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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, *et al.*, Plaintiffs, v. BUREAU OF INDIAN AFFAIRS, *et al.*, Federal Defendants, ARIZONA PUBLIC SERVICE, Defendant-Intervenor.	Case No. 2:16-CV-08077-SPL **FEDERAL DEFENDANTS' OPPOSITION TO DEFENDANT-INTERVENORS' MOTION TO DISMISS [ECF NO. 50]**

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INTRODUCTION

Dismissal of this case on the basis that Defendant-Intervenor, the Navajo Transitional Energy Company, L.L.C. (Mining Company), is a party required to be joined is not warranted. For complaints challenging agency action under the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA), Federal Rule of Civil Procedure 19 does not require dismissal for the inability to join a party; the only required party to defend the action is the United States. This case is no different. Here, Plaintiffs bring suit under all three statutes challenging Federal Defendants' environmental review of its proposed actions – *i.e.*, the environmental review related to the proposed approval of leases, permits, and rights of way associated with the operations of the Four Corners Power Plant and the nearby Navajo Mine. *See* ECF No. 1, Plaintiffs' Complaint (Pls' Compl.) at 3. In this context, Federal Defendants have a strong interest in defending the adequacy of their own environmental compliance and therefore, adequately represent all non-parties sharing an interest in having the analyses and approvals upheld. Federal Defendants will fully defend their analyses and decisions in this litigation.

The Mining Company contends that dismissal is required because it allegedly is a required party that cannot be joined because of its claimed sovereign immunity. *See* ECF No. 50, Navajo Transitional Energy Corp.'s Mot. to Dismiss & Mem. of P. & A. In Supp. (Mining Co. Mem.) at 1-2. But the Mining Company is not a required party and considerations of equity and good conscience do not dictate dismissal of the lawsuit

1 even if the Mining Company was a required party. First, the challenge is to federal
2 agency actions. Federal Defendants have a unique interest in defending their own
3 actions and are capable of adequately protecting the interests of all non-parties that
4 share an interest in seeing the actions upheld. Further, there is a separate public interest
5 in allowing a plaintiff to enforce the public right to administrative compliance with
6 relevant environmental standards and statutes. Second, the Mining Company's interest
7 in the leases, permits, and rights of way themselves, while economically significant to
8 the company and the Navajo Nation, may be protected through tailoring the type of
9 relief that is issued if the Court finds a legal violation. Third, there is no adequate
10 remedy for Plaintiffs if this case is dismissed for nonjoinder. Rather, a challenge
11 concerning environmental compliance under the ESA and NEPA is properly heard by a
12 district court and should be defended by the federal government. For these reasons, this
13 Court should deny the Mining Company's motion to dismiss.

14 **STANDARD UNDER FED. R. CIV. P. 19**

15 Federal Rule of Civil Procedure 12(b)(7) authorizes a motion to dismiss for
16 failure to join a party in accordance with Fed. R. Civ. P. 19, which covers joinder of
17 parties. Determining whether a party is required under Rule 19 involves a two-step
18 analysis. *See Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999); *Northrop*
19 *Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983); *Davis v.*
20 *United States*, 192 F.3d 951, 957-60 (10th Cir. 1999). First, the court determines
21 whether the party is "required" and must therefore be joined if feasible. Rule 19(a)(1). If

the absent party is required but cannot be joined, the court must then determine under Rule 19(b) whether in "equity and good conscience" the action should proceed without it. Rule 19(b). Rule 19(b) enumerates the four factors a court considers in determining whether to proceed. *Id*. These factors are neither exclusive nor dispositive. The court's determination is case specific and heavily influenced by the facts and circumstances of each case. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 862-63 (2008); *see also Davis*, 192 F.3d at 961 ("The nature of the Rule 19(b) inquiry – a weighing of intangibles – limits the force of precedent and casts doubt on generalizations . . . .") (citation and internal quotation marks omitted).

When a civil action involves the interests of a government entity that cannot be joined due to sovereign immunity, Rule 19 may require dismissal. *See Pimentel*, 553 U.S. at 872. Tribal sovereign immunity and Rule 19, however, do not bar every suit where an absent tribe or tribal entity claims an interest. *See Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258-60 (10th Cir. 2001) (affirming district court decision to exercise jurisdiction despite impacts on tribal interests). The moving party bears the burden of showing that the absent party that cannot be joined is required to be joined. *See Daley*, 173 F.3d at 1166 (citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)).

ARGUMENT

I. Dismissal Of the Complaint Is Not Required Under Rule 19.

1 Plaintiffs' complaint is a challenge to the federal government's environmental
2 review under the ESA and NEPA of its proposed approval of certain leases, permits,
3 and rights of way associated with the operations of the Four Corners Power Plant and
4 the nearby Navajo Mine. The Mining Company's motion to dismiss focuses on the
5 Court's authority to render the relief requested by Plaintiffs, *see* Pls' Compl. "Prayer
6 For Relief" at 56-57, and the effects of rendering such relief on the analysis required by
7 Rule 19. In so doing, the Mining Company fails to distinguish between the causes of
8 action alleged and the remedy that may be available. When properly analyzed, the
9 Mining Company is not a required party to Plaintiffs' challenge to federal agency
10 action. In these types of cases, the government is the only required party necessary for
11 defending the validity of its actions. To the extent that the Mining Company is deemed
12 to be a required party, dismissal is not appropriate because of the interest in allowing
13 review of administrative compliance under the ESA and NEPA, any prejudice as a
14 result of judgment entered in the case can be lessened or avoided, any judgment would
15 be adequate, and Plaintiffs have no other remedy. Accordingly, dismissal of Plaintiffs'
16 complaint is not required under Rule 19.

17 **A. Sovereign Immunity and Rule 19.**

18 Although Federal Defendants have neither analyzed nor taken an official position
19 on this issue, we will assume that for the limited purposes of this motion that the
20 Mining Company is not a party to this action and cannot be joined as a result of
21 sovereign immunity. Assuming the Mining Company cannot be joined as a result of

sovereign immunity, the Court's inquiry does not end there. *See Pimentel,* 553 U.S. at 862-73 (conducting a Rule 19 analysis even when the case involved sovereign immunity issues); *Dine Citizens Against Ruining Our Env't v. Office of Surface Mining Reclamation & Enf't*, No. 12-cv-1275, 2013 WL 68701, at *2 (D. Colo. Jan. 4, 2013) (Tribe's sovereign immunity alone did not make it an indispensable party under Rule 19). The Court still must determine under the two-part analysis whether the Mining Company is a required party, and only if so, whether the action should proceed in its absence.

B. The Mining Company Is Not a Required Party.

Parties that are required to be joined to a federal suit, if feasible, include:

1. Parties whose interests are such that in their absence complete relief cannot be accorded among those already present; *see* Fed. R. Civ. P. 19(a)(1)(A);[1] or
2. Parties who claim an interest relating to the subject matter of the action and whose absence may:
   a. "as a practical matter, impair or impede the absent person's ability to protect that interest;" or
   b. leave any of the existing parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. *See* Fed. R. Civ. P. 19(a)(1)(B)(i)-(ii).

A party need only meet one of these definitions. *See Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 997 (9th Cir. 2011).

[1] The inquiry under Rule 19(a)(1)(A) is limited to whether a district court can grant complete relief to persons already named as parties to the action; what effect a decision may have on absent parties is immaterial. *See Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 313 (3d Cir. 2007).

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1. The Mining Company Is Not a Required Party Under Rule 19(a)(1)(A).

The Mining Company is not a required party under Rule 19(a)(1)(A) because the parties to the suit can be accorded complete relief despite the Mining Company's absence. *See Alto v. Black*, 738 F.3d 1111, 1126-27 (9th Cir. 2013); *Sac & Fox Nation*, 240 F.3d at 1258-59. In cases challenging federal agency action, the primary relief sought is typically a declaration that the agency action was arbitrary and capricious or otherwise unlawful, and a plaintiff may also seek injunctive relief setting the agency action aside. *See* 5 U.S.C. § 706(2). There is no need for persons other than the government to be made parties to the case in order for complete relief to be afforded. This case is no different. Plaintiffs seek to enjoin certain federal approvals related to the Navajo Mine and Four Corners Power Plant on the grounds that the Federal Defendants' NEPA analysis and Biological Opinion supporting the federal agencies' decisions were invalid. *See* Pls' Compl. at 56-57. Plaintiffs do not need to obtain direct relief against the Mining Company in order to obtain meaningful relief.

Because Plaintiffs seek a declaratory judgment against Federal agency action, they would obtain all the relief to which they would be entitled without the Mining Company's presence as a party. *See Alto,* 738 F.3d at 1126 (finding that tribes did not need to be present for adequate relief to be granted in an APA action, distinguishing such a case from those in which "the injury complained of was a result of the absent *tribe's* action"); *see also Sac & Fox Nation*, 240 F.3d at 1258 ("Because plaintiffs'

actions focuses solely on the propriety of the Secretary's determinations, the absence of the . . . [t]ribe does not prevent the plaintiffs from receiving their requested declaratory relief (*i.e.*, a determination that the Secretary acted arbitrarily and capriciously . . . .")); *see also Makah*, 910 F.2d at 559 (holding that absent tribes were not necessary for a procedural challenge under the APA).

2. The Mining Company Is Not a Required Party Under Rule 19(a)(1)(B).

Joinder of a party is also "required" where feasible if the party "claims an interest relating to the subject of the action" and a judgment may "as a practical matter impair or impede the person's ability to protect the interest." Rule 19(a)(1)(B). When applying this rule, the court first asks whether the absent party has a "legally protected interest" and then whether that interest will be "impaired or impeded" by the suit. Federal Defendants do not contest that the Mining Company has an interest in the litigation because of its ownership and operation of the mine and its role as a party to some of the underlying approvals. But even "[i]f a legally protected interest exists, the court must further determine whether that interest will be *impaired* or *impeded* by the suit. Impairment may be minimized if the absent party is adequately represented in the suit." *Makah*, 910 F.2d at 558 (citation omitted). The Mining Company has made no

1 showing that Federal Defendants are inadequate representatives of what is at stake in
2 this litigation—the ESA and NEPA analyses and the subsequent federal approvals. *Id.*[2]
3 Here, the Mining Company and Federal Defendants have a common interest,
4 defending the validity of the government's environmental compliance and subsequent
5 approval of the leases, permits, and rights of way. The Mining Company's argument
6 that it is a required party mistakenly focuses on the Tribe's economic interests, Mining
7 Co. Mem. at 10-11, to the exclusion of the parties' other mutual interest in defending
8 the Federal Defendants' environmental compliance. *See Daley,* 173 F.3d at 1167; *Sw.*
9 *Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153-54 (9th Cir. 1998) (per
10 curiam) (finding that the government and the absent tribe shared a strong interest in
11 defeating that plaintiff's suit and thus, absent tribe was not a required party).

12 **3. Even if the Mining Company Is a Required Party, the Complaint Should Not be Dismissed under Rule 19(b).**

13 Even if the Court considers the Mining Company to be a required party, the
14 inquiry does not end. In light of the Mining Company's alleged immunity from suit, the
15 Court must proceed to the second part of the Rule 19 analysis and consider "whether, in
16 equity and good conscience, the action should proceed" in the Mining Company's
17 absence. Rule 19(b). Under Rule 19(b), the Court weighs four factors: (1) the extent a
18 judgment rendered in the person's absence might prejudice the absent party or the
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20 [2] In some decisions, courts have considered whether the United States may adequately represent an absent tribe in the context of the "required party" analysis under Rule 19(a);
21 in other contexts, courts have analyzed whether the United States adequately represents the interests of the absent tribe in the context of weighing the prejudice under Rule 19(b).

1 existing parties; (2) the extent to which any such prejudice could be lessened or
2 avoided; (3) whether judgment rendered in party's absence would be adequate; and (4)
3 whether the plaintiff would have an adequate remedy if the action is dismissed for
4 nonjoinder. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir. 2001),
5 *opinion modified on reh'g*, 257 F.3d 1158 (10th Cir. 2001).

6 The first two factors are concerned with prejudice to the absent and existing
7 parties and the extent to which any such prejudice can be lessened or avoided. Rule
8 19(b)(1) & (2). Consideration of the prejudice prongs of Rule 19(b) "is essentially the
9 same as the inquiry under [Rule 19(a)(1)(B)(i)] into whether continuing the action
10 without a person will, as a practical matter, impair that person's ability to protect his
11 interest relating to the subject of the lawsuit." *Enter. Mgmt. Consultants, Inc. v. United*
12 *States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989). For the reasons stated above,
13 the Mining Company is not prejudiced because the Federal Defendants will vigorously
14 defend the federal actions being challenged here—their environmental analyses and the
15 resulting approvals.

16 Any sovereign immunity possessed by the Mining Company would not change
17 this factor. *Dine Citizens*, 2013 WL 68701, at *4; *see Tenneco Oil Co. v. Sac & Fox*
18 *Tribe of Indians of Okla*., 725 F.2d 572, 574-75 (10th Cir. 1984) (per curiam). In *Dine*
19 *Citizens*, the court in evaluating the weight accorded to the Tribe's sovereign immunity,
20 stated that "the comity interests associated with tribal sovereign immunity, while
21 present, are tempered here as in *Manygoats*, by the interest in full application of federal

environmental law." 2013 WL 68701 at *4 (citing *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977)). Dismissing the suit, an ESA and NEPA action, for nonjoinder of an absent party triggers the "public rights" exception to traditional joinder rules, in cases in which the claim at issue derives from a federal regulatory scheme. *See Stern v. Marshall*, 564 U.S. 462, 490-91 (2011). Where a "public right" is at issue, traditional rules of joinder, including sovereign immunity, need not apply.[3] *See Conner v. Burford*, 848 F.2d 1441, 1460 (9th Cir. 1988) (dismissing an administrative review case for nonjoinder of an absent party "sound[s] the death knell for any judicial review of executive decisionmaking."); *see also Manygoats*, 558 F.2d at 559 (noting that it would be "anomalous" to dismiss an administrative review case for nonjoinder of Native American tribe because "[n]o 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."). Plaintiffs' challenge is an ESA and NEPA challenge under the APA and the public interest weighs in favor of finding that dismissal under Rule 19(b) is not proper.

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[3] The Mining Company's argument that *Center for Biological Diversity v. Pizarchik,* 858 F. Supp. 2d 1221 (D. Colo. 2012), a case also involving a NEPA challenge, should control here is misplaced. Mining Co. Mem. 9-10. *Pizarchik* is not binding authority on this court. Moreover, the *Pizarchik* court was explicit that it was not addressing whether the fact that a public right was at issue would affect the sovereign immunity argument, noting that this point in that case "woefully underdeveloped." 858 F. Supp. 2d at 1229 n.11; *see also Dine Citizens*, 2013 WL 68701, at *5 n.4 (distinguishing *Pizarchik*).

1 And, to the extent the Mining Company would suffer any prejudice, it is feasible
2 to eliminate any such prejudice by tailoring the relief provided. *See Stock West Corp. v.*
3 *Lujan*, 982 F.2d 1389, 1398-99 (9th Cir. 1993) (court concluded that the case could
4 proceed without the Tribe because, if the plaintiff prevailed, the court could simply
5 remand back to the Bureau of Indian Affairs. Thus through the shaping of relief, the
6 court could lessen the prejudice to the Tribe). For example, the Mining Company
7 appears concerned that the remedy ordered in the event of an adverse decision could
8 significantly affect its business. But the Mining Company mistakenly assumes that mine
9 operations would presumptively cease in such a case. Courts have routinely remanded a
10 decision for further analyses without closing the mine to preserve local jobs. *WildEarth*
11 *Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't*, Nos. CV 14-13-
12 BLG-SPW, CV 14-103-BLG-SPW, 2016 WL 259285, at *3 (D. Mont. Jan. 21, 2016);
13 *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't,* 104 F.
14 Supp. 3d 1208, 1232 (D. Colo. 2015), *vacated & appeal dismissed*, 652 F. App'x 717
15 (10th Cir. 2016); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332-34 (10th Cir.
16 1982). This Court could therefore tailor whatever relief granted to avoid the
17 circumstances that Mining Company contends renders its presence necessary to this
18 suit, should justice and equity so require. As the parties will argue during briefing on
19 the merits, in the event the Court finds in favor of Plaintiffs, the appropriate remedy
20 here is to remand the analyses and approvals to the agencies for appropriate ESA and
21 NEPA compliance without voiding the leases, permits, and rights of way or otherwise

1 temporarily closing the mine or shutting down the power plant. *See Jicarilla Apache*
2 *Tribe*, 687 F.2d at 1333-34.
3 Although vacatur may be an appropriate remedy in some instances for an agency
4 action that fails to comply with the ESA or NEPA, *see* 5 U.S.C. § 706(2)(A); *Citizens to*
5 *Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971), *abrogated on other*
6 *grounds by Califano v. Sanders*, 430 U.S. 99 (1977), the APA does not deprive
7 reviewing courts of traditional equitable powers when fashioning a remedy. *See* 5
8 U.S.C. § 702 (noting that nothing in the APA deprives reviewing courts of the power to
9 apply equitable factors to its remedies analysis). The Court's formulation of a remedy
10 under the ESA, NEPA, and the APA is controlled by principles of equity. *See Monsanto*
11 *Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010) (court must balance the
12 equities and consider the public interest before issuing injunction); *Nat'l Wildlife Fed'n*
13 *v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) ("The court's decision to grant or deny
14 injunctive or declaratory relief under APA is controlled by principles of equity.")
15 (citations omitted). The Court retains full discretion to consider what relief might be
16 appropriate following a finding that an agency must conduct further ESA and NEPA
17 analysis. *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080-82 (9th Cir. 2010);
18 *Nat'l Wildlife Fed'n v. NMFS*, 524 F3d 917, 936 (9th Cir. 2007); *see also N. Cheyenne*
19 *Tribe v. Norton*, 503 F.3d 836, 842 (9th Cir. 2007); *Jicarilla Apache Tribe*, 687 F.2d at
20 1332-34. In tailoring the relief and focusing on the action actually challenged by
21 Plaintiffs, Federal Defendants' ESA and NEPA analyses, no prejudice will necessarily

1 result to the Mining Company because the relief will not directly foreclose mining
2 activities. *See Dine Citizens*, 2013 WL 68701, at *6.
3 The third factor, whether the judgment would not be adequate in the absence of
4 the Mining Company, is "not intended to address the adequacy of the judgment from
5 the plaintiff's point of view." *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1292-
6 93 (10th Cir. 2003) (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390
7 U.S. 102, 111 (1968)). "Rather, the factor is intended to address the adequacy of the
8 dispute's resolution." *Id.* at 1293. This factor is concerned with "the interest of the
9 courts and the public in complete, consistent and efficient settlement of controversies."
10 *Patterson*, 390 U.S. at 111. If the Court were to ultimately decide this case against
11 Federal Defendants on the merits, complete relief, whether it is vacating the agencies'
12 approval of the leases, permits, and rights of way or only remanding them to the agency
13 pending further ESA and NEPA analysis, can be awarded without the Mining
14 Company.
15 Finally, the fourth factor, "whether the plaintiff would have an adequate remedy
16 if the action were dismissed for nonjoinder," Rule 19(b)(4), weighs against dismissal.
17 There is no alternative forum capable of granting an adequate remedy for Plaintiffs to
18 challenge Federal Defendants' ESA and NEPA analyses. *See Manygoats*, 558 F.2d at
19 559. Dismissing the case due to the inability to join the Mining Company will have the
20 effect of foreclosing judicial review of a significant category of federal agency actions.
21 *Id.* It would necessarily follow that no one other than Tribes could seek judicial review

1 for alleged ESA and NEPA violations of agency actions related to tribal interests, a
2 result anomalous to the national interests underlying both statutes. *Id.*; *see also Makah*,
3 910 F.2d at 559 n.6 (noting that the public interest in ensuring that regulations under the
4 challenged act were promulgated in compliance with APA procedures was an important
5 factor mitigating against dismissal under Rule 19(b)).

6 **CONCLUSION**

7 As discussed above, the Mining Company is not a required party in this lawsuit.
8 Where, as here, a plaintiff challenges an agency's ESA and NEPA analyses, the
9 government is the only necessary party to defend the agency's decision. Even if the
10 Mining Company is determined to be a required party that cannot feasibly joined,
11 dismissal is still not warranted in its absence for a number of different reasons: (1) the
12 Mining Company will not necessarily be prejudiced; (2) the public interest weighs in
13 favor of not dismissing ESA and NEPA challenges for nonjoinder of a party; (3) the
14 relief can be lessened to prevent prejudice; (4) any judgment would be adequate; and (5)
15 Plaintiff would not have an otherwise adequate remedy. Therefore, Federal Defendants
16 request that the Court deny the Mining Company's motion to dismiss.
17 Respectfully submitted this 16th day of November, 2016

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Assistant Attorney General

20 /s/ *Rickey D. Turner, Jr.*
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2016, I electronically filed the foregoing Defendants' Answer to Plaintiffs' Complaint with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ Rickey D. Turner, Jr.

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