Rebecca L. Reed (Bar No. 275833)
E-mail: rebecca.reed@procopio.com
Justin M. Fontaine (Bar No. 323357)
E-mail: justin.fontaine@procopio.com
PROCOPIO, CORY, HARGREAVES & SAVITCH LLP
525 B Street, Suite 2200
San Diego, CA 92101
Telephone: 619.238.1900
Facsimile: 619.235.0398

Attorneys for Intervenor-Defendant
CAMPO BAND OF DIEGUENO MISSION INDIANS

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BACKCOUNTRY AGAINST DUMPS; DONNA TISDALE; and JOE E. TISDALE,

Plaintiffs,

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS; DARRYL LACOUNTE, in his official capacity as Director of the United States Bureau of Indian Affairs; AMY DUTSCHKE, in her official capacity as inkRegional Director of the Pacific Region of the United States Bureau of Indian Affairs; UNITED STATES DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, in his official capacity as Secretary of the Interior; and TARA SWEENEY, in her official capacity as Assistant Secretary of the Interior for Indian Affairs,

Defendants.

Case No. 3:20-cv-02343-JLS-DEB

PROPOSED INTERVENOR DEFENDANT CAMPO BAND OF DIEGUENO MISSION INDIANS' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE FOR A LIMITED PURPOSE

Date: April 8, 2021
Time: 1:30 p.m.
Dept: 5A
Judge: Hon. Janis L. Sammatino

Complaint Filed: July 8, 2020
Trial Date: Not Set

Proposed Intervenor-Defendant CAMPO BAND OF DIEGUENO MISSION INDIANS (the "Tribe") respectfully submits the following Reply to Plaintiffs' Opposition to its Motion to Intervene for a Limited Purpose.

I.
INTRODUCTION

Plaintiffs' arguments in opposition to the Tribe's Motion to Intervene bear no resemblance to the Ninth Circuit's test for intervention and are squarely at odds with controlling precedent. Plaintiffs seek to discredit the legitimacy of a sovereign tribal government, but these spurious arguments are both irrelevant to the question before the court and are a matter of tribal law outside this court's jurisdiction. The Tribe has demonstrated: (1) it is entitled to intervene to protect its significant interest in the challenged approvals and resulting revenue and jobs for the Tribe and its members; (2) a decision in Plaintiffs' favor would impair the Tribe's ability to protect those interests; and (3) no other party will adequately represent the Tribe's sovereign interest in controlling its own lands and resources and protecting its right to self-determination. As a consequence, the Tribe has satisfied the requirements for intervention, which should be granted.

II.
ARGUMENT

A. Plaintiffs Do Not Deny that the Relief They Seek Would Disrupt the Tribe's Interest in the Lease

Plaintiffs do not deny that the relief they seek in this case would disrupt the Tribe's interest in the Lease and the bargained-for revenue and jobs. ***The Ninth Circuit has repeatedly recognized exactly that interest as a significantly protectable interest***. *See, e.g., Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 853 (9th Cir. 2019); *Kescoli v. Babbitt*, 101 F.3d 1304, 1309-10 (9th Cir. 1996) (relief sought "could affect the amount of royalties received by the Navajo Nation and the Hopi Tribe and employment opportunities for their members").

Rather than address this controlling precedent, Plaintiffs make outlandish allegations regarding the legitimacy of the Tribal government, including questioning the certification of the duly elected tribal secretary and allegations of election deficiencies that question the legitimacy of the actors before this court. *See, e.g.*, Declaration of Michelle Cuero, ¶¶ 19-21, 27-29; Declaration of Monique La Chappa, ¶¶ 9-12. These allegations are untrue, but that does not matter for the purposes of this motion because the allegations are irrelevant to whether the Tribe has asserted a significantly protectable interest.

Plaintiffs' Opposition does not dispute that the Tribe is a party to the Lease and the Lease provides the Tribe revenue and good paying jobs to Tribal members. *Compare* Tribe's Motion to Intervene, ECF No. 49-1 at 7-8 *with* Pls. Opp. to Motion to Intervene, ECF No. 55 at 1-4. Plaintiffs Opposition also does not dispute that the U.S. Bureau of Indian Affairs' ("BIA") approval of the Lease is the "property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). Consistent with Ninth Circuit precedent granting intervention to parties seeking intervention to defend an approval granted by the federal government, the Tribe has demonstrated a significantly protectable interest. *See, e.g.*, *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1180 (9th Cir. 2011); *Sw. Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2011); *see also Diné Citizens*, 932 F.3d at 853 (same in Fed. R. Civ. P. 19 context). And, of course, any challenge to the legitimacy of the Tribe's approval of the Lease cannot be decided here. As the BIA noted in its decision documents, Plaintiffs allegations are a matter of tribal law and are unrelated to the adequacy of the environmental review—the question before this court. BIA, Final Environmental Impact Statement for Campo Wind Project with Boulder Brush Facilities, Appendix T (January 2020) at RTC-51, *available at* http://www.campowind.com/.

A Tribe possesses inherent and exclusive power over matters of internal tribal governance, and claims that a Tribal government's action is invalid under the Tribe's constitution can only be brought in tribal court. *See* 1 Cohen's Handbook of Federal

Indian Law §§ 4.04, 4.06, 7.04 (2019) ("Challenges to the validity of a tribal council's action under the tribe's constitution must be brought in tribal court." *Id.* § 4.04); *see also Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1185-86 (E.D. Cal. 2009) (holding plaintiffs failed to meet standing burden which turned on tribal law issue, noting "[i]nternal matters of a tribe are generally reserved for resolution by the tribe itself, through a policy of Indian self-determination and self-government as mandated by the Indian Civil Rights Act . . . without authority, this Court will not interfere in the internal affairs of the Tribe"); *Bullcreek, et al. v. Western Regional Director, Bureau Of Indian Affairs*, 40 IBIA 196, 200-01 (2005) (holding that individual tribal members lack standing to challenge BIA's conditional approval of lease based on claims that the lease was not properly authorized by the Tribe's General Council, and recognizing the Department of the Interior's "responsibility to refrain from interfering in intra-tribal disputes").

B. The Tribe's Cannot Fully Protect its Interests Without Intervention

For the same reasons, Plaintiffs' argument that the Tribe can fully protect its interests without intervention is equally flawed.

Plaintiff, Donna Tisdale, who is not a member of the Kumeyaay Nation, offered a declaration that criticizes the strategic vision and economic and fiscal policy of the Tribe. *See, e.g.*, Declaration of Donna Tisdale, ¶¶ 8-10. But Plaintiffs' entire argument assumes incorrectly that there is no legally protectable interest in the Lease, and they have offered no arguments to dispute that if Plaintiffs succeed in this suit, the Tribe could not protect its interest in the Lease and bargained-for revenue and jobs. Because Plaintiffs' claims threaten and would otherwise impair these significant Tribal interests in the challenged approvals—interests that have been recognized in multiple other Ninth Circuit proceedings—this factor for intervention is met. *See Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898, 900 (9th Cir. 2011) (holding that proposed intervenor only need show that an action potentially threatens interests); *see also Diné Citizens*, 932 F.3d at 853 (holding tribal entity had interest in

federal approvals and associated expected jobs and revenues).

C. Plaintiffs Ignore and Fail to Discuss Controlling Ninth Circuit Precedent

Plaintiff's third argument—that Terra-Gen and the federal government can adequately represent the Tribe's interest—is in direct conflict with controlling Ninth Circuit precedent. The Ninth Circuit in *Diné Citizens* made clear in virtually identical factual circumstances that the federal government's interests in the adequacy of its NEPA and other environmental review "differs in a meaningful sense from [the Tribe's] interest in ensuring that the [project] continue to operate and provide profits to [the Tribe]." *Diné Citizens*, 932 F.3d at 855. The Ninth Circuit also recognized that the commercial party defending the approvals in *Diné Citizens* likewise could not represent the Tribe's interest because although it "shares at least some . . . financial interest in the outcome of the case[,]" the commercial party "does not share the [Tribe's] *sovereign* interest in controlling its own resources, and in the continued operation of the [project] and the financial support that such operation provides." *Id.* at 856 (emphasis in original).

Ignoring that controlling precedent, Plaintiffs point the court to a Tenth Circuit case they claim supports their argument that the federal government would be an adequate representative of the Tribe's interest. But *Dine Citizens* is explicitly to the contrary and is in accord with other binding Ninth Circuit precedent. *See, e.g.*, *White v. University of California*, 765 F.3d 1010, 2017 (9th Cir. 2014) (finding that although aligned in defending the University's decision, it was unlikely that the University and the Kumeyaay tribes' interest would remain aligned).

Plaintiffs also allege that a Tribe's defense of its sovereign interest does not justify intervention, relying solely upon a concurring opinion in a D.C. Circuit case. Pls. Opp. to Motion to Intervene at 8-9. As an initial matter, Plaintiffs fail to disclose to the Court that this D.C. Circuit opinion affirmed a district court's denial of a tribe's motion to intervene solely on timeliness grounds, where the tribe sought to intervene

six years into the action. *See Amador Cnty. v. U.S. Dep't of the Interior*, 772 F.3d 901, 904-06 (D.C. Cir. 2014). But more importantly, Plaintiffs' argument is, again, at odds with Ninth Circuit law. A Tribe's sovereign interest is *precisely* the type of interest that the Ninth Circuit has identified for protection under the Federal Rules. *See Diné Citizens*, 932 F.3d at 853-56, 860; *Kescoli*, 101 F.3d at 1310, 1312 (holding that lease-related challenge would "disrupt [the Tribe's] ability to govern themselves and to determine what is in their best interests").

III.

CONCLUSION

For the reasons stated above, the Tribe respectfully requests that the Court grant its motion and allow it to intervene for the limited purpose of filing a Motion to Dismiss for failure to join an indispensable party.

DATED: April 1, 2021

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: /s/ *Rebecca L. Reed*
Rebecca L. Reed
Justin M. Fontaine
Attorneys for Intervenor-Defendant
CAMPO BAND OF DIEGUENO MISSION INDIANS