2. Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, No. 17-17320, 2019 WL 3404210 (9th Cir. 2019)*

A coalition of regional, national, and tribal conservation organizations{[1]} sued the United States Department of the Interior, its Secretary, and several bureaus within the Agency (collectively, Federal Defendants),{[2]} alleging violation of the Endangered Species Act{[3]} (ESA) and the National Environmental Policy Act{[4]} (NEPA) for multiple agency actions that reauthorized coal mining activities on land reserved to the Navajo Nation. The Navajo Transitional Energy Company (NTEC), a tribal-owned corporation that owns the mine at issue in this case, intervened in the action for the purpose of moving to dismiss under Federal Rules of Civil Procedure 19 and 12(b)(7),{[5]} arguing that NTEC was a required party that could not be joined due to tribal sovereign immunity and therefore the lawsuit could not proceed. The United States District Court for the District of Arizona agreed with NTEC and granted its motion to dismiss.{[6]} On appeal the Ninth Circuit affirmed, holding that NTEC had a legally protected interest in the subject matter of the suit, that the Federal Defendants could not adequately represent NTEC's interest in the litigation, that NTEC could not be joined due to tribal sovereign immunity, and that the action could not, "in equity and good conscience,"{[7]} proceed without NTEC. The Ninth Circuit also refused to apply the public rights exception in favor of the plaintiffs.

This action resulted from changes and renewals to lease agreements, rights-of-way, and government issued permits relating to the 33,000-acre Navajo Mine. The Navajo Mine (Mine) is the sole producer of coal for the Four Corners Power Plant (Power Plant), both of which operations are located on tribal land of the federally recognized Navajo Nation within New Mexico. The Mine and Power Plant are vital sources of revenue for the Navajo Nation, generating between 40 and 60 million dollars per year for the tribe.

In 2011, Intervenor-Defendant Arizona Public Service Company (APS), the operator of the Power Plant, and the Navajo Nation amended the lease governing Power Plant operations, sought renewal from the Department of the Interior of the existing surface mining permit for the Mine, and a new permit that would allow operations to expand into another part of the lease area. The lease amendments and rights-of-way could not be issued without approval from multiple bureaus within the Department of Interior.

The Department of Interior's Office of Surface Mining Reclamation and Enforcement (OSMRE) engaged in formal consultation with the U.S. Fish and Wildlife Service, as required by the ESA when a project "may affect listed species or critical habitat."{[8]} Fish and Wildlife issued a final Biological Opinion that concluded the proposed mining action would not jeopardize the continued existence of any of the threatened and endangered species evaluated. Based upon this Biological Opinion, OSMRE developed an Environmental Impact Statement (EIS) pursuant to NEPA in May 2015. In July 2015, OSMRE and the Bureau of Indian Affairs (BIA) issued a Record of Decision that approved the continued operation and expansion of the Mine.

Upon obtaining the permits, APS and NTEC made considerable financial investments in the Power Plant and Mine and implemented the conservation measures required by the Record of Decision. NTEC moved mining operations into the areas designated by the new permit and acquired a new 115 million dollar line of credit, secured by the Mine as an asset of NTEC.

[[1]]Plaintiffs included Dine Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Amigos Bravos, Sierra Club, and Center for Biological Diversity.[[1]]

[[2]] Defendants included the Bureau of Indian Affairs, United States Department of Interior, United States Office of Surface Mining Reclamation and Enforcement, United States Bureau of Land Management, David Bernhardt in his official capacity as Secretary of the U.S. Department of the Interior, and United States Fish and Wildlife Service.[[2]]

[[3]] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).[[3]]

[[4]] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).[[4]]

[[5]] FED. R. CIV. P. 12(b)(7) & 19.[[5]]

[[6]] Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs, (No. CV-16-08077-PCT-SPL), 2017 WL 4277133 (D. Ariz. 2017).[[6]]

[[7]] FED. R. CIV. P. 19(b).[[7]]

[[8]] 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(a) (2019).[[8]]

In April 2016, the plaintiff conservation organizations sued the federal defendants. Plaintiffs alleged that Fish and Wildlife's Biological Opinion violated the ESA, and therefore BIA, OSMRE, and BLM's reliance upon the Biological Opinion contravened the ESA. In addition, plaintiffs also alleged NEPA violations, asserting that federal defendants constructed an unlawfully narrow purpose and need statement for the project in the EIS, which failed to consider reasonable alternatives and to provide proper analysis of the impacts of the mining operations.

After federaldefendants answered, NTEC intervened in the action for the sole purpose of filing a motion to dismiss under Federal Rules of Civil Procedure 19 and 12(b)(7).{{9}} Federal defendants opposed NTEC's motion to dismiss, arguing that they were the only party required to defend actions based on alleged violations of the ESA and NEPA. The district court granted NTEC's motion to dismiss and plaintiffs appealed. The Ninth Circuit reviewed the district court's decisions to dismiss and action for failure to join a required party for abuse of discretion, but reviewed its underlying legal conclusions de novo.

The Ninth Circuit first held that NTEC was a required party that must be joined if feasible because it had a legally protected interest in the subject matter of this suit that would be impaired by its absence. A person or entity is a required party and must be joined if feasible if either "in that [party]'s absence, the court cannot accord complete relief among existing parties"; or if "that [party] claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party]'s absence may . . . as a practical matter impair or impede the [party]'s ability to protect the interest" or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."{{10}}

The Ninth Circuit determined NTEC had a legally protected interest, reasoning that if the plaintiffs succeeded in their challenge to agency actions, NTEC's interest in the existing lease, rights-of-way, and surface mining permits would be impaired, and thus NTEC's expected jobs and revenue would be affected. The court also noted that unlike other cases where the court could tailor the scope of relief available to be only prospective in nature, here it could not adjust relief to avoid disruption of NTEC's legally protected interests. The Ninth Circuit also rejected plaintiffs' argument that NTEC's interests would not be impaired or impeded because existing parties to the suit would adequately represent those interests. The court found that neither the federal defendants nor APS could adequately represent NTEC's interests because although the federal defendants had an interest in defending their NEPA and ESA actions, that interest differed from NTEC's interest in ensuring that the Mine and Power Plant continue to operate and provide profits to the Navajo Nation. APS could also not adequately represent NTEC's interests because APS did not share the Navajo Nation's sovereign interest in controlling its own resources.

Second, the Ninth Circuit held NTEC was an "arm" of the Navajo Nation that enjoyed the Nation's immunity from suit and therefore could not feasibly be joined as a party to the litigation. The court reasoned that because NTEC is wholly owned by the Navajo Nation, is organized pursuant to Navajo law, was created specifically so the Nation could purchase the Mine, and because NTEC's profits go entirely to the Navajo Nation, the company shared the Navajo Nation's tribal sovereign immunity and therefore could not feasibly be joined.

Next, the Ninth Circuit evaluated the final joinder consideration, which requires the court to determine whether, in equity and good conscience, the actions should proceed among the existing parties or should be dismissed.{{11}} The court held that the litigation could not, in good conscience, continue in NTEC's absence. In making this determination, the court considered four factors of Federal Rules of Civil Procedure Rule 19(b).{{12}}

The Ninth Circuit first considered the extent which a judgment rendered in NTEC's absence might prejudice the company, concluding that NTEC would be prejudiced if the lawsuit were to proceed and plaintiffs prevailed given the annual revenue at stake for the Navajo Nation. Second, the court found that its inability to shape relief so as to avoid prejudice similarly favored dismissal since the

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[[9]] FED. R. CIV. P. 12(b)(7) & 19.[[9]]
[[10]] FED. R. CIV. P. 19(a)(1).[[10]]
[[11]] FED. R. CIV. P. 19(b).[[11]]
[[12]] *Id.*[[12]]

Navajo Nation would inevitably be prejudiced if plaintiffs succeed and federal defendants were unable to come to the same decisions as prior to the suit without imposing new restrictions or requirements on the Mine or Power Plant. The third factor requires the court to determine whether a judgment rendered in NTEC's absence would be adequate. The Ninth Circuit found the third factor weighed against dismissal since the judgment would not create conflicting obligations because it would be the Federal Defendants' duty, not NTEC's, to comply with NEPA and the ESA. Fourth, the court considered whether plaintiffs would have an alternate remedy if the suit was dismissed and concluded that they would not. The Ninth Circuit did not find this factor dispositive, however, pointing to case law which held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.{{13}} After considering all four factors, the Ninth Circuit concluded the litigation could not continue in NTEC's absence.

Finally, the Ninth Circuit held the public rights exception did not apply. Plaintiffs and the United States argued that the public rights exception applied because the litigation against the government was to enforce the public right to administrative compliance with the environmental protection standards of NEPA and the ESA. The Ninth Circuit rejected this argument, reasoning that while the plaintiffs only seek a renewed NEPA and ESA process, the implication of their claims is that the federal defendants should not have approved the mining activities in their exact form. Therefore, the relief the plaintiffs seek threatened NTEC's existing legal entitlements to the government-approved leases and permits. Because continuing the litigation without NTEC threatened to destroy their legal entitlements, the public rights exception did not apply.

In sum, the Ninth Circuit affirmed the judgment of the district court, holding that NTEC had a legally protected interest in the subject matter of the suit, that the federal defendants could not adequately represent NTEC's interest in the litigation, that NTEC could not be joined due to tribal sovereign immunity, and that the action could not, "in equity and good conscience,"{{14}} proceed without NTEC. The Ninth Circuit also refused to apply the public rights exception in favor of the plaintiffs.

[[13]] Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1025 (9th Cir. 2002).[[13]]

[[14]] FED. R. CIV. P. 19(b).[[14]]