewal permit to BHP. 30 C.F.R. §780.16, §784.21 and §773.15(a) and (j). Finally, OSM authorized the renewal of OSM Permit Number NM-0003F challenged herein. *Amended Answer* (Doc. 22) ¶7, 46.

ARGUMENT

The Court's Rule 12(b)(7) analysis entails two inquiries under Rule 19. The Court must first consider whether the Tribe is a "required" party under Rule 19(a) which must be joined "if feasible." *Klein* at 1214. If the Tribe is a required party, then the Court must decide under Rule 19(b) "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed" in the Tribe's absence. *Id.* As set forward below, the Tribe has not met its burden to show that it is a required party under Rule 19(a). In this case, the Tribe's speculation that one particular

outcome of Plaintiffs' litigation may have financial consequences for the Tribe is not "in-and-of-itself" sufficient to make the Tribe a required party under Rule 19(a).

Second, and even assuming *arguendo* the Tribe is required to be joined under rule 19(a) but cannot be joined because of limited tribal sovereign immunity, this case should proceed in equity and good conscience under Rule 19(b) and based on this Court's holding in *Klein*.

I. The Tribe is Not a Required To Be Joined Under Rule 19(a)

"The first consideration under Rule 19(a) is whether, in the absence of the […] Tribe, complete relief could be accorded among the persons already parties to the action." *Sac and Fox Nation of Missouri v. Norton* 240 F.3d 1250, 1258 (10th Cir. 2001), *cert denied,* 534 U.S. 1078 (2002)(holding that because plaintiffs actions focused solely on actions and alleged NEPA violations of U.S. Department of Interior in acquiring tribal trust lands for gaming, tribe was not required to grant requested relief). In this case, even in the absence of the Navajo Nation, complete relief in this ESA challenge could be accorded among the persons already parties to the Plaintiffs' legal action against OSM.

"The second consideration under Rule 19(a) is whether the [ ] Tribe claims an interest relating to the subject of this action and, if so, whether disposition of this action … may as a practical matter impair its ability to protect that interest or subject any of the persons already parties to a substantial risk of inconsistent obligations." *Sac and Fox,* 240 F.3d at 1258. In this case, and while the Tribe speculates that it may incur speculative financial consequence if the Navajo Mine "is closed" as a result of Plaintiffs' ESA challenge to OSM's permit renewal, the Tribe has failed to produce evidence that it

has a legally protectable interest in the subject matter of the litigation and that such interests are not adequately represented by Federal Defendants. For these reasons, the Tribe is not required to be joined under Rule 19(a).

A. In the Absence of the Tribe, Complete Relief Can Still Be Granted.

Even in the absence of the Tribe, complete relief could be accorded among the persons already parties to the Plaintiffs' ESA challenge. *See* Rule 19(a)(1)(A); *see also Sac and Fox Nation* 240 F.3d at 1258.

In this case, OSM, and not the Tribe, is the regulatory authority with jurisdiction over all aspects of permitting for the Navajo Mine operated by BHP and the Tribe does not provide evidence (or argue) that complete relief cannot be granted in the Tribe's absence. This action was commenced by Plaintiffs against OSM under the ESA and focuses solely on the propriety of the Federal agency's action in issuance of a permit renewal to BNCC. *Amended Complaint* (Doc. 22) ¶¶13-20. Moreover, there is no dispute that the absence of the Tribe does not prevent Plaintiffs from receiving their requested declaratory and injunctive relief as against the agency. *Id.* at 18 (Prayer for Relief).

Similarly, and because the legal obligation for ESA compliance in permit renewal issuance for the mine is OSM's alone, resolution of this litigation in the absence of the Tribe would not leave the Tribe (or any other party) subject to multiple lawsuits regarding the same subject matter. *See* Rule 19(a)(B)(ii); *accord Sac and Fox Nation v. Norton*, 240 F.3d at 1258(rejecting Tribe's allegation of multiple lawsuits).

In sum, even in the absence of the Tribe, complete relief could be accorded among the persons already parties to the Plaintiffs' ESA challenge.

B. The Tribe Does Not Have a Legally Protected Interest in the Subject Matter of the Litigation.

The Tribe fails to produce evidence that it has a legally protected interest in the subject matter of the litigation. Aside from merely alleging speculative financial consequences should OSM's permit renewal be vacated by the Court, the Tribe fails to identify any "legally protectable interest" relating to the subject matter of the litigation which would require the Tribe to be joined pursuant to Rule 19(a). Regardless, and as a practical matter, OSM's interest in defending issuance of the permit renewal is "virtually identical" to the interests of the Tribe, therefore any alleged prejudice from failure to join the Tribe as a required party is eliminated.

1. The Tribe's Alleged Financial Consequences Should OSM's Permit Renewal be Vacated Are Speculative and Insufficient to Satisfy Rule 19(a).

First, and relying on Ninth Circuit precedent, the Tribe argues that the tribe's economic interests alone and as a result of possible future "closure" of the mine are "in-and-of-themselves" sufficient to satisfy Rule 19(a). *Motion to Dismiss* at 5. The Tribe is wrong. The Tribe's alleged financial consequences are based on pure speculation that the mine would "close" should OSM's permit renewal be vacated by this Court as result of OSM's failure to comply with the ESA in permit issuance and, as such, should be rejected.

The Tribe fails to note that the Ninth Circuit has affirmatively held that for an Indian tribe to be a required party under Rule 19(a), the tribe's interest in litigation "must be more than a financial stake" and "more than mere speculation about a future event." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)(emphasis supplied)(cites omitted); *see also Cachil Dehe Band of Wintun Indians v. California* ,547 F.3d 962, 970

(9th Cir. 2008).

That said a tribe's economic interests may be sufficient to convey required party status under Rule 19 where the challenged decision, agreement, contract, lease or other instrument is issued or executed directly by the Indian tribe or where the tribe has a direct interest in a fixed fund or limited resource that the court is asked to adjudicate. *See Manygoats v. Kleppe*, 558 F.2d 556, 557 (10th Cir. 1977)(economic interests sufficient to make tribe required party where plaintiffs challenged agreement between tribe and company for uranium exploration and mining); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 999 (10th Cir. 2001)(economic interests sufficient to make tribe(s) required party where plaintiffs challenged government allocation of funding to tribes); *Davis v. U.S.*, 192 F.3d 951 (10th Cir. 1999)(economic interests sufficient to make tribe required party in disposition of tribal fund award); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537 (10th Cir. 1987)(economic interests sufficient to make tribe required party where court adjudicates bonuses paid by lessee); *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996)(economic interests sufficient to make tribe required party where plaintiffs challenged settlement agreement between tribes, agency and permittee); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975)(economic interests sufficient to make tribe required party where plaintiffs challenged lease agreement).[2]

[2] Additionally, at least two circuit courts have found that "it is implicit in Rule 19(a) itself that before party…will be joined as a defendant the plaintiff must have a cause of action against it." *Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453, 457 (5th Cir. 1989), *cert denied*, 493 U.S. 1020 (1999); *see also Davenport v. Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 366 (D.C. Cir. 1999)(quoting *Vieux Carre*). In this case, the only cause of action brought by Plaintiffs in this litigation is against OSM. The Tribe fails to produce evidence that Plaintiffs have a cause of action against the Tribe and therefore that the Tribe is required to be joined as a Defendant under Rule 19(a).

In this case, the Tribe's only claim or interest in this litigation is premised entirely on speculation regarding alleged future economic harm "[i]f the BNCC's Navajo Mine is closed" (*i.e.* unknown future event) as a result of Plaintiffs' ESA challenge to OSM's permit renewal. *See* Doc. 47-1 ¶6, 7; Doc. 47-2, ¶11, 20-21, 24, 27, 30. Because this litigation does not involve a challenge to a bargained for tribal contract or an interest in a fixed tribal fund or resource, the Tribe cannot be said to have a *per se* legally protectable interest in the subject matter of this litigation (*i.e.* OSM's compliance with the ESA in issuance of a permit renewal) and therefore cannot be said to be a required party for purposes of Rule 19(a). In other words, and contrary to the Tribe's representation, the Tribe's alleged speculative economic interests should the mine "be closed" as result of Plaintiffs' legal challenge is not "in-and-of-itself" sufficient to satisfy Rule 19(a).

2. The Tribe Would Not Be Prejudiced Because OSM's Interests in Defending the Permit Renewal Are Identical to the Tribe's Interests.

In this case, and because the duties for ESA compliance in permit issuance belong to the Federal agency alone, responsibility for defending OSM's permit renewal belongs to the U.S. government. That said the Tribe fails to submit evidence that OSM's interests in defending the permit renewal differ substantially from those of the Tribe's interests or that there exists a conflict of interest. Because OSM and the Tribe's interests in defending the renewal permit are "virtually identical," the Tribe's interests are adequately represented and the Tribe cannot be said to be a required party under Rule 19(a).

"[T]he prejudice to the relevant party's interest 'may be minimized if the absent

party is adequately represented in the suit.'" *Rishell v. Jane Phillips Episcopal Mem. Medical Ctr.*, 94 F.3d 1407, 1412 (10th Cir. 1996)(collecting cases)("[i]f, as a practical matter, the interests of the absent parties will be adequately represented, their interests will not be impaired…"). As a practical matter, if the U.S. government's (*i.e.* tribal trustee's) interests in defending a matter are virtually identical to the interests of the Indian tribe, a tribe cannot be said to be a required party under Rule 19(a). *Sac and Fox,* 240 F.3d at 1258 (finding U.S. Department of Interior and tribal interests "virtually identical" where Interior took tribal land into trust for tribe for gaming); *see also Southwest Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998)(reversing and remanding Rule 19 dismissal because tribal interests were represented by U.S. government as a party to lawsuit). The Ninth Circuit uses the following three-step inquiry to determine if a non-party is adequately represented by existing parties. *Id*. at 1153-54.

In this case, OSM and the Tribe's interests in defending the renewal permit are indistinguishable. Further, the Tribe fails to provide evidence of conflict between the interests of the Tribe and OSM such that the Tribe would be compelled to make arguments in defense of the permit renewal not made by the Tribe's trustee, the U.S. government. *See Manygoats*, 558 F.2d at 558 ("[w]hen there is a conflict between the interests of the United States and the interests of Indians, representation of the Indians by the United States is not adequate."). In other words, the Tribe has not met its burden of demonstrating that the interests of the Navajo Nation and OSM are not squarely aligned in defense of the permit renewal.

In sum, and because OSM and the Tribe's interests in defending the renewal

permit are "virtually identical," the Tribe's interests are adequately represented and the Tribe cannot be said to be a required party under Rule 19(a).

II. Even Assuming *Arguendo* The Tribe is a Required Party Under Rule 19(a), Plaintiffs' ESA Challenge Should Nonetheless Proceed in Equity and Good Conscience Under Rule 19(b).

Even assuming *arguendo* the Tribe is a required party under Rule 19(a), the Court must still decide under Rule 19(b) "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed" in the Tribe's absence. *Klein* at 1214. In this case, the issue of whether or not judicial review of OSM permitting actions for the Navajo Mine by public interest organizations should proceed in equity or good conscience under Rule 19(b) has been resolved by this Court in favor of proceeding without the Navajo Nation. For the reasons set forward herein, the Tribe's argument that this caselaw has been reversed should be rejected.

A. This Court In *Klein* Determined That Challenges to OSM Permitting Actions Related to the Navajo Mine Can Proceed in Equity and Good Conscience Without the Tribe under Rule 19(b)(1).

Whether a challenge to OSM permitting actions related to the Navajo Mine can proceed in equity and good conscience under Rule 19(b)(1) without the Tribe has already been resolved by this Court in *Klein* in favor of proceeding with the legal challenge.

In that case, environmental plaintiffs challenged OSM's issuance of a 2004 permit renewal and a 2005 permit revision for the Navajo Mine as violating NEPA and the APA. *Klein*, 676 F. Supp. 2d at 1203. Responding to a 12(b)(7) motion to dismiss filed by OSM, the Court, in evaluating on balance prejudice to the parties, held that because plaintiffs' challenge did not call for any action by or against the Navajo Nation,

the Nation would not be prejudiced. *Id.* at 1216 (*citing Manygoats,* 558 F.2d at 558-59). Further, the Court held that dismissal of plaintiffs' challenge for nonjoinder of the Navajo Nation "would produce an anomalous result" because then "[n]o one, except the Tribe" could seek judicial review of OSM permitting actions on tribal lands. *Id.* (*citing Manygoats* at 559).

In the case at bar, and identical to *Klein* and *Manygoats,* the challenge is to a federal government decision based on the federal decisionmaker's alleged non-compliance with Federal procedural requirements, and the relief sought is an injunction until such compliance is achieved. *See e.g. Amended Complaint* (Doc. 11) at 15-18. "The Tribe plays no role in in OSM's permitting decisions" "except that of commentator." *Klein* at 1216.

In sum, and because Plaintiffs do not challenge any action or decision by the Tribe, the Tribe would not be prejudiced should this litigation proceed. Other the other hand, if the Court were to dismiss this action for nonjoinder of the Tribe, it would produce an anomalous result because then no one except the Tribe could seek judicial review of OSM's compliance with the ESA in issuance of mine permits on tribal lands. For these reasons, Plaintiffs' ESA challenge should be allowed to proceed in equity and good conscience.

B. The Supreme Court's Decision in *Pimental* Does Not Overrule *Manygoats* Rule 19(b)(1) analysis or Make It Inapplicable to the Case At Bar.

The Tribe argues relying on a 2008 Supreme Court case that there has been a "significant change in the law" that now warrants reversal and invalidation of established 10th Circuit precedent. *See* Doc. 47 at 6-9 (*relying on Republic of Philippines v.*

Pimental, 553 U.S. 851 (2008)("*Pimental*"). Specifically, the Tribe argues that *Pimental* now requires this Court to give tribal sovereign immunity "maximum weight" under any circumstances and when evaluating on balance prejudice to the parties under Rule 19. The Tribe is wrong.

Pimental stands for the proposition that sovereign immunity is to be given greater weight on balance where courts are adjudicating "substantive claims" of the sovereign. It does not address or modify use of the balancing test under Rule 19 where no claims are asserted by or against the sovereign and as such does not overrule *Manygoats* or render it inapplicable to the case at bar.

Pimental involves an interpleader action by financial broker Merrill Lynch in U.S. Federal District Court against a foreign sovereign, the Republic of the Phillipines, and victims of human rights abuses under Phillipine President Marcos in order "to determine the ownership of property allegedly stolen by Ferdinand Marcos when he was the President of the Republic of the Philippines" and held by the brokerage firm. *Pimental* at 855. In reversing the circuit court, the Supreme Court found that the Court of Appeals erred in not giving the necessary weight to the absent entities' assertion of sovereign immunity and while determining on balance prejudice to the parties under Rule 19(b)(1). "The court in effect decided the merits" of the Republic's claim to ownership of Marcos' financial assets without their presence. *Id.* at 864. For this reason, "[t]he court's consideration of the merits [of the sovereign's claim to Marcos' financial assets] was itself an infringement on foreign sovereign immunity…" *Id.* (emphasis supplied).

The Supreme Court's decision in *Pimental* is readily distinguishable from this Court's decision in *Manygoats*. In *Pimental* the central issue was the lower court's

failure to properly balance the interests of foreign sovereign immunity under Rule 19 where the court was adjudicating "substantive claims" and ownership interests of the sovereign. *Pimental* at 861 ("it was improper to issue a definitive holding regarding a nonfrivolous, substantive claim made by an absent, required entity that was entitled by its sovereign status to immunity from suit.").

In *Manygoats*, and by contrast, no claims were asserted by or against the tribal sovereign and plaintiffs' challenge did not call for any action by or against the Navajo Nation. *Manygoats,* 558 F.2d at 558-59 ("[o]ur attention is called to no tribal remedies or procedures available to the plaintiff for attack on a federal EIS."). Because no substantive claims by the sovereign were at issue, the Court held that on balance dismissal of plaintiffs' challenge for nonjoinder of the Navajo Nation would prejudice the plaintiffs and "produce an anomalous result" because then "[n]o one, except the Tribe" could seek judicial review of OSM permitting actions on tribal lands. *Id.*

Reading *Manygoats* consistent with *Pimental* is supported by more recent cases in the 10th Circuit citing *Pimentel*. For example, in *Northern Arapahoe Tribe v. Harnsberger*, 660 F.Supp.2d 1264 (D. Wyo. 2009)("*NAT*"), the tribal sovereign (like the foreign sovereign in *Pimental*) "has a claim with respect to the effect of the 1905 Act," "has an equal interest in the Reservation" and "was a party to the agreement central to this case." *Id.* at 1280 (emphasis supplied). Similarly in *United Keetoowah Band of Cherokee Indians in Oklahoma v. Kempthorne*, 630 F.Supp.2d 1296 (E.D. Okla. 2009), the court found that, where the tribal sovereign has a substantive claim at issue in the

litigation, "a judgment rendered concerning the Cherokee Nation's contract in its absence would prejudice the Cherokee Nation." *Id.* at 1303(emphasis supplied).[3]

In sum, *Pimental* does not address or modify the balancing test under Rule 19(b)(1) established by *Manygoats* and *Klein* where no claims are asserted by or against the sovereign. As such, *Pimental* does not overrule *Manygoats* or *Klein* or render it inapplicable to the case at bar.

C. Any Prejudice Could be Lessened or Avoided by Protective Provisions, Equitable Relief and Other Measures

Plaintiffs challenge OSM's failure to comply with the procedural requirements of the ESA in issuance of a permit renewal to OSM. *Amended Complaint* (Doc. 11) at 15-18. The adequate relief in this case includes, but is not limited to, declaratory relief, vacatur of the underlying permit and injunctive relief. *Id.* at 18. In issuance of injunctive relief under the ESA "Congress has removed from the courts their traditional equitable discretion of balancing the parties' competing interests." *Silver v. Thomas*, 924 F. Supp. 988, 988 (D. Ariz. 1995). That said court's nonetheless have room to evaluate the scope of injunctive relief. *Id.*

D. The Court Can Render Adequate Judgment

Full and complete judgment in this case can be issued without the participation of the Navajo Nation. The present NEPA case concerns declaratory and injunctive relief as against the agency and does not seek any money damages against OSM, BNCC or the Tribe. Doc. 11 at 18 (Prayer for Relief).

[3] Contrary to the Tribe's assertion, these cases do not stand for the proposition that "tribal sovereign immunity is the dominant factor in the Rule 19(b) analysis." *Motion to Dismiss* at 7. These cases hold that on balance sovereignty is to be given "sufficient consideration" where the tribal sovereign has a "substantive claim" at issue in the litigation. *See NAT* at 1280.

E. Plaintiff Would Not Have Adequate Remedy if the Action Were Dismissed

As set out in detail in *Manygoats* and *Klein*, dismissal of this suit against OSM for violating the ESA which calls for no action by Tribe would produce an "anomalous" result which would bar NEPA enforcement in Indian Country by anyone but the Tribe. *Manygoats*, 558 F.2d at 558-59.

F. The "Public Interest Exception" Allows this Suit to Enforce Public Rights Under the ESA.

Even if this court should determine that the Navajo Nation is necessary, cannot be joined, and is "indispensable," the "public interest exception" prevents this case from being dismissed in "equity and good conscience." *National Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940); *accord Dickman v. Santa Fe*, 724 F. Supp. 1341, 1344 FN4 (D.N.M. 1989).

In this case, Congress, in passing the ESA, has established procedures to further its policy of protecting endangered species. *See* 16 U.S.C. §1531(b). As such, Plaintiffs' ESA claim is narrowly restricted to the enforcement of public rights and does not involve adjudication of private (or tribal) rights. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1104 (10th Cir. 2010)(discussing Section 7 consultation requirements).

CONSLUSION

For the reasons set forward above, the Tribe's arguments that this matter should be dismissed pursuant to Rule 12(b)(7) should be rejected.

RESPECTFULLY SUBMITTED this 5th day of August, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2011, I served a copy of this document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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