

No. 17-17320

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS, *et al.*,
Defendants,

ARIZONA PUBLIC SERVICE COMPANY, and NAVAJO
TRANSITIONAL ENERGY COMPANY, LLC,
Intervenors-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona, No. 3:16-cv-08077-SPL
The Honorable District Judge Steven Paul Logan

**ANSWERING BRIEF OF APPELLEE
NAVAJO TRANSITIONAL ENERGY COMPANY, LLC**

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CORPORATE DISCLOSURE STATEMENT

Appellee Navajo Transitional Energy Company, LLC certifies that it is wholly owned by the Navajo Nation. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF JURISDICTION	3
STATEMENT OF THE ISSUE	3
STATEMENT OF THE CASE	3
I. History of Navajo Transitional Energy and the Operations of the Navajo Mine and the FCPP on Navajo Nation Lands	4
A. The Navajo Nation has inherent sovereign rights and treaty rights to develop the natural resources on its trust lands to advance its own tribal goals	4
B. For decades, the Navajo Mine and the FCPP have been cornerstones of the Navajo Nation’s economy and major employers of Navajo people	8
C. In creating a tribal entity to purchase back the Navajo Mine, the Navajo Nation took a historic step to protect and promote its sovereign interests and goals.....	11
II. History of Federal Approvals for Mining Permit, Lease, and Rights-of-Way Renewals for the Navajo Mine and the FCPP	18
III. History of Proceedings in the District Court.....	22
A. Plaintiffs file a complaint asking the district court to set aside the ROD and vacate the federal approvals for operations at the Navajo Mine and the FCPP	22
B. The district court dismissed the action under Rule 19 based on its determination that Navajo Transitional Energy is a required and indispensable party that cannot be joined due to sovereign immunity	25

SUMMARY OF ARGUMENT	27
STANDARD OF REVIEW.....	30
ARGUMENT	31
I. The District Court Did Not Abuse Its Discretion under Rule 19 in Determining that Navajo Transitional Energy Was a Required and Indispensable Party in this Case.....	31
II. Rule 19 Involves a Case-Specific Determination about Whether an Action, “in Equity and Good Conscience,” May Proceed without a Required Absent Party.....	35
III. The District Court Did Not Abuse Its Discretion in Determining that Navajo Transitional Energy is a Required Party under Rule 19(a)	40
A. The sovereignty and socioeconomic interests of the Navajo Nation, acting through Navajo Transitional Energy, are at stake in this action.....	41
B. No other existing party represents the sovereignty and socioeconomic interests of the Navajo Nation, acting through Navajo Transitional Energy.....	49
IV. The District Court Did Not Abuse Its Discretion in Deciding that, “in Equity and Good Conscience,” this Action Should Not Proceed without Navajo Transitional Energy under Rule 19(b)	55
V. The Public-Rights Exception to Rule 19 Is Inapplicable in Cases, Like this One, Where the Requested Relief Would Destroy Legally Protected Rights of the Absent Party	61
VI. Plaintiffs Also Cannot Rely on Joinder of Navajo Transitional Energy’s Chief Executive Officer to Avoid Dismissal.....	68
CONCLUSION.....	70

TABLE OF AUTHORITIES

Cases

<i>Alto v. Black</i> , 738 F.3d 1111 (9th Cir. 2013)	37, 46
<i>Am. Greyhound Racing, Inc. v. Hull</i> , 305 F.3d 1015 (9th Cir. 2002)	31, 38, 46, 57, 59, 66
<i>Bakia v. County of Los Angeles</i> , 687 F.2d 299 (9th Cir. 1982)	36
<i>Burlington N. & Santa Fe Ry. Co. v. Vaughn</i> , 509 F.3d 1085 (9th Cir. 2007)	69
<i>Confederated Tribes v. Lujan</i> , 928 F.2d 1496 (9th Cir. 1991)	42, 56
<i>Conner v. Burford</i> , 848 F.2d 1441 (9th Cir. 1988)	29, 38, 62, 63, 64, 66, 68
<i>Ctr. for Biological Diversity v. Pizarchik</i> , 858 F. Supp. 2d 1221 (D. Colo. 2012)	44, 52, 54
<i>Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.</i> , 276 F.3d 1150 (9th Cir. 2002)	56
<i>Friends of Amador Cty. v. Salazar</i> , 554 F. App'x 562 (9th Cir. 2014) (unpublished)	34
<i>Kescoli v. Babbitt</i> , 101 F.3d 1304 (9th Cir. 1996)	25, 30, 38, 42, 43, 44, 46, 60, 62, 66
<i>Kettle Range Conservation Group v. United States BLM</i> , 150 F.3d 1083 (9th Cir. 1998)	63
<i>Kiowa Tribe of Okla. v. Mtg. Technologies, Inc.</i> , 523 U.S. 751 (1998)	32
<i>Lomayalaktewa v. Hathaway</i> , 520 F.2d 1324 (9th Cir. 1975)	44

<i>Makah Indian Tribe v. Verity</i> , 910 F.2d 555 (9th Cir. 1990).....	28, 37, 42, 49, 60, 64, 65
<i>Manybeads v. United States</i> , 209 F.3d 1164 (9th Cir. 2000).....	47, 51
<i>Manygoats v. Kleppe</i> , 558 F.2d 556 (10th Cir. 1977).....	34, 52, 53
<i>McClendon v. United States</i> , 885 F.2d 627 (9th Cir. 1989).....	33
<i>Michigan v. Bay Mills Indian Cmty.</i> , 134 S. Ct. 2024 (2014).....	31, 32, 33
<i>Nat’l Audubon Society v. Davis</i> , 307 F.3d 835 (9th Cir. 2002).....	69
<i>Nat’l Licorice Co. v. Nat’l Labor Relations Board</i> , 309 U.S. 350 (1940).....	38, 62, 63
<i>Nealey v. Transportacion Maritima Mexicana, S.A.</i> , 662 F.2d 1275 (9th Cir. 1980).....	30
<i>Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe</i> , 498 U.S. 505 (1991).....	32
<i>Phillippines v. Pimentel</i> , 553 U.S. 851 (2008).....	2, 29, 37, 56
<i>Pit River Home & Agrc. Coop. Ass’n v. United States</i> , 30 F.3d 1088 (9th Cir. 1994).....	57
<i>Provident Trademens Bank & Trust Co.</i> , 390 U.S. 103 (1968).....	36, 37
<i>Quileute Indian Tribe v. Babbitt</i> , 18 F.3d 1456 (9th Cir. 1994).....	34, 46
<i>Salt River Project Agric. Improvement & Power Dist. v. Lee</i> , 672 F.3d 1176 (9th Cir. 2012).....	36, 50, 53, 54, 69

<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978).....	31, 33
<i>Shermoen v. United States</i> , 982 F.2d 1312 (9th Cir. 1992).....	38, 39, 49, 66
<i>Thomas v. United States</i> , 189 F.3d 662 (7th Cir. 1999).....	46
<i>Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C.</i> , 476 U.S. 877 (1986)	32
<i>United States v. 14.02 Acres</i> , 547 F.3d 943 (9th Cir. 2008).....	4
<i>United States v. Mitchell</i> , 463 U.S. 206 (1983).....	5
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978).....	31
<i>Virginia Office for Protection & Advocacy v. Stewart</i> , 563 U.S. 247 (2011).....	69
<i>White v. Univ. of Cal.</i> , 765 F.3d 1010 (9th Cir. 2014).....	26, 32, 37, 62
<i>Wilbur v. Locke</i> , 423 F.3d 1101 (9th Cir. 2005).....	44, 66
<i>Wilderness Soc’y v. U.S. Forest Serv.</i> , 630 F.3d 1173 (9th Cir. 2014) (en banc)	62
<i>Ex parte Young</i> , 209 U.S. 123 (1908).....	68, 69, 70
Statutes	
<i>Administrative Procedures Act of 1946</i> , 5 U.S.C. § 500 <i>et seq.</i>	35, 61, 70

<i>Endangered Species Act of 1973,</i> 16 U.S.C. § 1536 <i>et seq.</i>	19, 20, 23, 51, 63, 64, 70
<i>Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. § 3501 et seq.</i>	6
<i>National Environment Policy Act of 1969,</i> 42 U.S.C. § 4321 <i>et seq.</i> ... 6, 19, 20, 23, 24, 34, 51, 52, 59, 62, 63, 64, 70	
<i>National Historic Preservation Act of 1966,</i> 16 U.S.C. § 470 <i>et seq.</i>	19, 20
<i>Navajo Clean Water Act,</i> 4 N.N.C. § 1385.....	7, 59
<i>Navajo Nation Air Pollution Prevention and Control Act,</i> 4 N.N.C. § 1156.....	7, 59
<i>Surface Mining Control and Reclamation Act of 1977,</i> 30 U.S.C. § 1201 <i>et seq.</i>	18, 19, 21, 23, 43
2 N.N.C. § 1900 <i>et seq.</i>	6
5 N.N.C. § 3600.....	13
16 U.S.C. § 101(d)(6)(B).....	20
16 U.S.C. § 1536	20
16 U.S.C. § 1540(g)	3
25 U.S.C. § 323	18
25 U.S.C. § 415	18
28 U.S.C. § 1291	3
28 U.S.C. § 1331	3
42 U.S.C. § 4332(2)(C)	20

Other Authorities

40 C.F.R. § 49.5512	12
Fed. R. Civ. P. 12(b)(7)	24
Fed. R. Civ. P. 19	<i>supra</i>
Fed. R. Civ. P. 24(a)	24
<i>Department of Interior Policy on Consultation with Indian Tribes</i> , Order 3317 (Dec. 1, 2011)	6
Navajo Nation Council Resolution No. CAP-34-80 (April 29, 1980)	7
Navajo Nation Council Resolution No. CAP-20-13 (April 29, 2013), <i>amended by</i> , Navajo Nation Council Resolution No. CAP-58-13 (Oct. 24, 2013)	13, 14, 15
Navajo Nation Council Resolution No. CO-50-13 (Oct. 24, 2013)	13, 14
<i>Treaty between United States of America and the Navajo Tribe of Indians</i> (June 1, 1868), 15 Stat. 667	4
<i>Treaty with the Navaho</i> (Sept. 9, 1849), 9 Stat. 974	4

GLOSSARY OF TERMS

APA	Administrative Procedures Act of 1946, 5 U.S.C. § 500 <i>et seq.</i>
APS	Arizona Public Service Company
BHP Billiton	The immediate prior owner and operator of the Navajo Mine before the sale of the mine to NTEC
BIA	United States Bureau of Indian Affairs
BLM	United States Bureau of Land Management
CSA	Coal Supply Agreement
DOI	United States Department of the Interior
EIS	Environment Impact Statement
EPA	United States Environmental Protection Agency
ESA	Endangered Species Act of 1973, 16 U.S.C. § 1536 <i>et seq.</i>
FCPP	Four Corners Power Plant
Federal Defendants	United States Department of the Interior, United States Bureau of Indian Affairs, 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, and United States Fish and Wildlife Service
FIP	Federal Implementation Plan
Four Corners region	Region in the southwestern United States where the four corners of Arizona, Utah, New Mexico, and Colorado meet
Navajo Mine	Navajo Mine Energy Project

NTEC	Appellee Navajo Transitional Energy Company, LLC
NEPA	National Environment Policy Act of 1969, 42 U.S.C. § 4321 <i>et seq.</i>
NHPA	National Historic Preservation Act of 1966, 16 U.S.C. § 470 <i>et seq.</i>
NPS	United States National Park Service
OSMRE	United States Office of Surface Mining Reclamation and Enforcement
Plaintiffs	Appellants Diné Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Center for Biological Diversity, Amigos Bravos, Sierra Club, and Center for Biological Diversity
SMCRA	Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 <i>et seq.</i>
USACE	United States Army Corps of Engineers
USFWS	United States Fish and Wildlife Service

INTRODUCTION

This action seeks to set aside a final Record of Decision (“ROD”) that the United States Department of Interior (“DOI”) and the other federal defendants (collectively “Federal Defendants”) issued to approve the continued operations of the Navajo Mine Energy Project (“Navajo Mine”) and the adjacent Four Corners Power Plant (“FCPP”) on Navajo Nation lands. If the requested relief were granted and the federal approvals were vacated, the Navajo Mine and the FCPP would be required to stop operations.

Appellee Navajo Transitional Energy Company, LLC (“Navajo Transitional Energy” or “NTEC”) is a tribal entity of the Navajo Nation. The Navajo Nation created Navajo Transitional Energy to own and operate the Navajo Mine—a tribal trust asset—for the benefit of the Navajo Nation and its people. The Navajo Mine and the FCPP are cornerstones of the Navajo economy, employing hundreds of Navajo tribal members and providing critical revenues for Navajo public services. If operations at the Navajo Mine and the FCPP were interrupted, the solvency of the Navajo Nation would be threatened,

and ownership of the Navajo Mine and other tribal assets almost certainly would be lost.

Even though this action seeks to extinguish Navajo Transitional Energy's legal right to operate the Navajo Mine and to stop operations at the FCPP—with devastating consequences to sovereignty interests and legally protected interests of the Navajo Nation and its people—Plaintiffs Diné CARE *et al.* (“Plaintiffs”) argue that this case should proceed without Navajo Transitional Energy. The district court correctly rejected that position. When, as in this case, an Indian tribe or tribal entity has sovereign immunity, and the legally protected interests of the tribe are at stake, Federal Rule of Civil Procedure (“Rule”) 19 requires dismissal “where there is a potential for injury to the interests of the absent sovereign.” *Phillippines v. Pimentel*, 553 U.S. 851, 867 (2008). Here, given the importance of Navajo Transitional Energy's legally protected interests and the clear potential for serious injury to those interests, the district court acted well within its discretion under Rule 19 in determining that dismissal was required.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 16 U.S.C. § 1540(g) and 28 U.S.C. § 1331. After the district court dismissed the action for failure to join Navajo Transitional Energy as a required and indispensable party under Rule 19, Plaintiffs timely filed a notice of appeal. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in dismissing this action under Rule 19 because Navajo Transitional Energy is a required and indispensable party that cannot be joined due to its sovereign immunity as an arm of the Navajo Nation.

STATEMENT OF THE CASE

Plaintiffs seek to set aside the ROD approving certain mining permits, and lease extension and rights-of-way renewals, that are required for the continued operations of the Navajo Mine and the FCPP on Navajo Nation lands. To understand the nature of Navajo Transitional Energy's interests in this action—including the protection of Navajo sovereignty rights and interests—some background on the

history of the Navajo Mine, the FCPP, and Navajo Transitional Energy is necessary.¹

I. History of Navajo Transitional Energy and the Operations of the Navajo Mine and the FCPP on Navajo Nation Lands

A. The Navajo Nation has inherent sovereign rights and treaty rights to develop the natural resources on its trust lands to advance its own tribal goals.

The Navajo Nation is a sovereign and federally recognized Indian tribe, securing the exclusive occupation and use of its homelands in treaties entered with the United States in 1849 and 1868. *See Treaty with the Navaho* (Sept. 9, 1849), 9 Stat. 974 (“Treaty of 1849”); *Treaty between United States of America and the Navajo Tribe of Indians* (June 1, 1868), 15 Stat. 667 (“Treaty of 1868”). Situated where the four

¹ Because this case was dismissed before the filing of the administrative record, Plaintiffs asked this Court to take judicial notice of the key agency documents at issue in their complaint, including: (1) OSMRE’s Four Corners Power Plant and Navajo Mine Energy Project, Environmental Impact Statement Record of Decision (July 14, 2015) (“ROD”); (2) OSMRE’s Environmental Impact Statement for the Four Corners Power Plant and Navajo Mine Energy Project (May 1, 2015) (“EIS”); and (3) OSMRE’s Environmental Assessment and Finding of No Significant Impact for Navajo Mine Permit Transfer Application, Navajo Reservation (Nov. 2013) (“Mine Transfer EA”). (App. Br. at 3 n. 1, 5 n. 2, and 8 n. 3.) Navajo Transitional Energy agrees with and joins Plaintiffs’ request for judicial notice of those documents. *See, e.g., United States v. 14.02 Acres*, 547 F.3d 943, 955 (9th Cir. 2008) (“Judicial notice is appropriate for records and reports of administrative bodies.” (citations and quotation marks omitted)).

corners of Arizona, Utah, New Mexico, and Colorado come together, the Navajo Nation encompasses over 17 million acres of trust lands in the southwestern United States. (SER-387; SER-246.) In addition to being the largest Indian tribe in terms of land size, the Navajo Nation also is the largest Indian tribe in terms of population with more than 320,000 enrolled tribal members, including roughly 174,000 members living within the Navajo Nation. (SER-406; SER-314.)

The Navajo Nation's most valuable trust asset is the coal resources on its tribal trust lands. (SER-411.) With those resources specifically reserved to the Navajo people under their treaties with the United States and other orders creating the Navajo Indian Reservation, the Navajo Nation enjoys fundamental treaty rights and inherent sovereign rights to develop its coal resources to advance its goals and rights to self-determination. (SER-5; SER-386.) As the trustee of the Navajo Nation's trust lands, the United States is required to engage in government-to-government dialogue with the Navajo Nation to support its sovereign decisions about the uses of its own trust assets. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 225 (1983) (describing nature of trust relationship between United States and Indian tribes); *Indian*

Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. § 3501 *et seq.*; *see also, e.g., Department of Interior Policy on Consultation with Indian Tribes*, Order 3317 (Dec. 1, 2011).

The Navajo Nation is served by a democratically elected, tripartite form of government with an executive branch (headed by the President of the Navajo Nation), a legislative branch (Navajo Nation Council), and a judicial branch (Navajo Nation Courts). The executive agencies under the Navajo Division of Natural Resources—including the Navajo Environmental Protection Agency, the Navajo Fish and Wildlife Department, the Navajo Historical Preservation Department, the Navajo Land Department, and the Navajo Minerals Department—oversee compliance with Navajo and federal environmental laws on Navajo Nation lands. *See* 2 N.N.C. § 1900 *et seq.* (defining authority of Navajo Division of Natural Resources). In doing so, those agencies work cooperatively with and exercise concurrent regulatory jurisdiction with DOI and its Office of Surface Mining Reclamation and Enforcement (“OSMRE”) in reviews of mining activities, including cooperation in reviews under the National Environment Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4321 *et seq.* The Navajo Nation’s Attorney General, as the

Chief Legal Officer for the Navajo Nation Department of Justice, defends challenges to regulatory determinations made by Navajo agencies, including citizen-suit challenges authorized in Navajo courts. *See, e.g.*, 4 N.N.C. § 1385 (authorizing citizen suits under the Navajo Clean Water Act); 4 N.N.C. § 1156 (authorizing citizen suits under Navajo Nation Air Pollution Prevention and Control Act).

Since the adoption of its first energy policy in 1980, the Navajo Nation has identified greater control over its own energy resources and greater self-determination on energy development as key tribal goals. *See* Navajo Nation Council Resolution No. CAP-34-80 (April 29, 1980) (“Navajo Nation Energy Policy of 1980”), App-1. Historically, however, the Navajo Nation has leased its coal resources to non-Indians and has remained outside of the ownership and operation of energy facilities on Navajo Nation lands, including the Navajo Mine and the FCPP. (SER-405; SER-50.) As described below, that changed for the first time in 2013 with the historic act of creating a tribal entity—Navajo Transitional Energy—to purchase back and operate the Navajo Mine as part of a broader tribal energy policy to transition the Navajo Nation’s

energy economy to renewable energy development and clean-coal technology.

B. For decades, the Navajo Mine and the FCPP have been cornerstones of the Navajo Nation's economy and major employers of Navajo people.

For many years, the Navajo Nation has relied on energy resources on its trust lands as a critical part of its economy and as a means to improve the difficult economic conditions facing the Navajo people. (SER-50; SER-134-40.) Starting in the late 1950s, the Navajo Nation granted lease agreements for non-Indian entities to undertake mining activities at the Navajo Mine. (SER-134.) A short time later, with the development of the coal supply from the Navajo Mine, the Navajo Nation entered into lease agreements with intervenor-defendant-appellee Arizona Public Service Company ("APS") and certain other utilities for the construction and operation of the FCPP directly adjacent to the Navajo Mine. (SER-134, SER-138.) From the start and continuing up to today, the Navajo Mine has served as the sole coal supplier to the FCPP, and the FCPP has been the Navajo Mine's sole coal customer. (SER-134; SER-2.) The land areas for both the Navajo

Mine and the FCPP are located entirely within the Navajo Nation. (SER-2; SER-134-38.)

The Navajo Mine and the FCPP have stayed in continuous tandem operation since the early 1960s, providing reliable power for the Navajo Nation and the greater Four Corners region. (SER-134, SER-138.) In that time, the Navajo Mine and the FCPP also have become cornerstones of the Navajo Nation's economy. Both the Navajo Mine and the FCPP are major employers on the Navajo Nation, employing hundreds of Navajo people and offering some of the highest salaries in the area. (SER-46-48; SER-335.) In the years leading up to the creation of Navajo Transitional Energy, the Navajo Mine also provided roughly \$40 million in annual tribal taxes and mining royalties directly to the Navajo Nation, with those revenues comprising a full one-third of the Navajo Nation's total general fund. (SER-322.) In those same years, the Navajo Nation received \$24.4 million annually from the FCPP in tribal taxes and direct payments under lease and right-of-way agreements, in addition to large annual contributions from APS and the other FCPP owners to Navajo community and youth programs. (SER-322-23.) Other service providers and vendors supporting the Navajo

Mine and the FCPP also pay significant tribal taxes and provide other revenues and employment opportunities for the Navajo Nation and its people. (SER-59.)

The employment income and revenues from the Navajo Mine and the FCPP are not only a major part of the Navajo Nation's economy, but also are critical for the funding of essential Navajo public services. More than 36 percent of Navajo people live below the federal poverty level, with the Navajo Nation persistently having the highest unemployment rate in the region and few private-sector employers. (SER-45-46; SER-323-24.) Infrastructure and access to basic services also historically have been lacking, particularly in more remote areas, with "[o]ver 20 percent of Navajos liv[ing] in houses without plumbing, telephones, kitchen facilities, and electricity[.]" (SER-323.) Navajo public services—including education, fire and rescue services, emergency management, highway safety, emergency medical services, and police services—are funded through tax revenues paid to the Navajo Nation. (SER-328-32.) Although the Navajo Nation has begun to develop other tax and revenues sources, including wind and solar projects on trust lands, there are no current feasible options to replace

the income and employment opportunities from the Navajo Mine and the FCPP in the short term. (SER-155-56; SER-47-48.)

C. In creating a tribal entity to purchase back the Navajo Mine, the Navajo Nation took a historic step to protect and promote its sovereign interests and goals.

Since the Navajo Nation Council adopted its first formal energy policy—the Navajo Nation Energy Policy of 1980—the Navajo Nation has pursued a goal to gain greater control over its own energy resources and to promote economic development with greater participation in energy markets. (SER-60; see SER-5 (stating goal of “the Navajo Nation’s development of its own resources and promotion of economic development” with creation of Navajo Transitional Energy).) In 2013, after decades of leasing its coal resources, the Navajo Nation was presented with an unprecedented opportunity to purchase back the Navajo Mine for its own ownership and operation. (SER-46.) Around that time, APS was shutting down three coal-fired electric generating units at the FCPP and was retrofitting the remaining two units with state-of-the-art selective catalytic reduction devices (“SCR devices”) to meet certain emission rate limits and to dramatically reduce air

pollutants.² (SER-138.) Those changes at the FCPP reduced the expected volume of coal production and sales at the Navajo Mine, prompting its then-owner and operator, BHP Billiton, to offer to sell the mine back to the Navajo Nation. (SER-404; SER-47.)

The decision to purchase back the Navajo Mine was a momentous step for the Navajo Nation—both in terms of protecting the Navajo Nation’s interests and in terms of undertaking the financial investment required for it. Around this time, the Navajo Nation Council and the President of the Navajo Nation approved the adoption of the Navajo Nation Energy Policy of 2013—the first formally-approved energy guidance policy since 1980—to develop “a comprehensive energy strategy” for the Navajo Nation to “establish energy independence and build its economy for future generations” of the Navajo people. (APP-

² In 2012, the EPA published a new Federal Implementation Plan (“FIP”) for the Best Available Retrofit Technology (“BART”) under the Clean Air Act, *see* 40 C.F.R. § 49.5512. (SER-138 (noting same).) As the ROD noted, “[a]lthough the BART rules specifically address oxides of nitrogen (NO_x) and particulate matter, the BART option chosen by the [FCPP] power plant operators would result in a decrease of all air pollutants emitted.” (*Id.*) When the installation of SCR equipment and other changes are fully implemented at the FCPP by July 2018, emission reductions over historic levels will be substantial, including a 87-percent reduction in nitrogen oxides emissions, a 79-percent reduction in selenium emissions, and a 58-percent reduction in particulate matter emissions. (SER-201.)

16, Navajo Nation Council Resolution No. CO-50-13 (Oct. 24, 2013).) The policy identified a tribal goal of promoting Navajo ownership of large-scale energy projects based on a diverse portfolio of sustainable trust resources, including the use of emerging clean-coal technologies and renewable energy resources, such as wind and solar farms, on Navajo Nation lands. (APP-13-28.) The policy also established a new executive agency—the Navajo Energy Office—to “facilitate energy development on the Nation” and to develop a long-term strategic plan “to stimulate increased revenues from energy projects, spur energy infrastructure development, and diversify the Navajo energy economy.” (APP-27.)

To facilitate the acquisition of the Navajo Mine, the Navajo Nation Council and the President of the Navajo Nation approved legislation to create Navajo Transitional Energy. Under the enabling legislation, Navajo Transitional Energy was formed as a wholly-owned Navajo entity and limited liability company under Navajo law, *see* 5 N.N.C. § 3600, with all profits passing to the Navajo Nation. (SER-93-128, Navajo Nation Council Resolution No. CAP-20-13 (April 29, 2013), *amended by*, Navajo Nation Council Resolution No. CAP-58-13 (Oct. 24,

2013).) The enabling legislation expressly provides that Navajo Transitional Energy serves as an “arm and subordinate instrumentality of the Navajo Nation” with “all protections, privileges, benefits, and authorities” arising from its status as a Navajo tribal entity. (SER-5; SER-36, NTEC Operating Agreement, Art. IX (Navajo Transitional Energy “shall have the Navajo Nation’s sovereign immunity”).) The enabling legislation also mandates the Navajo Nation’s direct involvement in the oversight and management of Navajo Transitional Energy as a tribal entity through representation by “a Member Representative Group consisting of five members of the Navajo Nation Council.” (SER-7.)

The purpose of Navajo Transitional Energy is “the protection and promotion of the Navajo Nation’s economic and financial best-interests, which are tied and related to mining operations within the Navajo Nation, as a means of ameliorating the economic, financial, and social conditions of the Navajo Nation.” (SER-6, Navajo Nation Council Resolution No. CO-58-13 (Oct. 24, 2013).) Navajo Transitional Energy also serves to advance the broader economic goal for the Navajo Nation to become a major provider of alternative renewable energy resources

for the region, as defined in the Navajo Nation Energy Policy of 2013. (SER-405.) To fund that goal, the legislation mandates that Navajo Transitional Energy must invest “no less than ten percent (10%) of its available Net Income in a given year into research and development of renewable and alternative sources of energy, storage, and transmission technologies and facilities.” (SER-3; *see also* Navajo Nation Resolution No. CAP-20-13 (April 29, 2013); SER-407.)

To create Navajo Transitional Energy, the Navajo Nation directly contributed millions of dollars to cover due diligence and start-up costs. (SER-6.) The Navajo Nation also authorized Navajo Transitional Energy to purchase the Navajo Mine and related leasehold rights under a three-year note from BHP Billiton for \$85 million dollars. (SER-22.) Navajo Transitional Energy then obtained a loan for roughly \$115 million dollars to pay off the original note and to secure a line of credit for future working capital. (SER-3.) The loan is secured by Navajo Transitional Energy’s entire catalog of assets, including the Navajo Mine itself. (*Id.*) A default on the loan would result in the loss of the Navajo Mine and the millions of dollars that the Navajo Nation

contributed to start-up costs, in addition to the loss of billions of dollars in the unattained future revenues for the Navajo Nation. (SER-4.)

With Navajo Transitional Energy's purchase of the Navajo Mine, the Navajo Mine and the FCPP executed a new Coal Supply Agreement ("CSA") for the Navajo Mine to supply coal for the FCPP's projected needs for up to 25 years beginning in 2016. (SER-244.) With the new CSA—and the federal approvals allowing performance of that agreement—the Navajo Mine and the FCPP are expected to continue to provide stable employment income for hundreds of Navajo people and to maintain critical funding needed for the Navajo Nation's essential public services. (SER-155-56; SER-335-36.) In the ROD at issue in this action, the federal agencies estimated that the Navajo Nation will receive \$40 to \$60 million annually in direct revenues from the operations at the Navajo Mine and the FCPP during the life of the project, with those revenues providing approximately 35 percent of the Navajo Nation's total general fund. (SER-155.) Over the life of the project, "a lower end estimate (*i.e.*, unadjusted) of [the] economic activity [generated by the Navajo Mine and the FCPP] is 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].” (*Id.*)

If the operations at the Navajo Mine and the FCPP were stopped before the Navajo Nation’s development of viable alternative energy projects, the federal agencies estimated Navajo Nation would lose approximately \$338 million in economic activity, “including the loss of a total of 2,293 jobs and the associated \$159 million in lost labor income.” (SER-57.) The loss for Navajo members directly employed at the Navajo Mine and the FCPP “would include the loss of 606 power plant and mine jobs and \$81.5 million (2011 dollars) in income for those workers.” (*Id.*) Because of the limited employment opportunities in the area, displaced Navajo workers likely would be unable to find other comparable employment without leaving the Navajo Nation, defeating a key goal of the Navajo Nation’s 2013 energy policy to promote community stability. (SER-48-49; *see* APP-14 (stating one goal of energy policy is to enable “Navajos to build stable careers while remaining close to their families” to “build the strength of our families and communities that have been fragmented by the need for our people to find work” in other regions).) The Navajo Nation also would lose the

stream of revenues needed to accomplish its tribal goal to transition to an energy economy based on renewable energy development and emerging clean-coal technologies. (SER-4; SER-405.) And the Navajo Nation would lose control of its most valuable existing trust asset and its economic plan to achieve greater sovereign independence and self-determination. (*Id.*)

II. History of Federal Approvals for Mining Permit, Lease, and Rights-of-Way Renewals for the Navajo Mine and the FCPP

The operations at both the Navajo Mine and the FCPP depend on federal approvals of necessary operating permits and agreements. For the Navajo Mine, OSMRE is responsible for issuing and renewing federal mining permits under the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), 30 U.S.C. §1201 *et seq.* For the FCPP, BIA’s approval is required for an extension of the power plant lease agreement with the Navajo Nation and for rights-of-way renewals for transmission lines over Navajo Nation lands. *See* 25 U.S.C. § 415 (requiring BIA approval for certain leases); 25 U.S.C. § 323 (requiring BIA approval for rights-of-way over trust land).

During the time that the Navajo Nation was negotiating to purchase back the Navajo Mine from BHP Billiton, the FCPP owners

and BHP Billiton started the process to request federal approvals to continue operations at the Navajo Mine and the FCPP for an additional 25 years up to 2041. (SER-133-42.) For the FCPP, APS and the other FCPP owners sought the consent of the Navajo Nation, and then approval from BIA, for a lease amendment to extend the term of the power plant lease for an additional 25 years. (SER-138.) APS also sought the consent of the Navajo Nation, and then approval from BIA, for necessary rights-of-way renewals for the power plant site, ancillary facilities, and existing transmission lines. (*Id.*) To continue operations at the Navajo Mine, BHP Billiton—and then later Navajo Transitional Energy—sought OSMRE’s approval to renew the existing SMCRA permit and to add a new permit area within the existing coal lease area. (SER-134.)

To evaluate those requests, the Federal Defendants initiated a comprehensive environmental review process to comply with NEPA and the consultation requirements of Section 7 of the Endangered Species Act of 1973 (“ESA”), 16 U.S.C. § 1536 *et seq.*, and Section 106 of the National Historic Preservation Act of 1966 (“NHPA”), 16 U.S.C. § 470 *et*

*seq.*³ As the lead agency and regulatory authority for surface coal mining and reclamation operations on tribal trust lands, OSMRE prepared the EIS in cooperation with numerous other tribal and federal agencies, including: the Navajo Nation and its regulatory agencies; the Hopi Tribe; BIA; USFWS; Bureau of Land Management (“BLM”); U.S. Army Corps of Engineers (“USACE”); U.S. Environmental Protection Agency (“EPA”); and National Park Service (“NPS”). (SER-206-07.)

The EIS review process extended over several years, with many opportunities for public comment. (SER-171-73.) After completing the comprehensive review, OSMRE ultimately issued a 1,700-page final EIS analyzing the environmental, socioeconomic, cultural, and other impacts of the proposed actions and other possible alternatives. (SER-150-54.) As the culmination of the consultation process under Section 7

³ Section 102(2)(C) of NEPA requires federal agencies to prepare an environmental impact statement for all major federal actions that may significantly affect the human environment. 42 U.S.C. § 4332(2)(C). Section 7 of the ESA requires consultation between the federal “action agency” (the agency authorizing an action) and the appropriate expert agency (U.S. Fish and Wildlife Service (“USFWS”) for terrestrial and most freshwater species) to ensure that authorized actions do not jeopardize the continued existence of any species listed under the ESA. 16 U.S.C. § 1536. Section 106 of the NHPA requires federal agencies to consult with any Indian tribe or nation that attaches religious and cultural significance to historic properties that may be affected by an action. 16 U.S.C. § 101(d)(6)(B).

of the ESA, USFWS also issued a biological opinion confirming that the proposed actions will not jeopardize any endangered fish species, including the Colorado pikeminnow and razorback sucker, with the implementation of the prescribed conservation measures and project conditions and terms. (SER-154.)

In July 2015, OSMRE and the other Federal Defendants issued the final ROD at issue in this action. Based on the extensive findings and conclusions in the final EIS and the USFWS's biological opinion, among other things, the ROD included: (1) OSMRE's approval of a five-year renewal of the Navajo Mine's SMCRA permit for the existing permit area and approval of an additional permit area within the existing coal lease area; (2) BIA's approval of the proposed lease amendment to extend the FCPP's power plant site lease with the Navajo Nation until 2041; and (3) BIA's approval of the proposed rights-of-way renewals for the FCPP power plant site, ancillary facilities, and existing transmission lines. (SER-133.)

Based on those federal approvals and related authorizations in the final ROD, the Navajo Mine and the FCPP have been able to continue operations without interruptions, and both Navajo Transitional Energy

and the owners of the FCPP have made substantial investments in reliance of the approvals. Among other things, Navajo Transitional Energy proceeded with steps to take over all day-to-day operations at the Navajo Mine and started expansion in the new mining area. To comply with the terms and conditions for the approvals, Navajo Transitional Energy and the FCPP also have proceeded with steps to reduce environmental impacts and to implement prescribed species conservation and recovery measures, including the installation of the SCR equipment at the FCPP. (SER-157-70 (describing terms and conditions of approvals, including environmental protection and conservation measures).) In addition, Navajo Transitional Energy and the FCPP are responsible for complying with regular documentation and reporting requirements on all prescribed terms and conditions for the life of the project with federal oversight. (SER-168.)

III. History of Proceedings in the District Court

A. Plaintiffs file a complaint asking the district court to set aside the ROD and vacate the federal approvals for operations at the Navajo Mine and the FCPP.

In April 2016, roughly nine months after issuance of the final ROD, Plaintiffs filed this action in the federal district court for Arizona.

The complaint named the DOI and the three federal agencies—OSMRE, BIA, and BLM—that made the approval decisions in the final ROD as defendants, along with the USFWS as the federal agency that issued the biological opinion required for the ESA’s Section 7 consultation process, and the Secretary of the DOI and the USFWS in her official capacity. (ER-13-69.)

In their complaint, Plaintiffs alleged that the Federal Defendants violated NEPA and Section 7 of the ESA in issuing the final ROD and approving the Navajo Mine’s SMCRA permit renewal and additional SMCRA permit area, and approving the FCPP’s power plant lease extension and rights-of-way renewals. (ER-49-69.) As requested relief, Plaintiffs asked the district court to issue an order declaring the final ROD and the approval decisions in the ROD as unlawful, and to set aside the ROD and vacate those decisions. (ER-68.) Plaintiffs also asked the district court to enjoin the Federal Defendants “from authorizing any elements of the Project pending their compliance with NEPA.” (ER-69.) If the approval of the SMCRA permit renewal and other approval decisions in the final ROD were vacated—and if the Federal Defendants were enjoined from authorizing any mining

activities at the Navajo Mine or any continued operations at the FCPP until the completion of another full NEPA review as requested by Plaintiffs—both the Navajo Mine and the FCPP would lack authority to continue operations and would be required to immediately initiate closure procedures. (ER-03-04.)

Given the potential impact of Plaintiffs' requested relief on the continued operation of the FCPP, APS moved to intervene as a matter of right under Rule 24(a) based on its interests in the FCPP and as a recipient of some of the federal approvals being challenged in the action. (Dkt. 18.) Neither Plaintiffs nor the Federal Defendants opposed APS's intervention, and the district court granted it. (Dkt. 24, 26.) Navajo Transitional Energy also moved to intervene as a matter of right under Rule 24(a) as the owner of the Navajo Mine, but only for the limited purpose of filing a motion to dismiss under Rule 12(b)(7).⁴ (Dkt. 31.) Plaintiffs and the Federal Defendants again did not oppose the intervention, and the district court granted it. (Dkt. 44, 45, and 49.)

⁴ The Navajo Nation did not separately intervene because Navajo Transitional Energy, as an arm of the Navajo Nation, intervened to protect the interests of the Navajo Nation and the Navajo people. The Navajo Nation is appearing as *amicus curiae* in this appeal in support of Navajo Transitional Energy.

B. The district court dismissed the action under Rule 19 based on its determination that Navajo Transitional Energy is a required and indispensable party that cannot be joined due to sovereign immunity.

After its limited intervention was granted, Navajo Transitional Energy moved to dismiss the action under Rule 19 on the ground that it was a required and indispensable party that cannot be joined due to its sovereign immunity as an arm of the Navajo Nation. (Dkt. 50.) After full briefing by all parties, the district court determined that Rule 19 required dismissal. (Dkt. 64.)

The district court first determined that Navajo Transitional Energy qualified as a required party under Rule 19(a). In making that finding, the district court observed that the “retroactive relief Plaintiffs seek could directly affect the Navajo Nation (acting through its corporation [Navajo Transitional Energy]) by disrupting its ‘interests in their lease agreements and the ability to obtain the bargained-for royalties and jobs.’” (ER-03 (quoting *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996)).) The district court further found that “[i]f successful, Plaintiffs’ challenges to Federal Defendants’ actions—which the continued operation of Navajo Mine and [the FCPP] are conditioned upon—could simultaneously jeopardize the solvency of the Navajo

Nation and challenge the economic development strategies it has chosen to pursue.” (ER-4.) Determining that Navajo Transitional Energy was a required party in view of those interests, the district court determined that “[s]uch affronts to the Nation’s sovereignty represent a legally protected interest under Rule 19.” (*Id.*) The district court further found that no other existing party, including the Federal Defendants, represented Navajo interests adequately or would assert the same arguments “to protect its sizable investments.” (ER-04-05.)

Having determined that Navajo Transitional Energy was a required party, the district court next determined that its joinder was not feasible due to its sovereign immunity as an arm of the Navajo Nation. In reaching that determination, the district court recognized that “[t]ribal sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe.” (ER-06 (citing *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014)).) Examining the circumstances at issue—including the fact that the Navajo Nation explicitly stated its intention for Navajo Transitional Energy to operate as a tribal entity to represent the Nation’s interests and to advance its energy and economic development goals—the district

court concluded that “it is clear ... that Navajo Transitional Energy enjoys sovereign immunity as an ‘arm’ of the Navajo Nation.” (ER-06.)

Finally, having determined that joinder was not feasible due to tribal sovereign immunity, the district court next considered whether, “in equity and good conscience” under Rule 19(b), the action may proceed without Navajo Transitional Energy. (ER-07.) Even assuming that no other avenues existed to challenge the federal approval decisions, the district court found that an examination of precedents “with similar circumstances” showed that the importance of Navajo Nation’s tribal sovereign immunity strongly outweighed any other equitable considerations. (*Id.*) In view of that finding, the district court determined that Navajo Transitional Energy was an indispensable party and that dismissal was proper under Rule 19.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in determining that dismissal was required under Rule 19 because Navajo Transitional Energy is a required and indispensable party that cannot be joined. Under Rule 19(a), among other reasons, an absent party may be “required” in an action if the party “claims an interest relating to the

subject of the action and is so situated that disposing of the action in the [party's] absence may ... as a practical matter impair or impede the [party's] ability to protect the interest[.]” Fed. R. Civ. P. 19(a)(1)(B)(i). The determination of whether an absent party has a protected interest that potentially may be impaired in an action “is a practical one and fact specific.” *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

Here, the district court acted well within the bounds of its discretion in determining that Navajo Transitional Energy was a required party under Rule 19(a). Like any other party, an Indian tribe is not a required party in every action that potentially might have some impact on its interests. But when a tribe has distinct sovereign rights and legal interests that could be impaired or destroyed by the relief requested in an action, the tribe is a required party under Rule 19(a) to protect those rights and interests. In this case, the district court correctly determined that Navajo Transitional Energy was a required party where the requested relief, if granted, would destroy its legal entitlement to operate the Navajo Mine and would cause serious harm to the interests of the Navajo people.

After determining that Navajo Transitional Energy was a required party under Rule 19(a) that cannot be joined due to tribal sovereign immunity, the district court also did not abuse its discretion in determining that dismissal was proper under Rule 19(b). Like the “required party” inquiry under Rule 19(a), the inquiry under Rule 19(b) is case specific, calling for a determination about whether a case in “equity and good conscience” may proceed without the participation of the absent party. Fed. R. Civ. P. 19(b). To guide that equitable determination, Rule 19(b) provides a non-exhaustive list of factors for a court to consider, including both the extent of potential prejudice to the absent party and the availability of other potential remedies for the plaintiff. See Fed. R. Civ. P. 19(b)(1)-(4) (listing those factors). As a general matter, “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.” *Pimentel*, 553 U.S. at 867. The limited “public rights” exception to joinder also does not apply in cases where the requested relief would operate to “destroy the legal entitlements of the absent parties.” *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988).

Here, the district court found that the requested relief would “jeopardize the solvency of the Navajo Nation and challenge [its] economic development strategies” (ER-04), in addition to destroying important contractual benefits for Navajo Transitional Energy and the Navajo Nation (ER-03). Given those findings, the district court acted well within its discretion under Rule 19(b) in determining that Navajo Transitional Energy was an indispensable party and that this case should not “in equity and good conscience” proceed without it. (ER-04-06.) This Court should affirm the district court’s dismissal.

STANDARD OF REVIEW

Because joinder determinations under Rule 19 are necessarily “practical” and “fact specific” based on the circumstances of a particular case, this Court reviews a district court’s determinations under Rule 19 for abuse of discretion. *Kescoli*, 101 F.3d at 1309. Under the abuse-of-discretion standard, this Court will affirm the district court unless the Court has “a definite and firm conviction that the court below committed clear error of judgment in the conclusion it reached upon a weighing of relevant factors.” *Nealey v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1278 (9th Cir. 1980) (internal citations

omitted). To the extent that the district court's inquiry under Rule 19 involves any determinations of law, this Court reviews those determinations *de novo*. *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion under Rule 19 in Determining that Navajo Transitional Energy Was a Required and Indispensable Party in this Case.

As federal law has recognized for centuries, “Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *see also, e.g., Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (“Indian tribes are ‘domestic dependent nations’ that exercise ‘inherent sovereign authority.’” (citations omitted)). Although Indian tribes have yielded some aspects of their previous inherent sovereignty as part of their relationship with the United States, “[t]he powers of Indian tribes are, in general, ‘inherent powers of a limited sovereignty which has never been extinguished.’” *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978) (citations and quotation marks omitted).

Among “the core aspects of sovereignty that tribes possess ... ‘is the common law immunity from suit traditionally enjoyed by sovereign powers.’” *Bay Mills*, 134 S. Ct. at 2030 (citations omitted). Such immunity from suit, as the Supreme Court repeatedly has stressed, “is a necessary corollary to Indian sovereignty and self-governance.” *Id.* (quoting *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890 (1986)). And, just as with other sovereigns, that “sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe.” *White*, 765 F.3d at 1025. Unless diminished by Congress, tribal sovereign immunity also applies equally in the context of tribes’ economic endeavors. *Kiowa Tribe of Okla. v. Mtg. Technologies, Inc.*, 523 U.S. 751, 754-55 (1998); *see also, e.g., Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (noting Congress consistently has approved tribal sovereign immunity and the “goal of Indian self-government, including ... encouraging tribal self-sufficiency and economic development” (citations omitted)); *Bay Mills*, 134 S. Ct. at 2030 (stating “unless and until Congress acts, the tribes

retain their historic sovereign authority” (citations and internal quotation marks omitted)).

Although Congress has authority to abrogate or restrict tribal sovereign immunity, “courts will not lightly assume that Congress in fact intends to undermine Indian self-government,” and an intention to do so must be expressed unequivocally. *Bay Mills*, 134 S. Ct. at 2031. Tribes also may waive their own sovereign immunity but, as with congressional abrogation, any such waivers must be “unequivocally expressed” and may not be implied. *Santa Clara Pueblo*, 436 U.S. at 58; *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989) (recognizing same).

Here, neither Plaintiffs, nor the United States as *amicus curiae*, contest that Navajo Transitional Energy has tribal sovereign immunity as an arm of the Navajo Nation.⁵ There also is no claim of any waiver

⁵ No party ever has contested that Navajo Transitional Energy possesses tribal sovereign immunity. The Federal Defendants have not appeared on appeal. In the underlying proceedings, however, the Federal Defendants expressly acknowledged that Navajo Transitional Energy is intended to “serve as an instrumentality of the Navajo Nation,” and it assumed the existence of tribal sovereign immunity before the district court. (See Mine Transfer EA-9; see also ER-109.) Plaintiffs also never have disputed that Navajo Transitional Energy has tribal sovereign immunity.

or abrogation of tribal sovereign immunity relative to these claims.⁶ Instead, Plaintiffs argue that the district court abused its discretion under Rule 19(a) in determining that Navajo Transitional Energy—representing the interests of the Navajo Nation—has legally protected interests that could be impaired by the request to vacate the approval decisions for the Navajo Mine’s and the FCPP’s continued operations. (App. Br. at 22-40.) Plaintiffs also argue that the district court abused its discretion in determining that the Navajo Nation’s protected interests as a sovereign outweigh any other equitable considerations under Rule 19(b) under the circumstances of this case. (*Id.* at 41-52.) For its part, the United States as *amicus curiae* goes farther and asks this Court to adopt a broad new categorical rule that a federal agency is

⁶ It is undisputed that Congress has not abrogated or restricted tribal sovereign immunity with respect to the statutes at issue in this case. *See, e.g., Manygoats v. Kleppe*, 558 F.2d 556, 557-58 (10th Cir. 1977) (concluding same as to NEPA and APA); *Friends of Amador Cty. v. Salazar*, 554 F. App’x 562, 565 (9th Cir. 2014) (unpublished) (“While [the APA] unequivocally waives the United States’ sovereign immunity in certain suits, it does not do the same for Indian tribes.” (citations and internal quotation marks omitted)). Participation in an administrative proceeding also does not waive tribal sovereign immunity. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (“We conclude that a tribe’s participation in an administrative proceeding does not waive tribal immunity in an action filed by another party seeking review of the agency’s decision”).

always “the best—and only necessary—party” under Rule 19 in any action challenging a federal agency’s compliance with federal law under the APA. (U.S. *Amicus* Br. at 9.) None of the arguments for reversal withstands scrutiny. The district court acted well within its discretion in ordering dismissal under Rule 19.

II. Rule 19 Involves a Case-Specific Determination about Whether an Action, “in Equity and Good Conscience,” May Proceed without a Required Absent Party

Rule 19 of the Federal Rules of Civil Procedure provides the framework for determining whether an action may proceed without an absent party or requires dismissal. Under Rule 19(a), a court first must determine whether the absent party qualifies as a “required party” that must be joined if feasible. *See* Fed. R. Civ. P. 19(a)(1) and (2). As defined by Rule 19(a)(1), a “required party” is any person “subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction” if:

- (A) In the party’s absence, “the court cannot accord complete relief among existing parties”;
- (B) The party claims “an interest in the action and resolving the action in [the party’s] absence may as a practical matter impair or impede [its] ability to protect that interest”; or

- (C) The absent party claims “an interest in the action and resolving the action in [its] absence may leave an existing party subject to inconsistent obligations because of that interest.”

Salt River Project Agric. Improvement & Power Dist. v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012) (citing Rule 19(a)(1)(A)-(B)). In deciding whether an absent party has an interest that may be impaired or harmed by the nature of the claims in an action, the court’s inquiry turns on the specific facts and circumstances at issue in the case. *See, e.g., Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982) (determination whether a party is required under Rule 19 “is heavily influenced by the facts and circumstances of each case”).⁷

If the joinder of a required absent party is not feasible—such as where the party cannot be joined due to sovereign immunity—the court “must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.”

⁷ Before amendments in 2007, Rule 19 used the term “necessary” party to describe a party that must be joined if feasible, and the term “indispensable” party to describe a party without whom the case cannot proceed “in equity and good conscience.” *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 103, 119 (1968) (discussing rule prior to amendments). Although the 2007 amendments changed those terms, the substance of the rule is unchanged. *See Alto v. Black*, 738 F.3d 1111, 1118 n. 6 (9th Cir. 2013) (stating same).

Fed. R. Civ. P. 19(b). To guide that equitable determination, Rule 19(b) provides a non-exhaustive list of factors for a court to consider, including: (1) the extent to which the absent party would be prejudiced by a judgment rendered in its absence; (2) the extent to which any such prejudice could be lessened or avoided in the terms of the judgment or through other measures, (3) whether a judgment rendered in the party's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action is dismissed for nonjoinder. *See* Fed. R. Civ. P. 19(b) (listing factors).

The weight of the different factors under Rule 19(b) necessarily turns on the facts and circumstances of the particular case, with “some compelling by themselves, and some subject to balancing against opposing interests.” *Pimentel*, 553 U.S. at 864 (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 103, 119 (1968)); *see also, e.g., Makah*, 910 F.2d at 558 (Rule 19 requires fact-specific inquiry). As a general matter, “when the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity by itself may be viewed as the compelling factor,” even if the dismissal leaves the plaintiff without a remedy. *White*, 765

F.3d at 1028; *see also, e.g., Hull*, 305 F.3d at 1025 (observing this Court has “regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs”).

Finally, there is a limited “public rights” exception to joinder requirements under Rule 19 in cases where the requested relief is “narrowly restricted to the protection and enforcement of public rights[.]” *Nat’l Licorice Co. v. Nat’l Labor Relations Board*, 309 U.S. 350, 363 (1940). For the “public rights” exception to apply, however, “the litigation must transcend the private interests of the litigants and seek to vindicate a public right,” and “the litigation must not ‘destroy the legal entitlements of the absent parties.’” *Kescoli*, 101 F.3d at 1311 (quoting *Conner*, 848 F.2d at 1459); *see also Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992) (“The public rights exception to joinder rules is an acceptable intrusion upon the rights of absent parties only insofar as the adjudication does not destroy the legal entitlements of the absent parties” (internal citation, quotation marks, and alterations omitted)). Thus, where an action seeks relief that creates a “threat to the absent tribes’ legal entitlements, and indeed to their

sovereignty, ... application of the public rights exception to the joinder rules would be inappropriate.” *Shermoen*, 982 F.2d at 1319.

As described below, applying those standards to the circumstances of this case, the district court acted within its discretion in determining that dismissal was required under Rule 19. Although Plaintiffs try to recast their complaint as seeking only “prospective” relief to enforce compliance with federal environmental laws, the district court correctly recognized that the requested relief—vacatur of the federal approvals needed for the continued operations at the Navajo Mine and the FCPP—was retroactive in nature and would upset important legal and contractual interests of Navajo Transitional Energy, in addition to causing harm to important sovereignty interests of the Navajo Nation. Given the nature and magnitude of those interests, the district court acted well within its discretion in determining that Navajo Transitional Energy qualified as a required and indispensable party under Rule 19 that cannot be joined due to tribal sovereign immunity.

III. The District Court Did Not Abuse Its Discretion in Determining that Navajo Transitional Energy is a Required Party under Rule 19(a)

As an initial matter, the district court did not abuse its discretion in determining that Navajo Transitional Energy was a “required” party under Rule 19(a) because it “has a ‘legally protected’ interest in the subject of [this] litigation which would be impaired or impeded if it was not party to this suit.” (ER-03.) As the district court correctly recognized, Navajo Transitional Energy—acting as an arm of the Navajo Nation—has protected legal and sovereignty interests in the continued operations of the Navajo Mine and the FCPP that no other existing party can adequately represent. Indeed, the arguments of *amicus* United States prove that very point. According to *amicus* United States, any “collateral consequences” from granting the request to vacate the federal approvals and closing the Navajo Mine and the FCPP would “not necessarily cause long-term prejudice to the tribe” because the approvals always could be reinstated again in the future. (U.S. *Amicus* Br. at 9, 16.) That position—entirely disregarding the sovereignty interests of the Navajo Nation and the devastating harm to the Navajo people that would result from any closure of the Navajo

Mine and the FCPP—only serves to confirm that Navajo Transitional Energy is a required party. The district court did not abuse its discretion in its application of Rule 19(a).

A. The sovereignty and socioeconomic interests of the Navajo Nation, acting through Navajo Transitional Energy, are at stake in this action.

Even though Plaintiffs expressly seek to set aside the ROD and to vacate the approvals given for the continued operations of the Navajo Mine and the FCPP, Plaintiffs insist that Navajo Transitional Energy—and, by extension, the Navajo Nation—have no protected legal interests at issue in this action. (*See, e.g.*, App. Br. at 24-25.) The district court correctly rejected that argument. As the district court recognized, if the challenged approvals were vacated, Navajo Transitional Energy would lose its legal rights to operate and to expand the Navajo Mine, making it unable to perform under its CSA with the FCPP and threatening its ownership interests in both the Navajo Mine and other trust assets. (ER-03-04.) A loss of those rights and interests also would destroy the broader economic development strategy of the Navajo Nation to pursue ownership of its energy resources to achieve greater self-determination and to expand the employment opportunities for its tribal members.

(*Id.*) Although both Plaintiffs and *amicus* United States discount the significance of those interests, the district court properly identified those protected interests as more than sufficient to qualify Navajo Transitional Energy as a required party under Rule 19(a).

This Court repeatedly has found that absent Indian tribes or tribal entities are required parties under Rule 19(a) when their legal interests or entitlements are at stake. *See, e.g., Confederated Tribes v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991) (“Indian tribes are necessary parties to actions affecting their legal interests”). In *Makah*, 910 F.2d at 558-59, for example, this Court held that absent tribes were required parties as to claims seeking to vacate a federal agency’s approval of a plan for fishing quotas allocated as treaty rights. Recognizing that the vacatur of the fishing quotas would disturb legal rights given in the approved allocations, this Court had no trouble concluding that the absent tribes had protected interests at risk in the adjudication of the plaintiffs’ claims. *Id.* at 559.

The decision in *Kescoli*, 101 F.3d 1304, is another example. In *Kescoli*, a non-Indian mining company conducted mining activities on trust lands under lease agreements with two absent tribes. After

OSMRE approved certain special conditions in the company's mining permit, the plaintiff filed an action challenging OSMRE's approval of the permit conditions as violating its duty to protect sacred burial sites under SMCRA and other federal laws. *Id.* at 1307. Because those challenges potentially could affect the company's mining operations, this Court held that the absent tribes were required parties under Rule 19(a). *Id.* at 1309-10. That was so, this Court observed, because the challenges to the company's permit conditions "could affect the amount of royalties received by [the absent tribes]" under the mining lease agreements and could harm "employment opportunities for their members." *Id.* at 1309-10. Although the plaintiff expressly did not seek to disturb the mining lease agreements, this Court recognized that plaintiff's action nevertheless "could affect the [absent tribes'] interests in their lease agreements and the ability to obtain the bargained-for royalties and jobs" and could "indirectly affect the parties' lease agreements by challenging the conditions under which [the company] may mine" on the trust lands. *Id.* at 3010. In view of those potential impacts on the absent tribes' contractual benefits and sovereignty interests in protecting its tribal members, this Court held that the

absent tribes had protected legal interests that made them required parties under Rule 19(a). *Id.*

Other cases also have reached the same conclusion where the plaintiff's requested relief would upset a tribe's contractual benefits or property rights, or would cause harm to a tribe's sovereignty interests. *See, e.g., Wilbur v. Locke*, 423 F.3d 1101, 1112 (9th Cir. 2005) ("Because the Tribe has an interest in retaining the rights granted by [a cigarette tax contract], the requirement of a 'legally protected' interest is satisfied"); *Lomayalaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975) (tribe was required party in action seeking to void a mining lease agreement with a non-Indian company, finding the requested relief "most surely would be prejudicial to [the tribe], 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 [tribal members]"); *Ctr. for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1226 (D. Colo. 2012) (Navajo Nation was a required party under Rule 19(a) in an action challenging federal approval of mining permit for BHP Billiton to operate Navajo Mine because of the potential loss of royalty and tax revenues to the Navajo Nation from

any interruption in operations, as well as the loss of employment opportunities for Navajo workers).

Seeking to obtain a different result in this case, Plaintiffs stress that their claims challenge only the Federal Defendants' decisions to approve the mining permits, and lease extensions and rights-of-way renewals, for the operations of the Navajo Mine and the FCPP. According to Plaintiffs, "[t]ribal sovereignty interests are not sufficient to make tribes required parties in cases for federal judicial review of decisions over which federal agencies—not tribes—have ultimate authority." (App. Br. at 23.) But Plaintiffs misapprehend the requirements to establish status as a required party under Rule 19(a). Even if an action challenges only federal decisions, Rule 19(a) requires examination of the protected interests of the absent party and the practical effect of the requested relief on those interests. *See* Fed. R. Civ. P. 19(a)(1)(B)(i) (providing same). Applying that rule, this Court repeatedly has held that a plaintiff cannot defeat the protected interests of an absent party simply by characterizing the action as unrelated to

those interests.⁸ *See, e.g., Quileute*, 18 F.3d at 1458 (“necessity [of a party] ... cannot be avoided by characterizing the issue as constitutionality [of the statute]” when invalidation of the statute “would affect the property interests of the [absent tribes]”); *Kescoli*, 101 F.3d at 1311 (rejecting plaintiff’s attempt to characterize action as seeking “only to enforce the [federal agency’s] obligations” under federal laws when the requested relief would affect the tribe’s sovereignty interests in royalty payments and employment of tribal members); *Hull*, 305 F.3d at 1024 (tribes were required parties in action challenging state’s authority to enter gaming compacts because “sovereign power of the tribes to negotiate compacts [would be] impaired by the ruling” as a

⁸ The decisions cited by Plaintiffs are not to the contrary. In *Alto*, 758 F.3d 1111, this Court held that an absent tribe was not a required party under Rule 19(a) in an action seeking to challenge a tribal member disenrollment decision made by BIA. Although member disenrollment decisions ordinarily implicate tribal sovereignty interests and would require joinder of the tribe, this Court concluded that joinder was not required under the unique facts of that case because “[t]he Tribe itself [had] delegated its authority over enrollment to the BIA.” *Id.* at 1129. Similarly, in *Thomas v. United States*, 189 F.3d 662, 668-69 (7th Cir. 1999), the Seventh Circuit found that the tribal governing board was not a required party in a challenge to a federal election when the board retained “no special legal status” not held by any other group of tribal voters. Here, the Navajo Nation has authority to pursue its own sovereignty interests in creating Navajo Transitional Energy, and there is no contention that the Navajo Nation delegated any authority to determine those interests to the Federal Defendants.

practical matter); *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000) (“[Plaintiff] argues that she is not attacking the two Agreements, only the 1974 statute that led to them. The practical effect, however, of what she seeks in having the 1974 statute invalidated would be the undoing of the Agreements to the substantial prejudice of the Hopi Tribe.”).

Here, Plaintiffs’ requested relief would substantially impair the protected sovereignty and legal interests of Navajo Transitional Energy—and, by extension, the Navajo Nation—by destroying its legal entitlement to operate and expand the Navajo Mine and by preventing performance of the CSA with the FCPP.⁹ Although Plaintiffs try to characterize their complaint as seeking only “prospective relief” from the Federal Defendants to enforce compliance with federal laws (*see* App. Br. at 25), the district court recognized that is not accurate.

⁹ Plaintiffs argue that the district court erred in considering “potential financial impacts to the interests of the Navajo Nation” and assert that the Navajo Nation “has made no appearance to express any interests” in this case. (App. Br. at 30-31.) That argument entirely disregards that Navajo Transitional Energy is an arm of the Navajo Nation and is tasked with representing its sovereignty interests on issues relating to the Navajo Mine. Plaintiffs cite no authority to support its apparent claim that the Navajo Nation, as a sovereign, may not rely on its own tribal entity to represent its interests.

Rather than seek only prospective relief in future administrative proceedings, Plaintiffs' complaint seeks to vacate Navajo Transitional Energy's approved permits and the issued approvals for the FCPP's lease extension and rights-of-way renewals with the Navajo Nation.

If Plaintiffs' requested relief were granted, there is no dispute that Navajo Transitional Energy would lose its legal rights to operate the Navajo Mine and would be precluded from performing under its CSA with the FCPP, and that the FCPP would be required to shut down. Indeed, the very goal of Plaintiffs' complaint is to close the Navajo Mine and the FCPP indefinitely—if not permanently. Such a result would have catastrophic consequences for Navajo Transitional Energy and the sovereign interests of the Navajo Nation, resulting in the loss of millions of dollars in critical revenues. That result also would cause the loss of ownership interests in the Navajo Mine and other tribal trust assets, in addition to the loss of hundreds of jobs for the Navajo people. Given the important sovereign rights and interests at stake in this action, the district court did not abuse its discretion in determining that Navajo Transitional Energy was a required party under Rule 19(a).

B. No other existing party represents the sovereignty and socioeconomic interests of the Navajo Nation, acting through Navajo Transitional Energy.

Even if it has protected interests may be impaired in this action, Plaintiffs argue that Navajo Transitional Energy is not a required party under Rule 19(a) because, according to Plaintiffs, the Federal Defendants and APS can adequately represent its interests. (App. Br. at 34-40.) *Amicus* United States joins that argument in part, broadly asserting that it has an unqualified interest in upholding agency actions in every case and that no potential differences could exist in this particular case between its interests and the sovereignty interests of Navajo Transitional Energy as an arm of the Navajo Nation. (U.S. *Amicus* Br. at 10-14.) The district court correctly rejected those claims.

Because the inquiry under Rule 19 is a “practical one,” *see Makah*, 910 F.2d at 558, an absent party with an interest in the action is not a required party under Rule 19(a) “if the absent party is adequately represented in the suit” by the existing parties. *Shermoen*, 982 F.2d at 1318 (citation and internal quotation marks omitted). In determining whether an existing party adequately represents the interests of an otherwise required absent party, this Court considers: (1) “whether the

interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments"; (2) "whether the party is capable of and willing to make such arguments"; and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Salt River Project*, 672 F.3d at 1179 (citation and internal quotation marks omitted).

In this case, the district court correctly recognized that Federal Defendants could not adequately represent important sovereignty interests of Navajo Transitional Energy and the Navajo Nation. First, although *amicus* United States now insists that "the agency itself is the best—and the only necessary—party to defend" its own decisions (U.S. *Amicus* Br. at 9), that argument is a major change in position. In prior proceedings with similar challenges to the federal mining permits for the Navajo Mine, the Federal Defendants themselves candidly acknowledged that "[t]he Federal Defendants' interests may not always be aligned with the Navajo Nation's interests" and that the Navajo Nation was a required and indispensable party under Rule 19 "where a claim is made that could adversely affect a Tribe's property rights or its sovereign authority[.]" *See Dine CARE v. Klein*, Colo. Dist. Ct. Case No.

1:07:cv:01475, Dkt. 62 at 27, 29 (Federal Defendants’ Motion to Dismiss) (internal citations omitted). *Amicus* United States offers no explanation for its change of position—nor does it otherwise explain why it can adequately represent the interests of Navajo Transitional Energy and the Navajo Nation here, when it admitted that it could not do so in prior similar proceedings. *See Manybeads*, 209 F.3d at 1166 (noting that the “United States contends that it can adequately represent the Hopi Tribe” in the case, but finding that the “contention is weak because it is the reverse of what the government contended in the district court”).

Plaintiffs and *amicus* United States also ignore that the Federal Defendants do not have the same interests in this case as Navajo Transitional Energy and the Navajo Nation. Although aligned with Navajo Transitional Energy and the Navajo Nation, the Federal Defendants’ interests are limited to defending the EIS and USFWS’s biological opinion. In doing so, the Federal Defendants must abide by the national objectives declared by NEPA and the ESA, in addition to considering the interests of the Navajo Nation. In contrast, Navajo Transitional Energy represents only the sovereignty interests of the

Navajo Nation in protecting its investment in the Navajo Mine and its contractual benefits from the CSA. Although the Federal Defendants may have an interest in upholding their own decisions, they do not have the same interest in preventing vacatur of the approvals needed for the continued operations of the Navajo Mine and the FCPP. See, e.g., *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977) (holding DOI could not adequately represent tribe's interests in mining agreement in case challenging DOI's approval of agreement under NEPA because DOI's "duties and responsibilities" under NEPA may conflict with tribe's interests in mining agreement).¹⁰ As another court recognized, although "a vacatur of the permit [for the Navajo Mine] may be inconvenient to the federal defendants, contrastingly, it is potentially devastating for the Nation." *Pizarchik*, 858 F. Supp. at 1227.

¹⁰ Although *Manygoats* correctly held that DOI could not adequately represent an absent tribe in a case involving unique tribal interests, the decision in *Manygoats* otherwise is inapposite. That case involved a contract to permit mining exploration on tribal trust lands. *Id.* at 557. Unlike this case, there was no claim that the tribe in *Manygoats* was dependent on the uninterrupted performance of the contract. As a result, the Court found that further environmental review "did not necessarily result in prejudice to the Tribe" in that case. *Id.* at 558-59. Here, in contrast, the record showed a risk of severe prejudice to tribal interests, including the potential insolvency of Navajo Nation and the almost certain loss of the Navajo Mine and other tribal assets.

Because the Navajo Transitional Energy and the Navajo Nation have unique interests in the continued operations of the Navajo Mine and the FCPP, there also is no basis to conclude that the Federal Defendants “will undoubtedly make all of the absent party’s arguments” in defending the project approvals. *Salt River Project*, 672 F.3d at 1179. Without Navajo Transitional Energy’s participation, it is entirely possible that the Federal Defendants could concede certain facts, or agree to some relief requiring the closure of all or part of the Navajo Mine or agree to withdraw the environmental impact reviews for more assessments. Any of those actions would expose Navajo Transitional Energy and the Navajo Nation to potentially catastrophic consequences, including the loss of the Navajo Mine and other tribal assets, and the displacement of hundreds of Navajo workers. In its brief to this Court, *amicus* United States remarkably fails to even acknowledge these serious risks to Navajo interests. Instead, *amicus* asserts, without any explanation, that closing the Navajo Mine and the FCPP would “not necessarily [cause] long-term prejudice to the tribe” in this case. (U.S. *Amicus* Br. at 16.) Although an absence of serious prejudice may be true in some cases—like the circumstances in *Manygoats*—the district

court correctly recognized that it was not true here, where the requested relief would “jeopardize the solvency of the Navajo Nation and challenge the economic development strategies that it has chosen to pursue.” (ER-03-04.) Thus, although the Federal Defendants’ interests may be aligned with Navajo Transitional Energy and the Navajo Nation in many respects, those interests are not identical, and *amicus* United States’ contrary arguments entirely disregard the unique circumstances of this case.

Finally, contrary to the arguments of Plaintiffs and *amicus* United States, this is a case where “the absent party would offer [a] necessary element to the proceedings that the present parties” would be unable to represent. *Salt River Project*, 672 F.3d at 1179. Navajo Transitional Energy—as an arm of the Navajo Nation—has “a unique role in relation to its members and to the management of its own lands.” *Pizarchik*, 858 F. Supp. at 1227. The creation of Navajo Transitional Energy to purchase back the Navajo Mine was a historic act by the Navajo Nation to advance its broader tribal plan to transition its economy to renewable energy development and clean-coal technology. No other party, including the Federal Defendants, represents those unique sovereignty

interests. Although Plaintiffs argue that APS could adequately represent the interests of Navajo Transitional Energy (*see* App. Br. at 34-37), APS is a non-Indian entity that does not speak for, or represent the interests of, the Navajo Nation.

Navajo Transitional Energy has unique interests in this case that are different in scope and nature from any other party. As an arm of the Navajo Nation, only Navajo Transitional Energy can be trusted to raise arguments to protect the important sovereignty interests of the Navajo Nation and the interests of the Navajo people. Given the unique nature of those interests, no other existing party can adequately represent Navajo Transitional Energy in this action. The district court acted well within its discretion in determining that Navajo Transitional Energy was a required party under Rule 19(a).

IV. The District Court Did Not Abuse Its Discretion in Deciding that, “in Equity and Good Conscience,” this Action Should Not Proceed without Navajo Transitional Energy under Rule 19(b).

After determining that Navajo Transitional Energy was a required party under Rule 19(a) that cannot be joined due to sovereign immunity, the district court did not abuse its discretion in determining that dismissal was required under Rule 19(b). Plaintiffs argue that the

district court failed to adequately consider all factors under Rule 19(b), including the availability of other alternative forums for their claims. (App. Br. at 52.) But, contrary to those arguments, the district court properly considered the equities and determined that the severe risk of prejudice to the sovereignty interests of Navajo Transitional Energy and the Navajo Nation was a compelling consideration that outweighed all other considerations in this case. (ER-07.)

As this Court has recognized, when the absent party is a tribe or tribal entity asserting sovereign immunity, “there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as one of those interests compelling by themselves, which requires dismissing the suit.” *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002) (citation and quotation marks omitted); *Lujan*, 928 F.2d at 1499-1500 (stating same). Although this Court still considers any other relevant equitable considerations under Rule 19(b), dismissal for nonjoinder generally is required “where there is a potential for injury to the interests of the absent sovereign.” *Pimentel*, 553 U.S. at 867. Although dismissal may leave the plaintiff without a remedy, that “result is a common

consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *Hull*, 305 F.3d at 1025; *see also Pit River Home & Agrc. Coop. Ass'n v. United States*, 30 F.3d 1088, 1102-03 (9th Cir. 1994) (stating same).

In this case, the district court correctly concluded that protection of tribal sovereign immunity strongly outweighed any other equitable considerations under Rule 19(b) under the circumstances of this case. As the district court found, the requested relief could "jeopardize the solvency of the Navajo Nation" and it "challenge[s] the economic development strategies that [the Navajo Nation] has chosen to pursue." (ER-04.) If the requested relief were granted, Navajo Transitional Energy would lose its legal entitlement to operate and to expand the Navajo Mine. If this critical source of tribal revenues was destroyed, Navajo Transitional Energy and the Navajo Nation almost certainly would lose ownership of the Navajo Mine and other important tribal assets. Such an outcome would make it impossible to perform under its CSA with the FCPP, destroying those valuable contractual benefits and the benefit of its bargain in purchasing the mine. Such an outcome also

would displace hundreds of Navajo workers, forcing more Navajo people to move away from the Navajo Nation to seek gainful employment. Those results would be directly contrary to the Navajo Nation's sovereignty goals in purchasing the Navajo Mine and pursuing an energy policy to develop renewable energy resources and clean-coal technology to advance the economic development and interests of the Navajo Nation. If the federal approvals for the continued operations of the Navajo Mine and the FCPP were vacated, the prejudice to Navajo Transitional Energy and the Navajo Nation would be severe.

Plaintiffs also have made no concessions to lessen the potential for prejudice to Navajo Transitional Energy and the Navajo Nation. If requested relief were limited to only prospective relief to enforce compliance with procedural requirements in any future administrative proceedings—without vacating the approvals or adding any more conditions—then it is possible that the prejudice to Navajo Transitional Energy would be lessened. But, as the district court recognized, Plaintiffs seek to vacate the existing approvals and shut down all operations at the Navajo Mine and the FCPP. (ER-68.) Plaintiffs also seek to “[e]njoin the Federal Defendants from authorizing any elements

of the Project pending their compliance with NEPA.” (ER-69.) Those requests for relief—which would operate to close the Navajo Mine and the FCPP indefinitely, if not permanently, for another multi-year NEPA review—are not designed to lessen prejudice to the sovereignty interests of Navajo Transitional Energy and the Navajo Nation.

As for alternative forums for Plaintiffs to raise their concerns, it is notable that the Navajo Mine and the FCPP remain subject to vigorous on-going monitoring and reporting requirements under the terms and conditions of the approvals with federal oversight. (SER-168.) To the extent that Plaintiffs object to the performance of those requirements, Plaintiffs potentially could raise such objections. Plaintiffs also potentially could raise environmental claims in Navajo courts in the future to the extent that any such claims may exist. *See, e.g.*, 4 N.N.C. § 1385 (authorizing citizen suits under the Navajo Clean Water Act); 4 N.N.C. § 1156 (authorizing citizen suits under Navajo Nation Air Pollution Prevention and Control Act). But, even if no alternative forum exists for Plaintiffs to challenge the federal approvals, the tribal interests in protecting immunity outweighs any interests of Plaintiffs in pursuing their “procedural” claims. *See, e.g., Hull*, 305 F.3d at 1025

(observing this Court has “regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs”); *Makah*, 910 F.2d at 560 (“[s]overeign immunity may leave a party with no forum for its claims”); *Kescoli*, 101 F.3d at 1311 (“we have recognized that a plaintiff’s interest in litigating a claim may be outweighed by a tribe’s interest in maintaining its sovereign immunity” (citation and quotation marks omitted)).

If this case were to go forward, the potential prejudice to Navajo Transitional Energy and the Navajo Nation would be hard to overstate. After establishing a long-term plan for redevelopment on the Navajo Nation—including a plan to reinvest profits from the Navajo Mine into developing new renewable energy project and clean-coal technology—Navajo Transitional Energy would face the possibility of losing all of its assets and defaulting on its loan. If the Navajo Mine and the FCPP were shut down even temporarily for a short term, Navajo Transitional Energy may not be able to afford the significant costs of restarting operations, particularly if it is found to be in default. Under such circumstances, the district court acted well within its discretion in

determining that “equity and good conscience” required dismissal of the action under Rule 19(b).

V. The Public-Rights Exception to Rule 19 Is Inapplicable in Cases, Like this One, Where the Requested Relief Would Destroy Legally Protected Rights of the Absent Party

Notwithstanding the risk of undue prejudice to Navajo Transitional Energy and the Navajo Nation, Plaintiffs and *amicus* United States also contend that the district court erred in not applying the “public rights” exception to joinder requirements under the circumstances of this case. In making that argument, both Plaintiffs and *amicus* United States baldly assert that the public-right exception applies in any action challenging federal agency compliance with federal environmental laws. (App. Br. at 20; U.S. *Amicus* Br. at 10.) That is so, according to *amicus* United States, because “[a]llowing joinder rules to preclude judicial review of agency action in situations where the APA itself authorizes review frustrates that statute.” (U.S. *Amicus* Br. at 10.) But a review of the public-rights exception shows no support for those positions.

First, contrary to the arguments of *amicus* United States, there is no broad categorical exception to joinder requirements in APA cases.

As explained in APS's brief to this Court, such arguments are contrary to the text and policy underlying Rule 19, as well as this Court's precedents. *See, e.g., Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2014) (en banc) (overruling "federal defendants" rule on intervention in NEPA challenges against federal government).

The public-rights exception to joinder also is not nearly as broad as Plaintiffs and *amicus* United States try to suggest. Rather than apply in every case implicating some public concern, the public-rights exception arises only in cases where the requested relief is "narrowly restricted to the protection and enforcement of public rights," such that there is no need for joinder rules to protect the interests of absent parties. *Nat'l Licorice Co.*, 309 U.S. at 363. For the public-rights exception to apply, this Court has instructed that two requirements must be satisfied. *Kescoli*, 101 F.3d at 1311. First, "the litigation must transcend the private interests of the litigants and seek to vindicate a public right." *Id.* Second, "although the litigation may adversely affect the absent parties' interests, the litigation must not 'destroy the legal entitlements of the absent parties.'" *Id.* (quoting *Conner*, 848 F.2d at 1459); *see also, e.g., White*, 765 F.3d at 1028 (applying same test for

public-rights exception to joinder). If the requested relief would operate to destroy an absent party's protected legal rights or entitlements, the public-rights exception is inapplicable, and dismissal for nonjoinder under Rule 19 is proper. *See Kettle Range Conservation Group v. United States BLM*, 150 F.3d 1083, 1087 (9th Cir. 1998) (for public-rights exception to apply, the absent "parties [must be] free to assert such legal rights as they might have acquired" (quoting *Nat'l Licorice Co.*, 309 U.S. at 366, alteration in original)).

A review of case law confirms the narrowness of the public-rights exception to joinder requirements. This Court previously has applied the public-rights exception in only one case—*Conner v. Burford*, 848 F.2d 1441. In that case, certain environmental groups alleged that the BLM violated NEPA and the ESA by selling leases for oil and gas exploration on national forest lands without first preparing an EIS and comprehensive biological opinion concerning the impact of the activities on endangered species. *Id.* at 1442-44. After the district court granted summary judgment on the NEPA and ESA claims, several of the lessees sought dismissal under Rule 19 for failure to join them as required and indispensable parties. *Id.* at 1459. Although the lessees were required

parties, this Court held that the case qualified for the public-rights exception to joinder because the challenged decisions were the BLM's general procedures in administering NEPA and the ESA, and its view that comprehensive environmental review was not required at the initial lease sale stage. *Id.* at 1460. In applying the public-rights exception, however, this Court explicitly limited the relief in the district court's order to provide that the sales were not void and that the lessees retained their rights under the lease contracts. *Id.* at 1463. This Court also stressed that the legal rights and entitlements of the lessees were not destroyed because, among other things, "the lessees remain free to assert whatever claims they may have against the government" for damages arising from any impairment of their contractual rights. *Id.* at 1462. Thus, although the action in *Conner* could proceed under the public-rights exception to joinder to decide BLM's procedural obligations under NEPA and the ESA, the exception did not apply to the extent that the requested relief would have destroyed the absent lessees' protected contractual rights or interests in the executed leases.

This Court recognized that same rule in *Makah*, 910 F.2d 555. In that case, an Indian tribe challenged both the amount of its own fishing

quotas and the regulatory procedure that was used to set the fishing quotas for all tribes with protected treaty fishing rights. *Id.* at 558. Characterizing the action as primarily seeking a reallocation of the quotas, the district court dismissed the action under Rule 19 on the ground that absent tribes were required and indispensable parties due to the potential impact of the requested relief on their treaty fishing rights. *Id.* On appeal, this Court affirmed the district court's dismissal except to the extent that the Indian tribe sought strictly prospective "relief that would affect only the future conduct of the administrative process" and would not affect the quota allocations that the federal agency already made. *Id.* at 559. Stressing that "the scope of the relief available to the [plaintiff tribe] on their procedural claims is narrow" and limited to prospective relief in enforcing lawful procedures in future proceedings, this Court held that the district had the authority to grant such procedural relief without the presence of the absent tribes. *Id.* As to any other requests for relief that would affect the fishing quotas of absent tribes, however, this Court recognized that the public-rights exception was inapplicable and that dismissal under Rule 19 was proper. *Id.* at 559-60, 559 n. 6 ("the district court's determination that

the absent tribes are indispensable to the ... claim for reallocation was not an abuse of discretion”).

In subsequent cases, this Court consistently has rejected the application of the public-rights exception to joinder in any cases where the requested relief would operate to destroy an absent party’s protected legal interests or rights. In *Shermoen*, 982 F.2d 1312, for example, this Court held that the public-rights exception did not apply to an action seeking to challenge legislation designating tribal reservations because, even assuming the action concerned only public interests, “the public rights exception to joinder rules is an acceptable intrusion upon the rights of absent parties only insofar as the ‘adjudication does not destroy the legal entitlements of the absent parties.’” *Id.* at 1319 (quoting *Conner*, 848 F.2d at 1459 (alteration in original)). Other cases similarly have strictly applied that rule. *See, e.g., Wilbur*, 423 F.3d 1101 (public-rights exception did not apply to an action challenging a cigarette tax negotiated between tribe and state); *Kescoli*, 101 F.3d 1304 (public-rights exception did not apply in case challenging approval of mining permit conditions because requested relief would destroy rights of absent tribe); *Hull*, 305 F.3d 1015 (public-

rights exception did not apply in a suit challenging state power to negotiate gaming compacts with Indian tribes because the practical effect of the requested relief would be a judgment that absentee tribes' existing gaming compacts were illegal).

Although Plaintiffs and *amicus* United States argue that this action should proceed notwithstanding the potential for prejudice to Navajo Transitional Energy—and, by extension, the Navajo Nation—the public-interest exception to joinder under Rule 19 is inapplicable. Plaintiffs do not seek only prospective relief to enforce the Federal Defendants' compliance with federal environmental laws in future administrative proceedings. Instead, as discussed above, Plaintiffs seek to vacate approvals that the Federal Defendants already issued for the continued operations of the Navajo Mine and the FCPP. Under those approvals, Navajo Transitional Energy has the legal entitlement to operate and to expand the Navajo Mine. If the approvals were vacated in this action, however, that legal entitlement would be destroyed. Navajo Transitional Energy would be unable to obtain its contractual benefits from its CSA with the FCPP, and the Navajo Nation likely would lose its ownership interests in the Navajo Mine and other trust

assets. Unlike *Conner*, there would be no remedy for damages against the Federal Defendants for those losses. In such circumstances, the public-rights exception to joinder requirements is entirely inapplicable. The district court acted within its discretion in dismissing this action for failure to join a required and indispensable party under Rule 19.

VI. Plaintiffs Also Cannot Join the Chief Executive Officer of Navajo Transitional Energy to Avoid Dismissal

Finally, if this Court agrees with the district court that Navajo Transitional Energy is a required and indispensable party that cannot be joined due to tribal sovereign immunity, Plaintiffs argue that this Court should join Navajo Transitional Energy's Chief Executive Officer, Clark Moseley, as an officer under *Ex parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* doctrine only applies, however, when there is an allegation that the sovereign entity or its officials have violated some federal law. Here, there is no such allegation. Plaintiffs cite no case where dismissal under Rule 19 was avoided by joining an executive of a tribal corporation when there is no allegation that the executive was violating federal law.

In *Ex parte Young*, the Supreme Court held that plaintiffs could obtain some relief notwithstanding sovereign immunity by suing state

officials, rather than the state itself, to prospectively require the state official to refrain from further violations of federal law. *See Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011); *Salt River Project*, 672 F.3d at 1176 (stating *Young* “permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune State or tribe”). The Supreme Court has emphasized that “[t]he doctrine is limited to that precise situation,” *Stewart*, 563 U.S. at 255, and that its application is inappropriate where the official does not have direct authority or the practical ability to enforce the challenged law, *see Young*, 209 U.S. at 155-56. *See also, e.g., Nat’l Audubon Society v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002) (holding that a suit against state officials was barred because the officials had no “direct authority or practical ability” to remedy alleged violations); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007) (rejecting application of the *Young* doctrine to a tribal official who was not “in any way responsible for enforcing” the challenged law).

Here, Plaintiffs do not—and cannot—raise claims or allegations that Navajo Transitional Energy, the Navajo Nation, or any of their officials have violated NEPA, the ESA, or the APA. Given that fact, the *Ex Parte Young* doctrine is inapplicable and does not offer an avenue for Plaintiffs to proceed with their claims notwithstanding the absence of Navajo Transitional Energy. Dismissal of the action is proper.

CONCLUSION

The district court did not abuse its discretion in determining that Navajo Transitional Energy was a required and indispensable party under Rule 19 that cannot be joined due to its sovereign immunity. Because Navajo Transitional Energy has legally protected interests that potentially would be destroyed if this action proceeded without it, the “public interest” exception to joinder is inapplicable to the facts of this case. This Court should affirm the district court’s dismissal for failure to join a required and indispensable party under Rule 19.

Dated this 11th day of May, 2018.

Respectfully submitted,

By: s/ Sara Kobak

Sara Kobak
Aukjen Ingraham
Brien J. Flanagan
Sarah Roubidoux Lawson
Schwabe, Williamson & Wyatt P.C.
1211 SW 5th Avenue, Suite 1900
Portland, OR 97204
Telephone: 503-222-9981

Of Attorneys for Intervenor-Defendant
Appellee Navajo Transitional Energy
Company, LLC

Index to Statutory Appendix
Appellee Navajo Transitional Energy Company, LLC

Navajo Nation Council Resolution No. CAP-34-80, (April 29, 1980).....	APP-1
Navajo Nation Council Resolution No. CAP-50-13 (Oct. 24, 2013)	APP-5

CAP-34-80
Class "B" Resolution
Area Approval Required.

RESOLUTION OF THE
NAVAJO TRIBAL COUNCIL

Establishment and Adoption of the
Navajo Nation Energy Policy

WHEREAS:

1. The Advisory Committee of the Navajo Tribal Council by Resolution ACAP-41-80 recommended the establishment and adoption of the Navajo Nation Energy Policy; and
2. The Economic Development and Planning Committee and the Resources Committee of the Navajo Tribal Council on the 24th day of April, 1980, recommended the establishment and adoption of the Navajo Nation Energy Policy; and
3. The Navajo Nation is not only a principal supplier of crucial energy resources critical to the development of the United States economy, but also bears a disproportionate share of the often irreversible social costs of environmental disruption; and
4. It is clear that other sovereigns are the principal tax and income beneficiaries of Navajo cooperation and resources contribution, and these benefits not only exceed the Navajo share of its own non-renewable resources, but the Navajo people receive little benefit from this transfer of wealth to other sovereign entities, leaving the Navajo Nation in a state of technological and economic poverty; and
5. While the Navajo Nation is a great energy producer, with some of the largest coal mines in the United States, and large electrical generating plants located on, but not owned by the Navajo Nation, many of our own people lack adequate water, electricity, paved roads, employment, housing, and other social and economic opportunities; and
6. The Navajo Nation must rely on its own resources, its own people, and its own will and determination to develop its own land and energy resources for the full economic use and benefit of its present and future generations; and
7. The United States is currently facing an "Energy Crisis" due to the insufficient supply and production of oil and gas to meet demands, and it is apparent that existing reserves will be exhausted within a few years at the current level of consumption; and

8. The history of relations between the Indian people and non-Indians has shown that whenever Indian people have something valuable (land, water, gold, oil, gas, coal, etc.); legal, moral, and ethical obligations are ignored and the virtual confiscation and exploitation of Indian resources takes place; and

9. The Navajo people historically have come to the aid of the United States in times of national emergency, and yet America has not reciprocated by permitting the Navajo Nation to share equitably in America's wealth; indeed, it has not permitted the Navajo Nation to share in a fair portion of its own energy resources.

NOW THEREFORE BE IT RESOLVED THAT:

1. For the purpose of gaining control over the Navajo Nation's energy resource management and development; to assure optimal returns and equity to the Navajo people from energy resource development and to invest in economic development ventures which will replace benefits derived from depleting resources, thereby diversifying the economy; the Navajo Tribal Council hereby establishes the following as the Navajo Nation Energy Policy:

- a) All energy resources of the Navajo Nation belong to the Navajo Nation. Navajo energy resources shall be developed to meet the present and future needs and for the full use and benefit of the Navajo people;
- b) The Navajo Nation shall become self-sustaining with respect to energy by 1990;
- c) All development shall be consistent with the highest standards of resource conservation and environmental protection; while taking into consideration and respecting the sacred nature of Navajo lands;
- d) The Navajo Nation shall maximize proceeds from energy resource development and take immediate steps to secure a more equitable share in its present agreements;
- e) As a sovereign government, the Navajo Nation shall exercise its right to receive all benefits from energy related federal legislation, regulations, and direct appropriations;
- f) The Navajo Nation shall cause the efficient utilization of its own resources through Navajo-owned and controlled enterprises and ventures,

emphasizing a development policy which promotes Navajo self-reliance, so that Navajo people have sufficient energy resources to meet their needs;

- g) In the course of using outside management, technical and financial assistance; contracts and agreements shall emphasize Navajo ownership and the transfer of technology and management to the Navajo people;
- h) Adverse results from resource development shall be minimized and mitigated whenever and wherever possible and the resulting costs shall be borne by the developer of the resource;
- i) Recognize the special legal position and community needs and interest of the Eastern Navajo Agency, including the communities of Ramah, Alamo, and Canoncito;
- j) The interests and need of energy impacted Navajo communities shall be considered in all resource development and appropriate steps shall be taken to assure that all chapters and communities share from the benefits from the development of energy;
- k) The administration shall provide for the systematic and maximum utilization of its organizational bodies and staff resources in the development, review and evaluation of proposals and its associated documents;
- l) The Navajo Nation, in the event of infeasible (high technology) projects, encourages alternative low technology energy resource development.

2. The Chairman of the Navajo Tribal Council shall prepare for the approval of the Advisory Committee, the Economic Development and Planning Committee, and the Resources Committee of the Navajo Tribal Council:

- a) A report describing how the Navajo Nation Energy Policy is being implemented, including a discussion and introduction of appropriate and proposed codes, amendments, regulations, and a report on resource inventory.
- b) A report outlining the progress of immediate action being taken by the Navajo Nation to institute interim measures acquiring more equitable shares from existing contracts, leases, and agreements.

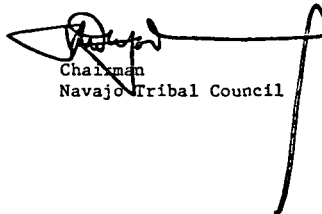
46

3. These reports shall be submitted no later than ninety (90) days after the certification of this resolution.

4. A moratorium is declared on all new energy development, including leases, permits and right-of-ways, except those presently under negotiation. This moratorium shall be in effect until the appropriate aforementioned reports are reviewed and approved by the appropriate committees of the Navajo Tribal Council.

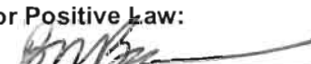
CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 59 in favor and 0 opposed, this 29th day of April, 1980.


Chairman
Navajo Tribal Council

Document No. 000076Date Issued: 07/17/2013**SECTION 164 REVIEW FORM**Title of Document: Rescinding CAP-34-80; Approving Navajo N Contact Name: HENRY, MICHELLE AProgram/Division: DIVISION OF NATURAL RESOURCESEmail: michellehenry@navajo-nsn.gov Phone Number: 928-871-7947Division Director Approval for 164A: 

Check document category: only submit to category reviewers. Each reviewer has a maximum 7 working days, except Business Regulatory Department which has 2 days, to review and determine whether the document(s) are sufficient or insufficient. If deemed insufficient, a memorandum explaining the insufficiency of the document(s) is required.

Section 164(A) Final approval rests with Legislative Standing Committee(s) or Council**Statement of Policy or Positive Law:**1. OAG: Date: 7/30/13

Sufficient Insufficient

☒ ☐**IGA, Budget Resolutions, Budget Reallocations or amendments: (OMB and Controller sign ONLY if document expends or receives funds)**

1. OMB: _____

Date: _____

☐ ☐

2. OOC: _____

Date: _____

☐ ☐

3. OAG: _____

Date: _____

☐ ☐**Section 164(B) Final approval rests with the President of the Navajo Nation****Grant/Funding Agreement or amendment:**

1. Division: _____

Date: _____

☐ ☐

2. OMB: _____

Date: _____

☐ ☐

3. OOC: _____

Date: _____

☐ ☐

4. OAG: _____

Date: _____

☐ ☐**Subcontract/Contract expending or receiving funds or amendment:**

1. Division: _____

Date: _____

☐ ☐

2. BRD: _____

Date: _____

☐ ☐

3. OMB: _____

Date: _____

☐ ☐

4. OOC: _____

Date: _____

☐ ☐

5. OAG: _____

Date: _____

☐ ☐**Letter of Assurance/M.O.A./M.O.U./Other agreement not expending funds or amendment:**

1. Division: _____

Date: _____

☐ ☐

2. OAG: _____

Date: _____

☐ ☐**M.O.A. or Letter of Assurance expending or receiving funds or amendment:**

1. Division: _____

Date: _____

☐ ☐

2. OMB: _____

Date: _____

☐ ☐

3. OOC: _____

Date: _____

☐ ☐

4. OAG: _____

Date: _____

☐ ☐

NAVAJO NATION DEPARTMENT OF JUSTICE

REQUEST FOR SERVICES

APP-6
DATE/TIME 7/19/13 @ 4:09p
DOC: 000076
UNIT: NM

-CLIENT TO COMPLETE-

DATE OF REQUEST: July 19, 2013 DIVISION: NATURAL RESOURCES
 REQUESTING PARTY: Michelle Henry DEPARTMENT: Administration
 PHONE NUMBER: (928) 871-7947 PROGRAM: Administration

COMPLETE DESCRIPTION OF LEGAL NEED AND SERVICES REQUESTED (attach documents):

SAS#000076 - Rescinding CAP-34-80; Approving the Navajo Nation Energy Policy of 2013.

DEADLINE:

**-DOJ SECRETARY TO COMPLETE-**

DATE/TIME IN UNIT: _____ RESPONSIBLE STAFF PERSON: Bidtah
 REVIEWED AND ASSIGNED: _____ TIME/HRS/MIN: 4:00pm COMPLETION DATE: 7/30/13

☒ REVIEW FOR LEGAL SUFFICIENCY
☐ REQUEST FOR LEGAL OPINION
☐ RESOLUTION: _____

☒ SURNAME
☐ APPOINTMENT/CONFERENCE/MEETING
☐ REVIEW & ADVISE

-DOJ ATTORNEY/ADVOCATE TO COMPLETE-

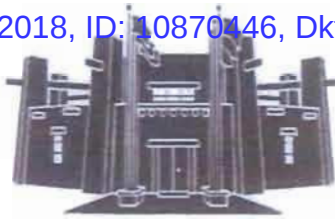
legally sufficient.

REVIEWED BY: [Signature] DATE: 7/30/13 TIME: 2 Hrs. — Min.
 SURNAMED BY: [Signature] DATE: 7/30/13 TIME: 2 Hrs. — Min.

DATE SENT TO DOJ RECEPTIONIST: _____ Called _____ for document pickup.
 Date: _____ Time: _____ By: _____

PICKED UP BY: [Signature] DATE/TIME: 7/30/13 4:45pm
 PLEASE PRINT *PLEASE PRINT* PLEASE PRINT* PLEASE PRINT

**LEGISLATIVE BRANCH
NAVAJO NATION**

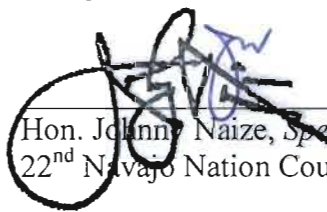


HONORABLE JOHNNY NAIZE
Speaker, 22nd Navajo Nation Council

September 11, 2013

MEMORANDUM

TO : *Honorable Members*
Resources and Development Committee
Naa'biik'iyati' Committee
Navajo Nation Council

FROM : 
Hon. Johnny Naize, *Speaker*
22nd Navajo Nation Council

SUBJECT : **ASSIGNMENT OF LEGISLATION**

Pursuant to 2 N.N.C § 164 (A)(4), this memorandum serves to inform and advise you that I assign the following legislation to the Resources And Development Committee, Naa'biik'iyati' Committee and the Navajo Nation Council;

Legislation No. 0276-13

**RELATING TO RESOURCES AND DEVELOPMENT AND NAA'BIK'IYATI';
RESCINDING CAP-34-80; APPROVING THE NAVAJO NATION ENERGY POLICY
OF 2013.**

As the Committee assigned to consider the legislation, Legislation No. 0276-13 must be placed on the Resources And Development Committee, Naa'biik'iyati' Committee and the Navajo Nation Council's agenda at the next regular meeting for final consideration.

ATTACHMENT: Legislation No. 0276-13

xc: Hon. Ben Shelly, *President*
The Navajo Nation
Harrison Tsosie, *Attorney General*
Mark Grant, *Controller*
Dominic Beyal, *Executive Director, OMB*
Honorable Roscoe Smith, Council Delegate (*Prime Sponsor*)

Office of Legislative Counsel
Telephone: (928) 871-7166
Fax: (928) 871-7576



Johnny Naize
Speaker of the Navajo Nation Council

MEMORANDUM

TO: Honorable Roscoe Smith
Crystal, Fort Defiance, Red Lake, Sawmill Chapters

FROM: *Mariana Kahn*
Mariana Kahn, Attorney
Office of Legislative Counsel

DATE: August 10, 2013

SUBJECT: PROPOSED NAVAJO NATION COUNCIL RESOLUTION; AN ACTION RELATING TO RESOURCES AND DEVELOPMENT AND NAABIK'ÍYÁTI'; RESCINDING CAP-34-80; APPROVING THE NAVAJO NATION ENERGY POLICY OF 2013

As requested, I have prepared the above-referenced proposed resolution and associated legislative summary sheet pursuant to your request for legislative drafting. Based on existing law and review of documents submitted, the resolution drafted is legally sufficient. However, as with all legislation, it is subject to review by the courts in the event of challenge. You are encouraged to review the proposed resolution to ensure that it is drafted to your satisfaction.

If you are satisfied with the proposed resolution, please sign it as "sponsor" and submit it to the Office of Legislative Services where it will be given a tracking number and sent to the Office of the Speaker for assignment.

If the proposed resolution is unacceptable to you, please contact me at the Office of Legislative Counsel and advise me of the changes you would like made to the proposed resolution.

Thank you for your service to the Navajo Nation.

13-520-1



**THE NAVAJO NATION
LEGISLATIVE BRANCH
INTERNET PUBLIC REVIEW PUBLICATION**

LEGISLATION NO: _0276-13_____ SPONSOR: Roscoe Smith

**TITLE: An Action Relating To Resources And Development And Naabik'iyati';
Rescinding CAP-34-80 Approving The Navajo Nation Energy Policy of 2013**

Date posted: September 11, 2013 at 4:15 pm

Digital comments may be e-mailed to comments@navajo-nsn.gov

Written comments may be mailed to:

**Executive Director
Office of Legislative Services
P.O. Box 3390
Window Rock, AZ 86515
(928) 871-7590**

Comments may be made in the form of chapter resolutions, letters, position papers, etc. Please include your name, position title, address for written comments; a valid e-mail address is required. Anonymous comments will not be included in the Legislation packet.

Please note: This digital copy is being provided for the benefit of the Navajo Nation chapters and public use. Any political use is prohibited. All written comments received become the property of the Navajo Nation and will be forwarded to the assigned Navajo Nation Council standing committee(s) and/or the Navajo Nation Council for review. Any tampering with public records are punishable by Navajo Nation law pursuant to 17 N.N.C. §374 *et. seq.*

**THE NAVAJO NATION
LEGISLATIVE BRANCH
INTERNET PUBLIC REVIEW SUMMARY**

LEGISLATION NO.: 0276-13

SPONSOR: Honorable Roscoe Smith

**TITLE: An Action Relating To Resources And Development And Naabik'iyati';
Rescinding CAP-34-80 Approving The Navajo Nation Energy Policy Of 2013.**

Posted: September 11, 2013 at 4:15 pm

5 DAY Comment Period Ended: September 16, 2013

Digital Comments received: *none*

1.7.11

**Executive Director
Office of Legislative Services**

9-17-2013. 9:00 AM

Date

**COMMITTEE REPORT
OF THE
RESOURCES AND DEVELOPMENT COMMITTEE**

22 nd Navajo Nation Council Third Year – 2013	LEGISLATION 0276-13 Presenting Sponsor: Honorable Roscoe D. Smith, Council Delegate
An action relating to Resources and Development and Naabik'iyati'; Rescinding CAP-34-80; approving the Navajo Nation Energy Policy of 2013	

Mr. Speaker:

The Resources and Development Committee, to whom has been referred Legislation 0276-13, has had it under consideration and reports a **DO PASS** recommendation and thence **REFERRED TO THE NAABIK'IYATI' COMMITTEE** on this 8th day of October, 2013.


Katherine Benally, Chairperson
RESOURCES AND DEVELOPMENT COMMITTEE

COMMITTEE ACTION:

Motion to Support: Leonard H. Pete
Second: George Apachito
Vote: 4-0-0

22nd NAVAJO NATION COUNCIL

Third Year 2013

The **NAA'BIK'IYATI' COMMITTEE** to whom has been assigned:**LEGISLATION No. 0276-13**

An Action Relating To Resources And Development And Naa'bik'iyati'; Rescinding CAP-34-80; Approving The Navajo Nation Energy Policy Of 2013. (*Sponsored by Honorable Roscoe Smith, Honorable Johnny Naize, Honorable Charles Damon II*)

Has had it under consideration and reports the same with the recommendation that it **DO PASS** with two amendments:

Amendment No. 1 (Motion by Honorable Walter Phelps and Second by Honorable Charles Damon II; VOTE 11-1)

On Page 3 of 5, lines 22 to 27 strike section (I) in its entirety:


~~I. The Nation's coal resources make a significant contribution to the support of many Navajo families and to the financial stability of the Navajo Nation government and its communities. The current policies of the federal government of the United States do not favor the use of coal. These policies negatively impact the Navajo Nation and the lives of its residents, and are contrary to the interest of the Navajo Nation; and~~

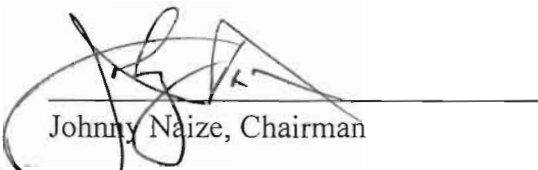
Amendment No. 2 (Motion by Honorable Dwight Witherspoon and Second by Honorable Walter Phelps; VOTE 11-1)

On attached 'Exhibit A', page 9 of 12, Section 9: Coal, Section 901: after 'legislation' delete "and adapt to the new federal regulatory environment"

And therefore, referred to the NAVAJO NATION COUNCIL

Respectfully submitted,

Adopted:  Legislative Advisor

Not Adopted:  Johnny Naize, Chairman

Not Adopted: _____ Legislative Advisor

Date: October 10, 2013

The vote was 8 in favor and 4 opposed

Motion: Honorable Danny Simpson

Second: Honorable Jonathan L. Hale

CO-50-13

**RESOLUTION OF THE
NAVAJO NATION COUNCIL**

**RELATING TO RESOURCES AND DEVELOPMENT AND NAABIKI'ÍYÁTI;
RESCINDING CAP-34-80; APPROVING THE NAVAJO NATION ENERGY
POLICY OF 2013**

BE IT ENACTED:

1. The Navajo Nation makes the following findings with respect to this resolution.

- a. The Navajo Nation Council adopted the Navajo Nation Energy Policy, CAP-34-80 on April 29, 1980 ("1980 Energy Policy"); and
- b. The Nation acknowledges the enduring principles and motivations set forth in the 1980 Energy Policy; and
- c. The Nation desires to update and amend the energy policies of the Nation by rescinding the 1980 Energy Policy (CAP-34-1980) by approving this 2013 Energy Policy; and
- d. The energy resources of the Nation are owned by the Nation and are to be administered and managed by the Nation for the benefit of all Diné; and
- e. The Nation will seek to maximize its level of autonomy in managing its energy resources and energy use on the Nation; and
- f. The Nation will take a leadership role in exploring and developing its energy resources to exercise its political sovereignty, to build true economic sovereignty, and to promote greater self-determination for future generations of Diné; and

CO-50-13

- g. The Nation has established wholly owned businesses that explore for, develop and manage certain of its energy resources. To optimize the Nation's use, management and conservation of its energy resources, the Nation may choose to utilize a combination of its wholly owned entities and outside energy companies to take advantage of the best technologies and capabilities to achieve the optimal balance of cost and results; and
- h. The 1980 Energy Policy helped build capacity of the Nation to realize many successes in the form of more favorable contracts and greater ownership of certain energy resources. It is acknowledged that the Nation can make improvements in the areas of governance, ownership, management, community involvement, health impacts, conservation and environmental protection of the Nation's energy resources; and
- i. The Navajo government should ensure that the local impacted communities are educated on relevant energy development and related issues. Prior energy development and related projects occurred with little or no consultation or results; and
- j. Energy forms a cornerstone of the Navajo economy by providing jobs for our people, electricity for our homes and business, and revenues for our local and central government. Developing energy resources will expand government revenues, create new industries and promote sustainable jobs for the Diné. This economic base provides opportunities for Navajos to pursue technical and managerial careers in many energy-related products, service and supporting industries. The ability for Navajos to build stable careers while remaining close to their families will build the strength of our families and communities that have been fragmented by the need of our people to find work in metropolitan centers. A growing Navajo economy draws

CO-50-13

educated and experienced tribal members back to the Nation, and provide the economic growth to support Navajo entrepreneurs and business owners; and

- k. The Navajo People have made invaluable contributions to the strength of the United States and its economy by permitting and assisting in the extraction of uranium over several decades. Numerous uranium mines across the Nation were not properly reclaimed leading to widespread contamination and illness of our people and livestock; and
- l. The United States is the trustee of the resources of the Navajo Nation. In this role the United States government has a duty to protect the Nation's energy resources and to assist the Nation to manage such resources for the benefit of the Diné. The United States government is to engage in government-to-government dialogue and understanding and to respect Navajo Nation's decision in the users of its resources. Historically, the United States government has sought to control the Nation's resources to benefit external interests in the uses of its natural resources or refrained from assisting the Nation in the protection of its interests; and
- m. The Nation's depletable fossil fuels are abundant; however, some fossil fuels are currently out of favor with federal and state regulatory and environmental policies. A balanced portfolio of fossil fuel and cleaner renewable energy resources will provide the Nation with greater economic and financial stability; and
- n. The Nation has the great potential of solar and wind energy resources. The development of these cleaner renewable resources can provide our communities with cleaner energy and generate substantial economic value if sold to surrounding communities and metropolitan regions; and
- o. Many of the Nation's residents, businesses and institutions are located in growth centers while many others are dispersed in remote regions and lack access to electric

CO-50-13

power. Greater access to electric power will provide a greater opportunity and access to modern conveniences for the Navajo residences; and

- p. The Nation is situated to provide pipeline and electrical transmission service provides access to more direct routes between energy sources and energy customers. The Nation's non-renewable energy resources require transportation and transmission to energy markets. Pipeline and transmission infrastructure can have a substantial impact on the environment communities and the viewscape. Establishing energy corridors are encouraged to enable the Nation to increase its revenues while minimizing the impact on the Nation; and
- q. Future development of cleaner renewable energy for export to metropolitan regions can generate substantial rents and business profits. These profits may be utilized to subsidize the cost of utilities for the Nation's residents, institutions and businesses; and
- r. By developing and executing a comprehensive energy strategy, the Nation can establish energy independence and build its economy for future generations. Diverse revenue streams from a balanced portfolio of energy extraction, generation and transmission will provide the Diné with economic stability, career opportunities and business opportunities.
- s. Approval and implementation of energy policies and agreements affect all parts of the Navajo Nation and it is important that the Executive Branch and Legislative Branch both be involved in the negotiation and approval of energy agreements.

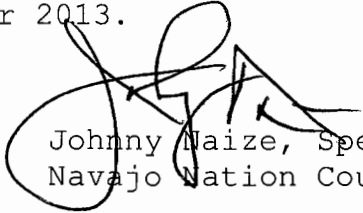
2. The Navajo Nation hereby rescinds CAP-34-80, the 1980 Energy Policy.

3. The Navajo Nation hereby approves the Navajo Nation Energy Policy of 2013, attached hereto as Exhibit A.

CO-50-13

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona) at which a quorum was present and that the same was passed by a vote of 13 in favor and 6 opposed, this 22nd day of October 2013.



Johnny Naize, Speaker
Navajo Nation Council

10-24-13

Date

Motion: Honorable Walter Phelps
Second: Honorable Katherine Benally

ACTION BY THE NAVAJO NATION PRESIDENT:

1. I hereby sign into law the foregoing legislation, pursuant to 2 N.N.C. § 1005 (C) (10), on this _____ day of OCT 24 2013 2013.



Ben Shelly, President
Navajo Nation

2. I hereby veto the foregoing legislation, pursuant to 2 N.N.C. § 1005 (C) (11), this _____ day of _____ 2013, for the reason(s) expressed in the attached letter to the Speaker.

Ben Shelly, President
Navajo Nation

Navajo Nation Energy Policy of 2013

PREAMBLE:

The Navajo Nation (hereinafter the "Nation"); to protect the energy natural resources and assets of the Nation; to ensure such resources and assets are used for the benefit of the Dine'; to create a self-sustaining economic future for the Dine' on their lands; to ensure sovereign control by the Nation over the extraction and flow of resources from the Nation's lands; to supply Navajo communities with the benefits afforded by energy development through total resource sovereignty, hereby establishes the Navajo Nation Energy Policy of 2013 (hereinafter the "2013 Energy Policy").

This 2013 Energy Policy provides guidance in common language for elected officials, community leaders, managers in the Nation's government, board members and managers of the Nation's enterprises, federal and state regulatory authorities and Navajo and non-Navajo business interests dealing with energy issues on the Nation. The 2013 Energy Policy serves to guide in consideration of specific legislation, rules and regulations, energy strategies, board resolutions, management policies, programs and decisions related to energy in and around the Nation.

WHEREAS:

1. The Navajo Nation Council adopted the Navajo Nation Energy Policy (CAP-34-80) on April 29, 1980 ("1980 Energy Policy"); and
2. The Nation acknowledges the enduring principles and motivations set forth in the 1980 Energy Policy; and
3. The Nation desires to update and amend the energy policies of the Nation by rescinding the 1980 Energy Policy (CAP-34-80) and, hereby adopting this 2013 Energy Policy; and
4. The energy resources of the Nation are owned by the Nation and are to be administered and managed by the Nation for the benefit of all Dine; and
5. The Nation will seek to maximize its level of autonomy in managing its energy resources and energy use on the Nation; and
6. The Nation will take a leadership role in exploring and developing its energy resources to exercise its political sovereignty, to build true economic sovereignty, and to promote greater self-determination for future generations of Dine'; and

7. The Nation has established wholly owned businesses that explore develop and manage certain of its energy resources. To optimize the Nation's use, management and conservation of its energy resources, the Nation may choose to utilize a combination of its wholly owned entities and outside energy companies to take advantage of the best technologies and capabilities to achieve the optimal balance of cost and results; and
8. The 1980 Energy Policy helped build capacity of the Nation to realize many successes in the form of more favorable contracts and greater ownership of certain energy resources. It is acknowledged that the Nation can make improvements in the areas of governance, ownership, management, community involvement, health impacts, conservation and environmental protection of the Nation's energy resources; and
9. The Navajo government should ensure that the local impacted communities are educated on relevant energy development and related issues. Prior energy development and related projects occurred with little or no consultation or results; and
10. Energy forms a cornerstone of the Navajo economy by providing jobs for our people, electricity for our homes and businesses, and revenues for our local and central government. Developing energy resources will expand government revenues, create new industries and promote sustainable jobs for the Dine. This economic base provides opportunities for Navajos to pursue technical and managerial careers in many energy-related product, service and supporting industries. The ability for Navajos to build stable careers while remaining close to their families will build the strength of our families and communities that have been fragmented by the need of our people to find work in metropolitan centers. A growing Navajo economy draws educated and experienced tribal members back to the Nation, and provides the economic growth to support Navajo entrepreneurs and business owners; and
11. The Navajo People have made invaluable contributions to the strength of the United States and its economy by permitting and assisting in the extraction of uranium over several decades. Numerous uranium mines across the Nation were not properly reclaimed leading to widespread contamination and illness of our people and livestock; and
12. The Nation's coal resources make a significant contribution to the support of many Navajo families and to the financial stability of the Navajo Nation government and its communities. The current policies of the federal government of the United States do not favor the use of coal. These policies negatively impact the Navajo Nation and the lives of its residents, and are contrary to the interests of the Navajo Nation; and

13. The United States is the trustee of the resources of the Navajo Nation. In this role the United States government has a duty to protect the Nation's energy resources and to assist the Nation to manage such resources for the benefit of the Dine. The United States government is to engage in government-to-government dialogue and understanding and to respect Navajo Nation's decision in the uses of its resources.. Historically, the United States government has sought to control the Nation's resources to benefit external interests in the uses of its natural resources or refrained from assisting the Nation in the protection of its interests; and
14. The Nation's depletable fossil fuels are abundant, however, some fossil fuels are currently out of favor with federal and state regulatory and environmental policies. A balanced portfolio of fossil fuel and cleaner renewable energy resources will provide the Nation with greater economic and financial stability; and
15. The Nation has the great potential of solar and wind energy resources. The development of these cleaner renewable resources can provide our communities with cleaner energy and generate substantial economic value when sold to surrounding communities and metropolitan regions; and
16. Many of the Nation's residents, businesses and institutions are located in growth centers while many others are dispersed in remote regions and lack access to electric power. Greater access to electric power will provide a greater number of opportunity and access to modern conveniences for the Navajo residences; and
17. The Nation is situated to provide pipeline and electrical transmission service providers with access to more direct routes between energy sources and energy customers. The Nation's non-renewable and renewable energy resources require transportation and transmission to energy markets. Pipeline and transmission infrastructure can have a substantial impact on the environment, communities and the viewscape. Establishing energy corridors are encouraged to enable the Nation to increase its revenues while minimizing the impact on the Nation.
18. Future development of cleaner renewable energy for export to metropolitan regions can generate substantial rents and business profits. These profits may be utilized to subsidize the cost of utilities for the Nation's residents, institutions and businesses; and
19. By developing and executing a comprehensive energy strategy, the Nation can establish energy independence and build its economy for future generations. Diverse revenue streams from a balanced portfolio of energy extraction,

generation and transmission, will provide the Dine with economic stability, career opportunities and business opportunities.

NOW, THEREFORE, BE IT RESOLVED THAT THE NAVAJO NATION COUNCIL HEREBY RESCINDS THE 1980 ENERGY POLICY (CAP-34-80) AND ADOPTS THE NAVAJO NATION ENERGY POLICY OF 2013, ATTACHED HERETO AS EXHIBIT A:

EXHIBIT A

NAVAJO NATION ENERGY POLICY OF 2013

Section 1: Short Title

The Navajo Nation Energy Policy of 2013 hereinafter is referred to as the "2013 Energy Policy". The Navajo Nation hereinafter is referred to as the "Nation"

Section 2: Scope and Review

This 2013 Energy Policy sets forth principles relating to the exploration, development, sustainable management and use of energy resources on the Navajo Nation. The energy resources and assets of the Nation addressed by the 2013 Energy Policy include fuel resources, mines, generation facilities, transmission and distribution infrastructure and pipelines. The energy uses addressed by the 2013 Energy Policy include, but are not limited to, residential, commercial, industrial and governmental uses, including heating, cooling, mechanical, industrial process and transportation uses.

The 2013 Energy Policy addresses the Nation's natural resource endowment in the areas of resource assessment, exploration, severance, development, production, preservation, management, protection, and distribution in order to maximize revenue and job creation for the benefit of the citizens of the Nation.

This 2013 Energy Policy may be amended by the Nation if, and when, circumstances require. The Navajo Energy Office, referenced herein, will recommend proposed amendments to the 2013 Energy Policy as needed.

Section 3: Definitions

Section 301: The following terms are defined for the purposes of this document as follows.

Electricity generating facilities. Includes facilities that burn fossil and biomass fuels to generate electricity; facilities that convert renewable resources to electricity (such as wind, solar, geothermal and hydroelectric); and, facilities generating electricity through nuclear fusion or fission for use on the Nation and for export for use off the Nation.

Electricity transmission infrastructure. Includes high voltage and distribution transmission lines, substations and related infrastructure.

Fuel minerals. Includes petroleum (e.g. oil, natural gas and associated liquids and gasses), coal, coal bed methane, uranium and any derivatives or associated minerals.

Large-scale energy developments. Includes (a) electricity generating facilities with capacity of one (1.0) megawatt or greater, (b) energy-related facilities utilizing five (5) acres of land or more, and (c) transmission lines or pipelines extending more than five hundred (500) feet.

High Voltage. Includes 69KV and higher.

Pipelines. Includes oil and gas pipelines, coal slurry lines and related compression and pumping infrastructure.

Section 4: Navajo Fundamental Law

Section 401: Before commencement of any Large-Scale Energy Development or other projects utilizing the Nation's energy resources, the Navajo Medicine Men's Association may be consulted to ensure the proper ceremonies, prayers and other rituals are conducted to maintain the Navajo people's Great Covenant with the deities. By doing so, the Nation shall strive to maintain a proper balance with the natural world.

Section 5: Sustainable Energy Economy

Section 501: Chapter 2 of the Navajo Nation Code entitled "The Foundation of the Dine', Dine' Law, and Dine' Government" describes the four sacred elements of life as "air, light/fire, water, and earth/pollen" and provides that "in all their forms [they] must be respected, honored, and protected for they sustain life". Recognizing the sacredness of these elements, the Nation desires to establish a sustainable energy economy based on the Nation's human capital, natural resources, capital resources and the exercise of its inherent sovereign authorities. A sustainable Energy Economy ensures an acceptable quality of life for Navajo people; proper planning and management by governmental officials; energy security; environmental stewardship; adequate rents, royalties, bonuses and taxes to ensure benefits for a sustainable Nation.

Section 6: General Provisions

Section 601: Applicability of the Nation's Laws and Regulations. The Nation's laws and regulations will apply to energy projects located within the Nation's jurisdiction.

Section 602: Long-Term Sustainability of Energy Developments. Energy developments on the Nation will be designed to be sustainable over the long-term based on economic considerations and environmental and community impacts.

Section 603: Lease Rent and Royalty Rates. Lease rental and royalty rates and charges for easements and rights-of-way will be equal to or greater than fair market value including energy projects where the Nation or an affiliate is an owner, taking into consideration the direct and indirect economic benefits of the energy project to the Nation.

Section 604: Renewal of Leases for Existing Energy Infrastructure. When negotiating renewals of rights-of-ways, leases for existing power generating facilities, transmission infrastructure and pipeline infrastructure and related water allocations, the Nation will maximize the total value of consideration to be received by the Nation.

Section 605: Selecting External Development Partners. External development partners of the Nation and its enterprises must possess relevant experience in the industry and those specific technologies required for the proposed energy development, as well as sufficient financial resources to adequately fund their portion of development expenses and contemplated investment in the project.

Section 606: End of Project Life. Leases and rights-of-way for energy projects will require the lessees to return the land to its original condition, or better, at the end of the projects, except where the Nation desires to retain improvements and related infrastructure after lease or right-of-way termination.

Section 607: Consistency in Energy-Related Decision Making. The development and management framework for the Nation's energy resources will encourage consistency in decisions involving the use of Navajo resources. The process for making energy development decisions shall be clearly communicated to the Nation and its stakeholders.

Section 608: Impact on Other Resources. New energy projects shall minimize negative impacts on other scarce and valuable resources of the Nation and manage such impacts in accordance with the Nation's laws, policies and plans for its resources, and will mitigate adverse impacts where necessary.

Section 609: Negotiation of Energy Agreements. The Executive and Legislative Branches of the Navajo Nation shall be involved in the negotiation and approval of energy agreements.

Section 7: Large-Scale Energy Developments

Section 701: Maximize Ownership, Control and Revenues. The Nation promotes majority ownership by the Nation or its entities of large-scale energy projects that utilize

the Nation's resources in order to optimize the Nation's participation in profits, in balance with the risks; maximize control and revenues; and, to ensure the interests of the Navajo people are protected. The Nation will have the option to purchase a majority of the equity of new large-scale energy projects on the Nation, including expansions of existing facilities and developments.

Section 702: Maximizing Navajo Return on Investment. When the Nation invests in energy projects, the primary goal will be to maximize profits and return on investment, in light of the attendant risks, for the benefit of the Nation.

Section 703: Navajo Ownership and Development Representatives. The Nation may acquire or designate an entity as its representative in any energy project in which the Nation desires to take ownership of a portion of such project.

Section 704: Operating Capabilities. The Nation will ensure that energy developments, including where the Nation or its enterprises possess a degree of ownership, will be operated and managed by entities that possess appropriate industry experience and capabilities.

Section 8: Community and Economy

Section 801: Expanding Rural Electrification. The Nation will continue to seek ways to expand electrical services to the residents of the Nation in balance with the cost to serve remote regions.

Section 802: Local Community Input, Support for, and Benefits from Energy Developments. Communities impacted by energy development will have the opportunity to provide input on and to indicate their support for such projects, and where substantially and adversely impacted by the development to share in a portion of the financial benefits of such projects.

Section 803: Managing the Cost of Energy for Residents of the Nation. The Nation will continue to seek ways to manage the cost of electricity and fuel for its residents to minimize the financial burden on Navajo communities.

Section 804: Navajo-Owned Small Businesses. The Nation will encourage the development of Navajo-owned small businesses that will support the Nation's energy industries.

Section 805: Fostering Economic Development, Developing Capabilities and Creating Career Opportunities. Energy projects will be developed to foster industrial and commercial growth, create career opportunities, and build the management skills and capabilities of the Navajo workforce in order to build the Nation's institutional capacity to manage its own energy resources.

Section 806: Distributed Electricity Generation. The Nation supports the development of distributed electricity generation and community scale electricity generation for use on the Nation.

Section 807: Science, Technology, Engineering, and Mathematics Education (STEM). The Nation shall support the pursuit of educational studies in STEM by its youth in order to create an interest in careers in the energy industry and to build a workforce that is prepared for technical and managerial careers in the energy industry.

Section 808: Health and Safety. The Nation will strive to protect the safety and health of Navajo communities when considering new energy developments and regulating existing energy developments.

Section 809: Energy Efficiency and Conservation. The Nation will continue to seek ways to enhance and promote energy efficiency and conservation on the Nation in order to manage future energy demand, reduce environmental impacts, reduce the financial energy costs for the residents of the Nation and build energy efficient industries.

Section 9: Coal

Section 901: The Future of Coal and Coal-Fired Power Plants. Coal and coal-fired plants are a significant component of the Navajo economy and the Nation's revenues. The Nation will encourage a future coal as a key component of the Nation's energy mix as a coal producer that derives a significant amount of royalties, rent, fees, jobs and tax revenue from coal mining and production of electricity. The Nation will pursue federal coal fuel legislation.

Section 10: Renewable Energy

Section 1001: Renewable Energy Development. The Nation will continue to develop a renewable portfolio of power generating facilities that balances coal, gas or oil-fired generation with economically viable renewable energy generation from such sources as wind, solar, hydro, geothermal and biomass.

Section 1002: Renewable Energy Portfolio Standard (RPS). The Nation will evaluate the appropriateness of implementing a Renewable Energy Portfolio Standard (RPS) for electricity used on the Nation. If an RPS is established, the Nation will strive to mitigate the impacts of increased costs of electricity for residential customers within the Nation caused by the implementation of an RPS.

Section 11: Nuclear Matters

Section 1101: Uranium Mining and Nuclear Power Generation. The Nation currently supports the moratorium on uranium mining on tribal trust, allotted trust and fee lands on the Navajo Nation. The Nation will continue to monitor uranium technologies and secondary mineral extraction techniques as well as market conditions to assess the safety, viability and potential of these activities for the future.

Section 12: Electrical and Energy Distribution Systems

Section 1201: New Electricity Transmission and Pipeline Infrastructure. The Nation supports the development of new electricity transmission infrastructure that provides the Nation with an opportunity to unlock the value of its vast renewable and conventional energy resources by providing transmission corridors to metropolitan centers.

Section 1202: Energy Corridors. The Nation will establish energy corridors to manage and minimize the impact on Navajo communities resulting from future electrical transmission, pipeline and railroad infrastructure.

Section 13: Navajo Energy Office

Section 1301: Establishment of the Navajo Energy Office. The Navajo Energy Office shall be established under the Executive Branch of the Navajo Nation government, and with appropriate staffing and budget.

Section 1302: Responsibilities. The Navajo Energy Office shall act as a clearinghouse for energy related projects, to facilitate energy development on the Nation and to increase institutional capacity on energy issues within Navajo Nation governmental agencies and enterprises. The Navajo Energy Office will act under the established Plan of Operation.

Section 1303: Strategic, Integrated Approach to Energy Planning. The Navajo Energy Office will develop a long-term Strategic Energy Plan. The Strategic Energy Plan will be designed to stimulate increased revenues from energy projects, spur energy infrastructure development, and diversify the Navajo energy economy. The Strategic Energy Plan will address opportunities to foster a competitive business environment to attract private investors to energy projects on the Nation, address how the Nation will strategically engage the key governmental and community representatives on Navajo energy projects, investigate the potential of all the Nation's available energy resources in all regions and serve as a resource to assist the Nation's leadership to prioritize energy projects

Section 14: Research and Development

Section 1401: Support for Technologies that Enhance the Use of Navajo Coal. The Nation will support clean coal technologies being developed through research and development which lessen the environmental impact of coal based electricity generation and maximize the efficient use of the Nation's coal resources.

Section 1402: Support for Technologies that Enable and Enhance the Use of All of the Nation's Resources. The Nation shall support the research and development of technologies that will allow the Nation to use its resources to maximize their benefit to the Nation and also lessen the environmental impact of their use.

Section 15: Taxation

Section 1501: Navajo Nation Taxation. The Nation shall seek to exert primacy in the taxation of energy development on the Nation to contribute to the funding of essential governmental services on the Nation.

Section 1502: Tax Incentive. The Nation may provide tax incentives to encourage the development of the Nation's energy resources, while balancing the need to provide supporting infrastructure, services and the Nation's finances.

Section 16: Limitations

Section 1601: Limitations. Nothing in the 2013 Energy Policy is intended to, nor shall it be construed to:

- a) Alter, amend or diminish in any way the sovereign immunity of the Navajo Nation or constitute a waiver of the sovereign immunity of the Navajo Nation, as defined in 1 N.N.C. § 551 .;
- b) Abrogate any authority conferred by the Navajo Nation Council upon any agency, enterprise or other instrumentality of the Navajo Nation;
- c) Repeal in whole or in part any law or regulation duly promulgated by the Navajo Nation or any of its agencies;
- d) Authorize or sanction the breach of any contractual duty or diminish any vested property rights; or
- e) Provide the basis for a private cause of action by or against any person or entity, or confer jurisdiction upon any court for any cause of action predicated on the 2013 Energy Policy.

STATEMENT OF RELATED CASES

Intervenor-Defendant-Appellee is not aware of any related cases.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,018 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately-spaced typeface using Century Schoolbook 14-point font.

Date: May 11, 2018

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 11, 2018, I electronically filed this document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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