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Of Attorneys for Intervenor-Defendant Navajo Transitional Energy Company LLC

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

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

Plaintiffs,

vs.

BUREAU OF INDIAN AFFAIRS, *et al.*,

Defendants.

and

ARIZONA PUBLIC SERVICE COMPANY and **NAVAJO TRANSITIONAL ENERGY COMPANY LLC**,

Intervenor-Defendants.

No. 3:16-cv-08077-SPL

REPLY OF NAVAJO TRANSITIONAL ENERGY COMPANY IN SUPPORT OF ITS MOTION TO DISMISS

I. INTRODUCTION

Navajo Transitional Energy Company ("NTEC") is a tribal entity, created to own the Navajo Mine (the "Mine"), to benefit the Navajo Nation by providing a stable source of jobs,

energy, and economic and alternative energy development opportunities for the Navajo for the next several decades. Plaintiffs' claims in this lawsuit threaten the permits and approvals that NTEC relies upon to operate the Mine.

Neither plaintiffs nor federal defendants dispute that NTEC has sovereign immunity, but argue that NTEC's sovereign immunity is not enough to dismiss this lawsuit under a series of exceptions. Those arguments fail—this is not an exceptional case. Federal defendants and plaintiffs should be prevented from interfering with NTEC and the Navajo Nation's sovereign rights and this case should be dismissed.

II. ARGUMENT

Both plaintiffs and federal defendants argue that NTEC is not a necessary party to this case primarily because the federal defendants will adequately protect NTEC's interest and that NTEC's interests won't really be affected because plaintiffs' lawsuit merely seeks to enforce procedural compliance with the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA"). This is simply not true. NTEC owns the Navajo Mine (the "Mine") and has not violated any laws, yet plaintiffs seek to halt the operations of the Mine and Four Corners Power Plant ("FCPP"). To do so would jeopardize NTEC's ownership of the mine, and would be an economic disaster to the Mine, NTEC, and the Navajo community it supports. NTEC has every right to protect the Mine, its assets, its employees, and its interests in this lawsuit—interests that the U.S. government does not share. In addition, NTEC has sovereign immunity which allows for dismissal of this case under Rule 19. NTEC can only lose its sovereign immunity in two ways: either by an act of Congress or by specifically relinquishing sovereign immunity. Neither exists in this case. Because NTEC is a sovereign entity and an indispensable party, this case must be dismissed.

As a preliminary matter, NTEC must correct plaintiffs' assertion that NTEC and the Navajo Nation are subject to the Supremacy Clause. Pursuant to the U.S. Constitution, Article VI, "this Constitution, and the laws of the United States which shall be made in pursuance

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thereof; ***and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land***; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding" (emphasis added). Plaintiffs' convoluted argument regarding "the supremacy of federal law" ignores that treaties stand on equal footing to federal law under the Supremacy Clause. Indeed, those covenants made between the federal government and the Navajo under the treaties of 1849 and 1868 are a matter of federal law, including the federal government's promise to "act to secure the permanent prosperity" of the Navajo people. Article 11, Treaty With The Navaho, 9 Stat. 974 (1849). Plaintiffs' assertions disregard the weight of the federal government's trust responsibility under the treaties and hundreds of years of U.S. Constitutional and Indian law, and will take considerable time to unravel. The Navajo Nation, and NTEC as an arm of the Navajo Nation, is a tribal government entitled to sovereign immunity and is not a State subject to the Supremacy Clause.[1]

A. NTEC IS AN INDISPENSABLE PARTY AND NO EXCEPTION APPLIES

Plaintiffs and federal defendants argue that NTEC is not an indispensable party and even if it were, the federal defendants could adequately represent NTEC's interests. NTEC, however, has already been determined to be an indispensable party. In October, this court found that the government cannot adequately represent NTEC's interests when it granted NTEC's motion to intervene under Rule 24. This case cannot be saved by plaintiffs' argument that NTEC's corporate officer should be joined nor does the public rights exception apply to this case.

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[1] NTEC believes this to be a non-issue for the present case. If the court wishes, however, NTEC would be happy to provide additional briefing on this issue. For an exhaustive analysis of the Supremacy Clause's application to Indian tribes, *see* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 24 Ariz. St. L.J. 113 (2002).

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1. This Court Has Determined—and Plaintiffs and Federal Defendants Have Conceded—that NTEC Is An Indispensable Party

This court has determined that "[a]s the owner of the mine at issue, NTEC may intervene as a matter of right." Order 1, Doc. 49. By granting the motion to intervene, the court has already found that NTEC met the required factors of intervention, which include: "…(4) the existing parties may not adequately represent the applicant's interest." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (quoting *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006)). The federal defendants and plaintiffs now seek, however, to argue that federal defendants *can* adequately represent NTEC.[2] Yet neither federal defendants nor plaintiffs opposed NTEC's motion to intervene for the limited purpose of filing a motion to dismiss. As NTEC already explained in its opening motion, the Rule 19(a) inquiry parallels the analysis under Rule 24(a). Mot. Dismiss 10, Doc. 50. Plaintiffs' and federal defendants' belated arguments seem to ignore this court's prior order and should be precluded.

What's more, only NTEC can represent the interests of the Mine owner, who is responsible to provide for the Navajo Nation. As the Mine owner, NTEC is the only entity that is impacted if plaintiffs are successful in obtaining an order that results in the shutdown of the Mine. No one but NTEC bears this burden or will argue for protecting the Mine, its workers, and the royalties and taxes relied upon by the Navajo Nation and Navajo people. The federal defendants cannot make the same arguments that NTEC can make and do not share the same interests as the Mine owner, responsible for the well-being of so many employees and such a large portion of the Navajo Nation's general fund.

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[2] The text of Rule 19(a)(2)(i) includes no mention about measuring adequacy of representation. Courts have included adequacy of representation as an exception based on the analysis in Rule 24(a). *See Glancy v. Taubman Centers, Inc.*, 373 F.3d 656, 664 (1st Cir. 2004) ("The importation of an "adequate representation" test into Rule 19(a)(2)(i) is prompted by the similarities between the provisions of Rule 19(a) and Federal Rule of Civil Procedure 24(a), which provides for intervention as a matter of right.".

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There is no reason to believe that federal defendants will structure arguments to protect and preserve ongoing operations of the Mine. Their interest is limited to defending the Environmental Impact Statement ("EIS") and Biological Opinion ("BiOp") at issue. In fact, without NTEC's intervention, federal defendants could concede certain facts that would require the closure of all or part of the mine or agree to withdraw the environmental reviews for additional assessment, exposing NTEC to potential catastrophic consequences. At any point where outcomes from arguments or positions taken by defendants in the litigation could adversely impact operation of the Mine, only NTEC can be trusted to raise arguments to protect the Mine and the jobs and revenues relied upon by the Navajo Nation and its people. *See Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992) (describing the factors for determining whether existing parties adequately represent the interests of absent tribes as: (1) "whether the 'interests of a present party to the suit are such that it will *undoubtedly* make *all* of the absent party's arguments'"; (2) "whether the party is 'capable of and willing to make such arguments'"; and (3) "whether the absent party 'would offer any necessary element to the proceedings' that the present parties would neglect") (emphasis added) (quoting *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980)). And, as NTEC has already explained in its motion to intervene, the federal government has a long history of failing to protect Navajo rights and property. *See* Mot. to Intervene 13, Doc. 31. It cannot be counted on to protect NTEC's interests now.

This court has already determined and the parties have conceded that this action will impair NTEC's ability to protect its interests and the existing parties cannot represent NTEC's interests. NTEC is an indispensable party under Rule 19.

2. Ex Parte Young Cannot Be Applied Where There Is No Claim That NTEC or Its Executives Are Violating Federal Law

In an attempt to overcome NTEC's sovereign immunity, plaintiffs make two arguments based on *Ex parte Young*, 209 U.S. 123 (1908): (1) "Under the *Young* doctrine, tribal (like state) sovereign immunity cannot defeat an action seeking prospective relief to vindicate federal

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law"; and (2) "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." Resp. 13, Doc. 57. Here, the second argument demonstrates the inapplicability of the first: *Ex parte Young* only applies when the plaintiffs contend that the sovereign entity or its officials have violated some federal law. Here, there is no such allegation. Further, plaintiffs cite no case where dismissal was avoided by joining an executive of a native corporation when there is no allegation that the executive is violating or will violate federal law.[3]

As to plaintiffs' first argument, sovereign immunity (whether immunity based on the Eleventh Amendment or based on treaty rights and tribal sovereignty) prohibits plaintiffs from filing suit directly against the sovereign (i.e., the state or tribe) in federal courts. But in *Ex parte Young*, the Supreme Court held that plaintiffs could avoid that constitutional roadblock by suing state officials, rather than the state itself, to require the state official to refrain from violating federal law. *See Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011); *Salt River Project v. Lee*, 672 F.3d 1176 (9th Cir. 2012) (holding that *Young* "permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune State or tribe"). The Supreme Court has emphasized that "[t]he doctrine is limited to that precise situation," *Stewart*, 563 U.S. at 255, and that its application is inappropriate where the official does not have direct

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[3] Indeed, plaintiffs do not provide legal support for their assertion that Mr. Moseley should be joined in this case. Plaintiffs cite *South Carolina Wildlife Federation v. South Carolina Department of Transportation*, 485 F. Supp. 2d 661, 672-75 (D.S.C. 2007), *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 781-84 (9th Cir. 2005), and *Alliance for the Wild Rockies v. Marten*, No. CV-1635-M-DWM, 2016 WL 4068459, at *2 (D. Mont. July 2, 2016), but none of those cases has any application in this context. *South Carolina Wildlife Federation* is a run-of-the-mill application of the *Young* doctrine, where the district court allowed suit against *state officials* alleged to have violated NEPA's procedural requirements. *Peabody* held that tribal sovereign immunity did not prevent the joinder of an absent tribe because the *suit was brought by a federal agency*, not, as here, by an individual plaintiff. And *Alliance for the Wild Rockies* does not even mention sovereign immunity or *Ex parte Young*.

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authority and practical ability to enforce the challenged statute, *see Young*, 209 U.S. at 155-56. *See also, e.g.*, *Nat'l Audubon Society v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002) (holding that a suit against state officials was barred because the officials had no "direct authority or practical ability" to remedy alleged violations); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007) (rejecting application of the *Young* doctrine to a tribal official who was not "in any way responsible for enforcing" the challenged law); *Okpalobi v. Foster*, 244 F.3d 405, 417 (5th Cir. 2001) ("[The *Young*] exception applies when the named defendant state officials have some connection with the enforcement of the act and 'threaten and are about to commence proceedings' to enforce the unconstitutional act.") (quoting *Young*, 209 U.S. at 155-56 (1908)). But here, plaintiffs do not and cannot raise claims or allegations that NTEC, the Navajo Nation, or any of its officials have violated NEPA, ESA or the Administrative Procedure Act ("APA").

3. Plaintiffs Cannot Rely on the Public Rights Exception to Avoid Dismissal

The public rights or public interest exception is a sparingly used doctrine applied only in exceptional circumstances that do not exist here. To apply the public rights exception, the litigation must "transcend the private interests of the litigants" in seeking to vindicate a public right. *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996). And, even if the litigation is deemed to transcend the private rights of those involved, the public rights exception is appropriate only if the litigation does not destroy "the legal entitlements of the absent parties." *Id.* By contrast, the exception does not apply when the plaintiff's claim is "focused on the merits of [the] dispute rather than on vindicating a larger public interest." *Id.*

The Ninth Circuit has only allowed application of the public rights exception in one case and then only where the claims challenged the procedures used by the agency in administering the statute at issue. In *Connor v. Burford*, environmental groups challenged the Bureau of Land Management's ("BLM") failure to conduct a comprehensive environmental impact statement and biological opinion prior to the sale of 700 oil and gas leases. 848 F.2d 1441 (9th Cir. 1988). The court determined the public rights exception applied in that case because the decision being

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challenged was the agency's procedures in administering NEPA and the ESA, specifically whether comprehensive review (an EIS) was required at the initial lease sale stage. *Id.* at 1460. Thus, the litigation did not "purport to adjudicate the rights of the lessees" as much as it established the basic general procedures by which NEPA and the ESA would be administered in the future. *Id.*

In another case, the Ninth Circuit suggested, in dicta, that the public rights exception could be applied where the claims challenged the procedures applied by an agency. In *Makah Indian Tribe v. Verity*, the plaintiff tribe challenged the procedures the Secretary of Commerce had followed in promulgating regulations setting tribal fishing quotas. 910 F.2d 555 (9th Cir. 1990). The court explained that even if the absent tribes were necessary with respect to the plaintiffs' procedural claims, the public rights exception could apply as long as that relief affected "only the future conduct of the administrative process." 910 F.2d at 559.; *see also Kescoli*, 101 F.3d at 1312 (distinguishing *Makah*). Notably, the court in *Makah* declined to apply the exception to the plaintiffs' substantive challenge to the quotas, which alleged the quotas violated the tribes' treaty rights and were otherwise unfair and sought declaratory and injunctive relief. *See id.* at 559-60. As the Ninth Circuit's discussion in *Makah* illuminates, prospective relief is just that –it is prospective. It is not the retrospective relief plaintiffs request here.

Plaintiffs' complaint does not allege failures of general process or lack of compliance with administrative procedures. Rather, here plaintiffs complain of specific, finite concerns with the outcomes of the BiOp and the EIS. Unlike the procedural claims in *Makah* or *Connor*, here plaintiffs make a particular, substantive, retroactive challenge to decisions the federal government has already made. Specifically, in claims challenging the BiOp, plaintiffs complain that the federal defendants did not "adequately" consider recovery needs, "failed to consider" certain aspects that the plaintiffs consider necessary, and relied upon mitigation measures to defend the "no jeopardy" decision, and plaintiffs want federal defendants to use alternative methods of analysis. Compl. 37-47, Doc. 1. In the end, plaintiffs' point is that they disagree with

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the facts the federal defendants relied upon and do not approve their ultimate conclusions. These are specific challenges to the actual decisions made by federal defendants in their multi-year environmental review process, which included input from numerous federal agencies, scientists, the Navajo Nation, and comments from plaintiffs.

This is not, as in *Makah* or *Burford*, an example of where the agencies' general, regular, or common practice is challenged. In both of those cases, the court applied the exception only to claims seeking compliance with generally applicable procedural requirements. This makes sense because an action seeking future administrative compliance with procedural requirements has the potential to benefit all those who participate in the regulatory scheme—a large class of absent parties would therefore be equally benefited by the litigation. *See Makah*, 910 F.2d at 559 n.6.

Importantly, the Ninth Circuit has rejected application of the public rights exception *every time* it has considered it since deciding *Makah* in 1990. *See, e.g.*, *Shermoen v. United States*, 982 F.2d 1312 (1992) (exception did not apply to challenge by individual Native Americans and a group of Yurok Indians to the Hoopa-Yurok Settlement Act, which recognized the Hoopa Valley Tribe and Yurok Tribe and designated reservations for each); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996) (public rights exception did not apply when a member of an Indian tribe challenged a mining permit and settlement agreement between her tribe, the Department of the Interior, and a mining company, which allowed mining operations near native burial sites); *Kettle Range Conservation Group v. United States BLM*, 150 F.3d 1083 (9th Cir. 1998) (per curium) (public rights exception did not apply when plaintiffs challenged a private-for-public land exchange between the BLM and a land dealer as failing to comply with NEPA); *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (public rights exception did not apply in a suit challenging the Governor of Arizona's power to negotiate gaming compacts with Indian tribes because the practical effect of the requested relief would be a judgment that absentee tribes' existing gaming compacts were illegal); *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005) (public rights exception did not apply when plaintiffs brought a

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constitutional challenge to a cigarette tax negotiated between a tribe and the state); *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014) (public rights exception did not apply in a suit alleging violations of the Native American Graves Repatriation Act). This court should do the same.

B. NTEC'S SOVEREIGN IMMUNITY REQUIRES DISMISSAL OF THIS CASE

Plaintiffs and federal defendants do not dispute that NTEC has sovereign immunity. Plaintiffs do, however, point out that NTEC has waived sovereign immunity related to complying with federal mining laws and then argue that NTEC's sovereign immunity somehow doesn't warrant dismissal of this case. Resp. 13-14. Plaintiffs are incorrect. Sovereign immunity can only be waived by specific and express waiver or by act of Congress. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014) (reaffirming that any congressional abrogation of sovereign immunity must be unequivocally expressed). There has been no abrogation of sovereign immunity relative to the claims in this case.[4]

Waiver of sovereign immunity similarly requires an affirmative action that does not exist here. Indian tribes are sovereign entities that possess "common-law immunity from suit traditionally enjoyed by sovereign powers." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Tribes may waive their sovereign immunity, but as with Congressional abrogation, such waivers must be "unequivocally expressed" and cannot be implied. *Santa*

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[4] It is undisputed that Congress has not abrogated tribal sovereign immunity with respect to the statutes at issue in this case. The relevant statutes are NEPA, the ESA and the APA. *Manygoats* and *Pizarchik* both acknowledge that Congress did not abrogate sovereign immunity in NEPA. *See Manygoats v. Kleppe*, 558 F.2d 556, 557-58 (10th Cir. 1977); *Ctr. for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1225 (D. Colo. 2012). *Pizarchik* comes to the same conclusion with respect to the ESA, which wasn't at issue in *Manygoats*. The Ninth Circuit has confirmed that Congress has not abrogated tribal sovereign in APA suits. *Friends of Amador Cty. v. Salazar*, 554 F. App'x 562, 565 (9th Cir. 2014) (unpublished) ("Abrogation of sovereign immunity 'cannot be implied but must be unequivocally expressed.' The APA provides no such express abrogation. While it unequivocally waives the United States' sovereign immunity in certain suits, it does not do the same for Indian tribes.").

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Clara Pueblo, 436 U.S. at 58; *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989). Participation in an administrative proceeding does not waive sovereign immunity. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) ("We conclude that a tribe's participation in an administrative proceeding does not waive tribal immunity in an action filed by another party seeking review of the agency's decision"). There is no evidence that NTEC expressly and unequivocally waived its sovereign immunity with respect to the issues in this case.[5] Consequently, NTEC's sovereign immunity controls the Rule 19 analysis in this case and requires dismissal. Mot. Dismiss 12-14, Doc. 50.

C. PLAINTIFFS' AND FEDERAL DEFENDANTS' OTHER ARGUMENTS AGAINST DISMISSAL FAIL

Plaintiffs' principal arguments question whether NTEC is an indispensable party and whether NTEC has sovereign immunity. As analyzed above, NTEC is indispensable and cannot be joined because of its sovereign immunity. Plaintiffs and federal defendants also raise fairness arguments that the court should not dismiss this case because they have no alternative forum and that there is little prejudice to NTEC if this case proceeds. NTEC briefly addresses those arguments below.

Both federal defendants and plaintiffs argue that this case may not be dismissed because there is no alternative forum to adjudicate this matter under Rule 19(b). Resp. 15. But, as explained in NTEC's opening brief, plaintiffs' right to bring a lawsuit is outweighed by tribal sovereign immunity when the result of such suit may adversely impact the rights of a sovereign tribe. *See White*, 765 F.3d at 1028. In *White*, the Ninth Circuit affirmed the district court's holding that protecting the interests of the sovereign tribe outweighs any prejudice to the plaintiffs. The Ninth Circuit in *White* specifically concluded that the case upon which federal

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[5] Plaintiffs seem to argue that the government's report of what NTEC allegedly waived is evidence of waiver in this case. Resp. 4 n.4. Plaintiffs do not provide the actual contract documents or NTEC operating agreement, which would not only be the best evidence in this case, but also clearly demonstrate that there was no express waiver of sovereign immunity.

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defendants and plaintiffs rely[6] does not bind the Ninth Circuit: "*Manygoats* is an out-of-circuit decision which has not been embraced by the Ninth Circuit in the many years that have followed. Instead, this Circuit has consistently dismissed actions under Rule 19 where it concludes an Indian tribe is 'necessary' yet not capable of joinder due to sovereign immunity, and therefore, this Court does not have the discretion to decide otherwise." *See id.*; *White v. Univ. of Cal.*, No. C 12-01978 RS, 2012 WL 12335354, at *11 (N.D. Cal. Apr. 27, 2012). *See also Kescoli*, 101 F.3d at 1311 ("[W]e have 'recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity.' If the necessary party is immune from suit, there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as a compelling factor.'") (quoting *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1499-1500 (9th Cir. 1991)); *Makah*, 910 F.2d at 560 (acknowledging that "[s]overeign immunity may leave a party with no forum for its claims"); *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) ("The fourth factor would ordinarily favor the plaintiffs; there is no adequate remedy available to them if this case is dismissed for lack of joinder of indispensable parties. *But this result is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims.*") (emphasis added).

If this case goes forward, the prejudice to NTEC and the Navajo community is severe. After establishing a long term plan for redevelopment on the Navajo Nation, including putting in place a plan to reinvest profits from the Mine into developing new energy sources, NTEC faces

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[6] Indeed, instead of mentioning *Manygoats* directly, plaintiffs cite to an out-of-circuit and unreported case relying on *Manygoats*. Resp. 15. Further, plaintiffs also misstate the content of footnote 8 in *Bay Mills*. It does not say tribal sovereign immunity "should not preclude suits involving off-reservation harm from tribal business if no alternative remedies were available" as plaintiffs claim. In fact, the court specifically declined to address "whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a 'special justification' for abandoning precedent is not before us." *Bay Mills*, 134 S. 2024, 2036 n.8 (2014).

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the possibility of losing all of its assets and defaulting on its loan. If the Mine is shut down even temporarily, NTEC may not be able to afford the significant costs of restarting operations, particularly if it is found to be in default. Such a shutdown will almost certainly result in residual lawsuits.

And, as economist Charles Cicchetti has explained in detail, the Navajo Nation would lose $68.7 million of annual taxes and royalties, which it needs to provide basic government services. Cicchetti Decl. at ¶ 23. In an already economically depressed area where 36% of the population lives under the poverty level, taking away the livelihood of the 397 Mine employees will be devastating to the region. *Id.* at ¶¶ 7-13. As longtime Navajo Mine worker Vecenti Benally said: "[I]t is incredibly stressful to think about losing my job at the mine. If I lost my job, I'd lose my house and my car. At least one of my children would lose his house as I help pay the mortgage. If the mine and plant shut down, the surrounding towns of Kirtland and Farmington would be decimated. . . . Closing the mine and the power plant would be an economic disaster for the region." Benally Decl. at ¶ 7.

III. CONCLUSION

NTEC has established that it meets the requirements of Rule 19. Plaintiffs and federal defendants argue that this case should be considered exceptional when no exceptional circumstances exist. NTEC's motion to dismiss should be granted.

Respectfully submitted this 30th day of November, 2016.

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