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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

| | |
|---|---|
| Diné Citizens Against Ruining Our Environment, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>Bureau of Indian Affairs, et al.,<br><br>Defendants. | No. 3:16-cv-8077-SPL<br><br>PLAINTIFFS' RESPONSE IN OPPOSITION TO NAVAJO TRANSITIONAL ENERGY COMPANY'S MOTION TO DISMISS |

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## INTRODUCTION

This Court should deny the Navajo Transitional Energy Company's (NTEC) motion to dismiss. Sovereign immunity cannot defeat an action for prospective relief against federal agencies to assure compliance with federal law. Denial of NTEC's motion is compelled by Rule 19, the public rights exception, and the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

## FACTS

> [T]he intensive use of the Four Corners Region for coal strip-mining and power plants fueled the growth of large urban centers in California, Arizona, and Nevada, but devastated lands belonging to the Navajo and Hopi people within this region, which were ultimately designated as a national sacrifice area.

Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation*, 13 Santa Clara J. Int'l L. 203, 243 (2015) (internal citation omitted); Doc. 1, ¶ 1.

Plaintiffs Diné Citizens Against Ruining Our Environment et al. (Diné CARE) brought this action for prospective relief against Federal Defendants for violating the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). Doc. 1, ¶¶ 3-7, 16-20, 90-179, A-J. The action does not seek to cancel any contract to which NTEC or the Navajo Nation is party or to extinguish any property right. *Id.* ¶¶ A-J.

Diné CARE challenges federal decisions approving continued and expanded operations of the Navajo Mine and Four Corners Power Plant (the Project). *Id.* ¶ 7. The mine and power plant form a massive, polluting energy complex that has been contaminating the Four Corners Region for more than 50 years. *Id.* ¶¶ 64-65. Navajo Mine, a sprawling 33,000-acre coal strip-mine, produces 5.8 million tons of coal annually

exclusively for the plant. *Id.* ¶ 70. Four Corners Power Plant is one of most polluting power plants in the United States, emitting a plume of pollution visible from space. *Id.* ¶ 64. Together with the adjacent San Juan Generating Station, Four Corners Power Plant constitutes the largest source of air pollution in the western hemisphere. *Id.* While the energy complex is located on the Navajo Nation, its pollution degrades air and water resources throughout the Four Corners region. *Id.* ¶ 8. Nearby communities, among the most polluted in the United States, suffer severely compromised public health. *Id.* ¶ 65. Endangered native fish in the San Juan River are facing extinction due, in part, to toxic pollution from the energy complex. *Id.* ¶¶ 1, 74.

The immense quantities of pollution produced by the complex impose real, monetary costs on the general public. For example, the social cost (i.e., the cost to the public) of emissions of just one pollutant—carbon dioxide—from the plant will total approximately $4.8 to $46.3 *billion* over the life of the Project.[1] The total harms and monetized costs of *all* pollution from the complex are undoubtedly much higher. As NTEC's declarant Charles Cicchetti has himself written:

> Power plants without pollution controls can no longer be permitted to use the air stream as a free waste transfer system that pollutes the air for downwind populations, not only causing many thousands of premature deaths and illnesses each year, but also causing higher labor and health

[1] OSM, Final Environmental Impact Statement for the Four Corners Power Plant and Navajo Mine Energy Project, at 4.2-25 to -27 & tbl. 4.2-18b (May 1, 2015), *available at* http://www.wrcc.osmre.gov/initiatives/fourCorners/documentLibrary.shtm (follow "Section 4.2 - Climate Change" hyperlink) [hereinafter Project FEIS]. The Court may take judicial notice of official information posted on an agency website. *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 727 n.3 (9th Cir. 2015).

> insurance costs, lost jobs, lost state and local tax revenues, and higher gasoline prices in downwind regions.

Charles J. Cicchetti, Expensive Neighbors: The Hidden Costs of Harmful Pollution to Downwind Employers and Businesses, at 38 (2011) (attached as Exhibit 1).

The plant is owned by various private utilities and operated by Intervenor-Defendant Arizona Public Service. Doc. 1, ¶¶ 61, 66. Electricity from the complex is transmitted to cities throughout the Southwest, principally Phoenix. *Id.* ¶¶ 1, 7, 60, 69. The mine was historically owned and operated by non-Navajo mining corporations, most recently BHP Billiton. *See Id.* ¶ 62; Doc. 32, ¶ 9. For nearly fifty years BHP Billiton and Arizona Public Service dumped toxic coal ash in areas adjacent to the plant and in the mine-out pits of Navajo Mine. Doc. 1, ¶ 86.

The mine "evaded meaningful environmental review for much of its early existence." *Diné CARE v. Klein*, 747 F. Supp. 2d 1234, 1240 (D. Colo. 2010). Since 2010, federal courts have twice held that federal agencies failed to lawfully disclose impacts of mine expansions and vacated approvals pending further review. *Id.* at 1263-64; *Diné CARE v. OSM*, No. 12-CV-1275-JLK, 2015 WL 1593995, at *3 (D. Colo. Apr. 6, 2015). The decisions temporarily delayed mine expansions for approximately one year each, but did not cause permanent shut down or derivative litigation.[2]

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[2] OSM, 2015 Environmental Assessment and Signed Finding of No New Significant Impact (FONNSI) for Navajo Mine, Navajo Reservation, New Mexico, at 1-2 (Dec. 29, 2015), *available at* http://www.wrcc.osmre.gov/initiatives/navajoMine/areaIVNorth.shtm (follow "Chapter 1" hyperlink) [hereinafter 2015 Area IV North EA].

In 2013 the Navajo Nation created NTEC and purchased the mine from BHP Billiton. Doc. 55 ¶ 9. BHP Billiton sold the mine because it could no longer "cost-effectively produce" coal for the plant, and it and Arizona Public Service were considering shutting the complex down.[3] The Navajo Nation (via NTEC) stepped in as the buyer-of-last-resort to purchase the uneconomical mine for $85 million. Tsosie Decl. ¶¶ 12, 16. The Navajo Nation waived BHP Billiton's liability for legacy pollution at the mine. *Id.* ¶ 16. NTEC also executed a "limited waiver of sovereign immunity to comply with and be subject to enforcement of Title V of SMCRA [the Surface Mining Control and Reclamation Act] and *all other U.S. environmental protection and health and safety laws of general applicability*."[4] Thus, NTEC acknowledged Federal Defendants' authority to assure compliance with federal environmental laws like NEPA and the ESA. *See also* Doc. 50 at 6 (recognizing Federal Defendant's "[a]uthority to [r]egulate and [a]pprove [c]ertain [a]ctivities on Navajo [r]eservation [l]ands").

NTEC sought approval from Federal Defendants to expand the mine by 5,568 acres to continue to supply coal to the power plant for 25 years. Doc. 1, ¶ 7.

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[3] Intervenor BHP Billiton Response Merits Br. at 10-11, *Diné CARE v. OSM*, No. 12-CV-1275-JLK (D. Colo. Dec. 6, 2013) (attached as Exhibit 2); Decl. of Harrison Tsosie, ¶ 12, *Diné CARE v. OSM*, No. 1:12-CV-1275-JLK (D. Colo. Mar. 23, 2015) (attached as Exhibit 3) [hereinafter Tsosie Decl.]. This Court "may take judicial notice of court filings and other matters of public record." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006).

[4] OSM, Environmental Assessment and Finding of No Significant Impact (FONSI) for Navajo Mine Permit Transfer Application, Navajo Reservation, New Mexico, at 9 (Nov. 2013) (emphasis added), *available at* http://www.wrcc.osmre.gov/initiatives/navajoMine/permitTransfer.shtm (follow "Environmental Assessment" hyperlink) (emphasis added) [hereinafter Transfer EA].

Simultaneously, Arizona Public Service sought federal approval of a 25-year extension of the lease for the power plant and federal renewal of the right-of-ways for the associated transmission lines. *Id.*

Federal Defendants issued an environmental impact statement under NEPA and a biological opinion under the ESA. *Id.* ¶¶ 4-5, 73-89. In July 2015 Federal Defendants issued a record of decision under NEPA, approving the mine expansion, the lease extension for the power plant, and the renewal of the right-of-ways. *Id.* ¶ 80. Federal Defendants were acting pursuant to their trust responsibilities towards the Navajo Nation.[5] In April 2016 Diné CARE brought this action against Federal Defendants.

**ARGUMENT**

Federal courts refuse to dismiss NEPA and ESA challenges to federal agency action on Indian lands for failure to join absent tribes under Rule 19, albeit under varying analyses. *Sw. Ctr. for Biological Diversity v. Babbitt* (*Sw. Ctr.*), 150 F.3d 1152, 1153-55 (9th Cir. 1998) (absent tribes not required because adequately represented by federal government); *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1256, 1259-60 (10th Cir. 2001) (same); *Manygoats v. Kleppe*, 558 F.2d 556, 558-59 (10th Cir. 1977) (tribe required but dismissal unwarranted due to federal interest in enforcement of NEPA).[6]

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[5] OSM, Four Corners Power Plant and Navajo Mine Energy Project Environmental Impact Statement Record of Decision (ROD), at 10, 23, 42, 43 (July 14, 2015), *available at* http://www.wrcc.osmre.gov/initiatives/fourCorners/documentLibrary.shtm (follow "ROD" hyperlink) [hereinafter ROD]; *accord* Doc. 50 at 6.

[6] *Accord Jamul Action Comm. v. Chaudhuri*, No. 2:13-CV-1920-KJM-KJN, 2016 WL 4192407, at *7 (E.D. Cal. Aug. 8, 2016); *Hayes v. Chaparral Energy, LLC*, No. 14-CV-495-GFK-PJC, 2016 WL 1175238, at **4-11 (N.D. Okla. Mar. 23, 2016); *Diné CARE v.*

These rulings are consistent with basic principles about the supremacy of federal law. Under the *Young* doctrine, tribal (like state) sovereign immunity cannot defeat an action seeking prospective relief to vindicate federal law. *Salt River Project v. Lee*, 672 F.3d 1176, 1181-82 (9th Cir. 2012); *Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 928-30 (D.C. Cir. 2012). This doctrine "gives life to the Supremacy Clause," "vindicate[s] the federal interest in assuring the supremacy of [federal] law," *Green v. Mansour*, 474 U.S. 64, 68 (1985), and is "indispensable to the establishment of constitutional government and the rule of law." 17A Wright et al., Federal Practice and Procedure § 4231 (3d ed.).[7]

Rule 19 does *not* enlarge tribal sovereign immunity. *See Vann*, 701 F.3d at 929-30.[8] Because tribal sovereign immunity cannot defeat an action against tribal officers for prospective compliance with federal law, it cannot, consistent with the Supremacy Clause, be enlarged by Rule 19 to defeat an action against *federal agencies* for prospective compliance with federal law. *See Vann*, 701 F.3d at 929-30. Thus courts will

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*OSM*, No. 12-CV-1275-JLK, 2013 WL 68701, at **2-6 (D. Colo. Jan. 4, 2013); *Diné CARE v. Klein*, 676 F. Supp. 2d 1198, 1216-17 (D. Colo. 2009); *Conn. ex rel. Blumenthal v. Babbitt*, 899 F. Supp. 80, 83 (D. Conn. 1995); Thomas P. Schlosser, *Understanding Federal Rule of Civil Procedure 19 and Its Application in the Sovereign Immunity Cases*, 60 APR-Fed. Law. 42 (2013); *see also* Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 Gonz. L. Rev. 1, 40 (2004); *but see Ctr. for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1227-30 (D. Colo. 2012).

[7] *Young*'s framework for vindicating federal law while protecting sovereignty parallels the public rights exception to Rule 19 by which courts will not dismiss an action that (1) seeks to vindicate public rights and (2) does not destroy legal entitlements of absent parties. *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 366 (1940); *see infra* Part B.5.

[8] *Accord Estate of Mitchell v. Modern Woodsmen of Am.*, No. 2:10-CV-965-JEO, 2015 WL 1778375, at *3 (N.D. Ala. Apr. 20, 2015) (citing 28 U.S.C. § 2072(a)-(b)); *Brennan v. Silvergate Dist. Lodge No. 50*, 503 F.2d 800, 804 (9th Cir. 1974).

not dismiss such cases because doing so would "effectively insultate[] an entire category of [federal] agency action from judicial review," *Hayes*, 2016 WL 1175238, at *11, and "immune[ize]" "virtually all public and private activity on Indian lands . . . from oversight under the [federal] government's environmental laws," *Diné CARE*, 2013 WL 68701, at *2. Indeed, it would "come[] dangerously close to suggesting that Indians have less judicial recourse than other Americans against arbitrary exercises of federal power." *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1502 n.4 (9th Cir. 1991) (O'Scannlain, J., dissenting); *cf. Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972) (NEPA applies on Indian lands). The practical significance would be to force Indian lands to remain national sacrifice areas for polluting industries. *See*, Tsosie, *supra* at 243.

Consistent with these authorities, Diné CARE demonstrates that (1) NTEC is not a required party; (2) even if NTEC were required, the equities support allowing this action to proceed; and (3) even if this Court concluded the case could not proceed without NTEC, the Court should join NTEC's chief executive officer as a defendant pursuant to Rule 19(a)(2) and the *Young* doctrine and, thereby, allow the case to proceed.

**A. Standard of Review: Pragmatic Application to Avoid Harsh Results.**

Rule 19 "should be employed to promote full adjudication of disputes with a minimum of litigation effort." *Glancy v. Taubman Ctrs., Inc.*, 373 F.3d 656, 665 (6th Cir. 2004) (quoting 7 Wright et al., *supra* § 1602). "The inquiry is a practical one and fact-specific, and is designed to avoid the harsh results of rigid application." *Makah Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). "The moving party has the burden of

persuasion in arguing for dismissal." *Id.* Courts "accept as true the allegations in Plaintiffs' complaint and draw all reasonable inferences in Plaintiffs' favor." *Paiute-Shoshone Indians v. Los Angeles*, 637 F.3d 993, 996 n.1 (9th Cir. 2011).

### B. NTEC Is Not a Required Party Under Rule 19(a) Because It Does Not Claim a Legally Protected Interest and It Is Adequately Represented.

#### 1. NTEC Does Not Possess a Legally Protected Interest in Federal Defendants' Noncompliance with Federal Law.

To be required, a party must claim a "legally protected" interest. *Cachil Dehe Band v. California*, 547 F.3d 962, 970 (9th Cir. 2008). "This interest must be more than a financial stake." *Makah Tribe*, 910 F.2d at 558. "[A]n absent party has no legally protected interest at stake in a suit merely to enforce compliance with administrative procedures," *Cachil Dehe Band*, 547 F.3d at 971, including federal agency compliance with NEPA. *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 467-69 (9th Cir. 1986).

Thus, in *Jamul Action v. Chaudhuri*, in which plaintiffs claimed federal agencies failed to "prepare an environmental impact statement in compliance with NEPA when they approved [a] Tribe's gaming management contract," the court held that the "Tribe is not a necessary party to this claim; it has no legally protectable interest in the federal defendants' execution of a NEPA review." 2016 WL 4192407, at *7; *accord N. Alaska*, 803 F.2d at 467-69; *see also Makah Tribe*, 910 F.2d at 559 (absent tribes not required for claims seeking compliance with procedures of fisheries act). Here, as in *Jamul Action* and *Northern Alaska*, Diné CARE alleges federal agencies violated NEPA and the ESA, and seeks to temporarily enjoin Federal Defendants from acting until they comply with those

laws. Doc. 1, ¶¶ 3-5, A-J. NTEC "do[es] not possess the required legally protected interest in the subject matter." *N. Alaska*, 803 F.2d at 468.

NTEC's asserted "economic interests related to mining activities" are insufficient. *Cf.* Doc. 50 at 10-11; *N. Alaska*, 803 F.2d at 468-69 ("merely financial interest" of miners seeking federal approvals insufficient to confer required party status in NEPA case). NTEC's asserted "property interest" also fails. *Cf.* Doc. 31 at 12. Diné CARE does not challenge NTEC's property interests, only Federal Defendants' compliance with federal law. Doc. 1, ¶¶ 3-5, A-J. "[M]iners with pending plans have no legal entitlement to any given set of procedures." *N. Alaska*, 803 F.2d at 469.[9] For this reason, *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996), is inapposite. *Cf.* Doc. 50 at 11.[10] There, unlike here, the plaintiff sought *not* to assure compliance with federal procedures, but to invalidate a condition of a contract to which a tribe was party. *Kescoli*, 101 F.3d at 1307. NTEC has not claimed a legally protected interest in this litigation.

**2. Federal Defendants Adequately Represent NTEC.**

In an action seeking prospective federal compliance with NEPA and the ESA, as here, "[t]he United States can adequately represent an Indian tribe unless there exists a

[9] *See* James M. McElfish, Jr., & Ann E. Beier, Environmental Regulation of Coal Mining, at 53 (1990) (noting federal coal mining permits are "a privilege granted by the regulatory authority").

[10] NTEC cites *Pizarchik*, 858 F. Supp. 2d at 1227, but it is irrelevant. In the Tenth Circuit, absent tribes are required under Rule 19(a), but if the case will not cancel a tribal contract, it may proceed under Rule 19(b) to vindicate NEPA. *Manygoats*, 558 F.3d at 558-59. The Ninth Circuit, however, holds absent tribes are not required in NEPA suits because of adequate federal representation. *Sw. Ctr.*, 150 F.3d at 1154. Thus, *Pizarchik* both conflicts with Ninth Circuit law and was wrongly decided under Tenth Circuit law.

conflict of interest between the United States and the tribe." *Sw. Ctr.*, 150 F.3d at 1154. The party seeking dismissal must "demonstrate" an *actual* conflict, rather than a "possibility of conflict." *Washington v. Daley*, 173 F.3d 1158, 1168 (9th Cir. 1999). Federal agencies' choice not to join an absent tribe's meritless motion to dismiss does not demonstrate an actual conflict. *Sw. Ctr.*, 150 F.3d at 1154.

Here, Federal Defendants adequately represent NTEC's interests. First, they share NTEC's interest in defending the challenged analyses under NEPA and the ESA. Doc. 16 at 45 (seeking dismissal); *see Sw. Ctr.*, 150 F.3d at 1154; *accord Daley*, 173 F.3d at 1167-68; *Alto v. Black*, 738 F.3d 1111, 1128 (9th Cir. 2013). Second, both Federal Defendants and NTEC recognize the United States' trust duty to protect the Navajo Nation's interests in this matter. ROD at 10, 23, 42, 43**;** Doc. 50 at 6**;** *Sw. Ctr.*, 150 F.3d at 1154 (representation adequate in light of trust duty); *accord Daley*, 173 F.3d at 1168; *Alto*, 738 F.3d at 1128. Third, "because the court's review [of the challenged actions] is limited to the administrative record . . . , [NTEC] could not offer new evidence in the judicial proceedings that would materially affect the outcome." *Alto*, 738 F.3d at 1128 (internal citation omitted); Doc. 30 at 2 (review limited to administrative record). The presence of Arizona Public Service, whose interest in the plant mirrors NTEC's interest in the mine, further assures adequate representation. Doc. 18 at 6-9 (explaining interest); Doc. 18-1 at 17 (seeking to deny relief); *Sw. Ctr.*, 150 F.3d at 1154-55.

NTEC's general statement about its "narrower economic interest" is insufficient to demonstrate an actual, relevant conflict. *Cf.* Doc. 31 at 13-14; *Sw. Ctr.*, 150 F.3d at 1155

(mere "possibility of conflict" due to government's "potentially inconsistent responsibilities under its trust obligations and the applicable environmental laws" insufficient); *accord Daley*, 173 F.3d at 1168; *Alto*, 738 F.3d at 1128. NTEC's assertion that Federal Defendants "will not seek to protect NTEC's interests," Doc. 31 at 14, has no evidentiary support and is inconsistent with NTEC's admission that "BIA approved the challenged leases, ROWs, and permits . . . in accordance with the federal trust responsibility." Doc. 50 at 6. Thus, NTEC has not shown it is a required party.[11]

**C. Equity and Good Conscience Support the Action Proceeding in NTEC's Absence Under Rule 19(b).**

Even if NTEC were a required party, equity and good conscience support allowing the case to proceed in the company's absence. Contrary to NTEC's assertion, the equitable analysis of Rule 19(b) must not be "direct[ed]" rigidly by sovereign immunity. *Cf.* Doc. 50 at 12. Rule 19 was revised to "steer judges away from a jurisprudence of labels," *Park v. Didden*, 695 F.2d 626, 627 (D.C. Cir. 1982), and instead "emphasize[] the pragmatic consideration of effects of the alternatives of proceeding or dismissing." *Provident Tradesmens v. Patterson*, 390 U.S. 102, 117 n.12 (1968).

"[I]f no *alternative forum* is available to the plaintiff, the court should be 'extra cautious' before dismissing the suit." *Makah*, 910 F.2d at 560 (quoting *Wichita &*

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[11] This conclusion does not conflict with this Court's order granting NTEC intervention. Doc. 49 at 1. While Rule 19(a) and Rule 24(a) are similar, Ninth Circuit case law requires a greater showing under Rule 19(a), which carries the potentially harsh consequence of dismissal. *See, e.g.*, *Alto*, 738 F.3d at 1125-29; *Cachil Dehe Band*, 547 F.3d at 971-72, 977; *Daley*, 173 F.3d at 1167-69; *Sw. Ctr.*, 150 F.3d at 1153-55; *N. Alaska*, 803 F.2d at 469; *Yellowstone County v. Pease*, 96 F.3d 1169, 1173 (9th Cir. 1996).

*Affiliated Tribes v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986)). Underscoring the critical importance of providing a forum, the Supreme Court recently suggested allowing exceptions to tribal sovereign immunity for off-reservation harm resulting from tribal commercial operations, as here, "if no alternative remedies were available." *Michigan v. Bay Mills Indian Comm.*, 134 S. Ct. 2024, 2036 n.8 (2014); Doc. 1 ¶ 8.

*Philippines v. Pimentel*, 553 U.S. 851 (2008), is inapplicable:

> *Pimentel* did not involve a claim seeking review of an agency's compliance with a federal statute, nor was there any finding that an existing party adequately represented the Republic [of the 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; *accord Diné CARE*, 2013 WL 68701, at *4; *SourceOne v. KGK Synergize, Inc.*, No. 08 C 7403, 2009 WL 1346250, at *9 (N.D. Ill. May 13, 2009). NTEC also cites *Pizarchik*, 858 F. Supp. 2d at 1228, but that case is an outlier. *Diné CARE*, 2013 WL 68701, at *5 n.4 (distinguishing *Pizarchik* for not considering public rights exception or *Young*), *followed by Hayes*, 2016 WL 1175238, at *4 n.5; *see supra* note 10. Here, the Rule 19(b) factors support this action going forward.

**1. Potential Prejudice to NTEC Is Minimal and Offset by Federal Representation.**

Diné CARE is not challenging any legal entitlement of NTEC and "does not call for any action for or by the tribe"; Diné CARE only challenges *Federal Defendants'* failure to comply with the requirements of NEPA and the ESA. *Manygoats*, 558 F.2d at 558-59; *accord Diné CARE*, 2013 WL 68701, at *6; *see also supra* Part B.1. Thus, "granting the relief requested"—prospective relief against Federal Defendants—"would

not undermine authority [NTEC] would otherwise exercise." *Alto*, 738 F.3d at 1129. As in *Alto*, and as NTEC admits, it is *Federal Defendants*, not NTEC, that possess the "[a]uthority to [r]egulate and [a]pprove" the federal actions challenged in this case. Doc. 50 at 6. Indeed, NTEC specifically waived sovereign immunity "to comply with and be subject to . . . all other U.S. environmental protection . . . laws of general applicability." Transfer EA, *supra* at 9**;** *see Davis*, 469 F.2d at 597 (NEPA applies on Indian lands). Further, any potential prejudice to NTEC "is offset in large part by the fact that [Federal Defendants' and Arizona Public Service's] interests in defending [the] decisions are substantially similar" to those of NTEC. *Sac & Fox*, 240 F.3d at 1259-60; *see also supra* Part II.B.2. This factor supports allowing this action to proceed.

Again, NTEC's asserted financial interest, Doc. 50 at 15, is insufficient and adequately represented, *see supra* Part B.1-2. It is also significantly overstated, given that in prior cases temporary cessation of mining did not did not cause the complex to shut down. *See* 2015 Area IV North EA, *supra* at 1-2. The overwhelming public harm caused by the complex further offsets any residual prejudice to NTEC. Doc. 1, ¶¶ 1, 8, 65, 74; Project FEIS, *supra* at 4.2-25 to -27 & tbl. 4.2-18b; Cicchetti, Expensive Neighbors, *supra* at 38.

**2. Prospective Relief Avoids Prejudice to Sovereign Interests, While Vindicating the Supremacy of Federal Law.**

The *Young* doctrine "strikes a delicate balance" to ensure tribal (or state) sovereign immunity is "preserved" while "giving recognition to the need to prevent violations of federal law." *Agua Caliente Band v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000)

(quoting *Idaho v. Coeur d'Alene*, 521 U.S. 261, 269 (1997)); *see Salt River Project*, 672 F.3d at 1181-82. The key to the balance is limiting relief, as here, to "prospective declaratory and injunctive relief" to stop the violation of federal law. *Agua Caliente*, 223 F.3d at 1045; *see also Verizon Maryland Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 646 (2002) (*Young* applies to requests to declare past decision unlawful and ineffective). This parallels the "public rights" exception. *See supra* note 7, *and infra* Part C.5.

Diné CARE's request for prospective relief to assure compliance with federal law is consistent with the delicate balance established by these doctrines, respecting sovereignty, while vindicating the supremacy of federal law. In fact, this action is further *removed* from tribal sovereignty than the *Young* situation because Diné CARE does not raise *any* claim against tribal officers, but only against Federal Defendants. *See Alto*, 738 F.3d at 1129 (claims against federal agency do not "undermine" tribal authority). Thus the Court's ability to shape relief supports allowing this action to proceed.

NTEC is mistaken that ancillary impacts of prospective relief to a sovereign's finances warrant dismissal. "[A]n ancillary effect on the state [i.e., sovereign] treasury is a permissible . . . consequence of the principal announced in *Ex parte Young*." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). NTEC's reliance on *Pimentel* is misplaced, as noted above. *See Hayes*, 2016 WL 1175238, at *4 n.5; *accord Diné CARE*, 2013 WL 68701, at *4; *SourceOne*, 2009 WL 1346250, at *9. *Lomayaktewa v. Hathaway* is also distinguishable: there plaintiffs sought "cancellation of [a] lease" to which the tribe was party. 520 F.2d 1324, 1327 (9th Cir. 1975). By contrast, here, Diné CARE does not

challenge or seek to cancel any tribal contract, but only seeks prospective relief against Federal Defendants. Doc. 1, ¶¶ A-J.

**3. The Interest of Complete, Efficient Settlement of Controversies Strongly Favors Allowing This Action to Proceed.**

NTEC tacitly acknowledges there is *no* danger of additional litigation arising from the *present dispute*—the challenged environmental analyses—if this action proceeds. *Cf.* Doc. 50 at 16; *see Diné CARE*, 2013 WL 68701, at *6 (following resolution of NEPA action "there will be no remaining suit to resolve"). NTEC's vague reference to a "morass of lawsuits" lacks the specificity needed to support dismissal, *see Hayes*, 2016 WL 1175238, at *7 (rejecting vague warnings of future litigation).

By contrast, the public interest of vindicating federal law would be thwarted if NTEC could wield its immunity to shield *Federal Defendants'* actions from review in federal court. *Hayes*, 2016 WL 1175238, at *11; *Diné CARE*, 2013 WL 68701, at *2; Schlosser, *supra* note 6. This would incentivize the most harmful polluters to locate on Indian lands. *See* Rebecca Tsosie, *supra*, at 243. Thus, the public interest in settling controversies supports allowing this action to proceed.

**4. The Lack of an Alternative Forum Weights Heavily in Support of Allowing This Action to Proceed.**

NTEC admits no alternative forum exists, which heavily supports allowing this action to proceed. *Diné CARE*, 2013 WL 68701, at *6 (lack of forum "weighs crushingly against dismissal"); *see Bay Mills*, 134 S. Ct. at 2036 n.8 (tribal sovereign immunity should not preclude suits involving off-reservation harm from tribal business if "no alternative remedies were available"). NTEC is mistaken that sovereign immunity

outweighs Diné CARE's right to seek prospective relief from Federal Defendants. *Pimentel* is inapposite because an alternative forum was available there. 553 U.S. at 873. The other cases cited by NTEC are also inapposite because none involved plaintiffs seeking prospective relief against *federal agencies* for violations of NEPA. *Cf. Sw. Ctr.*, 150 F.3d at 1153-54 (absent tribes not required in NEPA action because adequately represented by agencies); *see supra* Part B.1-2.

**5. The Public Rights Exception Applies to Allow Vindication of Federal Law.**

Dovetailing with *Young*, *Southwest Center*, and *Northern Alaska*, the public rights exception allows an action to proceed notwithstanding potential effects to absent parties if it (1) vindicates public rights and (2) will not extinguish legal entitlements of absent parties. *Nat'l Licorice*, 309 U.S. at 366; *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014). Here, Plaintiff nonprofits seek prospective relief to vindicate public rights; they do not seek to extinguish any entitlement of NTEC or the Navajo Nation. Doc. 1, ¶¶ 3, 16-20, 90-179, A-J. Thus, the public rights exception applies. *Connor v. Burford*, 848 F.2d 1441, 1460-61 (9th Cir. 1986) (NEPA); *Makah Tribe*, 910 F.2d at 559 n.6; *Manygoats*, 588 F.3d at 558-59 (NEPA); *Diné CARE*, 2013 WL 68701, at **5-6 (NEPA); *see also supra* Part C.2 (overlap of public rights exception and *Young* doctrine).

**D. If the Action Cannot Proceed Without NTEC, the Court Should Join NTEC's Chief Executive Officer.**

If the case cannot proceed without NTEC, the company can effectively be joined via joinder of its chief executive officer, Clark Moseley, in his official capacity. Immunity may shield NTEC from suit directly, but it does not shield Mr. Moseley:

> [T]he *Ex parte Young* doctrine allows suits for declaratory and injunctive relief against government officials in their official capacities—notwithstanding the sovereign immunity possessed by the government itself. The *Ex parte Young* doctrine applies to Indian tribes as well. . . .
>
> As a practical matter, therefore, the Cherokee Nation and the Principal Chief in his official capacity are one and the same in an *Ex parte Young* suit for declaratory and injunctive relief. As a result, the Principal Chief can adequately represent the Cherokee Nation in this suit, meaning that the Cherokee Nation itself is not a required party for purposes of Rule 19.

*Vann*, 701 F.3d at 929-30; *accord Salt River Project*, 672 F.3d at 1181-82; *S.C. Wildlife Fed'n v. S.C. Dep't of Transp.*, 485 F. Supp. 2d 661, 672-75 (D.S.C. 2007), *aff'd sub nom. S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324 (4th Cir. 2008) (NEPA case); *see also* Advisory Comm.'s Notes on 1966 Amend. to Fed. R. Civ. P. 19 (contemplating joinder of "a particular official" under rule to avoid sovereign immunity bar).

Here, if the Court finds joinder necessary, it should join Mr. Moseley, even though Diné CARE "has no claim against [NTEC]" and "is not seeking any affirmative relief directly from [NTEC]." *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 781-84 (9th Cir. 2005); *accord Alliance for the Wild Rockies v. Marten*, No. CV-16-35-M-DWM, 2016 WL 4068459, at *2 (D. Mont. July 28, 2016) (joining absent party under Rule 19(a)).

## CONCLUSION

Tribal sovereign immunity does not override the supremacy of federal law in actions seeking prospective relief to vindicate violations of federal law, as here. For the foregoing reasons, this Court should deny NTEC's motion to dismiss.

Respectfully submitted this 16th day of November, 2016,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of November 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all attorneys appearing in this case.

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