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6 CAMPO BAND OF DIEGUENO MISSION
INDIANS
7

8 UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
10

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

13 Plaintiffs,

14 v.

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

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

**CAMPO BAND OF DIEGUENO
MISSION INDIANS' REPLY TO
PLAINTIFFS' OPPOSITION TO
MOTION TO DISMISS**

Dept: 4D
Judge: Hon. Janis L. Sammartino

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

CAMPO BAND OF DIEGUENO MISSION INDIANS (the “Tribe”) respectfully submits the following Reply to Plaintiffs’ Opposition to its Motion to Dismiss.

I.

INTRODUCTION

Plaintiffs urge this Court to ignore multiple, binding Ninth Circuit cases that require dismissal of this litigation. To that end, Plaintiffs misrepresent case holdings and proffer out-of-circuit cases. Plaintiffs also offer multiple, untenable arguments (couched as “Factual Background”) that are irrelevant to whether the Court should dismiss the case under Rule 19. Each of these arguments is factually false (for the reasons described below), and, as a legal matter, has no bearing on whether the case should be dismissed under Rule 19. Plaintiffs also offer a number of declarations that contain strained allegations that are wholly irrelevant to the analysis under Rule 19. As but one example, Plaintiff Donna Tisdale’s personal opinions as to the numerous “effects” of wind turbines are not only objectionable on their face but wholesale irrelevant to the Rule 19 issue before the Court.¹

The material facts supporting dismissal are undisputed. Plaintiffs do not dispute that this action was filed to overturn the Bureau of Indian Affairs (“BIA”) approval of the Lease between the Campo Band of Diegueno Mission Indians (the “Tribe”) and Terra-Gen—an entitlement that has already been granted. And Plaintiffs do not dispute that, in approving the Lease, BIA found that the Project would “support[] the Tribe’s long-term economic viability [and] establish resources to address chronic social issues” and that the purpose of the Project was to

¹ Notably, Plaintiffs filed a Declaration of Donna Tisdale in support of its opposition which incorporates by reference declarations Plaintiffs filed in support of their motion for preliminary injunction [ECF 65-5 and 65-6.] Those declarations are subject to a pending motion to strike filed by Defendant Terra Gen. The Tisdale declaration (and the declarations it references) and the Declaration of Stephen Volker are obviously intended to misdirect the Court from the issue before it, none being relevant to the Rule 19 analysis. As such, they should be disregarded.

1 “develop economic income to support needed governmental programs for the Tribe.”
 2 Record of Decision (“ROD”) at Exec. Summary and 1.

3 Further, Plaintiffs do not dispute that the Tribe has sovereign immunity. The
 4 evidence patently shows that the Tribe has a substantial interest in both the Lease
 5 and Project –both of which Plaintiffs’ litigation is purposed to vitiate. As a
 6 consequence, the Tribe’s interests are directly and materially impacted by the
 7 outcome of this litigation. Thus, the Tribe is a required party under Federal Rule of
 8 Civil Procedure 19(a)(1)(B)(i) since it cannot be summoned as a party to this action
 9 because of the Tribe’s sovereign immunity. As controlling precedent makes clear in
 10 applying Rule 19(b) in this factual scenario, the Tribe is an indispensable party
 11 which compels the dismissal of this action. *See Diné Citizens Against Ruining Our*
 12 *Env’t v. Bureau of Indian Affairs*, 932 F.3d 843, 848, 851 (9th Cir. 2019), *cert.*
 13 *denied*, 141 S. Ct. 161 (2020); *Kescoli v. Babbitt*, 101 F.3d 1304, 1307 (9th Cir.
 14 1996); *Jamul Action Committee v. Simermeyer*, 974 F.3d 984, 989 (9th Cir. 2020);
 15 *Deschutes River All. v. Portland Gen. Elec. Co.*, No. 18-35867, 2021 WL 2559477,
 16 at *2 (9th Cir. June 23, 2021). Federal Defendants and Intervenor-Defendant Terra-
 17 Gen both agree. ECF Nos. 83, 76. Plaintiffs cannot overcome the import of the
 18 foregoing controlling law, and have not provided any legitimate reason to deviate
 19 from the multiple, binding Ninth Circuit holdings.

20 II.

21 ARGUMENT

22 A. Plaintiffs’ Factual Assertions Against Dismissal are False and 23 Irrelevant

24 Plaintiffs makes the same outlandish allegations about the legitimacy of the
 25 Tribal government and issues of tribal governance, incorporating by reference the
 26 declaration submitted in opposition to the Tribe’s intervention. Opp. at 6-8. These
 27 allegations are untrue. *See* Tribe’s Intervention Reply, ECF No. 56 at 3. Moreover,
 28 as the Court noted in granting the Tribe intervention, these allegations are irrelevant

1 to whether the Tribe has asserted a significantly protectable interest, and the Court
 2 sustained the Tribe's objections to that evidence. Intervention Order, ECF No. 74 at
 3 6-7; *id.* at 6 n.1. The Court should take the same position here. *First*, as the Tribe
 4 explained and the Court acknowledged, Tribes possess inherent and exclusive power
 5 over matters of internal tribal governance, and claims that a Tribal government's
 6 action is invalid under the Tribe's constitution can be brought only in tribal court.
 7 *See* 1 Cohen's Handbook of Indian Law §§ 4.04, 4.06, 7.04 (2019) ("Challenges to
 8 the validity of a tribal council's action under the tribe's constitution must be brought
 9 in tribal court." *Id.* § 4.04); *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d
 10 1171, 1185-86 (E.D. Cal. 2009) ("[i]nternal matters of a tribe are generally reserved
 11 for resolution by the tribe itself, through a policy of Indian self-determination and
 12 self-government as mandated by the Indian Civil Rights Act . . . without authority,
 13 this Court will not interfere in the internal affairs of the Tribe"); *see also* Intervention
 14 Order, ECF No. 74, at 6, n.1. *Second*, the Court recognized the Tribe's protectable
 15 interest that this litigation could impair. *See* Intervention Order, ECF No. 74 at 6-7.
 16 As the Court explained, Plaintiffs acknowledge the Tribe is a party to the Lease; the
 17 relief Plaintiffs seek here—to withdraw and enjoin authorization of the Lease—
 18 would impair "the Tribe's contract rights under the Lease." *See id.* Thus, although
 19 the Court is precluded from ruling on matters of Tribal governance, it need not reach
 20 those issues to dismiss this case.

21 Plaintiffs also seek to downplay the critical importance of the economic terms
 22 of the Lease by objecting to the declaration of the Tribe's Chairman, complaining
 23 that neither the Tribe nor Terra-Gen has provided Plaintiffs a copy of the Lease, and
 24 by alleging that the Tribe has only offered "vague allusions" to the terms of the
 25 Lease. Opp. at 6; Volker Decl. ¶ 3, ECF No. 84-1. A reading of the declaration
 26 demonstrates otherwise. In any case, Plaintiffs' protests to the Chairman's
 27 declaration cannot affect the merits of this motion because the BIA's ROD and Final
 28 EIS provide ample information on relevant Lease terms. As part of its review, BIA

1 evaluated the terms of the Lease in detail and concluded, based on that review, that
2 the Project would “create a consistent source of revenue for the Tribe via lease
3 payments” and would “generate substantial economic activity within the
4 Reservation.” ROD at 11.

5 The specific terms of the Lease are confidential proprietary business
6 information, and Plaintiffs’ demand for a copy is simply part of their effort to
7 second-guess the Tribe’s decision to use its resources and pursue economic
8 development as an exercise of its sovereign rights. Incredibly and in obvious
9 paternalistic fashion, Plaintiffs imply that this lawsuit and the relief they seek
10 actually furthers Tribal interests. Opp. at 6, 9-10, 14. In other words, Plaintiffs
11 know what is better for the Tribe than the Tribe itself. Plaintiffs urge the Court to
12 avoid “unyielding deference to rigid and *outmoded notions of sovereign immunity*”.
13 Opp. at 14 (Emph. Added). Plaintiffs exhort the Court to invalidate the Tribe’s
14 Lease and adopt *Plaintiffs’* preference for what they assert is a “better located,
15 designed, constructed and operated” project that Plaintiffs, not the Tribe, have
16 decided will “better serve” the sovereign tribal nation. Opp. at 6. This is precisely
17 the outcome that Rule 19 is designed to preclude.

18 Despite Plaintiffs’ characterization and arguments to the contrary (at 12-14),
19 Terra-Gen’s ongoing process to secure Federal Aviation Administration (“FAA”)
20 approval for the Project has no bearing on the Tribe’s motion to dismiss. As BIA
21 explained in the ROD, the Project must obtain Determinations of No Hazard from
22 the FAA. ROD at 28. The documents that Plaintiffs attach as exhibits to
23 declarations merely show certain steps in that process to require further FAA review.
24 ECF No. 84-1, Volker Decl. at ¶¶ 4-5 and Exhibit 2; ECF No. 84-2, Third Tisdale
25 Decl. at ¶¶ 10-11 and Exhibit 1. Despite Plaintiffs’ characterization, the documents
26 do not constitute any type of final disapproval from FAA. If FAA’s review
27 ultimately leads to a determination that other mitigation measures are required, that
28

1 does not affect the legal validity of BIA’s approval of the Lease between the Tribe
2 and Terra-Gen—the only agency action before this Court.

3 Federal Defendants’ and Terra-Gen’s respective oppositions to Plaintiffs’
4 motion for a preliminary injunction outlined in detail how BIA addressed and
5 accounted for each of the environmental allegations Plaintiffs raise here (at 14-21).
6 ECF No. 77, Federal Defendants Opp. to Preliminary Injunction at 15-20; ECF No.
7 78, Terra-Gen Opp. to Preliminary Injunction at 16-21. As those oppositions show,
8 each of the issues was evaluated in full in the NEPA process, and these baseless
9 allegations provide no basis for the Court to deny the Tribe’s motion to dismiss.

10 **B. The Tribe Has a Legally Protected Interest that Would Be Impaired**
11 **by This Suit**

12 Plaintiffs misrepresent Ninth Circuit precedent to argue that the Tribe’s legally
13 protected interests are at not at stake here. But as this Court recognized in granting
14 the Tribe’s intervention, the Tribe is a party to the Lease that Plaintiffs seek to
15 invalidate through vacatur of the necessary federal approvals, and Plaintiffs’
16 requested relief would impair the Tribe’s contract rights under the Lease. *See*
17 Intervention Order at 6-7. This is precisely the showing required under Rule
18 19(a)(1)(B)(ii). Plaintiffs offer no support for their incorrect assertion (at 23) that
19 there can only be a legally protected interest under Rule 19 if the case involves
20 “existing activities”, e.g., the wind project must be operating. It must be said, that is
21 a misrepresentation of controlling Ninth Circuit precedent, which actually stands for
22 the proposition that there may only be a sufficient legally protected interest where
23 the requested relief would “impair a right already granted,” such as the federally
24 approved Lease already granted here. *See Diné Citizens*, 932 F.3d at 852.

25 *Diné Citizens* held that the Navajo Nation entity was a necessary party under
26 Rule 19 because vacating the federal agency ROD at issue in that case “may have
27 retroactive effects on approvals already granted,” and therefore the tribal interest in
28 the “existing lease, rights-of-way and surface mining permits would be impaired,”

1 just as the Tribe’s interest in the existing Lease would be impaired by Plaintiffs’
 2 requested relief here. *See id.* at 853. *Kescoli* similarly hinged on the fact that the
 3 relief sought “could affect the [Tribes’] interests in their lease agreements and the
 4 ability to obtain the bargained-for royalties and jobs.” 101 F.3d at 1310. There is no
 5 daylight between the facts here and the operative facts of *Diné Citizens* and *Kescoli*.
 6 And Plaintiffs fail to acknowledge cases dismissed under Rule 19 even before a
 7 project is constructed. *See, e.g.,* Terra-Gen’s Joinder at 8, 9 (citing *Jamul*, 974 F.3d
 8 at 997). *Jamul Action Committee*, a recent Ninth Circuit decision upholding
 9 dismissal of litigation under Rule 19 for failure to join a necessary sovereign tribal
 10 entity, involved a casino that was not yet fully constructed or operational. *Id.* at 990.
 11 Contrary to Plaintiffs’ assertion (at 23), there is nothing “speculative” about the
 12 Tribe’s interest here—the Tribe has contractual rights under the Lease that this
 13 litigation would impair. *See* Intervention Order at 6-7.

14 The Ninth Circuit has already considered and rejected - many times - the
 15 argument Plaintiffs advance (at 24-25) that either Federal Defendants or a private
 16 party, like Terra-Gen, can adequately represent the Tribe’s interest because they are
 17 defending the litigation and aligned in that sense. *See Diné Citizens*, 932 F.3d at
 18 854-56; *Jamul*, 974 F.3d at 997-98; *Deschutes*, 2021 WL 2559477 at *8. As the
 19 Court found in granting intervention, “the Tribe has established that representation of
 20 its interest by the present Parties may be inadequate,” because neither Federal
 21 Defendants nor Terra-Gen shares the Tribe’s sovereign interests in controlling its
 22 resources and property and in Tribal self-governance. *See* Intervention Order at 7,
 23 10 (noting parallel between Rule 24 and 19(a)).

24 Finally, although Plaintiffs characterize their relief as only prospective (at 24)
 25 or procedural (at 6), citing *Makah*—this is precisely the argument the Ninth Circuit
 26 rejected in *Diné Citizens*. *Diné Citizens* distinguished the holding in *Makah* where
 27 the absent tribes lacked a legally protected interest because certain relief “would
 28 affect only the *future conduct* of the administrative process.” 932 F.3d at 852-53

(citing *Makah*) (emphasis in original). The court noted that *Makah* also held “that absent tribes *did* have a legally protected interest” related to the relief sought to upset allocation decisions that had already been made. *Id.* at 852 (emphasis in original). Plaintiffs in *Diné Citizens*, as here, sought to invalidate “already-negotiated lease agreements” and to upset “expected jobs and revenue.” *Id.* at 853. “Although Plaintiffs’ challenge is to Federal Defendants’ NEPA and ESA processes . . . , it does not relate only to the agencies’ future administrative process, but instead may have retroactive effects on approvals already granted.” *Id.* This is distinct from relief seeking to shape “future conduct” of administrative proceedings. *Id.* at 852-53.

C. Plaintiffs Offer No Valid Reason For The Case to Proceed

In urging the Court to allow the case to proceed under Rule 19(b), despite the Tribe’s sovereign immunity, Plaintiffs principally rely on two out-of-circuit district court cases that Plaintiffs argue hold that a suit like this, that challenges BIA’s failure to comply with the law, can proceed with tailored relief. *See Opp.* at 26-27.² But that is not the law of the Ninth Circuit. *Diné Citizens* considered that argument and held that where Plaintiffs sought to invalidate federal approvals, including a lease with the tribal entity, relief cannot be tailored to avoid prejudice to the absent tribal party. *See* 932 F.3d at 858. The Ninth Circuit recognized that even remand of the agency decision without vacatur could not avoid prejudice to the absent tribal party because further NEPA review could impose new restrictions or requirements on the federal approval. *See id.*

The only Ninth Circuit case on which Plaintiffs purport to rely in relation to the Rule 19(b) standard is *Southwest Center for Biological Diversity v. Babbitt*,³ but

² The District of Colorado case Plaintiffs cite (at 26) is just one outcome in that district. Plaintiffs fail to disclose that a subsequent District of Colorado decision, addressing a challenge to the same project, dismissed the challenge on exactly the same grounds the Tribe advances here because the “weight to the [Navajo] Nation’s sovereign immunity” was “dispositive and requires dismissal.” *See Ctr. for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1230 (D. Colo. 2012).

³ Plaintiffs also cite *Arakaki v. Catetano*, but that case decided intervention under Rule 24 and did not address dismissal under Rule 19(b).

1 the Ninth Circuit never considered whether the case should be dismissed under Rule
 2 19(b) because it found that the tribe was not a necessary party under Rule 19(a).
 3 And, in any event, the court in *Diné Citizens* considered and distinguished *Southwest*
 4 *Center* in its analysis under Rule 19(a). 932 F.3d at 854-56.

5 Plaintiffs fail to acknowledge the “wall of circuit authority” supporting
 6 dismissal where a tribe is a necessary party. *White v. Univ. of Cal.*, 765 F.3d 1010,
 7 1028 (9th Cir. 2014); *Diné Citizens*, 932 F.3d at 858; *Jamul*, 974 F.3d at 998;
 8 *Deschutes*, 2021 WL 2559477 at *7. Plaintiffs instead argue (at 28) that *Deschutes*
 9 and *Diné Citizens* were wrongly decided because they ignored *Southwest Center*, but
 10 that is untrue, and *Deschutes* and *Diné Citizens* are binding Ninth Circuit precedent
 11 all the same.

12 Finally, Plaintiffs are wrong to suggest that the public interest exception to
 13 allow the litigation to continue in the Tribe’s absence applies here. The court in
 14 *Diné Citizens* rejected the very same argument. Plaintiffs *Diné Citizens*, like here,
 15 argued that interest groups’ litigation to enforce federal agency NEPA compliance
 16 could proceed under the public rights exception in the absence of the Navajo Nation
 17 entity. 932 F.3d at 858. The Ninth Circuit disagreed, holding that the public rights
 18 exception is inapplicable to litigation that would invalidate entitlements already
 19 granted and therefore threaten existing legal rights. 932 F.3d at 859-60. In so
 20 holding, the Ninth Circuit expressly distinguished *Conner v. Burford*, 848 F.2d 1441
 21 (9th Cir. 1988), the case on which Plaintiffs here principally rely. The Ninth Circuit
 22 explained that in *Conner*, the contracts at issue themselves were not invalidated. *Id.*
 23 at 859. In contrast, the leases and rights-of-way at issue in *Diné Citizens* (as here)
 24 “are valid only with approval by BIA.” *Id.* at 860. “If the Record of Decision that
 25 granted such approval were vacated, then those agreements would be invalid and [the
 26 tribal entity] would lose all associated legal rights.” *Id.* So too here. If Plaintiffs
 27 succeed in obtaining vacatur of the ROD that granted BIA’s approval of the Lease
 28

1 between Terra-Gen and the Tribe, the Lease will be invalid and the Tribe will lose all
2 associated legal rights.

3 Plaintiffs (at 30) cite Tenth Circuit precedent, *Many Goats v. Kleppe*, in urging
4 the Court to apply the public rights exception, but *Diné Citizens* specifically
5 addressed and disagreed with that Tenth Circuit decision. 932 F.3d at 860-61. Even
6 assuming that Plaintiffs are pursuing public rights and not their own pecuniary
7 interests here,⁴ Ninth Circuit precedent is clear that the public interest exception does
8 not apply if “litigation threatens to destroy an absent party’s legal entitlements,” as
9 this case threatens the Tribe’s contractual rights under the Lease. *Id.* at 860 (citing
10 *Kescoli and Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992)).

11 III.

12 CONCLUSION

13 For the reasons stated above, the Tribe respectfully requests that the Court grant
14 its Motion to Dismiss for failure to join an indispensable party.

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16 DATED: July 15, 2021

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19 By: /s/ Rebecca L. Reed

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CAMPO BAND OF DIEGUENO
MISSION INDIANS

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25 ⁴ A recent media account cites local court records summarizing the results of prior
26 litigation by Plaintiffs Donna Tisdale and Backcountry Against Dumps: “Between
27 2011 and 2013, she and her organizations settled lawsuits with six different solar and
28 wind developers for more than \$10 million, and 500 acres of public land worth \$2.5
million, according to documents filed in California state court.” *See* Victoria
McKenzie, “Feds Try To Kill Suit Over Tribal Wind Energy Project,” *Law360* (Jul.
8, 2021).