No. 17-17320

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT; SAN JUAN CITIZENS ALLIANCE; AMIGOS BRAVOS; SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT; UNITED STATES BUREAU OF LAND MANAGEMENT; SALLY JEWELL, in her official capacity as Secretary of the U.S. Department of Interior; UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants-Appellees,

ARIZONA PUBLIC SERVICE COMPANY, NAVAJO TRANSITIONAL ENERGY COMPANY LLC,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court for the District of Arizona
Case No. 3:16-cv-08077-SPL

BRIEF FOR INTERVENOR-DEFENDANT-APPELLEE ARIZONA PUBLIC SERVICE COMPANY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor-Defendant-Appellee Arizona Public Service Company (APS) hereby discloses that it is a wholly-owned subsidiary of Pinnacle West Capital Corporation. No publicly held corporation owns 10% or more of Pinnacle West Capital Corporation's stock. APS jointly owns the Four Corners Power Plant with an APS and Pinnacle West affiliate—4C Acquisition, LLC—and with Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, and Tucson Electric Company.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

ABBREVIATION	DEFINITION
APA	Administrative Procedure Act
APS	Arizona Public Service Company
BIA	Bureau of Indian Affairs
BNCC	BHP Navajo Coal Company
EIS	Environmental Impact Statement
ESA	Endangered Species Act of 1973, 16 U.S.C. §§ 531 et seq.
FCPP	Four Corners Power Plant
NEPA	National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq.
NTEC	Navajo Transitional Energy Company, LLC
OSMRE	Office of Surface Mining Reclamation and Enforcement
SCR	Selective Catalytic Reduction
SMCRA	Surface Mining Control and Reclamation Act
U.S. EPA	United States Environmental Protection Agency

INTRODUCTION

Plaintiffs' stated purpose for litigating this case is to immediately extinguish the Navajo Transitional Energy Company, LLC's (NTEC's) and Arizona Public Service Company's (APS's) legal rights to operate the Navajo Mine and the Four Corners Power Plant (FCPP), respectively. Plaintiffs make that abundantly clear in their complaint, which formally and expressly asks the courts to set aside the Department of the Interior's 2015 Record of Decision authorizing NTEC's and APS's continued operations of these assets. ER68-69.

An order invalidating the Record of Decision—and thereby halting NTEC's and APS's operations—would have devastating fiscal and economic consequences for the Navajo Nation and its members, who own NTEC and the Navajo Mine. The fate of the Navajo Mine and FCPP are inextricably linked, since the Mine is the sole supplier of fuel for the FCPP. The Navajo Nation derives roughly 35% of its general fund from the Navajo Mine and FCPP, including direct revenue of between $40 and 60 million each year. Those revenues are essential for the Nation to exercise its sovereign authority and provide for the welfare of its people—through education, fire and rescue, highway safety, police, and other critical services. The Navajo Mine and FCPP are also an important source of high-paying jobs to hundreds of tribal members. As the district court recognized, a ruling in

Plaintiffs' favor would pose a significant threat to "the solvency of the Navajo Nation." ER4.

The legal question raised in this appeal is whether the federal courts can adjudicate Plaintiffs' claims—and decide whether to extinguish NTEC's legal right to operate the mine—even though NTEC is not a party to the case. The answer is *no*. Federal Rule of Civil Procedure 19 is specifically designed to prevent courts and litigants from curtailing the legal rights and entitlements of absent third parties. The fairness and due-process interests embodied in Rule 19 are especially strong here, where the absent party—NTEC—is an arm of the sovereign Navajo Nation, and where the Nation's economic interests are so plainly threatened. The district court properly dismissed this case under Rule 19.

Plaintiffs and the Government claim the district court abused its discretion by declining to adjudicate NTEC's rights in NTEC's absence. Not so. The Government is wrong to assert—contrary to its longstanding view—that cases filed under the Administrative Procedure Act are categorically exempt from Rule 19's unambiguous joinder and dismissal requirements. And both Plaintiffs and the Government are wrong to deny that those requirements have been satisfied here. In fact, NTEC *does* have vested rights protected by the 2015 Record of Decision; the Government is *not* able to adequately protect those rights; and the Navajo Nation's sovereign immunity weighs *strongly* in favor of dismissal.

In short, the district court got it right: NTEC's legal rights are at the very heart of this case, and those rights cannot be adjudicated in NTEC's absence. The decision below should be affirmed.

STATEMENT OF JURISDICTION

Defendant-Intervenor-Appellee APS agrees with the jurisdictional statement of Appellants.

STATEMENT OF THE ISSUES

Whether Rule 19 allows the district court to adjudicate NTEC's legal right to operate the Navajo Mine in NTEC's absence.

STATUTORY ADDENDUM

Pursuant to Circuit Rule 28-2.7, a statutory addendum is attached to this brief.

STATEMENT OF THE CASE

I. THE IMPORTANCE OF THE NAVAJO MINE AND FOUR CORNERS POWER PLANT TO THE NAVAJO NATION

The Navajo Nation is a federally recognized Indian tribe that exercises sovereign control over more than 27,000 square miles of territory spanning across portions of Arizona, Utah, and New Mexico.[1] The Nation operates under a tripartite form of government led by a President, the Navajo Nation Council, and a Supreme Court. *Id.*; *id.* (select *Government*). The Nation's executive branch

[1] Official Site of the Navajo Nation, *History*, http://www.navajo-nsn.gov/history.htm (last visited May 7, 2018).

encompasses numerous administrative agencies, including an Environmental Protection Agency and Department of Fish and Wildlife.

For more than 50 years, the Navajo Nation has funded its government operations and provided for the welfare of its people through revenues derived from mining the abundant natural resources located within its territory. APS.SER2. The Nation's right to control the economic development of those resources has been settled for 150 years. The 1868 Navajo Nation Treaty (Treaty of Bosque Redondo), 15 Stat. 667, expressly recognizes the Nation's right to manage Navajo lands and resources, including its vast coal resources. ER103; APS.SER49.

A critical source of revenue for the Navajo Nation has long been mining and energy operations conducted by the Navajo Mine and the adjacent FCPP. Both are located on the Navajo Nation. The Mine is the sole supplier of coal to the FCPP, which generates up to 1,540 MW of reliable, baseload power for customers in the southwestern United States. APS.SER58, 60.[2] Operations at the Navajo Mine and

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[2] As Plaintiffs' opening brief explains, the district court dismissed this litigation before completion of the administrative record. Plaintiffs' Br. 3 n.1. Intervenor-Defendant APS joins in Plaintiffs' request (at notes 1, 2 and 3) that the Court take judicial notice of three documents issued by the Department of the Interior in relation to the challenged project: (1) Record of Decision for the Four Corners Power Plant and Navajo Mine Energy Project (July 14, 2015), http://www.wrcc.osmre.gov/initiatives/fourCorners/documents/ROD/CompleteROD.pdf; (2) Final EIS for the Four Corners Power Plant and Navajo Mine Energy Project (May 1, 2015), https://www.wrcc.osmre.gov/initiatives/fourCorners/documentLibrary.shtm (select Final EIS); and (3) Environmental Assessment and

FCPP currently generate $40-60 million per year in direct revenue to the Navajo Nation in taxes, rents and royalties, accounting for approximately 35% of the Navajo Nation's general fund. ER127.

The FCPP is co-owned and operated by Intervenor-Defendant-Appellee APS and subject to lease agreements with the Navajo Nation. APS.SER60. APS and the Navajo Nation negotiated and executed the original Lease Agreement in 1960 for the purpose of constructing and operating the FCPP, and the plant has been in continuous operation since 1962. APS.SER58, 60. APS and the Navajo Nation subsequently amended the Lease Agreement, including in 1966, 1978, and 1985, to reflect the evolving operations at the plant. APS.SER60; APS.SER29.

Mining activities at the Navajo Mine began in the early 1960s. APS.SER58. For many years, the Navajo Mine was owned and operated by BHP Navajo Coal Company (BNCC), with the Navajo Nation leasing its extensive coal resources at Navajo Mine to BNCC and collecting rents and royalties. *Id.* In 2013, the Navajo Nation Council initiated an extensive legislative process to create and fund NTEC, with the goal of having NTEC purchase and operate the mine on behalf of the Navajo Nation. APS.SER59.

Finding of No Significant Impact for Navajo Mine Permit Transfer Application, Navajo Reservation, New Mexico, (Nov. 2013), https://www.wrcc.osmre.gov/initiatives/navajoMine/permitTransfer.shtm (select Environmental Assessment and Finding of No Significant Impact).

In April 2013, the Navajo Nation Council voted by a supermajority to create NTEC as a wholly-owned entity of the Navajo Nation. APS.SER43-44; APS.SER53, 54 n.11. In October 2013, again by supermajority vote, the Navajo Nation Council allocated the necessary funds from the Navajo Nation's Unreserved, Undesignated Fund Balance towards acquisition of the Navajo Mine. APS.SER77; APS.SER53. In December 2013, NTEC completed its purchase of the mine. APS.SER28. Upon doing so, the Navajo Nation became—through NTEC—both the owner and the leaseholder of the tribal trust assets at issue. APS.SER53; APS.SER74-75; *see also* ER141.

The Navajo Nation Council's principal purpose in creating NTEC and having it purchase the mine was to "control the mineral rights and operations of Navajo Mine as well as to protect and promote the Navajo Nation's economic and financial self-interests." APS.SER73; APS.SER49-52. At the same time, the Council sought to begin diversifying the Navajo Nation's energy portfolio, by requiring NTEC to invest a portion of its net income from Navajo Mine operations in research and development of renewable and alternative sources of energy, storage, and transmission technologies. APS.SER38. NTEC operates the Navajo Mine as an arm of the Navajo Nation, and it possesses the Nation's inherent sovereign immunity. ER141.

NTEC operates the mine pursuant to a permit issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) under the Surface Mining Control and Reclamation Act (SMCRA). APR.SER28. That permit was previously held by BNCC; it was transferred to NTEC when NTEC purchased the mine in 2013. APS.SER73.

The operations conducted at the FCPP and Navajo Mine are an essential lifeblood of the Navajo Nation's economy. These operations provide payments and royalties to the Navajo Nation government and employ hundreds of tribal members in high-skilled, high-paying jobs. ER127. In addition to the direct revenue from ongoing operations at the FCPP and Navajo Mine, the Nation also benefits from significant indirect and induced economic activity from the project. *Id.* The direct revenues fund, among other things, the Navajo Nation Department of Diné Education, the Navajo Nation Department of Emergency Management, the Navajo Nation Department of Fire and Rescue Services, the Navajo Nation Department of Highway Safety, the Navajo Nation Emergency Medical Service, and the Navajo Police Department. APS.SER37.

It is hard to overstate the economic significance of the FCPP and Navajo Mine to the Navajo Nation. Indeed, the federal government has estimated that a "lower end estimate" of the economic activity generated by the FCPP and Navajo Mine through 2041 includes "approximately $1-1.5 billion in direct revenue to the

Navajo Nation, $4.1 billion in labor income, and $10.8 billion in [gross state product]." ER127.

II. FEDERAL APPROVALS FOR THE FCPP AND NAVAJO MINE ENERGY PROJECT

This case arises out of successful efforts by APS and NTEC to obtain federal regulatory approvals that were necessary to facilitate continued operations of the FCPP and Navajo Mine, respectively. Without these approvals, the Navajo Mine and FCPP would have shut down. APS.SER26-27.

In 2011, APS and the Navajo Nation negotiated and executed Lease Amendment and Supplement No. 3 to extend the term of the existing FCPP lease to facilitate operations through 2041, among other purposes. APS.SER29. Because the United States holds the Navajo Nation lands in trust for the tribe, the parties were required to obtain approval for the lease amendment from the Bureau of Indian Affairs (BIA), pursuant to 25 U.S.C. § 415(a). BIA approval was similarly required, pursuant to 25 U.S.C. § 323, for renewal of APS's existing rights-of-way over the Navajo Nation lands for the FCPP plant site, ancillary facilities, and certain transmission lines that distribute FCPP power. ER133-37. APS therefore requested BIA approval of the Lease Amendment and rights-of-way.

Concurrently, BNCC (which was replaced by NTEC upon NTEC's purchase of the mine in December 2013), formally requested that OSMRE renew the existing SMCRA permit that authorized ongoing mining and reclamation activities

on the 20,590 acres of Navajo Mine in operation. APS.SER24; ER130-32. BNCC (replaced by NTEC) also separately applied for a SMCRA permit to allow mining operations to move to a new area within the existing Navajo Mine lease area. APS.SER24; ER130-32.

These federal approvals triggered obligations under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 et seq. The federal government generally meets its NEPA obligations by reviewing and disclosing potential environmental impacts of major federal actions in a public document—in this case an environmental impact statement (EIS). In July 2012, OSMRE published in the Federal Register a notice of its intent to prepare an EIS for OSMRE's consideration of the Navajo Mine SMCRA permit application and for BIA's consideration of the proposed FCPP Lease Amendment and renewals of rights-of-ways for the FCPP. OSMRE, Notice of Intent To Initiate Public Scoping and Prepare an Environmental Impact Statement for the Four Corners Power Plant and Navajo Mine Energy Project, 77 Fed. Reg. 42,329 (July 18, 2012).[3]

The 2012 notice launched a comprehensive, multi-year, multi-agency NEPA environmental review process supporting the entitlements challenged in this action.

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[3] Intervenor-Defendant APS requests that the Court take judicial notice of this Federal Register notice. *See* 44 U.S.C. § 1507; *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1179 (9th Cir. 2002) ("[F]ederal courts are required to take judicial notice of the Federal Register.").

OSMRE served as the lead agency in that process, which also involved significant participation by the BIA, U.S. Army Corps of Engineers, Bureau of Land Management, U.S. Environmental Protection Agency (U.S. EPA), U.S. Fish and Wildlife Service, and National Park Service as well as the Navajo Nation and the Hopi Tribe. APS.SER31-33.

As part of the environmental review process, OSMRE and the other federal agencies solicited—and received—extensive input from the general public. The agencies held a total of 18 public open house meetings—half at the scoping phase of the environmental review, and the other half after OSMRE issued a draft EIS in 2014. APS.SER62-64. Radio announcements and an informational video about the environmental review were translated into Navajo and Hopi, and translators attended the public open house sessions to further facilitate participation among the Navajo and Hopi communities. APS.SER41-42. This comprehensive public outreach generated more than 500 scoping phase comments and 4,500 comments on the draft EIS. APS.SER63-64.

In May 2015, OSMRE issued a 1,700-page final EIS that analyzed potential environmental impacts of the proposed action, evaluated reasonable alternatives, and addressed cumulative effects. The EIS evaluated and disclosed potential effects on air quality, climate change, cultural resources, water quality, wildlife and habitats, socioeconomics, and environmental justice, among other areas.

APS.SER15-22. As the federal agencies later explained, this analysis was framed by the purpose and need for the proposed action, which included to "[p]rovide for tribal self-determination and promote tribal economic development in the energy and mining sectors for the Navajo Nation." ER126.

Concurrent with the NEPA review, the agencies engaged in formal consultation with the U.S. Fish and Wildlife Service, as required by the Endangered Species Act (ESA) of 1973, 16 U.S.C. §§ 1531 et seq. In April 2015, the U.S. Fish and Wildlife Service concluded formal consultation and issued a Biological Opinion addressing the potential impact of the proposed permit and approvals on various species. APS.SER65. The Biological Opinion concluded that the proposed action would not jeopardize the continued existence of the species the U.S. Fish and Wildlife Service evaluated during the consultation. APS.SER61.

In July 2015, OSMRE and BIA issued the Record of Decision Plaintiffs seek to overturn. That Record of Decision included:

- BIA's approval of Lease Amendment No. 3 to the FCPP site lease between APS and the Navajo Nation, extending it to 2041. ER133-34.
- BIA's approval of grants of easement for rights-of-way to APS for the FCPP plant site, ancillary facilities, and transmission lines. ER135-36.

- OSMRE's approval of the renewal of the Navajo Mine's existing SMCRA permit (Federal Permit NM-0003) to authorize continued mining operations for an additional five years beginning in 2014. ER130-32.
- OSMRE's approval of the Navajo Mine's expansion of the SMCRA permit area to begin operations in the new permit area in 2016 through 2041. *Id.*
- BIA's approval of a right-of-way to NTEC for an access road at the Navajo Mine. ER136-37.

Taken together, the effect of the Record of Decision is to grant APS and NTEC the legal right to continue operating the FCPP and the Navajo Mine, effective upon signing the Record of Decision. ER131, 133. Thus, the Record of Decision was a linchpin for survival of these assets. The Record of Decision was signed—and took legal effect—on July 15, 2015.

III. NTEC'S AND APS'S SUBSEQUENT FINANCIAL INVESTMENTS IN THE NAVAJO MINE AND FCPP

After obtaining the federal permits and approvals authorized by the Record of Decision, APS and NTEC proceeded to make significant financial investments in the FCPP and Navajo Mine. Those investments involve hundreds of millions of dollars in upgrades, improvements, and conservation measures—investment which would not have been made if the federal government had not issued the Record of

Decision authorizing NTEC and APS to continue operating the FCPP and Navajo Mine.

First, issuance of the Record of Decision in 2015 allowed APS to proceed with procuring materials and installing state-of-the-art air emission controls—selective catalytic reduction (SCR) devices—to reduce the FCPP's emissions of nitrogen oxides. APS.SER12-13. These new controls were required by the U.S. EPA under the Clean Air Act to be installed and operational by July 31, 2018, and that work is now substantially complete. APS.SER30.

When fully implemented later this year, the FCPP will achieve significant emissions reductions over historic levels, including:

- 87% reduction in nitrogen oxides,
- 79% reduction in selenium,
- 67% reduction in mercury,
- 58% reduction in particulate matter, and
- 26% reduction in greenhouse gases.

APS.SER23. The changes in compliance with the Clean Air Act will also reduce water consumption by approximately 20%. APS.SER25, 35.

Notably, the costs associated with these emissions controls have been enormous, totaling close to $500 million. APS.SER48. As an example of non-governmental parties' interest in the Record of Decision, APS would never have

made this nearly half-a-billion dollar investment without the Record of Decision approving the lease and rights-of-way extensions and facilitating the uninterrupted supply of coal to the FCPP. *Id.*

Second, NTEC and APS are also investing between $15 and $20 million over the life of the project to implement a number of species conservation and recovery measures. Those measures include: (1) developing and implementing a Pumping Plan to protect Colorado pikeminnow and razorback sucker; (2) developing and implementing a Non-native Species Escapement Prevention Plan to minimize the risk of non-native species (plants, invertebrates, and fish) invading the San Juan River; and (3) funding implementation of recovery actions and creating, maintaining, or improving habitat for Colorado pikeminnow and razorback sucker. APS.SER67-71. These conservation measures too would not have been undertaken but for the federal government's issuance of the Record of Decision.

Finally, NTEC relied on the SMCRA permits authorized by the Record of Decision to secure a new $115 million dollar line of credit in July 2016 to provide necessary working capital. APS.SER3. NTEC secured this line of credit by pledging its entire catalog of assets, including the Navajo Mine. *Id.* NTEC also moved mining operations into the new mining permit areas approved by the SMCRA permit.

IV. PLAINTIFFS' LITIGATION SEEKING TO SHUT DOWN THE NAVAJO MINE AND FCPP

Plaintiffs-Appellants Diné Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Center for Biological Diversity, Amigos Bravos, and Sierra Club (collectively, Plaintiffs) are interest groups that oppose continued operations of the FCPP and Navajo Mine. In April 2016, Plaintiffs filed a complaint in the U.S. District Court for the District of Arizona, alleging that the U.S. Department of the Interior and its Secretary, BIA, OSMRE, Bureau of Land Management, and U.S. Fish and Wildlife Service violated the ESA, NEPA, and the Administrative Procedure Act (APA) when they issued the Record of Decision and Biological Opinion. ER15 (¶3).

Plaintiffs are clear and unambiguous about the relief they are seeking in this case: Their complaint asks the court to "set aside" the Record of Decision. ER68-69. The result of any such vacatur would be to invalidate the regulatory approvals upon which NTEC and APS currently rely for authorization to operate the Navajo Mine and FCPP. Plaintiffs have openly sought similar results for years. Plaintiffs have twice obtained vacatur of SMCRA permits intended to authorize critical modifications of mining operations needed at the Navajo Mine in order to continue providing fuel to the FCPP. *See* Mem. Op. 45, *Diné Citizens Against Ruining Our Env't v. Klein*, No. 07-cv-1475-JLK, (D. Colo. Oct. 28, 2010), ECF No. 136; Order 7, *Diné Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining*

Reclamation & Enforcement, No. 12-cv-01275 (D. Colo. Apr. 6, 2015), ECF No. 83. Plaintiffs' public comments on the agency approvals demonstrate their intent: They urged a "transition away from continued operation of Navajo Mine and FCPP." APS.SER55. Having failed to convince the agencies to withhold necessary approvals for continued operations of the Navajo Mine and FCPP, Plaintiffs initiated this civil action to pursue that goal.

In July 2016, APS moved to intervene as a matter of right under Federal Rule of Civil Procedure 24(a). APS explained that it has a clear interest in participating in this case as co-owner and operator of the FCPP, who obtained the challenged approvals to facilitate ongoing plant operations. *See* APS.SER12-13; ER78. Neither Plaintiffs nor the Government opposed intervention. In August 2016, the district court granted APS intervention as of right as a party defendant. ER82-83.

In September 2016, NTEC moved to intervene as of right under Rule 24(a), for the limited purpose of filing a motion to dismiss. Once again, neither Plaintiffs nor the Government opposed intervention. In October 2016, the district court granted NTEC intervention as a matter of right as the owner of Navajo Mine. ER93-94.

NTEC then moved to dismiss under Rule 19. ER101. NTEC argued that it is a required party under Rule 19(a): if Plaintiffs succeed in vacating the Record of

Decision, NTEC could lose its existing right to mine coal, resulting in the loss of hundreds of jobs and millions of dollars in royalties, taxes and economic activity relied on by NTEC and the Navajo Nation. ER103-04. NTEC argued that it cannot be joined because (1) NTEC is an arm of the Navajo Nation that has sovereign immunity, and (2) dismissal is therefore required by Rule 19(b).

The district court agreed. In September 2017, the court found that NTEC had demonstrated a legally protected interest under Rule 19(a)(1)(B). ER1-9. Specifically, the court held that Plaintiffs' challenges to the federal approvals, upon which "continued operation of Navajo Mine and [FCPP] are conditioned," threaten "the solvency of the Navajo Nation and challenge the economic development strategies it has chosen to pursue." ER3-4 (footnote omitted).

In light of these "affronts to the Nation's sovereignty," the court rejected Plaintiffs' and the Government's assertion that federal defendants adequately represent NTEC's sovereign interests. ER4. On the contrary, the court found that "NTEC's interests in the outcome of this case far exceed" the Government's interest in defending the validity of its approvals, rendering NTEC a required party to the litigation. ER4-5. The court recognized "undisputed facts" making "clear that [NTEC] enjoys sovereign immunity as an 'arm' of the Navajo Nation," and therefore cannot be joined to the suit. ER6-7.

The court then evaluated the Rule 19(b) factors to determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed," which the court noted "can only be determined in the context of [the] particular litigation." ER7 (citations omitted). Based on NTEC's sovereign immunity and the unique facts of the case, the court concluded, "[i]n equity and good conscience, the present case cannot continue without Intervenor-Defendant NTEC." *Id.*

SUMMARY OF ARGUMENT

Rule 19 is clear that an absent party must be joined when litigation may impair its interest. Where a necessary 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 NTEC's right to continue operating the Navajo Mine in NTEC's absence. That decision should be affirmed.

I. The Government is wrong to argue that Rule 19 does not apply to APA litigation. Contrary to the broad and categorical rule the Government espouses, Rule 19 requires a case-specific consideration of the relevant factors. This Court has consistently employed that fact-dependent inquiry in Rule 19 cases, including in APA litigation. *See, e.g., Kescoli v. Babbitt*, 101 F.3d 1304, 1309-13 (9th Cir. 1996). Moreover, sitting *en banc*, this Court has rejected the exact same claim—a

rule that the federal government is the only proper defendant (there, in NEPA cases) under Rule 24, a Rule with nearly identical language to Rule 19. *See Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1180-81 (9th Cir. 2011). Just as that rule contradicted the plain text of Rule 24, the Government's position here cannot be squared with Rule 19. And although the Government invokes a limited exception to Rule 19 for proceedings very narrowly restricted to enforcement of "public rights," this Court has made clear that the "public rights" exception does not apply where, as here, the requested relief would "'destroy the legal entitlements of the absent parties.'" *Kescoli*, 101 F.3d at 1311 (citation omitted).

Notably, the Government's position in this case is inconsistent with its past litigation positions. Indeed, the Government has itself urged the dismissal of an APA case challenging an agency approval for the Navajo Mine. Unlike here, in that case the Government recognized that "[t]he Navajo Nation is an indispensable party" but joinder "is not 'feasible'" due to the Nation's sovereign immunity, and thus that the case had to be dismissed under Rule 19. Defs.' Mot. to Dismiss 26-28, *Diné Citizens Against Ruining Our Env't v. Klein*, 676 F. Supp. 2d 1198 (D. Colo. 2009), ECF No. 62. The Government's unexplained (and unacknowledged) about-face in this case is bewildering.

II. The Government and Plaintiffs are also wrong to claim that Rule 19 allows this case to proceed even without NTEC's participation. NTEC is a

necessary party under Rule 19(a)(1)(B) because Plaintiffs ask the court to vacate the Record of Decision, which would extinguish NTEC's existing legal right to operate the Navajo Mine. This would inflict severe socioeconomic consequences on the Navajo Nation—the beneficial owner of NTEC—through lost profits, jobs, and general fund revenue.

NTEC's interests in advancing the Navajo Nation's sovereign tribal objectives are not shared by any other party to the case, and the Government has demonstrated that it is incapable of adequately representing NTEC's interests. APS has distinct interests and lacks the background and expertise to defend the operations at the Navajo Mine.

As this Court has recognized, tribal sovereign immunity is typically dispositive and requires dismissal under Rule 19(b). Any other outcome would allow plaintiffs to *indirectly* achieve a result—destruction of the sovereign's legal rights—that it could not achieve directly. None of the Rule 19(b) factors is capable of overcoming NTEC's sovereign immunity here.

III. As such, the district court did not abuse its discretion when it dismissed the case, and its decision should be affirmed. But if this Court disagrees and allows this case to proceed, it should impose clear limits on the scope of available relief to mitigate the harm to NTEC's interests. Specifically, the Court should make clear that if Plaintiffs succeed in their challenge to the Record of Decision,

the proper remedy would be to remand the matter back to the relevant agencies without vacatur. That result would protect NTEC and the Navajo Nation from the severe harm associated with any temporary shutdown of the Navajo Mine and FCPP. Remand without vacatur therefore is the only remedy capable of minimizing the prejudice to NTEC.

STANDARD OF REVIEW

Rule 19 joinder determinations are practical and fact-specific. *Kescoli*, 101 F.3d at 1309. This Court reviews a district court's Rule 19 decision for abuse of discretion. *See Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002); *Kescoli*, 101 F.3d at 1309. 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." *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993) (citation omitted). If the district court's determination turns on a question of law, that determination is reviewed *de novo*. *Am. Greyhound Racing, Inc.*, 305 F.3d at 1022; *Kescoli*, 101 F.3d at 1309.

ARGUMENT

I. THE GOVERNMENT IS WRONG TO ASSERT THAT RULE 19 DOES NOT APPLY TO ADMINISTRATIVE PROCEDURE ACT LITIGATION

The Government's primary argument is the extraordinary (and perhaps unprecedented) assertion that APA litigation is categorically exempt from Rule 19's carefully-crafted joinder rules. Specifically, the Government asserts the

existence of a "general rule recognized by this Court and other courts of appeals that the United States is the *only* required defendant in an APA challenge to federal agency action." Gov't Amicus Br. 7. The Government thus argues that this case should be allowed to go forward, "irrespective of Rule 19." *Id.*[4]

That argument should be rejected out of hand: It squarely conflicts with the plain language of Rule 19; it is contrary to decades of this Court's precedent; and it flatly contradicts the Government's own prior positions in cases implicating Rules 19 and 24. Rule 19 unambiguously governs APA cases, and there is no legal basis for ignoring that rule simply because the case involves a challenge to agency action.[5]

A. The Government's Categorical Rule Is Contrary to Rule 19's Text, to Precedent, and to Policy

1. The Government's argument that APA litigation is somehow exempt from Rule 19's joinder rules—and that APA cases like this one must be allowed to

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[4] *See also* Gov't Amicus Br. 7 ("In [an APA] suit such as this, the agency's defense of its own action is adequate as a matter of law . . . ."); *id.* at 8 ("[F]ederal agencies and officers are normally the only necessary defendants in an APA action."); *id.* at 9 (In any case where the claims are "directed against a federal agency, challenging that agency's compliance with federal law," the "presence of the federal defendants whose action is being challenged should be deemed adequate as a matter of law."); *id.* (Because "[t]he only question to be decided in APA litigation is whether an agency action will be set aside"—and "[g]iven that agency action is judged on the basis articulated by the agency itself"—"there can be no question that the agency itself is the best—and only necessary—party to defend that action").

[5] Plaintiffs' claims in this suit are not limited to the APA. They also bring claims under the ESA, which is a separate cause of action.

proceed "irrespective of Rule 19"—has no basis in law. Most importantly, it directly conflicts with the Federal Rules of Civil Procedure. Rule 1 states that those rules "govern the procedure in all civil actions and proceedings in the United States District Courts," subject only to the specific exceptions set forth in Rule 81. No one claims that any of Rule 81's specific exceptions apply here—and they plainly do not.

Rule 19 sets forth specific rules establishing when a case must be dismissed for failure to join required parties. Specifically, Rule 19(a) unambiguously requires a person to be joined, if feasible, whenever "that person *claims an interest* relating to the *subject of the action* and . . . disposing of the action in the person'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) (emphasis added). Next, Rule 19(b) requires a court to dismiss the action if it is infeasible to join that person and the court determines that "in equity and good conscience" the action should not proceed without the absent party.

As the Government itself acknowledges (at 7), Rule 19 contains no exception for APA cases. By its terms, Rule 19 thus requires an APA case—just like any other case—to be dismissed if a required party cannot be joined and the court determines the action should not proceed, after engaging in a case-specific consideration of the relevant factors. Courts must give the Federal Rules of Civil

Procedure their plain meaning. *See, e.g.*, *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540-41 (1991) ("As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous."). There is simply no legal basis for ignoring Rule 19's carefully-calibrated standards for determining when a case must be dismissed for failure to join a required party. Indeed, the fact that Rule 1 and Rule 81 categorically exempt certain types of cases from the other rules—without creating any such exception for APA cases—further confirms that Rule 19 applies to such cases.

2. Unsurprisingly, no court has ever embraced the categorical exception to Rule 19 for APA cases that the Government urges here. On the contrary, this Court and other courts have dismissed APA cases for failure to join required parties under Rule 19. *See, e.g.*, *Kescoli*, 101 F.3d at 1310-11 (dismissing SMCRA and APA case because Navajo Nation and Hopi Tribe were required parties under Rule 19).[6] And even when this Court has refused to dismiss such cases, it has typically done so *not* because Rule 19 does not apply (as the Government claims), but rather because Rule 19's requirements for dismissal have not been met in that

[6] *See also, e.g.*, *Vill. of Hotvela Traditional Elders v. Indian Health Servs.*, 1 F. Supp. 2d 1022, 1026 (D. Ariz. 1997) (holding Hopi Tribe to be a necessary party under Rule 19(a) in NEPA challenge to the Indian Health Service's approval of a Hopi-owned wastewater treatment facility), *aff'd*, 141 F.3d 1182 (9th Cir. 1998); *cf. Kettle Range Conservation Grp. v. U.S. Bureau of Land Mgmt.*, 150 F.3d 1083, 1086-87 (9th Cir. 1998) (rejecting plaintiff's requested relief to rescind land contracts in the absence of joinder of the required private parties on the basis of Rule 19, despite the violation of NEPA).

particular case. *See, e.g., Makah Indian Tribe v. Verity*, 910 F.2d 555, 558-60 (9th Cir. 1990) (analyzing and applying Rule 19 in an action involving APA claims); *Manygoats v. Kleppe*, 558 F.2d 556, 558-59 (10th Cir. 1977) (evaluating Rule 19 factors in a NEPA case).

The Government's own authorities prove the point. Their brief cites a lengthy list of decisions that purportedly justify its categorical rule exempting APA cases from Rule 19's joinder rules. *See* Gov't Amicus Br. 8-9; *see also id.* at 7. But not one of those decisions announces or applies a bright-line rule that Rule 19 can be ignored or that the Government is the only necessary party in an APA case. On the contrary, in each of these decisions, the courts applied Rule 19's case-by-case, fact-specific test.[7] Nothing in those decisions supports the radical notion that Rule 19 can be cast aside simply because a case is brought under the APA.

3. The Government's argument in this case is virtually identical to one that this Court rejected in its *en banc* decision in *Wilderness Society v. United States*

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[7] *See Alto v. Black*, 738 F.3d 1111 (9th Cir. 2013) (case-specific assessment of Rule 19 factors); *Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999) (case-specific Rule 19 assessment concluding that the government and tribe's interests were identical because they were co-managers of the specific resources at issue); *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1155 (9th Cir. 1998) (per curiam) (case-specific Rule 19 analysis of the interests demonstrated by the tribe relative to the interests of other parties to the suit); *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996) (same); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001) (same).

Forest Service, 630 F.3d 1173 (9th Cir. 2011). That case overturned a prior panel's establishment of a categorical rule prohibiting third parties from intervening as defendants in NEPA challenges against the federal government. That prior panel had held that "the federal government is the *only* proper defendant in a NEPA compliance action," *id.* at 1178, notwithstanding the fact that Rule 24 expressly allows for intervention when a party "claims an interest relating to the property or transaction that is the subject of the action" and that interest "may as a practical matter" be impaired or impeded in disposition of the case. Fed. R. Civ. P. 24(a)(2).

This Court decisively rejected that argument and held that Rule 24 governs all cases. The Court explained that any "bright-line rule" that the federal government is the only proper defendant in NEPA cases is "inconsistent with the text of Rule 24(a)(2), which requires only 'an interest relating to the property or transaction that is the subject of the action.'" *Wilderness Soc'y*, 630 F.3d at 1178. The Court explained that that erroneous federal-defendant-only rule "mistakenly focuses on the underlying legal claim instead of the property or transaction that is the subject of the lawsuit." *Id.* And it held that "[c]ourts should be permitted to conduct [the Rule 24] inquiry on a case-by-case basis, rather than automatically prohibiting intervention of right on the merits in all NEPA cases." *Id.* at 1179.

Wilderness Society's logic applies equally here. Just as this Court rejected an atextual and categorical federal-defendant-only rule for purposes of Rule 24, it should likewise reject a virtually identical rule for purposes of Rule 19. Indeed, as the Advisory Committee Note points out, the requirements for intervention as of right under Rule 24(a) are almost word-for-word the same as the test for qualifying as a required party under Rule 19(a). *See* Fed. R. Civ. P. 24 advisory committee's note to 1966 amendment ("Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication . . . .").[8] Under both rules, the proper inquiry requires a case-by-case assessment of the particular circumstances at issue. Neither supports categorically foreclosing any such inquiry simply because the claim constitutes a challenge to federal agency action.

4. The Government defends its categorical rule with two policy arguments, neither of which has merit.

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[8] *Compare* Fed. R. Civ. P. 24(a)(2) (authorizing intervention as of right for any party who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."), *with* Fed. R. Civ. P. 19(a)(1)(B)(i) (requiring joinder of any party who "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest").

First, the Government asserts that because the APA "does not authorize any relief against non-federal entities," "an APA action *threatens no interests beyond the interest in seeing agency action upheld*, which the agency itself adequately represents." Gov't Amicus Br. 9 (emphasis added).

With all respect to the Government, that is absurd. Although APA cases necessarily involve challenges to agency action, such action often bestows legal rights or entitlements on third parties. The fact that the remedy in a successful APA case may be to vacate the agency action at issue does *not* mean that the third party has nothing directly at stake, or that the Government is somehow always capable of representing the third party's distinct interests in retaining the legal right or entitlement at issue. This case offers a perfect example. The Government's action here provided a legal entitlement to NTEC: the ability to operate, and expand, the Mine. Vacatur of that entitlement most assuredly threatens NTEC's property interest in the Navajo Mine. And because NTEC has acted in reliance on its entitlements, NTEC has vastly more to lose from vacatur of the decision than the Government does. *See supra* at 14.

To be sure, the Government is correct that in *some* cases, the challenged agency action might not create third-party rights or entitlements—and in *some* cases, the Government might largely be able to represent the third party's interest in having the agency action upheld. But those cases can be analyzed—and, if

appropriate, allowed to proceed—on a case-by-case basis, by applying Rule 19's fact-specific, multi-factor framework. They do *not* support the Government's categorical suggestion that Rule 19 should simply be ignored in APA litigation.

Second, the Government argues that applying Rule 19 in APA cases "would undermine important public rights crafted by Congress" by preventing certain lawsuits authorized by Congress if it is impossible to join a required party. Gov't Amicus Br. 10; *see also id.* at 3 (discussing "public rights" doctrine). That argument also fails. The entire purpose of Rule 19's joinder requirements is to require dismissal of civil actions that would otherwise be authorized. Rule 19 recognizes that in certain circumstances, otherwise valid civil actions should be dismissed to prevent adjudication of third party rights and interests in their absence. The Government's complaint that Rule 19 will sometimes require such dismissal reflects little more than a disagreement with the Rule 19's underlying policy.

The Government's suggestion that APA cases are categorically different because they involve "public rights" is also mistaken. To be sure, this Court has recognized a limited exception to Rule 19 for proceedings "'narrowly restricted to the protection and enforcement of public rights.'" *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014) (quoting *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940)). But this Court has also recognized that the so-called "public rights" exception does *not* apply when APA litigation threatens to "destroy the legal

entitlements of the absent parties." *Kescoli*, 101 F.3d at 1311 (citation omitted). Indeed, this Court has regularly *refused* to apply the "public rights" exception in situations where the requested relief would destroy the existing legal entitlement of an absent party.[9]

That is precisely the situation here: NTEC currently has a legal right to operate the Navajo Mine under the approvals granted by the Record of Decision. And NTEC will lose that right if Plaintiffs prevail on their claim and the Record of Decision is vacated. Because this case threatens to "destroy the legal entitlements of the absent parties," *Kescoli*, 101 F.3d at 1311 (citation omitted), the "public rights" doctrine does not apply. This settled exception to the public rights doctrine confirms that Rule 19 applies—and that this case should be dismissed.

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[9] *See, e.g.*, *White*, 765 F.3d at 1028 (public rights exception inapplicable because the relief sought by the Plaintiffs would destroy the rights of the absent tribe); *Kescoli*, 101 F.3d at 1311-12 (public rights exception inapplicable to APA case where Plaintiffs' requested relief "threatens the [tribes'] sovereignty by attempting to disrupt their ability to govern themselves and to determine what is in their best interests in balancing potential harm caused by the mining operations against the benefits of the royalty payments"); *Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992) ("Because of the threat to the absent tribes' legal entitlements, and indeed to their sovereignty, posed by the present litigation, application of the public rights exception to the joinder rules would be inappropriate."); *Kettle Range Conservation Grp.*, 150 F.3d at 1087 & n.2 (public rights exception inapplicable in NEPA action which would destroy the absent party landowners' ownership rights to parcels of land, and clarifying that *Conner v. Burford*, 848 F.2d 1441, 1461 (9th Cir. 1988), applied the public rights exception where the legal entitlements of the absent parties were not destroyed).

B. The Government's Argument is Inconsistent With Its Past Litigation Positions

In addition to being inconsistent with Rule 19's text, precedent, and policy, the Government's argument here is also inconsistent with its own longstanding interpretation of Rule 19. For decades, the Government has recognized that Rule 19 *does* apply to APA cases. Yet suddenly here the Government advances the contrary view, apparently for the first time. And it does so without even acknowledging (much less explaining) its change of heart. The fact that the Government's brief so completely departs from its earlier stance is good reason to doubt the soundness of its new position.

1. For decades, the Government has filed briefs in this and other Courts acknowledging that Rule 19 applies to APA cases. In some of those briefs, the Government has expressly argued that an APA case must be dismissed due to the court's inability to join an absent defendant.[10] In others, the Government has argued that the case should proceed, but only because the fact-specific Rule 19 requirements for dismissal have not been satisfied.[11]

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[10] *See, e.g.*, Federal Appellees Br. 24-30, *Vill. of Hotvela Traditional Elders v. Indian Health Servs.*, No. 97-15718, 1997 WL 33550848 (9th Cir. Sept. 8, 1997) (arguing that challenge on APA and NEPA grounds should be dismissed under Rule 19 for failure to join a required and indispensable tribe).

[11] *See, e.g.*, Answering Brief of Federal Appellees 38-39, *Alto v. Black*, No. 12-56145, 2012 WL 5248148 (9th Cir. Oct. 10, 2012) ("As this Court has stated, Rule 19 determinations are 'heavily influenced by the facts and circumstances of each

Two of the Government's prior filings are especially noteworthy. *First*, in *Diné Citizens Against Ruining Our Environment v. Klein*, 676 F. Supp. 2d 1198 (D. Colo. 2009), like here, some of the same plaintiffs sought to invalidate a SMCRA permit to operate the exact same Navajo Mine based on APA/NEPA grounds. No. 07-1475 *Diné Citizens* Mot. to Dismiss 1-2. But there, the Government did *not* argue that it is the only required defendant in an APA case. Quite the contrary. *The Government instead moved to dismiss the case under Rule 19, on essentially the exact grounds now advanced by NTEC here*. Specifically, the Government argued because "[t]he Navajo Nation is an indispensable party" but joinder "is not 'feasible'" due to the Nation's sovereign immunity, the court must dismiss the case. *Id.* at 26-28.

In doing so, the Government acknowledged that the Navajo Nation had a "significant economic interest" in continuing operations of the Navajo Mine. *Id.* at 27. The Government also expressly conceded that it was incapable of effectively representing the Navajo Nation's interests, explaining that "[t]he Federal Defendants' interests may not always be aligned with the Navajo Nation's interests." *Id.* The Government concluded that "the Navajo Nation's absence impairs its ability to protect its interests." *Id.* at 26. And perhaps most importantly,

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case.' *On the unique facts of the present case*, the district court did not err in determining that the Band is not a 'required party.'" (citations omitted) (emphasis added)).

the Government recognized that longstanding precedent holds that in appropriate circumstances—even in an APA case—cases must be dismissed under Rule 19 when a tribe cannot be joined due to sovereign immunity:

> Time and again, the courts have found that where a claim is made that could adversely affect a Tribe's property rights or its sovereign authority, but where the Tribe's sovereign immunity prevented the Tribe from being joined as a party to the action, the Tribe was an indispensable party and the case had to be dismissed. This rule has been applied in cases where the United States was also named as a defendant . . . .

Id. at 29 (footnotes omitted).

Second, the Government's position here is also inconsistent with the argument it advanced in *Wilderness Society*, discussed above. There, the Government argued that "a categorical rule is ill-suited to address the diverse substantive statutes and factual circumstances under which NEPA claims arise; and the federal defendant rule erroneously focuses on NEPA as a special category of claims for purposes of Rule 24(a)(2)." *Wilderness Soc'y* U.S. Amicus Br. 3, 2010 WL 5780041 (9th Cir. Dec. 3, 2010). Instead, the Government maintained, "the proper approach is to apply, as this Court does in all other contexts, the text of Rule 24 to each motion to intervene." *Id.* That is precisely the type of textually-mandated, case-specific approach that should govern the analogous Rule 19 inquiry here.

2. The Government's invocation of the "public rights" exception to Rule 19 also contradicts its past filings. Despite relying on that exception here, the Government nowhere mentions the settled law establishing that the exception does not apply when the relief sought will destroy the legal rights of the absent party. That omission is especially glaring because the Government has itself previously relied on that limitation to argue *against* applying the "public rights" exception, including in APA/NEPA cases.[12] And even when the Government has urged this Court to apply the "public rights" doctrine and allow a case to proceed, it has scrupulously acknowledged that the doctrine does not apply when the case would deprive an absent party of its legal rights.[13] The Government's prior filings completely undermine the "public rights" argument it is making here.

3. The Government is not bound by its prior litigating positions, and nothing prevents it from flip-flopping as it pleases. But in these circumstances—

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[12] *See, e.g.*, *Washington v. Daley* Federal Appellee Br. 45-46 (No. 97-35680), 1998 WL 34081797 (9th Cir. Feb. 11, 1998) (arguing that public rights exception did not apply because plaintiff's requested relief would threaten tribe's treaty rights); *Vill. of Hotvela Traditional Elders* Federal Appellees Br. 45 (No. 97-15718), 1997 WL 33550848 (9th Cir. Sept. 8, 1997) (arguing in a NEPA case that the public rights exception did not apply because plaintiff's remedy would preclude tribe from operating a sewer facility, "thereby significantly encroaching upon the Tribe's sovereign interests").

[13] *See, e.g.*, Defendant-Appellee Br. 29, *Aylward v. U.S. Forest Serv.*, No. 03-35856, 2004 WL 5469138 (9th Cir. July 12, 2004) (arguing that the "public rights" exception was applicable under circumstances where it would not destroy the absent third parties' "legal entitlements").

where the Government's complete reversal of position is so stark, unacknowledged, and unexplained—it is entirely appropriate for this Court to wonder whether the Government fully appreciates that its argument is an outlier. At a minimum, the Court should discount the Government's sweeping assertions that its new stance is somehow supported by the clear logic of the APA, by precedent, or by some sort of "general rule" that "the United States is the *only* required defendant in an APA challenge to federal agency action." Gov't Amicus Br. 7.

II. RULE 19 REQUIRES DISMISSAL BECAUSE NTEC IS A REQUIRED PARTY THAT CANNOT BE JOINED AS A RESULT OF ITS SOVEREIGN IMMUNITY

The district court did not abuse its discretion in dismissing this action. The Rule 19 joinder determination is "a practical one and fact specific." *Kescoli*, 101 F.3d at 1309 (quoting *Makah Indian*, 910 F.2d at 558). Under the particular facts of this case, NTEC is a necessary party under Rule 19(a)(1)(B) because Plaintiffs seek to extinguish NTEC's right to operate the Navajo Mine—a remedy that would inflict severe harm to its significant economic and energy policy interests. But NTEC cannot be joined without its express consent, because it possesses the Navajo Nation's sovereign immunity. *See* APS.SER5-6, 9 (¶¶ 5, 8, Exhibit 1 at 32). The Rule 19(b) factors strongly favor dismissal, given that NTEC owns the Navajo Mine and the Navajo Nation depends upon the income and job creation of

both the Navajo Mine and FCPP. The district court's decision should therefore be affirmed.

A. NTEC is a Required Party Under Rule 19(a)(1)(B).

A party is required under Rule 19(a)(1)(B) 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). As the district court explained, a necessary party only needs to have "'a *claim* to an interest,'" and "[a] legally protected interest need not be 'property in the sense of the due process clause.'" *See* ER3 (quoting *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992), and *Am. Greyhound Racing, Inc.*, 305 F.3d at 1023). The district court correctly held that NTEC satisfies the threshold for having a legally protected interest under Rule 19(a)(1)(B) in the particular circumstances of this case. ER3-4.

1. NTEC plainly holds a legally protected interest "relating to the subject of th[is] action," Fed. R. Civ. P. 19(a)(1)(B)—its interest in the continued operation of the Navajo Mine. That interest is legally protected; it was created by the 2015 Record of Decision, which authorized the approvals and permits that give NTEC the legal authority to operate the Mine. Plaintiffs seek to vacate the Record of Decision; and if successful, they will extinguish NTEC's legal entitlement to operate the Mine. *See supra* at 12. Adjudicating this case without NTEC will

therefore unambiguously "impair or impede [NTEC's] ability to protect [its] interest." Fed. R. Civ. P. 19(a)(1)(B)(i).

Notably, the Government's own analysis confirms the importance of NTEC's legal entitlements to the Navajo Nation. Losing the right to operate the Navajo Mine would inflict severe socioeconomic consequences on the Navajo Nation—the beneficial owner of NTEC, decimating the Nation's operating revenues and destroying the livelihoods of the 757 tribal employees of the Navajo Mine and FCPP. *See* ER127; *Ctr. for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1227 (D. Colo. 2012). Moreover, as the Government has explained, "[t]he end of economic and fiscal contributions from the Navajo Mine and FCPP's operations could lead to reductions in education attainment, increased crime and recidivism, and a reduced ability to maintain or upgrade the housing stock." APS.SER45.

In short, by posing a clear and present threat to the solvency of the Navajo Nation, as well as to the welfare and livelihoods of tribal members, this lawsuit clearly affects NTEC's legal rights. There can be no doubt that NTEC's interests are directly at stake.

2. This is not the first case to be dismissed under Rule 19 because the plaintiffs were unable to join an Indian tribe. In other cases, courts have properly

dismissed cases under Rule 19 when granting the plaintiff's requested relief would extinguish the absent tribe's legal rights or entitlements.

In *Kescoli*, plaintiff challenged under the APA and SMCRA the federal government's approval of a lease agreement between a coal company and the Navajo Nation and Hopi Tribe. 101 F.3d at 1307; Appellant Br. 2, *Kescoli v. Babbitt*, No. 94-17125, 1995 WL 17145212 (9th Cir. March 30, 1995). At the Government's urging, this Court held that the Navajo Nation and Hopi Tribe were required and indispensable—and the suit properly dismissed. *Kescoli,* 101 F.3d at 1310-11. As the court explained, the relief sought by the plaintiff "could affect the Navajo Nation's and the Hopi Tribe's interests in their lease agreements and the ability to obtain the bargained-for royalties and jobs" under that agreement. *Id.* at 1310; *see also id.* at 1311-12 (refusing to apply "public rights" doctrine because case threatened tribes' legal entitlements).

Lomayaktewa v. Hathaway likewise involved an attempt to invalidate a lease agreement between a coal company and the Hopi Tribe. 520 F.2d 1324, 1324-25 (9th Cir. 1975). And again, this Court held that Rule 19 barred the case from proceeding:"[i]t seems perfectly obvious that a judgment rendered in the absence of the Hopi Tribe most surely would be prejudicial to it, for the royalties to be paid

under the lease still amount to more than $20 million and cancellation of the lease would eliminate the employment of many of the Hopis." *Id.* at 1326.[14]

And in *Pizarchik*, several of the same plaintiffs in this case brought an ESA action (again) challenging the Navajo Mine's SMCRA permit. 858 F. Supp. 2d at 1224. The district court dismissed the case under Rule 19, finding in a very similar factual context the "weight to the Nation's sovereign immunity" to be "dispositive and require[] dismissal." *Id.* at 1230.

3. Plaintiffs' attempts to deny that NTEC has a legally protected interest are unavailing. They primarily rely on *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466 (9th Cir. 1986), a case they describe as holding that "a mining company's interests in obtaining a permit from federal regulators is insufficient to make the company a required party in a NEPA suit challenging the federal permitting process." Pls. Br. 30 (citing 803 F.2d at 468-69). But Plaintiffs ignore the crucial distinction: There, the absent parties merely held "*pending*" permit applications such that their asserted interest concerned only "[the National Park Service] *procedures* regarding mining plan approval." *Northern Alaska*, 803 F.2d

[14] The Government (at 11 n.3) attempts to distinguish *Lomayaktewa* on the grounds that the relief here is not directed at canceling a lease itself. That is a false distinction. Plaintiffs here seek to invalidate the approval of a lease between APS and the Navajo Nation and the SMCRA permit that authorizes NTEC to operate the mine.

at 469 (emphasis added). As this Court found, "miners with pending plans have no legal entitlement to any given set of procedures." *Id.*

Here, by contrast, NTEC's legal interest in operating the mine is *not* "pending," and it has *nothing* to do with "procedures." Rather, NTEC currently holds a substantive legal right to operate the Navajo Mine. That right derives from the 2015 Record of Decision—and it is under attack here. NTEC's vested legal right is more than sufficient to constitute a legally protected interest under Rule 19(a), and nothing in *Northern Alaska* suggests otherwise.[15] Plaintiffs' reliance on *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998) (per curiam), is similarly misplaced. The absent tribe in that case sought dismissal to protect its *future* ability to store water in a dam. *Id.* at 1153-54. That contemplated future tribal action is distinguishable from NTEC's current and ongoing operations of the Navajo Mine, which are authorized by the Record of Decision this litigation threatens to invalidate.

Plaintiffs are also wrong to argue that NTEC's "mere financial interest" is insufficient to satisfy Rule 19(a). Pls. Br. 31. This case involves NTEC's legal right to continue operating the Navajo Mine. Plaintiffs cite no case for the

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[15] If anything, *Northern Alaska supports* NTEC's claimed interest, insofar as this Court's decision went out of its way to emphasize that its Rule 19(a) analysis applied only to miners with "pending" permit requests, and *not* to miners whose requests had already been "approved." *See* 803 F.2d at 469 & n.2.

proposition that a company's legal right to conduct certain activity under a federal permit is somehow incapable of triggering Rule 19(a) because the company has a financial interest in that activity.[16]

In any event, Plaintiffs are wrong to discount the crucial role that the Navajo Mine and FCPP play in generating revenue and employment for the Navajo Nation. As discussed, the Navajo Nation receives more than a third of its general fund through tax revenue and royalties from the Navajo Mine and FCPP, and hundreds of tribal members are employed there. *See* ER127; *Pizarchik*, 858 F. 2d Supp. at 1227. Courts have held that similar factual circumstances meet the requirements of Rule 19(a). *See, e.g.*, *Vill. of Hotvela Traditional Elders v. Indian Health Servs.*, 1 F. Supp. 2d 1022, 1026 (D. Ariz. 1997) (finding Hopi Tribe to be a necessary party under Rule 19(a) in a NEPA challenge to the Indian Health Service's approval of a Tribe-owned wastewater treatment facility that directly employed tribal members).

Relatedly, Plaintiffs argue that APS adequately represents the interests of NTEC and the Navajo Nation, and that APS's interest in the project is "nearly identical" to that of NTEC. Pls. Br. 37-39. But APS's and NTEC's interests in the project are not precisely aligned such that the adequate representation standard is

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[16] Indeed, the only case Plaintiffs cite for their "mere financial interest" argument expressly acknowledged that an Indian tribe's financial interest in a "fixed fund which a court is asked to allocate may create a protectable interest [under Rule 19(a)]" and it held that a tribe's interest in its allocation of an annual harvest of salmon *was* such an interest. *See Makah Indian Tribe*, 910 F.2d at 558-59.

met. *See White*, 765 F.3d at 1027 (explaining that "the different motivations of two parties could lead to a later divergence of interests"). APS and NTEC have different financial interests as holders of different federal entitlements at issue in this case. Additionally, APS lacks the expertise and background to defend the operations at Navajo Mine, which NTEC—not APS—owns and operates. More fundamentally, NTEC's interests in achieving the aims of its enabling legislation and advancing the Navajo Nation's sovereign tribal objectives is not shared by any party.

4. Unlike Plaintiffs, the Government does not deny that NTEC has a legally protected interest at stake in this case. As it has previously argued—in other litigation seeking to shut down operations at the Navajo Mine—the Navajo Nation has a "clear interest in the subject-matter of th[e] lawsuit." No. 07-1475 *Diné Citizens* Mot. to Dismiss 26. Specifically, the Government has emphasized that the Nation "has significant economic interests at stake related to continuation of the lease . . . and related to the employment opportunities the mine operation (and related industries) offer to members of the Navajo Nation." *Id.* at 27.

Instead, the Government argues that NTEC's interests will not be impaired in this litigation because it—the Government—can adequately protect those interests. Gov't Amicus Br. 9. This Court should doubt those assurances, for several reasons.

First, the entities that would actually be called upon to defend NTEC's interests if this case were to proceed—*i.e.*, the actual federal defendants in this case, including the U.S. Department of the Interior and its Secretary, BIA, OSMRE, Bureau of Land Management, and U.S. Fish and Wildlife Service—do not themselves claim to be able to defend NTEC's interests or speak on its behalf. For reasons that are unclear, the federal defendants have declined to file a response brief in this appeal. Rather the brief was filed as an amicus brief (not a party brief); it was filed on behalf of the "United States" (not the relevant agencies); its "Statement of Interest" neither mentions nor purports to speak on behalf of the federal defendants; and the brief is silent on how or whether it advances defendant BIA's tribal trust responsibility to the Navajo Nation. This litigation posture calls into question whether those defendants believe they are able or willing to adequately represent NTEC's interests.

Second, the Government's amicus brief also includes significant factual errors and omissions that should undermine confidence in the Government's ability to protect NTEC's interests. To take one important example, the Government prominently proclaims agnosticism on the foundational question of whether NTEC is entitled to exercise the Navajo Nation's sovereign immunity. *See* Gov't Amicus Br. 5 n.2 (stating that the Government "takes no position on whether NTEC does in fact enjoy sovereign immunity"). But OSMRE—a federal defendant in this case—

recognized that NTEC has sovereign immunity. ER141. In fact, as a condition of transferring the SMCRA permit to NTEC, OSMRE itself required *NTEC* to provide a limited waiver of sovereign immunity for the purpose of allowing the United States to enforce Title V of SMCRA. *Id*.

Other examples also reveal the Government's disregard of basic facts relating to this case. The federal defendants' response to public comments, included in the final EIS, shows that the Government was aware that APS's investment of nearly half a billion dollars in upgrades to the FCPP was *contingent* on receiving the challenged approvals. APS.SER48. But the Government's brief here makes the extraordinary claim that if Plaintiffs succeed in vacating the Record of Decision, APS and NTEC would somehow be no worse off than if the Government had never issued the approvals in the first instance. Gov't Amicus Br. 9 ("An adverse judgment setting aside the agency action, while it could have collateral consequences for nonparties like NTEC, leaves those nonparties in a state no different from that in which would have found themselves had the agency never taken the challenged action in the first place.").

The Government is simply wrong: Vacatur of the regulatory approvals at issue here threaten APS's nearly $500 million investment in upgrades to FCPP. And NTEC and the Navajo Nation will likewise suffer significant financial losses as a result of interruption to the continued operation of the Navajo Mine, including

threats to the $115 million dollar line of credit and the loss of 35% of the Navajo Nation's general fund. *Supra* at 5, 14. The Government's failure to appreciate how high the stakes really are in this case is not reassuring.

Third, the Government cannot represent NTEC's interests with respect to the proper remedy (in the event the district court agrees with Plaintiffs on the merits). The Navajo Nation has a significant interest in uninterrupted continued operation of the Navajo Mine, including the jobs, tax revenue, royalties, and remaining current on a multi-million dollar loan secured by the project. Therefore, if the district court holds the 2015 Record of Decision unlawful in any respect, NTEC would undoubtedly provide significantly different information to the court regarding why it should exercise its discretion to remand *without* vacatur.

Fourth, the federal agencies simply do not share such interests with respect to the approvals in question. They are accordingly unlikely to defend NTEC's interests with the requisite effort and force. *See Shermoen*, 982 F.2d at 1318 (describing the factors for determining whether existing parties adequately represent the interests of absent tribes to include "'whether the "interests of a present party to the suit are such that it *will undoubtedly make all*" *of the absent party's arguments*'" (emphasis added) (citation omitted)); *Pizarchik*, 858 F. Supp. 2d at 1227 ("While a vacatur of the permit may be inconvenient for the federal defendants, contrastingly, it is potentially devastating for the [Navajo] Nation.").

B. Dismissal is Appropriate Under Rule 19(b) in Light of NTEC's Sovereign Immunity

Under Rule 19(b), if a party who is required to be joined cannot feasibly be joined, the court must decide whether "in equity and good conscience" the case should be dismissed. Fed. R. Civ. P. 19(b). This Court has often recognized that an absent party's sovereign immunity weighs strongly in favor of dismissal under Rule 19(b). *See*, *e.g.*, *White*, 765 F.3d at 1028; *Kescoli*, 101 F.3d at 1311. Indeed, the Supreme Court has explained that "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) (addressing immunity of foreign sovereign).

Beyond sovereign immunity, Rule 19(b) itself sets forth four non-exhaustive factors for a court to consider when making this determination: "(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." Here, NTEC's sovereign immunity and the other Rule 19(b) factors support dismissal.

1. As this Court recently explained in *White*, there is a "wall of circuit authority" establishing that an absent party's sovereign immunity will require a case to be dismissed under Rule 19(b). 765 F.3d at 1028. "Although Rule 19(b) contemplates balancing the factors, 'when the necessary party is immune from suit, there may be "very little need for balancing Rule 19(b) factors because *immunity itself may be viewed as the compelling factor*."'" *Id.* (emphasis added) (quoting *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994), itself quoting *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991)). Indeed, "virtually 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." *Id.* (emphasis added) (citing *Am. Greyhound Racing, Inc.*, 305 F.3d 1015; *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002); *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999); *Kescoli*, 101 F.3d 1304; *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989)).

Requiring dismissal in cases involving sovereign immunity makes perfect sense. After all, sovereign immunity reflects a fundamental, constitutional determination that sovereign entities may not be sued without their consent. *See, e.g.*, *Quileute Indian Tribe*, 18 F.3d at 1460-61; *Fluent v. Salamanca Indian Lease*

Auth., 928 F.2d 542, 548 (2d Cir. 1991). It would be strange indeed if a sovereign who enjoys such immunity could nonetheless have its legally-protected interest impaired by a lawsuit to which it is *not* a party.

Allowing such suits to proceed would allow plaintiffs to *indirectly* achieve a result—destruction of the sovereign's legal rights—that it could not achieve directly. The upshot would be to "effectively abrogate the Tribe's sovereign immunity by adjudicating its interest . . . without consent." *Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989); *see also Pimentel*, 553 U.S. at 867 (holding that "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous," the case must be dismissed whenever "there is a potential for injury to the interests of the absent sovereign").

For decades, the Government has repeatedly acknowledged—indeed, *emphasized*—that a tribe's sovereign immunity is typically dispositive and requires dismissal under Rule 19(b).[17] Yet here, the Government (once again) pirouettes and declares that "the default assumption should be *against* dismissal," in spite of

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[17] *See, e.g.*, *Vill. of Hotvela Traditional Elders* Federal Appellees Br. 41, No. 97-15718, 1997 WL 33550848 (9th Cir. Sept. 8, 1997) (arguing in Rule 19(b) analysis that "[t]he Tribe's interest in maintaining its sovereign immunity generally outweighs any interest that the plaintiffs might have in continuing the litigation. Where, as are the unique circumstances here, the Tribe-owned project is complete and in operation and all federal funds have been exhausted, 'immunity itself may be viewed as the compelling factor.'" (citations omitted)); Appellees Br. 35-38 (No. 96-5337), *Cherokee Nation of Oklahoma v. Babbitt*, 1997 WL 34646683 (D.C. Cir. Mar. 14, 1997).

NTEC's sovereign immunity. Gov't Amicus Br. 16. As with its other changes of position, the Government neither acknowledges the change of course nor tries to explain it. And although the Government suggests that its theory is unique to APA litigation, it fails to acknowledge that in *Kescoli—itself* an APA case—the Government told this Court that "[t]he critical, and indeed, overriding consideration when Indian tribal interests are involved is sovereign immunity." Federal Appellees Br. 27, *Kescoli v. Babbitt*, No. 94-17125, 1995 WL 17145211 (9th Cir. May 18, 1995). In such circumstances, the Government argued, "immunity itself may be viewed as the compelling factor" requiring dismissal under Rule 19(b). *Id.* The Government had it right in *Kescoli*—and nothing has changed since then.

2. None of the express Rule 19(b) factors is capable of overcoming NTEC's sovereign immunity here. The first factor, addressing prejudice, overwhelmingly *reinforces* the need for dismissal. *See* Fed. R. Civ. P. 19(b)(1). As described above, any ruling in Plaintiffs' favor would inflict severe harm on NTEC and the Navajo Nation. *See supra* at 5-8, 36-37, 41.

To be sure, the district court could attempt to limit the scope of the prejudice by refusing to vacate the 2015 Record of Decision, even if Plaintiffs prevail. *See* Fed. R. Civ. P. 19(b)(2). As explained further below, remanding that decision to the relevant federal agencies—without vacatur—would be far superior to setting

that decision aside. *See infra* at 51-57. But even if a court remands the approvals to the Government for further analysis, it would reopen the decisions already made and approvals already granted, creating significant uncertainty and exposing NTEC to the possibility of additional obligations and constraints. NTEC has already invested years of work—and millions of dollars—in working alongside the federal agencies to obtain the relevant approvals. A court-mandated do-over would impose significant hardships, even if the existing Record of Decision remains in place while the new proceedings unfold.

As to Rule 19(b)'s final factor, it is true that dismissal of this case would leave Plaintiffs without an alternative Article III forum in which to pursue their claims anew. *See* Fed. R. Civ. P. 19(b)(4). But there is nothing anomalous in that result: Sovereign immunity, by its very nature, eliminates claims that could otherwise be brought. Indeed, this Court has often acknowledged that for purposes of Rule 19(b), a plaintiff's interest in litigating a claim will often be "outweighed by a tribe's interest in maintaining its sovereign immunity." *Quileute Indian Tribe*, 18 F.3d at 1460-61 (citation omitted). In *Dawavendewa*, for example, this Court explained that many of its prior decisions recognized that a Rule 19 dismissal would leave the plaintiff without an alternative forum in which to bring a claim. 276 F.3d at 1162. "*Nevertheless, in each case, we determined that the absent Indian Tribe was indispensable and dismissed the case.*" *Id.* (emphasis added)

(citing *Lomayaktewa*, *Confederated Tribe*, *Shermoen*, *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088 (9th Cir. 1994), *Quilete Indian Tribe*, *Kescoli*, and *Clinton*). That same result—dismissal—is likewise appropriate here.[18]

III. AT A MINIMUM, THIS COURT SHOULD MAKE CLEAR THAT IF THIS CASE GOES FORWARD, THE DISTRICT COURT MAY NOT VACATE THE 2015 RECORD OF DECISION

For the reasons set forth above, no court should adjudicate NTEC's legal right to operate the Navajo Mine in NTEC's absence. That would be fundamentally unfair, and—if Plaintiffs' request to set aside the 2015 Record of Decision is granted—it would severely prejudice NTEC. The district court correctly dismissed this case in its entirety under Rule 19.

If this Court disagrees with that analysis and allows this case to proceed, however, it should impose clear limits on the scope of available relief. The Court should instruct the district court that—in the unlikely event it concludes that the 2015 Record of Decision was flawed—the proper remedy would be to remand that

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[18] The Government asserts that depriving Plaintiffs of a federal forum "weigh[s] heavily *against* dismissal." Gov't Amicus Br. 17. But that claim runs headfirst into the binding precedent discussed above. Indeed, the Government itself has previously argued that this Court's decisions "'routinely h[o]ld that the tribal interest in maintaining its sovereign immunity overcomes the lack of an alternative remedy or forum for plaintiffs,'" and that a district court's application of this "general principle" is "not an abuse of discretion." Federal Defendants-Appellees Answering Br. 46, *Arviso v. Norton*, 129 F. App'x 391 (9th Cir. 2005), 2004 WL 5469167 (citation omitted).

decision to the Department of the Interior *without* vacatur. That restriction on the available relief would help limit the potential harm to NTEC and the Navajo Nation, while affording Plaintiffs the chance to litigate their claims. Restricting the remedy in this way would be both just and appropriate, for at least three reasons.

First, there is no question that remand without vacatur is a lawful remedy available in this case. This Court and other courts of appeals have regularly applied that remedy as an exercise of equitable discretion in appropriate circumstances. *See, e.g.*, *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995); *Western Oil & Gas Ass'n v. U.S. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (citing cases); *see also Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080-82 (9th Cir. 2010); *Nat'l Wildlife Fed'n v. Nat'l Marube Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008); ER117-18 (explaining legal authority for remedy).

This case offers a textbook example of when remand without vacatur is justified. As explained above, vacatur of the Record of Decision would deprive NTEC of authority to operate the Navajo Mine, immediately jeopardizing the economic well-being of the Navajo Nation and its members. *See, e.g.*, *Cal. Communities Against Toxics v. U.S. EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (per curiam) (remanding EPA action without vacatur because vacatur would be

"economically disastrous"); *see generally supra* at 4-8 (discussing economic significance of the Navajo Mine).

Indeed, the Government has itself already agreed that remand without vacatur is the only appropriate remedy if Plaintiffs prevail. As the federal defendants argued to the district court below, "in the event the [district court] finds in favor of Plaintiffs [on the merits], the appropriate remedy here [would be] to remand the analyses and approvals to the agencies for appropriate ESA and NEPA compliance *without voiding the leases, permits, and rights of way or otherwise temporarily closing the mine or shutting down the power plant*." ER116-17 (emphasis added).

Second, this Court has authority to issue prospective guidance to the district court about the scope of the remedy, as part of its Rule 19 joinder analysis. As noted above, Rule 19(b) requires courts to conduct a flexible, discretionary, pragmatic analysis into whether—"in equity and good conscience"—an action should be allowed to proceed in the absence of a required party. As part of that analysis, courts must consider the extent to which an adverse judgment might prejudice the adverse party, and also "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." Fed. R. Civ. P. 19(b)(2) (emphasis added).

Rule 19(b) thus provides ample authority for this Court to make clear, in advance, that the only way to avoid undue prejudice to NTEC and the Navajo Nation is to avoid any resolution of this case that would deprive NTEC of its right to operate the Navajo Mine. Instructing the district court that it should not vacate the 2015 Record of Decision, regardless of how it otherwise adjudicates the merits, is the clearest and most straightforward way to achieve that objective.[19]

The Advisory Committee Notes accompanying Rule 19 support this pragmatic approach. In discussing Rule 19(b)'s focus on "the measures by which prejudice [to an absent party] may be averted or lessened," the Notes emphasize that "'shaping of relief' is a familiar expedient to this end." Fed. R. Civ. P. 19(b) advisory committee's note to 1966 amendment. They favorably cite a number of prior decisions implementing that approach, including one district court decision explaining that the court would "frame its [eventual] decree so as to protect the interests of th[e] absent parties." *Miller & Lux Inc. v. Nickel*, 141 F. Supp. 41, 46 (N.D. Cal. 1956). Rule 19 plainly anticipates that the proper scope of any eventual relief should be considered—and, if necessary, limited—as part of the Rule 19(b) joinder analysis.

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[19] As noted above, the Navajo Mine exclusively sells coal to the FCPP, which is immediately adjacent to the Mine. *See supra* at 4. If Plaintiffs were to succeed in invalidating approvals for FCPP operations, this would also shut down Navajo Mine by eliminating its sole purchaser.

Notably, this Court has previously applied that approach in similar circumstances. *See, e.g., Stock W. Corp. v. Lujan*, 982 F.2d 1389, 1393, 1399 (9th Cir. 1993). There, the Court allowed a case to proceed without an absent tribe but emphasized that the district court should "lessen any prejudice" to the tribe by "*remand[ing] the case for further agency proceedings* rather than compel[ling] agency action" if it found in favor of the plaintiffs. *Id.* at 1399 (emphasis added). The Court explained that "[i]n this manner, the [district] court would accommodate both the Tribe's absence in federal court and its apparent willingness to participate in Interior Department administrative proceedings." *Id.*[20] So too here. If the Court allows Plaintiffs' case to proceed, it should clarify that the most they can obtain is a remand—*not* a ruling that would vacate the 2015 Record of Decision and thereby extinguish NTEC's rights.

Finally, Plaintiffs themselves appear to concede that one way to limit the potential prejudice to NTEC and the Navajo Nation would be to limit the scope of potential relief. Although their complaint unambiguously asks the district court to "set aside" (*i.e.*, vacate) the 2015 Record of Decision, ER68-69, their brief purports

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[20] Similarly, *Conner* affirmed a district court's decision allowing a case challenging oil and gas leases on NEPA and ESA grounds. 848 F.2d at 1461. In doing so, the Court limited the scope of the district court's order to ensure that it did not prejudice the absent lessees by invalidating the leases at issue. *Id.* at 1460-61. *Conner* thus supports the commonsense proposition that in analyzing whether a case can proceed without an absent party, this Court can itself shape the scope of the remedy in order to avoid unfair prejudice to that party.

to embrace a much narrower form of relief that would *not* deprive NTEC of its right to operate the Navajo Mine. Not only do Plaintiffs repeatedly disclaim any intent to "prejudice" NTEC or the Navajo Nation, but they also specifically declare that the relief they seek "does not 'undermine authority' that [NTEC] or the Navajo Nation 'would otherwise exercise.'" Pls. Br. 43-44 (citation omitted). Although those statements are inconsistent with Plaintiffs' prayer for relief, they suggest that Plaintiffs would be satisfied with a result short of vacatur.

Significantly, Plaintiffs support their no-prejudice argument by pointing to other APA cases in which district courts have invalidated agency action in connection with the Navajo Mine, but *without* requiring the mine or FCPP to shut down. *Id.* at 9 n.4, 44 (citing *Diné Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining Reclamation & Enforcement*, 82 F. Supp. 3d 1201, 1218 (D. Colo. 2015); *Diné Citizens Against Ruining Our Env't v. Klein*, 747 F. Supp. 2d 1234, 1264 (D. Colo. 2010)). Indeed, Plaintiffs emphasize that those "prior public interest lawsuits challenging federal approval of different expansions of the Navajo Mine have not led to the closure of the mine or power plant." *Id.* at 44; *see also id.* at 9 n.4 (stressing that "[n]either case caused the closure of the mine or power plant").

Plaintiffs presumably rely on those cases because they believe that the same result—a victory for Plaintiffs that nonetheless *does not require the Navajo Mine*

to shut down—would be equally appropriate here. If so, then there is no obstacle to this Court's making that limit on the potential available relief fully explicit, as part of its Rule 19(b) analysis.

In short, this Court should take Plaintiffs at their word: If the Court allows this case to go forward despite NTEC's absence, it should make clear that the district court should *not* vacate the 2015 Record of Decision or take any other action that would block NTEC from continuing to lawfully operate the mine.

CONCLUSION

For the foregoing reasons, the district court's order should be affirmed. In the alternative, this Court should impose clear limits on the scope of available relief to lessen prejudice to NTEC.

May 11, 1018

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6 Intervenor-Defendant-Appellee is unaware of any related cases pending in this Court that are related to this appeal, as defined by Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, Brief for Intervenor-Defendant-Appellee is proportionately spaced, has a typeface of 14 point and contains 13,800 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and including the Glossary of Acronyms and Abbreviations.

s/ Stacey L. VanBelleghem
Stacey L. VanBelleghem

CERTIFICATE OF SERVICE

I, Stacey L. VanBelleghem, hereby certify that I electronically filed the foregoing Brief for Intervenor-Defendant-Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 11, 2018, which will send notice of such filing to all registered CM/ECF users.

s/ Stacey L. VanBelleghem
Stacey L. VanBelleghem

ADDENDUM

Pursuant to Circuit Rule 28-2.7

TABLE OF CONTENTS

No. 17-17320

25 U.S.C. § 323

§ 323. Rights-of-way for all purposes across any Indian lands

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

25 U.S.C. § 415(a)

§ 415. Leases of restricted lands

(a) Authorized purposes; term; approval by Secretary

Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land located outside the boundaries of Indian reservations in the State of New Mexico, leases of land on the Agua Caliente (Palm Springs) Reservation, the Dania Reservation, the Pueblo of Santa Ana (with the exception of the lands known as the "Santa Ana Pueblo Spanish Grant"), the reservation of the Confederated Tribes of the Warm Springs Reservation of Oregon, the Moapa Indian Reservation, the Swinomish Indian Reservation, the Southern Ute Reservation, the Fort Mojave Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Burns Paiute Reservation, the Coeur d'Alene Indian Reservation, the Kalispel Indian Reservation and land held in trust for the Kalispel Tribe of Indians, the Puyallup Tribe of Indians,,[1] the pueblo of Cochiti, the pueblo of Pojoaque, the pueblo of Tesuque, the pueblo of Zuni, the Hualapai Reservation, the Spokane Reservation, the San Carlos Apache Reservation, the Yavapai-Prescott Community Reservation, the Pyramid Lake Reservation, the Gila River Reservation, the Soboba Indian Reservation, the Viejas Indian Reservation, the Tulalip Indian Reservation, the Navajo Reservation, the Cabazon Indian Reservation, the Muckleshoot Indian Reservation and land held in trust for the Muckleshoot Indian Tribe, the Mille Lacs Indian Reservation with respect to a lease between an entity established by the Mille Lacs Band of Chippewa Indians and the Minnesota Historical Society, leases of the the[1] lands comprising the Moses Allotment Numbered 8 and the Moses Allotment Numbered 10, Chelan County, Washington, and lands held in trust for the Las Vegas Paiute Tribe of Indians, and lands held in trust for the Twenty-nine Palms Band of Luiseno Mission Indians, and lands held in trust for the Reno Sparks Indian Colony, lands held in trust for the Torres Martinez Desert Cahuilla Indians, lands held in trust for the Guidiville Band of Pomo Indians of the Guidiville Indian Rancheria, lands held

[1] So in original.

in trust for the Confederated Tribes of the Umatilla Indian Reservation, lands held in trust for the Confederated Tribes of the Warm Springs Reservation of Oregon, land held in trust for the Coquille Indian Tribe, land held in trust for the Confederated Tribes of Siletz Indians, land held in trust for the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians, land held in trust for the Klamath Tribes, and land held in trust for the Burns Paiute Tribe, and lands held in trust for the Cow Creek Band of Umpqua Tribe of Indians, land held in trust for the Prairie Band Potawatomi Nation, lands held in trust for the Cherokee Nation of Oklahoma, land held in trust for the Fallon Paiute Shoshone Tribes, lands held in trust for the Pueblo of Santa Clara, land held in trust for the Yurok Tribe, land held in trust for the Hopland Band of Pomo Indians of the Hopland Rancheria, lands held in trust for the Yurok Tribe, lands held in trust for the Hopland Band of Pomo Indians of the Hopland Rancheria, lands held in trust for the Confederated Tribes of the Colville Reservation, lands held in trust for the Cahuilla Band of Indians of California, lands held in trust for the Confederated Tribes of the Grand Ronde Community of Oregon, and the lands held in trust for the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and leases to the Devils Lake Sioux Tribe, or any organization of such tribe, of land on the Devils Lake Sioux Reservation, and lands held in trust for Ohkay Owingeh Pueblo[2] which may be for a term of not to exceed ninety-nine years, and except leases of land held in trust for the Morongo Band of Mission Indians which may be for a term of not to exceed 50 years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

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[2] So in original. Probably should be followed by a comma.

44 U.S.C. § 1507

§ 1507. Filing document as constructive notice; publication in Federal Register as presumption of validity; judicial notice; citation

A document required by section 1505(a) of this title to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection as provided by section 1503 of this title. Unless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it. The publication in the Federal Register of a document creates a rebuttable presumption—

(1) that it was duly issued, prescribed, or promulgated;

(2) that it was filed with the Office of the Federal Register and made available for public inspection at the day and hour stated in the printed notation;

(3) that the copy contained in the Federal Register is a true copy of the original; and

(4) that all requirements of this chapter and the regulations prescribed under it relative to the document have been complied with.

The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number.