

1 **Aukjen Ingraham, OSB. #023338**
 Email: aingraham@schwabe.com
 2 **Brien Flanagan, OSB #023044**
 Email: bflanagan@schwabe.com
 3 **Sarah Roubidoux Lawson, AZB #023708**
 Email: slawson@schwabe.com
 4 SCHWABE, WILLIAMSON & WYATT, P.C.
 5 1420 Fifth Avenue, Suite 3400
 Seattle, WA 98101
 6 Telephone: 206.622.1711
 7 Facsimile: 206.292.0460

8 Of Attorneys for Intervenor-Defendant Navajo Transitional
 Energy Company LLC

9 **UNITED STATES DISTRICT COURT**
 10 **DISTRICT OF ARIZONA (Prescott Division)**

11 **DINÉ CITIZENS AGAINST RUINING**
 12 **OUR ENVIRONMENT, et al.,**

13 Plaintiffs,

14 vs.

15 **BUREAU OF INDIAN AFFAIRS, et al.,**

16 Defendants.

No. 3:16-cv-08077-SPL

NAVAJO TRANSITIONAL
 ENERGY CORPORATION'S
 MOTION TO DISMISS AND
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT

ORAL ARGUMENT REQUESTED

17 **I. MOTION AND INTRODUCTION**

18 Navajo Transitional Energy Company L.L.C. (“NTEC”) was formed by action of the
 19 Navajo Nation (“the Nation”) to own and operate the Navajo Mine (“ the Mine”) for the benefit
 20 of the Nation. Plaintiffs’ challenge threatens continued operations at the Mine and adjacent Four
 21 Corners Power Plant (“FCPP”), which would result in the loss of hundreds of Navajo jobs and
 22 the loss of significant royalties and tax revenues for the Nation. Because of the impact on
 23 NTEC’s interests, NTEC is a required party pursuant to Federal Rule of Civil Procedure
 24 19(a)(1)(B)(i).

1 NTEC, as an arm of the Nation, however, possesses sovereign immunity and cannot be
2 joined, and devastating injury to its interests would or could occur in its absence. Applying the
3 Supreme Court's Rule 19(b) balancing test analysis, this action cannot proceed in equity and
4 good conscience. Accordingly, NTEC moves for the dismissal of this action pursuant to Rules
5 19 and 12(b)(7).

6 Counsel for NTEC has conferred with counsel for plaintiffs, defendant government
7 agencies and defendant-intervenor Arizona Public Services ("APS"). Plaintiffs and the
8 government oppose NTEC's motion to dismiss. APS does not oppose NTEC's motion to
9 dismiss.

10 In support of this motion, NTEC relies on NTEC's Limited Motion to Intervene, the
11 Declaration of Harry Scott ("Scott Decl."), the Declaration of Doreen Tanner ("Tanner Decl."),
12 the Declaration of Vecenti Benally ("Benally Decl."), the Declaration of Charles Cicchetti, Ph.D.
13 ("Cicchetti Decl."), and the Declaration of Clark Moseley ("Moseley Decl."). A proposed form
14 of order granting NTEC's motion to dismiss is attached hereto as Exhibit A.

15 **II. FACTUAL BACKGROUND**

16 **A. THE NAVAJO NATION AND FEDERAL GOVERNMENT HAVE APPROVED 17 OPERATION OF THE MINE AND POWER PLANT**

18 The Mine and FCPP are on the Navajo land or Navajo reservation and are a critical
19 source of royalties, taxes, jobs and economic opportunity for the Nation for over half a century.
20 Cicchetti Decl. ¶¶ 8-13, 24; Moseley Decl. ¶ 4. Regularly over those fifty years, the Nation has
21 confirmed its commitment to the Mine and FCPP with lease renewals and authorizations, and by
22 securing a first right of refusal for the Nation to purchase the Mine. Then, in 2013, the Nation,
23 through legislation, formed NTEC to purchase the Mine and negotiate coal supply agreements
24 with FCPP. The goal of NTEC is to maintain the revenue stream from the Mine and FCPP for
25 the Nation, while utilizing the profits from the Mine to advance transitional energy projects and
26 facilitate economic development. Navajo Nation Resolution CAP-20-13, as amended by CO-58-
27 13 ("NTEC Formation Resolution").

1 Prior to 2013, NTEC's predecessor and the FCPP formally sought renewals to ongoing
2 leases entered into between FCPP and the Nation and rights of way across Nation lands, and
3 renewal and modification to a mining permit to continue operation of the Mine and FCPP past
4 the previous permit expiration of July 2016. As a necessary part of assessing the lease, right of
5 way ("ROW"), and permit applications, the federal defendants conducted a consolidated analysis
6 of environmental impacts in consultation with the Nation. After a multi-year analysis of impacts
7 to the environment and endangered and threatened species pursuant to the Endangered Species
8 Act ("ESA") and the National Environmental Policy Act ("NEPA") and a number of other laws,
9 the defendants in July of 2015 issued the Record of Decision ("ROD"), which was the final
10 condition precedent for issuance of the series of leases, rights-of-way, and permits to allow the
11 Mine and FCPP to continue to operate ("The Approvals"). In April 2016, plaintiffs filed this
12 action, ostensibly challenging the federal agencies' actions under the ESA and NEPA but
13 functionally challenging The Approvals authorized thereby.

14 The Approvals include a lease entered into by the Nation and authorizations granted to
15 NTEC—the Navajo Nation entity that now owns the Mine. Thus they reflect authorizations
16 given by the Nation for activities impacting Navajo resources entrusted to NTEC. As a
17 sovereign nation, the Nation has the right to manage its natural resources and preserve vital
18 Nation-based economies. Tribes are "distinct political communities, having territorial
19 boundaries, within which their authority is exclusive... which is not only acknowledged, but
20 guaranteed by the United States." *Worcester v. Georgia*, 31 U.S. 515, 557 (1832); *Merrion v.*
21 *Jicarilla Apache*, 455 U.S. 130, 139-141 (1982) (finding that tribes have "inherent right" to
22 "self-government and territorial management").

23 Under the Navajo Treaty of 1868 between the Nation and the United States, the Nation
24 reserved unto itself the right to manage its lands, including the right to exclude outsiders. Treaty
25 of Bosque Redondo, 15 Stat. 667 (1868). Nation lands are set apart as a permanent homeland for
26 the Navajo people, and for their exclusive use and occupation without interference. Article XIII,
27 15 Stat. 671. The United States agreed that no persons except the Navajo should ever be

1 permitted to pass over, settle upon, or reside in, the lands of the Navajo Nation. Article II, 15
2 Stat. 668.

3 The federal defendants involvement in the permits, leases and ROW on Navajo land
4 reflect a continuing cooperation amongst the governments of sovereigns, and is not an abrogation
5 of sovereign immunity. Plaintiffs' requested relief may invalidate the lease renewals entered into
6 by the Nation, the ROWs over Navajo Nation land, and the mining permit granted to NTEC.
7 Any threat to the validity of The Approvals also threatens the continued operation of the Mine
8 and FCPP and the hundreds of jobs and hundreds of millions of dollars the Mine and FCPP bring
9 to the regional economy.¹

10 **B. THE PARTIES**

11 **1. NTEC Is a Navajo Corporation Created for the Benefit of the Navajo**
12 **Nation to Manage the Nation's Energy Resources**

13 The Nation has long been burdened by outside interests using Navajo land and taking
14 Navajo natural resources for those outside interests' own profits. But, in 2013, the Nation
15 created NTEC to take ownership of the mine and promote the economic and financial interests of
16 the Nation and the Navajo people while remaining dedicated to responsible management of the
17 Nation's natural resources. Moseley Decl. ¶ 3. The Nation also created NTEC with the specific
18 purpose of moving towards sustainable energy development within the Nation's boundaries. *Id.*

19 NTEC owns and operates the Mine on land held in trust by the federal government for the
20 benefit of the Nation, leased with the consent of the Nation, and located entirely within the
21 boundaries of the Nation. Moseley Decl. ¶ 4. The Mine supplies coal exclusively to the nearby
22 FCPP, which is also on Nation trust land, leased with the consent of the Nation, and entirely
23 within the boundaries of the Nation. *Id.* NTEC and FCPP operate pursuant to the mining
24 permits, ROWs, and leases challenged by plaintiffs in this case. *Id.*

25
26
27 ¹ Plaintiffs' request for relief is vague and indefinite. NTEC does not concede that plaintiffs are entitled to any
28 relief, up to and including interruption or shut down of the Mine and FCPP operations.

1 NTEC is a wholly-owned Navajo corporation located on the Nation and incorporated
2 pursuant to Navajo law. Moseley Decl. ¶ 5. The Navajo Nation is a sovereign nation that is
3 immune from suit under Navajo law. 1 N.N.C. § 553(A) (“[t]he Navajo Nation is a sovereign
4 nation which is immune from suit.”). The Nation’s sovereign immunity is inherent, and is
5 neither judicially created nor bestowed on the Nation by any other government. 1 N.N.C.
6 § 553(B). The Nation expressly extended its sovereign immunity to NTEC under both its
7 enabling legislation, NTEC Formation Resolution §§ ACD, A(9), and Article IX of the
8 Operating Agreement. Moseley Decl. ¶¶ 5, 8, Exhibit 1 at 32.

9 NTEC was created in support of Navajo self-government through adherence to the
10 Nation’s regulatory and adjudicatory authorities, duties, and functions. Moseley Decl. ¶ 6.
11 NTEC was created and enabled by the NTEC Formation Resolution, and is managed and
12 operated pursuant to the Operating Agreement with the Nation. *Id.* Pursuant to NTEC’s
13 organizational charter, a percentage of the net income generated by the Mine will be reinvested
14 to fund research and development of renewable and alternate sources of energy on the Nation.
15 *Id.*

16 NTEC is organized pursuant to the Navajo Nation Limited Liability Company Act,
17 Navajo Nation Code tit. 5, § 3600. Moseley Decl. ¶ 7. NTEC is a single-member
18 Navajo limited liability company, and the Nation is the sole member. *Id.* NTEC is exclusively a
19 Navajo corporation and is not incorporated in any U.S. state or territory. *Id.* The Nation’s
20 ownership is represented by a Member Representative Group consisting of five members of the
21 Navajo Nation Council. *Id.* NTEC is managed on behalf of the Navajo Nation by a
22 Management Committee. *Id.* A Navajo Nation selection committee appoints the Management
23 Committee members. *Id.*

24 As a single-member limited liability company, NTEC’s profits are the Nation’s profits,
25 and NTEC makes distributions of net income to the Nation in accordance with the NTEC
26 Formation Resolution and the Operating Agreement. Moseley Decl. ¶ 8. Because NTEC’s
27 activities are so closely tied to the Nation, the purposes of sovereign immunity are properly
28

1 served by the Nation's extension of immunity to NTEC. *Id.*

2 **2. Plaintiffs Are Five Citizen Groups**

3 Plaintiffs are five citizen groups: Diné Citizens Against Ruining Our Environment, San
4 Juan Citizens Alliance, Center for Biological Diversity, Amigos Bravos, and the Sierra Club.
5 Each of these citizen groups objected to the Environmental Reviews Record of Decision
6 ("ROD") before the agencies. Those objections were considered and addressed by the federal
7 defendants, but ultimately failed.

8 **3. Defendants Are Federal Agencies with Authority to Regulate and**
9 **Approve Certain Activities on Navajo Reservation Lands**

10 Defendants are the BIA, OSMRE, BLM, Fish and Wildlife Service ("FWS"), DOI, and
11 Sally Jewell, in her official capacity as Secretary of the U.S. Department of the Interior ("the
12 Secretary"). BIA, OSMRE, BLM, and FWS are all agencies within DOI. DOI is a cabinet-level
13 agency, and the Secretary is the head of DOI. The government-to-government relationship
14 between the United States and the Navajo Nation was established by treaty in 1849, wherein the
15 United States promised to "legislate and act as to secure the permanent prosperity" of the Navajo
16 people. Article 11, Treaty With The Navaho, 9 Stat. 974 (1849). The BIA approved the
17 challenged leases, ROWs, and permits with the consent of the Navajo Nation, and in accordance
18 with the federal trust responsibility, federal law, and promises made to the Nation under the 1849
19 Treaty With The Navaho.

20 **C. CLOSURE OF THE MINE WOULD BE DEVASTATING TO NTEC, MINE WORKERS**
21 **AND THE REGION**

22 Any interruption to the continued operation of the Mine would not only cause a loss of
23 irreplaceable revenue to the Navajo Nation, it would also cause NTEC to go into debt and the
24 loss of important jobs. Cicchetti Decl. ¶¶ 13, 24, 33-34. The impact of a shutdown would hit an
25 already economically vulnerable region with extraordinary unemployment, hovering at 50% for
26 the Navajo Nation. *Id.* at ¶ 8, 18. Many mine workers have the best-paying job in their families
27 and support their extended relatives. Tanner Decl. ¶ 5; Scott Decl. ¶ 5, Benally Decl. ¶ 4.

1 Closure of the Mine would be a disaster now and have disastrous consequences in the future.

2 Cicchetti Decl. ¶¶ 28-29, 32-35, 40-41.

3 **1. NTEC and the Nation Would Go Into Significant Debt if Mine**
 4 **Operations Were Stopped**

5 In 2013, the Nation, through NTEC, purchased the Mine from BHP Billiton under a three
 6 year note for \$85 million dollars. Moseley Decl. ¶ 9. In July 2016, NTEC obtained a new loan
 7 that paid off the original note and secured an additional line of credit to ensure working capital
 8 for the future, for a total of about \$115 million dollars. *Id.* The new loan is secured by NTEC's
 9 entire catalog of assets, including the Navajo Mine itself. *Id.* If the Mine was forced to shut
 10 down, NTEC would risk defaulting on payments under the new loan, putting NTEC's assets at
 11 risk of foreclosure. *Id.* In a foreclosure, NTEC would lose every single asset it owns, up to and
 12 including the Mine. *Id.* Without ownership and control of the Mine, NTEC would be forced to
 13 cease operation, and the Nation would lose the millions of dollars it contributed to NTEC's start-
 14 up costs and anticipated revenues from a fifteen-year Coal Supply Agreement between NTEC
 15 and FCPP. *Id.* Even worse, NTEC and the Nation would lose control of the natural resources
 and jobs they have worked so hard to protect.

16 **2. Any Threat to Continued Operation of the Mine Will Result in the**
 17 **Loss of Critical Jobs**

18 The Mine employs 397 people and provides some of the best-paying jobs in the region.
 19 Scott Decl. ¶ 4, Cicchetti Decl. ¶¶ 10, 13. Mine workers support not only their immediate
 20 family, but also their extended families. This support is called Ke' and is inherent in the Navajo
 21 way of life. Scott Decl. ¶ 2, Benally Decl. ¶ 2. Doreen Tanner has worked at the Mine as a
 22 heavy equipment operator for 27 years. Tanner Decl. ¶ 1. She supports her three children, her
 23 four grandchildren and her parents in various ways. *Id.* at ¶ 5. In the wintertime especially,
 24 extended family who have no work ask for money for food, gas and heat. *Id.* at ¶ 6. They come
 25 to her because they know she has a good job at the Mine. *Id.* Her parents live in a rundown
 26 trailer with malfunctioning electrical equipment. *Id.* at ¶ 5. She is concerned about the fire
 27 hazard and intends to purchase them a new trailer with wages earned at the Mine. *Id.*

1 Harry Scott, a 15 year Navajo mine mechanic, also supports his extended family with his
2 wages. Scott Decl. ¶ 4. He and his schoolteacher wife support as many as 10 to 12 other people.
3 *Id.* at ¶ 5. Scott strongly believes that education is the best way to improve the Navajo Nation
4 and has used his wages to finance his four children's education. *Id.* at ¶ 6. He appreciates the
5 apprenticeship programs and other training available at the Mine to further education. *Id.* If he
6 lost his job, Scott would lose his house and car and ability to support his children and
7 grandchildren. *Id.* at ¶ 7.

8 Vecenti Benally, a 32 year employee of the mine, plans to retire at the mine after putting
9 in 50 years of work. Benally Decl. ¶ 1. He supported his children through college as a mine
10 worker and continues to support his children, nephew and niece's children with basics such as
11 food and clothing when they cannot make ends meet. *Id.* at ¶ 4. Losing his job would be
12 devastating: he would lose his house and car and his child would also lose his house. *Id.* at ¶ 7.
13 The towns of Farmington and Kirtland would be devastated, because the contractors and others
14 who rely on the mine for business would be out of work. *Id.* His job is not replaceable. *Id.* at
15 ¶ 6. He would have to travel as far as Wyoming to find similar wages. *Id.*

16 **3. Any Threat to Continued Operation of the Mine Would Have a** 17 **Devastating Economic Effect on the Region**

18 The 397 Mine employees and their families are not the only ones that would be affected
19 if the Approvals are found to be invalid. Closing the Mine and FCPP would cause likely even
20 more devastation to San Juan County and the Navajo Nation than a coal-mining state such as
21 West Virginia, because there are simply no other jobs available. Cicchetti Decl. ¶ 14. Closing
22 FCPP and the Mine means that San Juan County could become the poorest economic area in the
23 United States. *Id.* A recent report authored by Arizona State University ("ASU"), and
24 considered by the federal defendants in the environmental reviews, calculates the economic
25 effect of the Mine and the FCPP on San Juan County. Between 2016 and 2041, shuttering the
26 Mine and FCPP would cause losses of 53,790 job-years, labor income of \$3.98 billion, and San
27 Juan County gross product of \$9.66 billion. *Id.* at ¶¶ 28-29.

1 Dr. Charles Cicchetti, a noted economist who has studied the region for years is adamant
2 that the closure of the FCPP and the Mine would be economic disaster for the region. He says:

3 The Navajo Mine and Four Corners Power Plant have, for more
4 than 50 years, provided a stable source of employment for the
5 residents of San Juan County, including hundreds of Native
6 Americans who live in the Northern and Eastern Agencies area of
7 the Navajo Nation, which suffers from very high unemployment
8 levels. . . . I urge the Court to recognize the importance to the
9 region of keeping open the Navajo Mine and Four Corners Power
10 Plant. A failure to do so would be devastating to an already
11 crippled local economy.

12 Cicchetti Decl. ¶¶ 42-43.

13 **III. ARGUMENT**

14 Under Federal Rule of Civil Procedure 12(b)(7) and Rule 19, a court must assess whether
15 to dismiss a case when a required party cannot be joined. First, the court determines whether the
16 party is necessary and, if so, whether that party *can* be joined. Fed. R. Civ. P. 19(a)(1). Then
17 under Rule 19(b), the court determines whether the party is indispensable such that in equity and
18 good conscience the suit should be dismissed. *White v. Univ. of Cal.*, 765 F.3d 1010, 1026
19 (9th Cir. 2014).

20 Because the Mine and NTEC's economic development goals will be dramatically
21 disturbed if plaintiffs obtain the relief requested, NTEC is a required party to this lawsuit.
22 Because NTEC possesses sovereign immunity, it cannot be joined in this action without its
23 express consent. *E.g., Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998);
24 *Fletcher v. U.S.*, 116 F.3d 1315, 1324 (10th Cir. 1997). NTEC does not waive its sovereign
25 immunity and cannot be joined. Finally, courts in the Ninth Circuit hold that sovereign
26 immunity is the dominant factor in the controlling Rule 19(b) analysis, and applying this
27 analysis, this action must be dismissed.

28 This case, in fact, is nearly identical to a lawsuit brought by several of these same
plaintiffs in Colorado. In *Center for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221
(D. Colo. 2012), plaintiffs challenged the environmental reviews issued in support of a renewal

1 of a mining permit and sought to shut down the Navajo Mine. The court found that the Navajo
 2 Nation was a required party because of the significant economic interests tied up between the
 3 Mine and the Nation.² The court concluded that the Nation could not be joined due to its
 4 sovereign immunity. *Id.* at 1224-25. The court dismissed the case because plaintiffs' requested
 5 relief jeopardized the mining permits and the prejudice to the Nation, a sovereign entity, from
 6 potential shutdown of the Mine was paramount. *Id.* at 1228-30.³ NTEC, as owner of the mining
 7 permits, the benefitted party from rights-of-way at risk by plaintiffs' challenge, the owner of the
 8 Mine and exclusive supplier of coal to FCPP, and an economic development arm of the Nation,
 9 requests this court do the same for the same reasons.

10 **A. NTEC IS A REQUIRED PARTY UNDER RULE 19(A) BECAUSE IF PLAINTIFFS**
 11 **SUCCEED, NTEC COULD LOSE THE RIGHT TO MINE AND SELL COAL,**
 12 **RESULTING IN THE LOSS OF HUNDREDS OF JOBS, ROYALTIES, TAXES AND**
 13 **ECONOMIC OPPORTUNITY FOR THE NAVAJO NATION**

13 The Rule 19(a) inquiry parallels the analysis under Federal Rule of Civil Procedure 24(a),
 14 *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 134 n.3 (1967), which
 15 NTEC addressed in its Limited Motion to Intervene.⁴ Tribal economic interests related to

16 _____
 17 ² NTEC was not involved in the *Pizarchik* litigation because the company had not yet been formed. The Nation
 18 formed NTEC in 2013, the year after the *Pizarchik* decision.

19 ³ In an unreported decision, a separate court in the District of Colorado refused to dismiss claims related to the
 20 Navajo Mine, reasoning that the plaintiffs' environmental claims were against the federal agencies, not the Navajo
 21 Mine, and that Indian Tribes did not enjoy the same rights of sovereign immunity as foreign nations. *Diné Citizens*
 22 *Against Ruining Our Env't v. U.S. Office of Surface Mining Reclamation & Enforcement*, 2013 U.S. Dist. LEXIS
 23 1401 (D. Colo. Jan. 4, 2013). This decision, however, misinterprets the primacy of sovereign immunity required by
 24 the U.S. Supreme Court in *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 863-64 (2008), and implies that
 25 tribal sovereign immunity exists only to halt the encroachment of states and allow tribes to govern their internal
 26 affairs. *Diné Citizens*, 2013 U.S. Dist. LEXIS 1401, at *14 n. 3. Tribal sovereign immunity by Treaty and federal
 27 law acknowledges the rights of tribes to protect their economic interests and repel suits like this one which attempt
 28 to abrogate tribal interests without confronting the tribe itself. *See generally White*, 765 F.3d at 1024 (discussing
 29 tribes "inherent sovereign authority" arising from their original tribal sovereignty not from a constitutional source.)

⁴ Rule 19 states in relevant part:

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court
 of subject-matter jurisdiction must be joined as a party if: . . .

(B) that person claims an interest relating to the subject of the action and
 is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the
 interest Fed. R. Civ. P. 19(a)(1)(B)(i).

1 mining activities, on their own, are enough to satisfy Rule 19(a). *See, e.g., Kescoli v. Babbitt*,
2 101 F.3d 1304, 1309-10 (9th Cir. 1996) (finding that tribes were necessary parties because of the
3 tribes' economic interest in the mine and also the decisions and approvals of the tribe would be
4 impacted if plaintiff succeeds); *Pizarchik*, 858 F. Supp. 2d at 1227 (finding Navajo Nation a
5 necessary party under similar circumstances). Here, NTEC has satisfied Rule 24's criteria
6 for intervention. *See* Order Granting NTEC's Lim. Mot. to Intervene, ECF No. 49. As
7 economist Dr. Cicchetti testifies, NTEC's interests related to the permits and leases—incomes
8 contingent upon the leases and mining operation, such as royalties, taxes, fees, employment
9 income, and the multiplier effects—are not frivolous. Cicchetti Decl. ¶¶ 24, 32-35. Here, a
10 finding for plaintiffs disrupts tribal decision-making about use of tribal resources and economic
11 development, and will result in a shutdown of the Mine and FCPP, causing a massive loss of
12 jobs, taxes, royalties, and economic activity relied on by NTEC and the Nation. As Judge
13 Blackburn concluded in *Pizarchik*, “the Nation claims an interest relating to the subject of this
14 action and is so situated that disposing of the action in its absence may, as a practical matter,
15 impair or impede its ability to protect that interest.” *Pizarchik*, 858 F. Supp. 2d at 1227.
16 Accordingly, NTEC's ownership of the Mine and lease-related interests make it a required party
17 pursuant to Rule 19(a).

18 **B. NTEC CANNOT BE JOINED BECAUSE IT IS AN ARM OF THE NAVAJO NATION**
19 **IMBUED WITH SOVEREIGN IMMUNITY**

20 The Ninth Circuit has long held that sovereign immunity extends to business activities of
21 a tribe, not just government activities. *See, e.g., White*, 765 F.3d at 1025 (“Sovereign immunity
22 not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the
23 tribe.”); *Miller v. Wright*, 705 F.3d 919, 923-24 (9th Cir. 2013) (holding tribal sovereign
24 immunity not only protects tribes themselves, but also extends to arms of the tribe acting on
25 behalf of the tribe).

26 To establish whether an entity is entitled to sovereign immunity as an “arm of the tribe,”
27 a court examines several factors, including the method of creation and the tribe's intent with

1 respect to the sharing of its sovereign immunity. *White*, 765 F.3d at 1025 (quoting *Breakthrough*
 2 *Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)).
 3 Here, the Navajo Nation Council passed legislation, approved by the Nation’s president in April
 4 2013, creating and enabling NTEC as “instrumentalities of the Navajo Nation, which are entitled
 5 to all of the privileges, immunities, and authorities of the Navajo Nation, subject to the
 6 conditions set forth [in the Resolution].” Moseley Decl. at ¶¶ 5, 8, Exhibit 1 at 32. As
 7 established by that enabling Resolution, the Nation specifically granted NTEC the Nation’s
 8 sovereign immunity from suit. *Id.* Because NTEC is immune from suit, NTEC cannot be joined.

9 **C. SOVEREIGN IMMUNITY GOVERNS THIS ANALYSIS AND COMPELS DISMISSAL**
 10 **UNDER RULE 19(B)**

11 After establishing that NTEC is a required party that cannot be joined, this court must
 12 determine if this action can proceed in NTEC’s absence. Rule 19(b) requires that:

13 If a person who is required to be joined if feasible cannot be joined, the court must
 14 determine whether, in equity and good conscience, the action should proceed among the existing
 15 parties or should be dismissed. The factors for the court to consider include:

- 16 (1) the extent to which a judgment rendered in the person’s
 17 absence might prejudice that person or the existing parties;
 18 (2) the extent to which any prejudice could be lessened or avoided
 19 by:
 20 (A) protective provisions in the judgment;
 21 (B) shaping the relief; or
 22 (C) other measures;
 23 (3) whether a judgment rendered in the person’s absence would
 24 be adequate; and
 25 (4) whether the plaintiff would have an adequate remedy if the
 26 action were dismissed for nonjoinder.

23 Fed. R. Civ. P. 19(b). Courts must balance all relevant factors—in addition to the four
 24 enumerated in the rule—in determining whether “in equity and good conscience” a case should
 25 proceed or be dismissed. Fed. R. Civ. P. 19(b); *see, e.g., Republic of the Philippines v. Pimentel*,
 26 553 U.S. 851, 863-64 (2008); *Pizarchik*, 858 F. Supp.2d at 1228. Sovereign immunity, however,
 27 directs this whole analysis. *Pimentel*, 553 U.S. at 864 (finding that the Ninth Circuit erred in not
 28

1 giving sufficient weight to the Republic’s assertion of sovereign immunity); *Quileute Indian*
2 *Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (“[W]hen the necessary party is immune
3 from suit, there may be ‘very little need for balancing Rule 19(b) factors because immunity itself
4 may be viewed as the compelling factor.’”); *Kescoli*, 101 F.3d 1304 (affirming dismissal of
5 lawsuit on sovereign immunity grounds when mining lease on Navajo and Hopi lands was
6 challenged).

7 **1. Sovereign Immunity is the Paramount Factor in the Rule 19(b)**
8 **Balancing Test**

9 The significance of sovereign immunity curtails the discretion otherwise afforded to
10 courts in the Rule 19(b) analysis and heavily tips the scale “in favor of dismissal.” *Northern*
11 *Arapaho Tribe v. Harnsberger*, 660 F. Supp. 2d 1264, 1280 (citing *Kickapoo Tribe of Indians of*
12 *Kickapoo Reservation v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995)) *vacated in part on other*
13 *grounds*, 697 F.3d 1272 (10th Cir. 2012); *White v. Univ. of Cal.*, No. C 12-01978 RS, 2012 U.S.
14 Dist. LEXIS 191061, at *39-40 (N.D. Cal. Oct. 9, 2012) (“[V]irtually all cases to consider the
15 question appear to dismiss under Rule 19, regardless of whether a remedy is available, if the
16 absent parties are Indian tribes invested with sovereign immunity.”). As the Tenth Circuit has
17 said, “there is very little room for balancing other factors set out in Rule 19(b), because
18 immunity may be viewed as one of those interests compelling by themselves.” *Enter. Mgmt.*
19 *Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989) (internal quotation
20 marks omitted); *see also, Pimentel*, 553 U.S. at 865-66 (discussing great weight sovereign
21 immunity is given in Rule 19(b) analysis).

22 In *Pimentel*, the U.S. Supreme Court faced a class of human rights victims bringing
23 claims for financial reparations against assets of the Philippines. The Philippines interceded
24 seeking dismissal under Rule 19. The district court held, and the Ninth Circuit affirmed, that
25 while the Philippines may meet the requirements of Rule 19(a), it was not indispensable because
26 dismissal of the claims would prejudice the victims and leave them without an adequate remedy.

1 In reversing the Ninth Circuit, the Supreme Court found that the Ninth Circuit did not accord
2 enough weight to the compelling sovereign immunity claim. *See Pimentel*, 553 U.S. at 869.
3 “Dismissal of the action must be ordered,” the Court said, “where there is potential for injury to
4 the interests of the absent sovereign.” *Id.* at 867. In essence, the *Pimentel* Court clarified that
5 the Rule 19(b) factors must be assessed in terms of their impact to the sovereign and that equity
6 and good conscience require that courts respect comity and protect the independence of
7 sovereign states. This deference is crucial to preserve sovereigns’ independence and is intended
8 to “give foreign states and their instrumentalities some protection from the inconvenience of
9 suit.” *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003). Importantly, dismissal of
10 sovereigns in some cases under Rule 19(b) will mean that a plaintiff’s claims are dismissed and
11 they have no other forum to resolve those claims. That result, however, is “contemplated under
12 the doctrine of foreign sovereign immunity.” *Pimentel*, 553 U.S. at 872.

13 *Pimentel* and its progeny establish that sovereign immunity is paramount in the Rule
14 19(b) balancing test. Specifically, the Rule 19(b) balancing test is weighted in favor of the
15 sovereign. *Pimentel*, 553 U.S. at 865-66; *see also White*, 765 F.3d at 1028 (noting nearly all
16 cases analyzing the issue have dismissed the case under Rule 19, regardless of claims or
17 prejudice to plaintiffs, if absent parties are Indian tribes invested with sovereign immunity). The
18 potential prejudice to a sovereign’s interests must be prominently factored into the analysis, and
19 implicit in sovereign immunity is the possibility that a plaintiff will not be able to raise a claim in
20 United States courts. *Pimentel*, 553 U.S. at 872; *Confederated Tribes of Chehalis Indian*
21 *Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991) (“Courts have recognized that a
22 plaintiff’s interest in litigating a claim may be outweighed by a tribe’s interest in maintaining its
23 sovereign immunity.”). Under *Pimentel*, dismissal is appropriate because NTEC is imbued with
24 sovereign immunity and faces irreparable harm if operations at the mine are interrupted.

25 **2. Analysis of the Factors Listed under Rule 19(b) Demonstrates that** 26 **Dismissal is Appropriate**

27 The courts in the Ninth Circuit have frequently repeated that “when the necessary party is
28

1 immune from suit, there may be very little need for balancing Rule 19(b) factors because
2 immunity itself may be viewed as the compelling factor,” *e.g.*, *Quileute Indian Tribe*, 18 F.3d at
3 1460, which alone is enough to support dismissal. In addition, the analysis of relevant factors
4 under Rule 19(b) further illustrates that dismissal is appropriate because NTEC’s rights will be
5 prejudiced and the impact to NTEC and the Nation of losing the approvals to mine and the
6 financial repercussions associated with that loss will be disastrous.

7 **a. *NTEC’s Interests Will Be Prejudiced by a Judgment for***
8 ***Plaintiffs in NTEC’s Absence***

9 Analysis of the first Rule 19(b) factor—prejudice to existing parties or NTEC if a
10 judgment is issued in NTEC’s absence—is nearly identical to a Rule 19(a) inquiry. *See*
11 *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1499. NTEC discussed in
12 detail its Rule 24 and 19(a) analysis in its Limited Motion to Intervene and incorporates those
13 arguments here. *See* Motion to Intervene, p. 14. Plaintiffs’ requested relief threatens the Mine’s
14 continued operation. As Dr. Cicchetti testifies, any potential closure of the Mine and FCPP
15 would devastate NTEC’s business and the regional economy. Cicchetti Decl. ¶¶ 24, 28-29, 32-
16 35. NTEC’s interests would be severely prejudiced in its absence from this lawsuit. The first
17 factor weighs in favor of dismissal.

18 **b. *Because of the Relief Plaintiffs Seek in This Action, the***
19 ***Prejudice to NTEC’s Interests Cannot Be Mitigated***

20 When the prejudice to an absent sovereign’s economic and financial interests cannot be
21 avoided, dismissal is appropriate. *See Pimentel*, 553 U.S. at 869-70 (citations omitted);
22 *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975) (concluding that prejudice to
23 Hopi Tribe could not be avoided when another Hopi group attempted to deprive the tribe of
24 benefits under a valuable lease). Plaintiffs have requested relief that may invalidate or otherwise
25 suspend The Approvals for the operation of the Mine and FCPP, thereby threatening a significant
26 part of the regional economy. Because plaintiffs’ requested relief threatens the Mine’s
27 operations, there is no way the severe prejudice to NTEC or the region can be lessened or
28 avoided. This second factor weighs in favor of dismissal.

1 **c.***Issuing a Judgment in NTEC’s Absence is Inadequate*

2 Adequacy in this context, as *Pizarchik* notes, “refers to the public stake in settling
3 disputes by wholes, whenever possible” and addresses the “social interest in the efficient
4 administration of justice and the avoidance of multiple litigation.” *Pizarchik*, 858 F.Supp.2d at
5 1229 (quoting *Pimentel*, 553 U.S. at 870) (citations and internal quotation marks omitted). The
6 analysis of this factor generally relates to separate litigation over the same issue by other parties,
7 but the repercussive litigation that will arise if there is a shutdown of the Mine and FCPP puts
8 such litigation squarely in the meaning of this third factor. Issuing a judgment in this matter
9 without NTEC’s presence would be disastrous. If plaintiffs acquire the remedy they seek, the
10 federal defendants would suspend or withdraw The Approvals, which would not only be an
11 economic disaster for NTEC and the Nation, but would likely lead to more litigation. At
12 minimum, if the Mine shuts down, NTEC will be in jeopardy of not being able to make
13 payments on its operational loan and will lose every single asset it currently owns, leading to a
14 morass of lawsuits. This third factor weighs in favor of dismissal.

15 **d.***Sovereign Immunity Outweighs Plaintiffs’ Interest in Litigating*
16 ***These Claims***

17 The final factor of analysis—whether plaintiffs have an adequate remedy if this case is
18 dismissed—is also governed by sovereign immunity. As noted above, sovereign immunity
19 contemplates, as it must, dismissal of a plaintiff’s claims even when that plaintiff has no
20 alternative forum to adjudicate those claims. *Pimentel*, 553 U.S. at 872. That is because any
21 prejudice to plaintiffs is “outweighed by prejudice to absent entities invoking sovereign
22 immunity.” *Id.*; see also *Pizarchik*, 858 F. Supp. 2d at 1230 (finding that court must “give
23 ‘sufficient’ weight to the Nation’s sovereign immunity in order to promote comity and mutual
24 dignity between co-equal powers”). In this case, plaintiffs have already been heard on the issues
25 they raise in their complaint. Plaintiffs have commented on the federal agencies’ actions
26 throughout the multi-year permitting process. Their objections were heard and the federal
27 defendants accounted for those concerns in the government-to-government consultation with the
28

1 Nation, and in issuing the environmental reviews and permits, leases and ROWs.

2 NTEC expects plaintiffs to repeat previous arguments that this court should apply
 3 *Manygoats v. Klepe*, 558 F.2d 556 (10th Cir. 1977), to this case. In *Manygoats*, the Tenth
 4 Circuit reversed an order of dismissal based on the Navajo Nation's sovereign immunity and
 5 allowed a private plaintiff lawsuit challenging the adequacy of an environmental impact
 6 statement related to uranium exploration and mining. In the decades that have followed, the
 7 Ninth Circuit has not adopted *Manygoats*. Instead, the Ninth Circuit has repeatedly dismissed
 8 lawsuits under Rule 19 when it finds that a tribal entity is a necessary party but not capable of
 9 joinder because of sovereign immunity. *E.g.*, *White*, 765 F.3d 1010; *Am. Greyhound Racing,*
 10 *Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002); *Dawavendewa v. Salt River Project Agric.*
 11 *Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002); *Manybeads v. United States*, 209
 12 F.3d 1164 (9th Cir. 2000); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999); *Kescoli*, 101 F.3d
 13 1304; *Quileute Indian Tribe*, 18 F.3d 1456; *McClendon v. U.S.*, 885 F.2d 627 (9th Cir. 1989). In
 14 so doing, the Ninth Circuit has unequivocally recognized that a "plaintiff's interest in litigating a
 15 claim may be outweighed by a tribe's interest in maintaining its sovereign immunity" because
 16 "society has consciously opted to shield Indian tribes from suit without congressional or tribal
 17 consent." *Quileute*, 18 F.3d at 1460-61 (citations and internal quotation marks omitted). The
 18 fourth factor weighs in favor of dismissal.

19 IV. CONCLUSION

20 For the foregoing reasons, NTEC moves this court to dismiss this action pursuant to
 21 Rules 19(b) and 12(b)(7), and any other relief this Court deems just and proper.

22 Respectfully submitted this 2nd day of November, 2016.

23 SCHWABE, WILLIAMSON & WYATT, P.C.

24 By: /s/ Aukjen Ingraham

25 **Aukjen Ingraham, OSB. #023338**

26 *Admitted Pro Hac Vice*

27 Telephone: 503.222.9981

28 Facsimile: 503.796.2900

Of Attorneys for Intervenor-Defendant Navajo
 Transitional Energy Company