No. 17-17320

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

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Diné Citizens Against Ruining Our Environment, *et al.*,
Plaintiffs-Appellants,

vs.

U.S. Bureau of Indian Affairs, *et al.*,
Defendants,

and

Arizona Public Service, and Navajo Transitional Energy Company
Intervenor-Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, CASE NO. 3:16-cv-08077-PCT-SPL

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# APPELLANTS' REPLY BRIEF

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## INTRODUCTION

> The state has no power to impart to him [any state official] any immunity from responsibility to the supreme authority of the United States.

*Ex parte Young*, 209 U.S. 123, 160 (1908).

> [When a federal court is] reviewing [a] determination of federal law, … it is neither prudent nor natural to see such review as impugning the dignity of the State or implicating the state's sovereign immunity in the federal system.

*Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 653 (2002) (Souter, J., concurring).

> But if it turns out that the [immovable property] rule [exception to sovereign immunity] does not extend to tribal assertions of rights in non-trust, non-reservation property, the applicability of sovereign immunity in such circumstances would, in my view, need to be addressed in a future case.

*Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1656 (2018) (Roberts, C.J., concurring).

An Indian tribe, like a state, cannot wield sovereign immunity to defeat the enforcement of federal law through prospective, non-monetary relief. Indeed, save in exceptional circumstances involving conflicting federal and tribal interests, questions of tribal sovereign immunity are irrelevant in lawsuits against federal agencies for violating federal law when making federal decisions, as here. The

Supreme Court has strongly suggested that tribal sovereign immunity should not apply to commercial activities—like the coal complex here—that cause off-reservation harm, if sovereign immunity would work to deprive the plaintiff of an adequate forum to seek relief.

Because tribal sovereign immunity does not and should not control the resolution of the instant case, this Court should reverse the district court and remand for resolution of the merits.

## ARGUMENT

### I. The Energy Company Is Not a Required Party Because It Has No Legally Protected Interest that Cannot Be Adequately Represented by Federal Defendants and Arizona Public Service.

The Energy Company, along with Arizona Public Service, fails to identify any interest in the instant case that cannot be adequately represented by Federal Defendants. Consequently, the Energy Company cannot be considered a required party.

#### A. The Energy Company's Interest in Federal Defendants' Compliance with Federal Law Is Insufficient to Confer Required Party Status.

1. Because this case concerns neither a tribal property or contractual right, or a tribe's sovereign authority, but rather the legality of a federal permitting action, the Energy Company has no

interest beyond that created by the challenged actions of the Federal Defendants. The company, as well as Arizona Public Service, concedes that its asserted interest is in the Federal Defendants' issuance of the record of decision, which approved the coal mining permit for the Energy Company, the lease for the Four Corners Power Plant, and the rights-of-way for transmission lines in New Mexico and Arizona (collectively, the "Project"). (NTEC Br. at 41; APS Br. at 36.) Neither the Energy Company nor Arizona Public Service disputes that Federal Defendants possess exclusive authority over these decisions. (NTEC Br. at 18; APS Br. at 8-9.) Nor do they dispute that Federal Defendants' possess ultimate authority over compliance with the federal Endangered Species Act (ESA) and National Environmental Policy Act (NEPA). (NTEC Br. at 19-20; APS Br. at 9.) Having no authority over the underlying federal actions, the Energy Company lacks the interest necessary to be a required party in a "lawsuit" that "[a]t its base … is a challenge to the way certain federal officials administered [decisions] for which they were both substantively and procedurally responsible." *Thomas v. United States*, 189 F.3d 662, 667, 669 (7th Cir. 1999); *Alto v. Black*, 738 F.3d 1111, 1129 (9th Cir. 2013) (finding tribe not required

party where it lacked final authority over membership decision); *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 469 (9th Cir. 1986) (holding miners with pending plans not required in NEPA litigation).[1]

2. Contrary to the Energy Company's suggestion (NTEC Br. at 34 n.6), Congress *has* restricted tribal sovereign immunity in statutes at issue in this case. The ESA authorizes citizen suits, as here, against "*any* person," which is defined to include "the Federal Government, … any State, *municipality*, or political subdivision of a State; or *any other entity subject to the jurisdiction of the United States*." 16 U.S.C. §§ 1532(13), 1540(g)(1) (emphases added). Courts have found that tribal sovereign immunity was abrogated in similar environmental protection statutes which define "municipality"[2] to include tribes. *E.g.*, *Deschutes River Alliance v. Portland Gen. Elec. Co.*, No. 3:16-CV-1644-SI, 2018 WL

[1] *See also WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, No. CV 16-65-M-DWM, 2018 WL 1023104, at *3 (D. Mont. Feb. 22, 2018) (holding "states and tribes do not satisfy the threshold for a legally protected interest under Rule 19(a)" in ESA action challenging federal animal pelt export program); *Jamul Action Comm. v. Chaudhuri*, 200 F. Supp. 3d 1042, 1052 (E.D. Cal. 2016) (holding tribe "has no legally protected interest in federal defendants' execution of a NEPA review" prior to approving a gaming management contract).

[2] The ESA does not define "municipality." *See* 16 U.S.C. § 1532.

2917356, at *7 (D. Or. June 11, 2018) (rejecting sovereign immunity argument in Clean Water Act case); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1096-97 (8th Cir. 1989) (Resource Conservation and Recovery Act). As these statutes are *in pari materia* with the ESA, the ESA should be given a similar construction. *See, e.g.*, *United States v. Brugnara*, 856 F.3d 1198, 1207 (9th Cir. 2017).

Further, pursuant to the Surface Mining Control and Reclamation Act (Surface Mining Law), under which Federal Defendants issued the Energy Company's mining permit, tribes must waive sovereign immunity to obtain regulatory authority over coal mining, which assures judicial review of permitting decisions. 30 U.S.C. § 1300(j)(3)-(4). This presumes that sovereign immunity cannot thwart judicial review when, as here, a tribe *lacks regulatory authority over coal mining*, as the alternative (which would allow tribes to assert sovereign immunity when they *lack* regulatory authority) would "negate the[] … purpose of the provision." *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) (quoting *N.Y. State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973)). Even if these provisions do not abrogate tribal sovereign immunity with respect to the actions at issue in this case, they

demonstrate "the balance of power that Congress struck in this context," which "is the compass [the Court should] follow in determining the legal significance of the tribal interest under Rule 19(a)." *Thomas*, 189 F.3d at 667. Given this congressional allocation of authority, "the district court erred in finding the [Energy Company] had to be included the lawsuit." *Id.* at 668.

While "[n]o court has held that the sovereign immunity waiver in the APA [Administrative Procedure Act] by the United States also serves as a general abrogation of tribal sovereign immunity," *White v. Univ. of Cal.*, 765 F.3d 1010, 1024 (9th Cir. 2014), the fact that "Congress explicitly made [agency action] subject to judicial review" is an important consideration in determining whether a case should go forward under Rule 19. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 n.6 (9th Cir. 1990); *Thomas*, 189 F.3d at 667.

3. Neither the Energy Company nor Arizona Public Service denies that the Project is interstate in nature, with significant off-reservation and interstate impacts, including poisoning endangered fish and causing $4.8 to $46.3 billion in harm from its greenhouse gas emissions.

ER 16-17, 36-38, 44-45, 122-24.[3] The Supreme Court has indicated that tribal sovereignty should not work to insulate tribal commercial entities, like the Energy Company, from judicial scrutiny of off-reservation harm if alternative avenues for relief are not available, as here. *Mich. v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 n.8 (2014) (suggesting tribal sovereign immunity should not apply to off-reservation torts); *see Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1656 (2018) (Roberts, C.J., concurring) (suggesting tribal sovereign immunity should not apply to off-reservation litigation over property ownership). In short, the Energy Company's interest in federal litigation over federal decisionmaking regarding interstate activity with significant off-reservation impacts is too attenuated to render it a required party under Rule 19(a). *See Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154-55 (9th Cir. 1998) (concluding that although tribe had interest in off-reservation activity, tribe was not required party because of adequate representation by federal agencies).

[3] In the case's current posture, the Court "accepts as true the allegations in Plaintiffs' complaint." *Paiute-Shoshone Indians of Bishop Cmty. v. City of L.A.*, 637 F.3d 993, 996 n.1 (9th Cir. 2011).

4. No case cited by the Energy Company or Arizona Public Service supports their contention that Federal Defendants' record of decision created the type of legally protected interest required by Rule 19(a). Most of the cited cases involved challenges to the validity of existing contracts, which are inapposite because the Conservation Groups are not seeking to invalidate any contracts in the instant case.[4] Further, unlike *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991), and *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458-59 (9th Cir. 1994), the Conservation Groups here do not seek "complete rejection of [the Energy Company's or the Navajo Nation's] current status as the exclusive governing authority of the reservation" or any "adjudication of … governing authority over the reservation." As noted,

[4] *See Wilbur v. Locke*, 423 F.3d 1101, 1112-13 (9th Cir. 2005) (tribe was required party because plaintiff was required to "establish the illegality of the Compact [between tribe and state]"); *Am. Greyhound Racing v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002) (plaintiffs sought to enjoin contract negotiations where existing "compacts provide for automatic renewal"); *Manybeads v. United States*, 209 F.3d 1164, 1166 (9th Cir. 2000) (ruling for plaintiffs would have "practical effect" of "undoing of the Agreements" of absent tribes); *Kescoli v. Babbitt*, 101 F.3d 1304, 1307, 1309 (9th Cir. 1996) (plaintiff sought "to invalidate the settlement [agreement]" between tribes, regulators, and coal company); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) (plaintiff sought to "void the lease" between tribe and coal company).

it is Federal Defendants that have *exclusive* authority over the federal decisions at issue in this case.

*Makah*, 910 F.2d at 557, involved a challenge to administrative regulations setting fishing quotas, but unlike here where the Energy Company attempts to assert an interest created by Federal Defendants' record of decision, the absent tribes in *Makah* had *preexisting* treaty rights to fish. The regulation itself was not the genesis of the absent tribes' asserted rights. *Center for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1224, 1230 (D. Colo. 2012), and *Village of Hotvela Traditional Elders v. Indian Health Services*, 1 F. Supp. 2d 1022, 1024, 1026, 1031 (D. Ariz. 1997), which dismissed ESA and NEPA cases, respectively, under Rule 19, are outliers, inconsistent with both controlling Ninth and Tenth Circuit precedent,[5] as well as the majority of district court decisions and scholarly commentary.[6] Further, unlike

[5] *Sw. Ctr.*, 150 F.3d at 1154-55 (absent tribes not necessary in NEPA and ESA lawsuit); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259-60 (10th Cir. 2001) (NEPA lawsuit); *Manygoats v. Kleppe*, 558 F.2d 556, 558-59 (10th Cir. 1977) (NEPA lawsuit).

[6] *WildEarth Guardians*, 2018 WL 1023104, at **3-4 (ESA and NEPA suit); *Jamul Action Comm.*, 200 F. Supp. 3d. at 1052 (NEPA suit); *Hayes v. Chaparral Energy, LLC*, No. 14-CV-495-GFK-PJC, 2016 WL 1175238, at **4-11 (N.D. Okla. Mar. 23, 2016) (NEPA suit), *vacated as*

here, *Pizarchik*, 858 F. Supp. 2d at 1229 n.11, did not address a "developed" argument about the public rights doctrine, *see infra* Part II (discussing doctrine), and *Village of Hotvela*, 1 F. Supp. 2d at 1026, did not involve off-reservation impacts and did not consider adequacy of federal representation, *see infra* Part I.B (discussing federal representation).

The Energy Company's repeated reliance on *Kescoli* is misplaced. First, as noted, unlike here, the plaintiff in *Kescoli*, 101 F.3d at 1309, sought to "invalidate the settlement," *i.e.* a contract, to which absent tribes were party—the paradigmatic case for involuntary joinder. *See Shields v. Barrow*, 58 U.S. 130, 139-40 (1854). Second, the continuing validity of *Kescoli* is questionable in light of Congress's subsequent amendment to the Surface Mining Law in 2006 providing that tribal

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*moot sub nom. Hayes v. Osage Minerals Council*, 699 F. App'x 799 (10th Cir. 2017); *Diné Citizens Against Ruining our Env't*, No. 12-CV-1275-AP, 2013 WL 68701, at **2-6 (D. Colo. Jan. 4, 2013) (NEPA case); *Diné Citizens Against Ruining our Env't v. Klein*, 676 F. Supp. 2d 1198, 1216-17 (D. Colo. 2009) (NEPA suit); *Connecticut ex rel. Blumenthal v. Babbitt*, 899 F. Supp. 80, 83 (D. Conn. 1995) (NEPA suit); Thomas P. Schlosser, *Understanding Federal Rule of Civil Procedure 19 and Its Application in the Sovereign Immunity Cases*, Fed. Law., Apr. 2013, at 42, 44; Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 Gonz. L. Rev. 1, 40 (2004).

sovereign immunity may not preclude judicial review of permits if tribes obtain regulatory authority over coal mining. Pub. L. No. 109-432, § 209(a), 120 Stat. 2922, 3019-20 (2006) (codified as amended at 30 U.S.C. 1300(j)(3)-(4)). Third, *Kescoli*, 101 F.3d at 1307-08, 1311, involved a "private" dispute (tribal protection of tribal burial sites) limited to tribal lands. By contrast, the instant case involves issues of broad public concern over interstate activity with significant off-reservation impacts. ER14, 17, 19-24, 36-40. Finally, *Kescoli* never addressed whether existing parties could adequately represent the absent tribes. Here, as demonstrated below, *infra* Part I.B, existing parties—Federal Defendants and Arizona Public Service—can represent any interest the Energy Company has in Federal Defendants' federal decisions under federal law.

### B. Federal Defendants and Arizona Public Service Adequately Represent Any Interests the Energy Company May Have in the Federal Decisions at Issue.

1. The Energy Company and Arizona Public Service ignore this Court's repeated holdings that in administrative review cases, as here, "[t]he United States can adequately represent an Indian tribe unless there exists a conflict between the United States and the tribe."

*Washington v. Daley*, 173 F.3d 1158, 1168 (9th Cir. 1999) (quoting *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998)); *Alto*, 738 F.3d at 1127-29 (holding federal defendants adequately represented tribe in APA case); *see also Heckman v. United States*, 224 U.S. 413, 444-46 (1912) (finding tribal members not required where United States was defending members' interests, as here). A showing of an actual, rather than merely, "possible" or "potential" conflict is necessary. *Sw. Ctr.*, 150 F.3d at 1154; *accord Alto*, 738 F.3d at 1128; *Washington*, 173 F.3d at 1168. Here, the Energy Company admits that Federal Defendants approved the Project pursuant to their trust responsibility, ER102, and that its and Federal Defendant's interests in defending this action are "aligned." (NTEC Br. at 51.)

The Energy Company has failed to identify any argument Federal Defendants (or Arizona Public Service) cannot or will not make. (*See* NTEC Br. at 49-55.) The Energy Company's speculation that "it is entirely *possible* that the Federal Defendant *could* concede [unidentified] facts, or agree to some [unidentified] relief requiring the closure of all or part of the Navajo Mine or agree to withdraw the environmental impact reviews for more assessments" (NTEC Br. at 53

(emphases added)) is insufficient to demonstrate an *actual* conflict. *Alto*, 738 F.3d at 1128 ("To be sure, conflicts can arise between the United States and an Indian tribe; when they do, the government cannot adequately represent the tribe's interests. But no such conflict has surfaced to this point in this case ...." (internal citation omitted)); *accord* *Washington*, 173 F.3d at 1168; *Sw. Ctr.*, 150 F.3d at 1154. Finally, that other conflicts in other cases have prevented other federal defendants from adequately representing other absent tribes does not prevent Federal Defendants from representing the Energy Company (and the Navajo Nation) here.

2. The Energy Company refers to its "sovereignty interests" (NTEC Br. at 51-52, 54-55), but as noted, neither the Energy Company nor the Navajo Nation has sovereign authority over the issuance of the coal mining permits or approval of rights-of-way or leases at issue here. That is authority possessed by Federal Defendants, which they exercised in their trust capacity when they issued the record of decision approving the Project. ER126-29. Thus, as in *Alto*, 738 F.3d at 1129, granting relief to the Conservation Groups, here, "would not undermine authority the Tribe would otherwise exercise." Thus, the Energy

Company's sovereignty interests are insufficient to render it a required party. *Id.*

3. The cases cited by the Energy Company undercut its position. *Manygoats*, 558 F.2d at 558-59, the principal case on which the company relies, ultimately held that a public interest suit brought under NEPA should *not* be dismissed despite the interests of an absent tribe, if as here, the plaintiffs do not seek to invalidate any contracts to which the absent tribes are parties:

> Dismissal of the action would create an anomalous result. No one, except the Tribe, could seek review of an environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on Indian lands. NEPA is concerned with national environmental interests. Tribal interests may not coincide with national interests. We find nothing in NEPA which exempts Indian lands from national environmental policy.
>
> [I]n equity and good conscience the case should and can proceed without the presence of the Tribe as a party.

*Id.* at 559. While it is true that prior to reaching its ultimate conclusion (that the NEPA case could proceed) the Tenth Circuit in *Manygoats* determined that federal agencies could not adequately represent tribal interests, *id.* at 558, the Ninth Circuit has rejected this position, holding instead that federal agencies *can* adequately represent tribal

interests absent a demonstrated conflict. *Sw. Ctr.*, 150 F.3d at 1154. Ultimately however, both circuits agree on the same basic point: public interest NEPA suits, like the instant action, should not be dismissed for failure to join absent tribes (or other parties). *Sw. Ctr.*, 150 F.3d at 1154-55; *Manygoats*, 558 F.2d at 558-59; *see also Conner v. Burford*, 848 F.2d 1441, 1459-62 (9th Cir. 1988).[7]

*Salt River Project v. Lee*, 672 F.3d 1176 (9th Cir. 2012), similarly provides no relief for the Energy Company. There the Court reversed the district court's decision under Rule 19 to dismiss a suit against Navajo Nation officials for allegedly violating federal law. *Id.* at 1182. In reversing, this Court explained: "Indeed, a contrary holding would effectively gut the *Ex parte Young* doctrine. That doctrine 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." *Id.* at 1181. So too here. The supremacy of federal law (NEPA and the ESA) ensured by the *Ex parte Young* doctrine and the Supremacy Clause, U.S. Const. art.

[7] The Energy Company also cites *Pizarchik*, 858 F. Supp. 2d at 1227, but that case merely followed the ruling about adequate representation from *Manygoats*, which the Ninth Circuit has rejected.

VI, cl. 2, would be lost if, via Rule 19, tribes could effectively "impart to [federal officials] any immunity from responsibility to the supreme authority of the United States." *Ex parte Young*, 209 U.S. 123, 160 (1908).

Finally, *Manybeads*, 209 F.3d at 1166, is inapposite because unlike in that case, here Federal Defendants have consistently maintained before the district court, ER113, and before this Court (U.S. Amicus Br. at 11-15) that they can adequately represent the Energy Company's interests in defending the challenged federal actions.

4. Arizona Public Service's arguments are also unavailing. Neither the company's puzzlement about why the Federal Defendants filed an amicus brief, nor Federal Defendants' decision not to take a position on the Energy Company's assertion of sovereign immunity as an arm of the Navajo Nation (which is irrelevant to the merits of this case), nor Federal Defendants' alleged disregard for Arizona Public Service's investments (which are also irrelevant) establishes an actual conflict which would prevent Federal Defendants (and Arizona Public Service) from adequately representing the Energy Company's interests

in the challenged federal actions. *Cf. Alto*, 738 F.3d at 1128; *Washington*, 173 F.3d at 1168; *Sw. Ctr.*, 150 F.3d at 1154.

Arizona Public Service provides no reason why Federal Defendants supposedly cannot represent the Energy Company's interests with respect to remedy. (*Cf.* APS Br. at 45.) In fact, Federal Defendants, the Energy Company, and Arizona Public Service all advocate for the same remedy in the event the Conservation Groups are successful on the merits—remand for further analysis without impacting operations at the coal complex. ER116-17 ("[T]he appropriate remedy here is to remand the analyses and approvals to the agencies for appropriate ESA and NEPA compliance without voiding the leases, permits, and rights of way or otherwise temporarily closing the mine or shutting down the power plant."); (NTEC Br. at 58 ("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 [the Energy Company] would be lessened."); APS Br. at 45 (advocating for "remand *without* vacatur") (emphasis added).)

Finally, *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992), is irrelevant because, unlike here, that case involved an inter-tribal conflict in which different absent tribes had "competing interests and divergent concerns." Here, Federal Defendants and the Energy Company (and Arizona Public Service) share the interest in defending Federal Defendants' approval of the Project.

## II. Even If the Energy Company Were a Required Party, Dismissal Was Unwarranted.

1. The Ninth Circuit has never held that sovereign immunity alone is decisive in the Rule 19(b) analysis. *E.g.*, *Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1162 (9th Cir. 2002) ("[T]he Ninth Circuit has, nonetheless, consistently applied the four part balancing test to determine whether Indian tribes are indispensable parties."). *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008),[8] did not change this:

> Unlike the present case, *Pimentel* did not involve a claim seeking review of an agency's compliance with a federal

[8] Contrary to Arizona Public Service's assertion, tribal sovereignty is not a "fundamental, constitutional determination." (APS Br. at 47.) There is no textual reference to *any* sovereign immunity in the constitution, Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201, 1205 (2001), let alone tribal sovereign immunity, which "developed almost by accident" through caselaw. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998).

> statute, nor was there any finding that an existing party adequately represented the Republic [of Philippines] or the Commission's interests. Finally, and perhaps most important, the parties in *Pimentel* had an alternative forum in which to resolve their dispute.

*Hayes*, 2016 WL 1175238, at *4 n.5 (NEPA case); *accord Diné Citizens Against Ruining Our Environment*, 2013 WL 68701, at *4. Tribal (or state) sovereign immunity may not automatically thwart an action seeking to correct violations of federal law via prospective injunctive relief, which includes "a declaration of the *past*, as well as the *future* ineffectiveness" of the unlawful action, as here. *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645-46 (2002). Nor does tribal sovereign immunity shield off-reservation harm due to commercial activity from judicial review, if sovereign immunity would deprive the injured party of redress, as here. *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2036 n.8; *Upper Skagit Indian Tribe*, 138 S. Ct. at 1656 (2018) (Roberts, C.J., concurring); ER 16-17, 36-38, 44-45, 122-24 (off reservation harm, including poisoning of endangered fish and billions of dollars in climate harm). Moreover, here, sovereign interests are not even implicated because the Energy Company had no sovereign authority over the federal decisions at issue in this action. *Alto*, 738

F.3d at 1129. And to the degree the Energy Company is interested in Federal Defendants' decisions, Federal Defendants adequately represent that interest, further minimizing any prejudice. *Sac & Fox Nation*, 240 F.3d at 1260 ("[T]he potential prejudice to that interest [tribal interest in revenue from gaming activities] is offset in large part by the fact that the Secretary's interests in defending his decisions are substantially similar, if not virtually identical, to those of the Wyandotte Tribe.") This supports allowing this action to proceed.

2. While it is true that there is a "wall of [Ninth] [C]ircuit authority" affirming dismissal of cases under Rule 19(b) on the basis of the sovereign immunity of absent tribes, *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014), "[i]n each of the cases" that constitute the wall "the *absent tribe was a party or signatory to a contract sought to be enforced*." *Id.* at 1033 (Murgia, J., dissenting) (emphasis added). By contrast, appellate decisions that address Rule 19(b) in NEPA actions not seeking to void contracts, as here, have unanimously concluded that dismissal was not warranted. *Sac & Fox Nation*, 240 F.3d at 1259-60; *Manygoats*, 558 F.2d at 558-59; *accord Hayes*, 2016 WL 1175238, at *4-11 (NEPA case); *Diné Citizens Against Ruining Our*

*Environment*, 2013 WL 68701, at **3-6 (NEPA case); *Diné Citizens Against Ruining Our Environment*, 676 F. Supp. 2d at 1216-17 (NEPA case). Thus, analogous authority supports allowing this action to proceed.

3. As noted in the Conservation Groups' opening brief, the requested prospective injunctive relief is designed to avoid prejudice to the Energy Company and the Navajo Nation. (Op. Br. at 45-48.) That the groups seek to set aside Federal Defendants' unlawful decisions does not change the prospective nature of the requested relief, as vacating the unlawful decisions "does not impose upon [the Energy Company or the Navajo Nation] 'a monetary loss resulting from a past breach of a legal duty on the part of the [Energy Company or the Navajo Nation].'" *Verizon*, 535 U.S. at 645-46 (quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)). The effect of setting aside the decisions at issue here pending compliance with NEPA and the ESA is a prospective injunction: it will provide interim relief pending Federal Defendants' compliance with federal law. *See id.* (explaining that invalidation of past state decision was prospective and within *Ex parte Young* doctrine). The Energy Company concedes that such interim relief

pending Federal Defendants' compliance with NEPA and the ESA may be "short term" and may not result in long-term impacts. (NTEC Br. at 60.)

Further, both the Energy Company and Arizona Public Service concede that, upon a proper showing and after a ruling on the merits, the district court could shape relief to lessen or avoid prejudice to the Energy Company and the Navajo Nation. (NTEC Br. at 58-59; APS Br. at 49-50.) While, at the district court, the Conservation Groups would vigorously oppose remand to the Federal Defendants without vacatur and would present appropriate evidence to support their position, the groups agree with the Energy Company and Arizona Public Service that the district court possesses authority to shape relief to lessen or avoid prejudice. Fed. R. Civ. P. 19(b)(2)(B). In any event, the Conservation Groups share the Energy Company's concerns about potential impacts to the people of the Navajo Nation and are committed to good faith negotiations with any potentially impacted entities prior to seeking injunctive relief, for ultimately the Conservation Groups also share the Energy Company's asserted goal to "transition its economy to renewable

energy development." (NTEC Br. at 54.)[9] This supports allowing the action to proceed.

4. The Energy Company, as well as Arizona Public Service, fails to identify any alternative forum in which the Conservation Groups could bring their claims. (NTEC Br. at 59-60 (suggesting only that groups could "raise objections" to violations of "on-going monitoring and reporting requirements" and that the groups "*potentially* could raise [unidentified] environmental claims in Navajo courts *in the future to the extent that any such claims may exist*" (emphases added)); APS Br. at 50 ("[I]t is true that dismissal of this case would leave Plaintiffs without an alternative Article III forum in which to pursue their claims anew.") The Energy Company is wrong that its purported sovereignty interests outweigh the Conservation Groups' interest in seeking redress for off-

[9] Arizona Public Service's request for this Court to issue an advisory opinion—without reviewing any evidence and prior to any ruling on the merits—mandating remand without vacatur as the only available remedy is unsupported. *Stock W. Corp. v. Lujan*—the only case offered by Arizona Public Service to support its unorthodox position—merely observed that relief *could be* shaped to avoid prejudice to an absent tribe: "If Stock West prevails in any part of its action, the district court *could* remand the case for further agency proceedings rather than compel agency action." 982 F.2d 1389, 1399 (9th Cir. 1993) (emphasis added). The Court did not preemptively mandate, as Arizona Public Service suggests, that the district court limit available remedies.

reservation harm. As noted, the Supreme Court has indicated that assertions of tribal sovereign immunity should yield to a plaintiff's right to redress for *off-reservation harm resulting from tribal commercial activity*, as here. *Bay Mills Indian Cmty.*, 134 S. Ct. at 2036 n.8; *Upper Skagit Indian Tribe*, 138 S. Ct. at 1656 (2018) (Roberts, C.J., concurring). The significant off-reservation harm at issue here, ER 16-17, 36-38, 44-45, 122-24, distinguishes the instant action from the cases cited by the Energy Company and Arizona Public Service.[10]

5. Contrary to the Energy Company's argument, *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), is on point and controlling. As here, the plaintiffs in *Conner* sought to enforce the protections of NEPA

[10] *Am. Greyhound Racing*, 305 F.3d at 1018, 1026 (challenge to gaming contracts on tribal lands—no allegations of off-reservation harm, save plaintiff racetrack owners' interest in "freeing themselves from the competition of Indian gaming"); *Makah*, 910 F.2d at 556-57 (challenging fishing quotas in fishing grounds guaranteed to tribes by treaty—no allegations of off-reservation harm, except plaintiff's interest in obtaining greater share of fishing quotas); *Kescoli*, 101 F.3d at 1307 (challenge to settlement agreement about protection of tribal burial sites on Navajo Nation); *Quileute Indian Tribe*, 18 F.3d at 1457-58 (challenge to agency decision over escheat of fractional property interests on reservation); *Dawavendewa*, 276 F.3d at 1153-54 (challenge to hiring-preference provision of power plant lease on reservation).

and the ESA. *Id.* at 1460.[11] As here, the plaintiffs in *Conner* sought to "enjoin only the actions of the government." *Id.* at 1461. The relief the Conservation Groups seek here—a prohibition against federal approval of ground disturbing activity pending compliance—is indistinguishable in effect from the relief approved in *Conner*:

> We enjoin only the actions of the government; the lessees remain free to assert whatever claims they may have against the government. Thus, the public right to compliance with environmental standards is vindicated with a minimum imposition on the rights of the lessees. The order as modified will obviously preclude immediate government approval of surface-disturbing activity, but such foreclosure of the lessees' ability to get 'specific performance' until the government complies with NEPA and the ESA is insufficient to make the lessees indispensable to this litigation.

*Id.* at 1461. As in *Conner*, the Conservation Groups do not seek to invalidate any *contracts* to which the Energy Company (or anyone else) is a party. *Id.* at 1460-61. Further, unlike the leases—bargained-for, contractual agreements—that the absent parties purchased in *Conner*,

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[11] Even before the Supreme Court articulated the public rights doctrine in *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 363 (1940), courts at common law did not apply compulsory joinder in the face of countervailing public interests. *Ambassador Petroleum Co. v. Sup. Ct. of L.A. County*, 208 Cal. 667, 673-675 (1930) (refusing to dismiss suit by state against oil and gas companies for wasting natural gas in violation of statute).

Federal Defendants' issuance of a strip-mining permit to the Energy Company and approval the lease and rights-of-way were not bargained-for contracts and did not create property rights. *See Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982) ("Where state law gives the issuing authority broad discretion to grant or deny license applications in a closely regulated field, initial applicants do not have a property right in such licenses protected by the Fourteenth Amendment."); James M. McElfish, Jr., & Ann E. Beier, Environmental Regulation of Coal Mining: SMCRA's Second Decade 53 (Envtl. L. Instit. 1990) ("The SMCRA permit is a privilege granted by the permitting authority."); *see also* 30 U.S.C. § 1260(b) (granting agency discretion to grant or deny permit); 25 U.S.C. § 415(a) (granting discretion to approve lease); 25 U.S.C. § 323 (granting discretion to approve rights-of-way); *Hayes*, 2016 WL 1175238, at *10 (explaining distinction between seeking to cancel lease and seeking to enjoin action pending federal compliance with federal law).

The cases cited by the Energy Company in which this Court declined to apply the public rights doctrine are distinguishable because they did not involve public rights under NEPA and the ESA, or the

plaintiffs sought to extinguish contracts or other property rights of absent parties, or both.[12]

## III. If the Energy Company Were a Required Party, Its Chief Executive Should Be Joined to Represent the Company.

1. The Energy Company's opposition to joinder of its Chief Executive Officer Clark Moseley undermines its protestations of sovereign immunity. If, as the Energy Company contends, "Plaintiffs do not—and cannot—raise claims or allegations that Navajo Transitional Energy [the Energy Company], the Navajo Nation, or any of their officials have violated NEPA, the ESA, or the APA," (NTEC Br. at 70), then there is no predicate claim to which sovereign immunity could apply in the first place—i.e., if the Conservation Groups are not suing

[12] *White*, 765 F.3d at 1028 (plaintiffs' case would extinguish tribal rights in skeletal remains); *Wilbur*, 423 F.3d 1101, 1112-13 (9th Cir. 2005) (plaintiff's suit would "establish the illegality of the Compact [between tribe and state]"); *Am. Greyhound Racing*, 305 F.3d at 1023 (plaintiffs sought to enjoin contract negotiations where existing "compacts provide for automatic renewal"); *Kettle Range Conservation Group v. BLM*, 150 F.3d 1083, 1084, 1087 (9th Cir. 1998) (plaintiffs sought to void contractual land exchange); *Kescoli*, 101 F.3d at 1309 (plaintiff "seeks to invalidate the settlement"); *Shermoen*, 982 F.2d at 1316-17, 1319 (plaintiffs sought to alter sovereign authority of absent tribes over reservation); *Makah*, 910 F.2d at 556-57 (plaintiffs sought to invalidate fishing quotas based on pre-existing treaty rights).

the Energy Company or the Navajo Nation, then any sovereign immunity of the Energy Company or the Navajo Nation is irrelevant. *See Alto*, 738 F.3d at 1129 (dismissing "the Band's legal interest in maintaining sovereign control over membership issues" because granting the requested relief "would not undermine authority the Tribe would otherwise exercise").

2. The Energy Company is also mistaken that officers of sovereign states or tribes cannot be joined via the *Ex parte Young* doctrine as defendants in environmental litigation, as here. The Fourth Circuit allowed plaintiffs bringing a NEPA action to join the Director of the South Carolina Department of Transportation as a defendant in a suit pursuant to the *Ex parte Young* doctrine. *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 330-32 (4th Cir. 2008). The court recognized that "[t]he federal statute [NEPA] and our precedent permit suit against a state actor where a party seeks to preserve federal rights under NEPA pending the outcome of federal procedural review." *Id.* at 331. This is necessary "to preserve the integrity of the federal remedies." *Id.* at 330. The Ninth Circuit allows the same procedure: "[N]onfederal defendants may be enjoined if federal and state projects

are sufficiently interrelated to constitute a single federal action for NEPA purposes." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1092 (9th Cir. 2003) (quoting *Fund for Animals v. Lujan*, 962 F.2d 1391, 1397 (9th Cir. 1992)); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1344-45 (9th Cir. 1995) (allowing joinder of private defendant to avoid dismissal under Rule 19). Thus, the Chief Executive Office of the Energy Company may be joined pursuant to Rule 19 and the *Ex parte Young* doctrine to represent the Energy Company's interests, to "preserve the integrity of federal remedies," *S.C. Wildlife Fed'n*, 549 F.3d at 330, and ensure "a resolution consistent with practical and creative justice." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 n.16 (1968).

3. The authorities cited by the Energy Company do not support its position, for even though those decisions barred suits against certain officials, they allowed suits against other officials with requisite authority. *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002) (allowing suit pursuant to *Ex parte Young* doctrine against "Director of the California Department of Fish & Game" under ESA); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092-93

(9th Cir. 2007) (allowing suit under *Ex parte Young* against tribal official responsible for collecting challenged tax). As Chief Executive Officer of the Energy Company Mr. Moseley has the authority to assure that the company complies with the decisions of Federal Defendants and federal law. *See Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 929-30 (D.C. Cir. 2012) (finding principal chief had authority to represent tribe as required by *Ex parte Young*).

## CONCLUSION

The doctrine of compulsory joinder, which became Rule 19, was developed at common law to address and assure complete adjudication of private disputes. The Supreme Court, the Ninth Circuit and other federal courts—from *National Licorice Co.*, to *Manygoats*, to *Northern Alaska Environmental Center*, to *Conner*, to *Southwest Center*, to *Alto*—have consistently rejected misuse of this devise to stymie judicial oversight of federal agencies' administration of federal law. Because the district court's ruling is inconsistent with this precedent, it should be reversed and this matter remanded for resolution of the merits.

Respectfully submitted this 31st day of July 2018.

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6,299 words, excluding portions exempted under Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Shiloh Hernandez
Shiloh Hernandez

## CERTIFICATE OF SERVICE

I certify that on July 31, 2018, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this action are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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