UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

TERRA-GEN DEVELOPMENT COMPANY, LLC; and CAMPO BAND OF DIEGUENO MISSION INDIANS,

Intervenor-Defendants.

Case No.: 20-CV-2343 JLS (DEB)

ORDER (1) GRANTING CAMPO BAND OF DIEGUENO MISSION INDIANS' MOTION TO DISMISS; (2) OVERRULING PLAINTIFFS' EVIDENTIARY OBJECTIONS; (3) DENYING PLAINTIFFS' MOTION TO STRIKE; AND (4) DENYING AS MOOT FEDERAL DEFENDANTS' AND TERRA-GEN'S PARTIAL MOTIONS TO DISMISS, PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, AND TERRA-GEN'S MOTION TO STRIKE

(ECF Nos. 46, 60, 65, 75, 80, 85, 86)

Presently before the Court is Intervenor-Defendant Campo Band of Diegueno Mission Indians' (the "Tribe") Motion to Dismiss (the "Motion" or "MTD," ECF No. 75), as well as Intervenor-Defendant Terra-Gen Development Company, LLC's ("Terra-Gen") Joinder in the Tribe's Motion ("Joinder," ECF No. 76); the Tribe's Notice of Supplemental Authority (ECF No. 82); Defendants United States Bureau of Indian Affairs (the "BIA"), Darryl LaCounte, Amy Dutschke, United States Department of the Interior, David Bernhardt, and Tara Sweeny's (collectively, "Federal Defendants") Response to the Tribe's Motion ("Fed. Defs.' Resp.," ECF No. 83); Plaintiffs Backcountry Against Dumps, Donna Tisdale, and Joe E. Tisdale's (collectively, "Plaintiffs") Opposition to the Tribe's Motion ("MTD Opp'n," ECF No. 84); Plaintiffs' Objections to Evidence Filed in Support of the Tribe's Motion ("Pls.' Evid. Objs.," ECF No. 85); Plaintiffs' Motion to Strike Portions of Declaration and Memorandum filed by the Tribe in Support of its Motion ("MTS," ECF No. 86); the Tribe's Reply to Plaintiffs' Opposition to the Motion ("Reply," ECF No. 87); the Tribe's Opposition to Plaintiffs' Evidentiary Objections ("Evid. Objs. Opp'n," ECF No. 87-1); and the Tribe's Opposition to Plaintiffs' Motion to Strike ("MTS Opp'n," ECF No. 88). The Court took these matters under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). *See* ECF No. 74.

Having carefully considered the Parties' arguments and evidence and the law, the Court **GRANTS** the Tribe's Motion to Dismiss, **OVERRULES** Plaintiffs' Evidentiary Objections, and **DENIES** Plaintiffs' Motion to Strike. In light of this disposition, the Court further **DENIES AS MOOT** Terra-Gen's and Federal Defendants' Partial Motions to Dismiss (ECF Nos. 46, 60), Plaintiffs' Motion for Preliminary Injunction (ECF No. 65), and Terra-Gen's Motion to Strike (ECF No. 80).

BACKGROUND

Plaintiffs seek judicial review of an approval by the BIA of a lease between the Tribe and Terra-Gen for development of a wind energy project (the "Lease"), to be built principally on the Tribe's reservation (the "Reservation") in San Diego County (the "Project"). *See generally* First Amended and Supplemental Complaint ("FAC," ECF No.

42). As relevant to the present Motion, the Project would involve the construction of, *inter alia*, sixty turbines and fifteen miles of access roads within a 2,200-acre corridor on the Reservation. *Id.* ¶ 2. Because the Project is located on trust land, the BIA reviewed the lease in accordance with 25 U.S.C. § 415 to determine its compliance with various federal laws, including the National Environmental Policy Act ("NEPA"). Declaration of Marcus Cuero in Support of the Tribe's Motion to Intervene ("1st Cuero Decl.," ECF No. 49-2) ¶ 30.[1] The BIA also undertook an environmental review, which resulted in the publication of a Draft Environmental Impact Statement ("EIS") and a Final Environmental Impact Statement ("FEIS") pursuant to NEPA. *Id.* ¶ 31. After holding public meetings on the EIS and FEIS, "on April 7, 2020, the U.S. Department of the Interior's Assistant Secretary for Indian Affairs signed the Record of Decision ("ROD") authorizing BIA approval of the Lease, and then approved the revised and restated Lease between Terra-Gen and the Tribe on May 4, 2020." *Id.*

"The revenue expected to be generated by the Project will become the primary funding source for the Tribal government"; "[t]he Project will . . . provide job opportunities for Tribal Members during construction . . . and once the Project is operational," with "[t]he Lease for the Project requir[ing] Terra-Gen to give preference in hiring to Tribal Members related to the Project"; and "[t]he Lease also provides for an option for the Tribe to purchase the improvements upon the expiration of the 25-year lease term, thus providing sustainable long-term benefits to the Tribe and securing the Tribe's long-term commitment to using its land to generate renewable energy for current and future generations." *Id.* ¶¶ 37, 39–40, 42. As of March 2021, the Tribe had already received over a million dollars in rents and payments under the Lease. *Id.* ¶ 34. Fourteen Tribal Members were employed during the

[1] Plaintiffs object to multiple paragraphs in the Declaration of Marcus Cuero in Support of the Tribe's Motion ("2d Cuero Decl.," ECF No. 75-2). *See generally* Pls.' Evid. Objs.; MTS. For the reasons provided *infra* at 6–9, the Court overrules the Evidentiary Objections and denies the Motion to Strike. However, for the sake of avoiding controversy in this recitation of the relevant facts, the Court instead cites to the substantively identical declaration that Mr. Cuero submitted in support of the Tribe's motion to intervene, to which Plaintiffs did not raise the same objections.

environmental review of the Project, *id.* ¶ 36, and the Project also resulted in a 2019 scholarship program to fund higher education and training that, to date, has provided fifteen scholarships to Tribal Members, *id.* ¶ 35.

On July 8, 2020, Plaintiffs filed their initial Complaint in the United States District Court for the Eastern District of California (the "Eastern District"). *See generally* ECF No. 1. Federal Defendants moved to transfer venue to this District. *See* ECF No. 5. Shortly thereafter, Terra-Gen filed a motion seeking to intervene as a defendant in the action. *See* ECF No. 6. Ultimately, the Eastern District granted both motions, *see* ECF Nos. 22–23, and the action was transferred to this District and assigned to the Honorable Roger T. Benitez, *see* ECF Nos. 25–26. The action was subsequently reassigned to this Court. *See* ECF Nos. 35–36.

Both Terra-Gen and Federal Defendants moved to dismiss, *see* ECF Nos. 34, 40, and Plaintiffs filed the operative FAC in lieu of opposing the motions, prompting the Court to deny the motions to dismiss as moot, *see* ECF No. 43. The FAC asserts three claims: (1) violation of NEPA; (2) violation of the Migratory Bird Treaty Act; and (3) violation of the Bald Eagle and Golden Eagle Protection Act. *See generally* FAC. Plaintiffs primarily seek declaratory and injunctive relief, in addition to attorneys' fees. *See id.* ¶ 181.

Both Terra-Gen and Federal Defendants have filed partial motions to dismiss, which remain pending before the Court. *See* ECF Nos. 46, 60. Meanwhile, the Tribe filed a Motion to Intervene for a Limited Purpose on March 3, 2021, *see* ECF No. 49, and Plaintiffs filed a Motion for Preliminary Injunction on May 19, 2021, *see* ECF No. 65. Following briefing by the Parties, *see* ECF Nos. 68–72, the Court determined that it would be most efficient for the Court and the Parties to decide the Motion to Intervene first, *see generally* ECF No. 73. The Court indicated that, "[d]epending on the outcome of said motion, the Court will request briefing and next decide the Tribe's proposed motion to dismiss." ECF No. 73 at 2.

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On June 14, 2021, the Court granted the Tribe's Motion to Intervene. *See generally* ECF No. 74 (the "Intervention Order"). In accordance with the Intervention Order, the Tribe filed the present Motion to Dismiss on June 17, 2021. *See* ECF No. 75.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(7) permits a defendant to move to dismiss a complaint for failure to join a necessary party under Federal Rule of Civil Procedure 19. Rule 19 sets forth a method to determine whether a party is so "indispensable" to an action that the case must be dismissed absent the party's joinder. The moving party has the burden of demonstrating that dismissal is appropriate. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

To determine whether a party is "indispensable" under Rule 19, a court conducts a three-part inquiry. *See* Fed. R. Civ. P. 19; *see also Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 996 (9th Cir. 2020). First, the court determines if the absent party is "necessary" to the dispute. Fed. R. Civ. P. 19(a). The court next determines whether joinder is feasible. *See Jamul*, 974 F.3d at 996. If the party is necessary and cannot be joined, the court next determines if the absent party is "indispensable" such that "in equity and good conscience" the suit should be dismissed. Fed. R. Civ. P. 19(b). "[This] inquiry is a practical one and fact specific." *Makah Indian Tribe*, 910 F.2d at 558 (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118–19 (1968)). "[It] is designed to avoid the harsh results of rigid application." *Id.* (citing *Eldredge v. Carpenters 46 N. Cal. Joint Apprenticeship & Training Comm.*, 662 F.2d 534, 537 (9th Cir. 1981)).

Rule 19(a) sets forth two circumstances pursuant to which an absent party is a required or "necessary" party. First, an absent party must be joined if, "in that person's absence, the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A). Second, joinder of an absent party is required if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring

double, multiple, or otherwise inconsistent obligations because of the interest." *Id.* 19(a)(1)(B).

"Only if [an] absent part[y is] 'necessary' and cannot be joined must the court determine whether 'in equity and good conscience' the case should be dismissed under [Rule] 19(b)." *Makah Indian Tribe*, 910 F.2d at 559. To make this determination, the court must consider the following factors: "(1) the extent to which a judgment rendered in the [party]'s absence might prejudice that [party] or the existing parties; (2) the extent to which any prejudice could be lessened or avoided . . . ; (3) whether a judgment rendered in the [party]'s absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b); *Makah Indian Tribe*, 910 F.2d at 559–60. If, after considering these factors, the court finds that the action cannot proceed in equity and good conscience, "a motion to dismiss under Rule 12(b)(7) for failure to join a party is properly granted." *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 851 (9th Cir. 2019).

In ruling on a Rule 12(b)(7) motion, the court "accept[s] as true the allegations in Plaintiff's complaint and draws all reasonable inferences in Plaintiff's favor," *Paiute-Shoshone Indians of Bishop Community of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 996 n.1 (9th Cir. 2011), but "the court may consider evidence outside the pleadings" as well, *Camancho v. Major League Baseball*, 297 F.R.D. 457, 460–61 (S.D. Cal. 2013) (quoting *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960)).

ANALYSIS

I. Plaintiffs' Evidentiary Objections and Motion to Strike

Plaintiffs filed both Evidentiary Objections to various statements made in the Declaration of Marcus Cuero in Support of the Tribe's Motion ("2d Cuero Decl.," ECF No. 75-2) as well as a Motion to Strike essentially the same portions of the Second Cuero Declaration and any references thereto in the Tribe's Memorandum of Points and Authorities. *See generally* Pls.' Evid. Objs.; MTS. Plaintiffs base their objections primarily on the "Best Evidence Rule," arguing that the Lease entered into by the Tribe

and Terra-Gen should have been produced and used as evidence rather than Mr. Cuero's statements about the same. *See generally id.*

The Tribe opposes, arguing that the Best Evidence Rule does not apply to evidence of the "purpose and effect" of a document like the Lease and that Mr. Cuero's statements are not being offered to prove the contents of a writing. *See generally* Evid. Objs. Opp'n. The Tribe further argues that Plaintiffs' Motion to Strike is duplicative of their Evidentiary Objections to the extent it seeks to strike paragraphs from the Second Cuero Declaration, and that the Motion to Strike portions of the Tribe's Memorandum of Points and Authorities should be denied because Plaintiffs offer no authority to support the request. *See generally* MTS Opp'n.

As an initial matter, the Court agrees that the proper vehicle for Plaintiffs' objections to statements contained within the Second Cuero Declaration is evidentiary objections rather than a motion to strike. *See Forest Grove Sch. Dist. v. Student*, No. 3:14-CV-00444-AC, 2018 WL 1762738, at *2 (D. Or. Apr. 12, 2018) ("The proper vehicle for striking material that is not part of the pleadings is an evidentiary objection.") (citations omitted); *Shelton v. Reinke*, No. 3:11-CV-00064-BLW, 2013 WL 1319630, at *11 (D. Idaho Mar. 28, 2013) (noting that motions to strike are limited to pleadings and construing motions to strike filed in the case as objections to the materials filed by the opposing party), *aff'd*, 585 F. App'x 359 (9th Cir. 2014). Accordingly, to the extent the Motion to Strike seeks to strike paragraphs from the Second Cuero Declaration, the Court **DENIES** it as duplicative of Plaintiffs' Evidentiary Objections. The Court further agrees that Plaintiffs provide no authority authorizing the striking of portions of a brief, and that authority within the Ninth Circuit appears to disapprove of such a motion. *See generally* MTS Opp'n; *see, e.g.*, *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. CV 01-640RE, 2005 WL 878602, at *3 (D. Or. Apr. 8, 2005) (denying motion to strike memorandum in support of motion but noting that court would disregard arguments raised therein to the extent they relied on stricken material). Accordingly, the Court also **DENIES** the Motion to Strike to the extent it seeks to strike portions of the Tribe's Memorandum of Points and Authorities.

Turning, then, to Plaintiffs' Evidentiary Objections, the Court first finds that Plaintiffs have likely waived their arguments, given that the Tribe filed a substantively identical declaration from Marcus Cuero, the First Cuero Declaration, in support of its Motion to Intervene, and Plaintiffs failed to raise the instant objections to identical or substantially similar statements in that declaration. *See, e.g.*, *CSL, L.L.C. v. Imperial Bldg. Prod., Inc.*, No. C 03-05566 JCS, 2006 WL 3526924, at *9 (N.D. Cal. Nov. 21, 2006) (denying motion to strike in part because "the objections are untimely to the extent they address declarations that were filed long before the hearing"); *U.S. Equal Opportunity Emp. Comm'n v. GNLV Corp.*, No. 206CV01225BESPAL, 2009 WL 10679135, at *3 (D. Nev. June 2, 2009), *rev'd in part*, 427 F. App'x 599 (9th Cir. 2011) (noting that, "[w]hile the Federal Rules of Civil Procedure do not prescribe a specific time period during which a party must move to strike an affidavit, the trial court must exercise its discretion in deciding whether a party has timely objected to or waived its right to object to an affidavit," and denying motion to strike where party failed to object to evidence in original opposition to motion) (citing *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Siliconix Inc.*, 726 F. Supp. 264, 268 (N.D. Cal. 1989)).

Even overlooking this legitimate concern, however, the Court finds that Plaintiffs' Evidentiary Objections fail on the merits. Plaintiffs object to paragraph 29 of the Second Cuero Declaration on the ground of hearsay, arguing that "Mr. Cuero's statement is an out-of-court statement offered to prove the truth regarding the opinions and motivations of the General Council." Evid. Objs. at 2. However, Mr. Cuero declares under penalty of perjury that he has personal knowledge of the matters set forth in his declaration, *see* 2d Cuero Decl. ¶ 4, and thus "[his] statement is not hearsay, as he is testifying as to what occurred at meetings at which he was personally present. Thus, his statement is not 'a statement, other than one made by the declarant while testifying at the current trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *Leicht v. Sw. Carpenters Pension Plan*, No. SACV 12-00354 SJO, 2013 WL 1729558, at *4 (C.D. Cal. Apr. 22, 2013) (quoting Fed. R. Evid. 801(c)), *aff'd*, 606 F. App'x 360 (9th Cir. 2015).

The remainder of Plaintiffs' objections are based on the "Best Evidence Rule," which provides that "[a]n original writing, recording, or photograph is required in order to prove its content." Fed. R. Evid. 1002. However, "[t]he rule does not set up an order of preferred admissibility, which must be followed to prove any fact. It is, rather, a rule applicable only when one seeks to prove the contents of documents or recordings." *United States v. Gonzales-Benitez*, 537 F.2d 1051, 1053–54 (9th Cir. 1976) (citing Fed. R. Evid. 1002). Thus, "'[t]he [best evidence] rule is not applicable when a witness testifies from [p]ersonal knowledge of the matter, even though the same information is contained in a writing.'" *Vyas v. Vyas*, No. CV1502152RSWLDFMX, 2017 WL 3841809, at *5 (C.D. Cal. Sept. 1, 2017) (citation omitted), *aff'd*, 765 F. App'x 195 (9th Cir. 2019); *see also Campbell-Thomson v. Cox Commc'ns*, No. CV-08-1656-PHX-GMS, 2010 WL 1814844, at *2 n.2 (D. Ariz. May 5, 2010) ("While Plaintiff asserts that the best evidence rule requires Cox to submit a map of each zone, the contents of a map are not at issue. Instead, the relevant factual inquiry concerns the configuration of the geographic zones. Testimony from those who configured and who are familiar with the geographic zones is therefore admissible to establish the nature of these zones.") (citing *Gonzales-Benitez*, 537 F.2d at 1053–54).

Plaintiffs argue that Mr. Cuero's statements concerning the General Counsel resolution approving the Lease, the Lease itself, and the ROD violate the Best Evidence Rule, and that the documents themselves—particularly the Lease, which has not been produced—are the only evidence the Tribe may rely on to prove the statements at issue. *See generally* Pls.' Evid. Objs.; MTS. The Court, however, disagrees. The statements in question are not being offered to prove the contents of the documents at issue. Mr. Cuero's statements are based on his personal knowledge as Chairman of the Tribe and/or a member of the Executive Committee, as well as his membership in the General Council. *See* 2d Cuero Decl. ¶¶ 1–2, 9. Thus, he is competent to testify as to the matters to which Plaintiffs object, and his statements do not purport to prove actual provisions within those documents. Accordingly, the Court **OVERRULES** Plaintiffs' Evidentiary Objections.

II. The Tribe's Motion to Dismiss

A. Summary of the Parties' Positions

The Tribe moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(7), contending it is a necessary party given that it has a legally protected interest in the negotiated and approved Lease that will be impaired absent its involvement given that its interests align with neither Federal Defendants' nor Terra-Gen's. ECF No. 75-1 ("Mot. Mem.") at 17–21. The Tribe further asserts that it cannot be joined due to tribal sovereign immunity. *Id.* at 21–22. The Tribe next argues that this action cannot proceed without it, as it will suffer prejudice for the same reasons that it is a necessary party and because relief cannot be shaped in a way to avoid that prejudice. *Id.* at 23–24. The Tribe concedes that a judgment rendered in its absence would be adequate and assumes that Plaintiffs' lack of an alternative remedy weighs against dismissal, but nonetheless argues that "'the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.'" *Id.* at 24–25 (quoting *Dine Citizens*, 932 F.3d at 858). Finally, the Tribe asserts that the public rights exception does not apply because "[t]he Ninth Circuit has routinely declined to apply the public rights exception in actions involving impairment to existing leases of tribal land." *Id.* at 25 (citing *Dine Citizens*, 932 F.3d at 859–60).

Terra-Gen joins the Tribe's Motion, generally making the same arguments advanced by the Tribe. *See generally* Joinder. Likewise, Federal Defendants "do not dispute that the Motion to Dismiss should be granted under the current state of the law in the Ninth Circuit," Fed. Defs.' Resp. at 4, but nonetheless note that "the position of the United States is that it is generally the only required party in litigation challenging final agency action under the Administrative Procedure Act," *id.* at 1.

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Plaintiffs, however, vociferously oppose the Tribe's Motion.[2] Plaintiffs claim that the Tribe is not a necessary party because the Tribe has no legally protected interest given that "the Project has not yet been constructed and there is no existing operation to be shut down." MTD Opp'n at 23. Plaintiffs argue that "future *potential* revenue . . . is simply a speculative financial stake in the outcome of the litigation." *Id.* at 23–24 (citations omitted) (emphasis in original). Should the Court find that the Tribe had a legally protected interest, Plaintiffs claim the BIA and Terra-Gen adequately protect that interest. *Id.* at 24–25. And, even should the Court find that the Tribe is a necessary party, Plaintiffs contend that the Tribe is not indispensable, given that "this suit is directed at BIA's failures to comply with the law, and any relief can and should be tailored to address those failures." *Id.* at 27. Plaintiffs assert that, "when the harms are appropriately balanced, equity and good conscience require this Court to reach the merits of Plaintiffs' claims." *Id.* at 28–29. Additionally, Plaintiffs claim that the public rights exception applies to their suit, as "Plaintiffs' claims can be tailored so that they do not destroy the legal entitlements of the absent tribe" and "are directed at the BIA's inadequate environmental review in approving the Tribe's lease with Terra-Gen, rather than at the Tribe's legitimate interest under applicable law to manage its Reservation to benefit its members." *Id.* at 29.

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[2] Plaintiffs devote the bulk of their Opposition to arguments that are irrelevant to the present Motion. For example, Plaintiffs argue that the Tribal Counsel did not approve the Project, *see* Opp'n at 7–9; however, as the Court noted in the Intervention Order, the Court lacks authority to rule on issues of tribal governance, *see* Intervention Order at 6 n.1. Plaintiffs also point out that the Federal Aviation Administration ("FAA") granted Plaintiffs' Petition for Review of the FAA's Determinations of No Hazard to Air Navigation for the Project, *see* Opp'n at 12–14, but ultimately any FAA approvals are a separate question from Plaintiffs' instant challenges to the Lease and the BIA's approval of the same. Finally, Plaintiffs devote many pages to the allegedly adverse environmental impacts of the Project on both Tribal Members and the community, *see id.* at 9–10, 14–21, but those issues have no bearing on the Court's Rule 19 analysis. Further, to the extent that Plaintiffs purport to speak on behalf of Tribal Members and their interests—*see, e.g.*, *id.* at 20–21—the Court acknowledges that not all Tribal Members may agree with the Tribe's position, but the fact remains that the Tribe is representing that it has approved the Project, wishes it to go forward, and seeks dismissal of Plaintiffs' challenges via the present Motion.

B. Is the Tribe a Necessary Party?

The Tribe grounds its argument that it is a necessary party in Rule 19(a)(1)(B)(i). Accordingly, the Court must decide whether: (1) the Tribe "claims an interest relating to the subject of the action" and, if so, (2) "disposing of the action in the [Tribe]'s absence may . . . as a practical matter impair or impede the [Tribe]'s ability to protect the interest."

The Ninth Circuit has noted that "the finding that a party is necessary to the action is predicated only on that party having a *claim* to an interest." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (emphasis in original). "Just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party." *Id.* Ultimately, "[a] legally protected interest need not be 'property in the sense of the due process clause.'" *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, No. CV-16-08077-PCT-SPL, 2017 WL 4277133, at *2 (D. Ariz. Sept. 11, 2017), *aff'd*, 932 F.3d 843 (9th Cir. 2019) (quoting *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002)). Nonetheless, "[t]his interest must be more than a financial stake . . . and more than speculation about a future event." *Makah Indian Tribe*, 910 F.2d at 558 (citations omitted). "Accordingly, an interest that 'arises from terms in bargained contracts' may be protected, but [the Ninth Circuit] ha[s] required that such an interest be 'substantial.'" *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 970 (9th Cir. 2008) (citing *Am. Greyhound Racing*, 305 F.3d at 1023).

The Tribe argues that, "[h]ere, as in *Diné Citizens*, the action brought by Plaintiffs, if successful, will impair the Tribe's legally protected interest in the Lease between the Tribe and Terra-Gen, stop the Project, prevent the Tribe from receiving its benefits, and frustrate the Tribe's ability to 'use its natural resources as it chooses.'" Mot. Mem. at 19 (citing *Dine Citizens*, 932 F.3d at 853, 857). Plaintiffs, meanwhile, contend that, unlike in *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996), or *Dine Citizens*, 932 F.3d 843, "the Tribe's interest in the Project is limited to the potential revenue the Tribe would receive,"

which is only "a speculative financial stake in the outcome of the litigation, not a legally protected interest." MTD Opp'n at 23–24 (citations omitted). In its Reply, the Tribe asserts that "Plaintiffs offer no support for their incorrect assertion . . . that there can only be a legally protected interest under Rule 19 if the case involves 'existing activities', e.g., the wind project must be operating." Reply at 6. Indeed, the Tribe claims "that is a misrepresentation of controlling Ninth Circuit precedent, which actually stands for the proposition that there may only be a sufficient legally protected interest where the requested relief would 'impair a right already granted,' such as the federally approved Lease already granted here." *Id.* (citing *Dine Citizens*, 932 F.3d at 852). The Tribe further notes that the recent Ninth Circuit decision *Jamul*, 974 F.3d 984, "uph[eld] dismissal of litigation under Rule 19 for failure to join a necessary sovereign tribal entity" where "a casino . . . was not yet fully constructed or operational." *Id.* (citation omitted).

The Court agrees with the Tribe that it adequately claims a legally protected interest relating to this action. The law in the Ninth Circuit is clear that an *interest* rather than a formal property right is sufficient; accordingly, contrary to Plaintiffs' arguments, that the Project is neither built nor operational is not dispositive. *Shermoen*, 982 F.2d at 1317; *see, e.g.*, *Jamul*, 974 F.3d 984 (finding Indian tribe to be indispensable party in suit alleging that federal government failed to comply with NEPA in approving gaming ordinance and management contract and seeking to enjoin further construction of a casino); *Am. Greyhound Racing*, 305 F.3d at 1023 (concluding tribe had cognizable and substantial interest in bargained land leases not yet approved by Secretary of the Interior); *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999) (rejecting argument that at-issue leases between Indian tribes "do not become effective until the leases are approved by Secretary Babbitt," and because "[n]one of the leases has been approved as yet . . . , the Tribe lacks a vested interest in the leases and lacking such an interest it has no legally protected interest that may be impaired or impeded by the present action"); *see also Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, No. 120CV00706DADEPG, 2021 WL 600952, at *5 (E.D. Cal. Feb. 16, 2021) (finding absent contractors to be "necessary" parties with

legally protected interests in contracts, even though contracts had not been judicially confirmed in state court as required by provisions within the contracts). At any rate, the Tribe *has* already realized benefits from the Lease. *See* 1st Cuero Decl. ¶¶ 34–36 (noting that the Tribe has already received over a million dollars in rents and payments under the Lease, fourteen Tribal Members were employed during the environmental review of the Project, and Tribal Members have received fifteen scholarships pursuant to a 2019 scholarship program to fund higher education and training established as a result of the Project).

Thus, this case is distinguishable from, for example, *Pilant v. Caesars Enterprise Services, LLC*, in which the district court held that an Indian tribe did not have an interest in the plaintiff's wrongful termination action. *See generally* No. 20-CV-2043-CAB-AHG, 2020 WL 7043607 (S.D. Cal. Dec. 1, 2020). There, the plaintiff had been employed by the defendants as a general manager at a hotel and casino owned by the Rincon Band of Luiseño Indians (the "Rincon Band"). *Id.* at *1. The plaintiff, who claimed to have been constructively terminated because he opposed the decision to reopen the casino in light of the Covid-19 pandemic, brought a wrongful termination action against the defendants. *Id.* The defendants moved to dismiss under Rule 12(b)(7) for failure to join the Rincon Band. *Id.* The court determined that "[t]he Rincon Band does not have a legally protected interest in whether Defendants violated California law with respect to Defendants' employment of [the plaintiff]," and that "any judgment in favor of [the plaintiff] in this case will not impact the Rincon Band's sovereignty or its ability or right to operate the [casino]—it will merely require Defendants to pay money to [the plaintiff]." *Id.* at *3. The court noted that the case was distinguishable from others finding Indian tribes to be indispensable parties, pointing out that, among other differences, the plaintiff was not "challeng[ing] any aspect of Defendants' contract(s) with the Rincon Band," seeking injunctive relief, or "challeng[ing] agreements or seek[ing] to enjoin negotiations between federal or state government entities and the Rincon Band or agency actions affecting the Band." *Id.* at *4–5 (citing, *inter alia*, *Dawavendewa v. Sal River Project Agr. Imp. & Power Dist.*, 276 F.3d

1150, 1155, 1157 (9th Cir. 2002); *Jamul*, 974 F.3d at 990; *Shermoen*, 982 F.2d at 1314; *Dine Citizens*, 932 F.3d at 847; *Am. Greyhound Racing*, 305 F.3d at 1020; *Kescoli*, 101 F.3d at 1307). Here, on the other hand, Plaintiffs *are* challenging the Tribe's extant Lease with Terra-Gen, are seeking to enjoin the Project, and are challenging the BIA's approval of the Project, thus clearly and substantially affecting the Tribe.

The Ninth Circuit's decision in *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, is likewise distinguishable considering the facts before this Court. 375 F.3d 861 (9th Cir. 2004). There, a non-profit organization that advocates for the rights of disabled persons sued two private entities that staged an annual rodeo at an arena owned by a university system that was "a sub-entity of the state of Nevada," alleging discrimination under the Americans with Disabilities Act ("ADA") and seeking an injunction preventing the defendants from operating at the arena until the facility was ADA-compliant. *Id.* at 865–67. One of the defendants moved to join the university system, and the district court granted the motion, in part finding that it "ha[d] a legally protected interest in the outcome of the litigation" as "the entity that owns and operates the [arena] in the most 'direct sense.'" *Id.* at 867. The university system and defendants argued that the university system had a legally protected interest in the action "simply because [the university system] is a signatory to a contract with [one of the defendants]." *Id.* at 880–81. The Ninth Circuit, however, disagreed, noting that the suit in question "is not an action to set aside . . . a contract, an attack on the terms of a negotiated agreement, or litigation seeking to decimate [a] contract." *Id.* at 881 (citations and internal quotation marks omitted) (ellipses and alteration in original). Because the plaintiff only sought the defendants' compliance with the ADA, and "[n]o term of the contract requires discrimination on the basis of disability or precludes [the defendants] from accommodating disabled individuals to the extent Title III requires them to do so," a successful suit would not invalidate or set aside the contract. *Id.* Here, on the other hand, Plaintiffs ask the Court to "[o]rder Defendants to withdraw their Project approvals and their March 2020 FEIS" and to "[p]reliminarily and permanently enjoin Defendants from initiating or permitting

any activities in furtherance of the Project that could result in any change or alteration of the physical environment" pending compliance with federal law. FAC at Prayer for Relief. Because the Lease "allow[s] Terra-Gen to develop, construct, operate, and maintain renewable energy generation facilities on land within the Tribe's Reservation boundaries," *id.* ¶ 1, should Plaintiffs prevail, the relief they seek would essentially destroy the Lease.

Further, in *Disabled Rights Action Committee*, the Ninth Circuit noted that a victory by the plaintiff would not destroy the university system's bargained-for rights, given that "there is no allegation that [the university system] had as an objective in negotiating the contract, let alone a primary objective, preservation of a physically inaccessible venue." *Id.* at 882. In so finding, the Ninth Circuit distinguished *Dawavendewa*, in which "the Navajo Nation had specifically bargained for [a challenged] hiring preference as the primary consideration for the lease, so the invalidation of that provision would essentially decimate the Nation's bargained-for rights." *Id.* (citing *Dawavendewa*, 276 F.3d at 1157). Here, too, the Tribe specifically bargained for certain rights in the Lease, including a hiring preference and an option to purchase the improvements built pursuant to the Project that would "provid[e] sustainable long-term benefits to the Tribe and secur[e] the Tribe's long-term commitment to using its land to generate renewable energy for current and future generations," which would be destroyed should Plaintiffs prevail. 1st Cuero Decl. ¶¶ 40, 42. In addition, the Ninth Circuit acknowledged in *Disabled Rights Action Committee* that, "should [the plaintiff] prevail, [the university system] stands to lose a valuable source of income—not an insubstantial consideration. But a financial stake in the outcome of the litigation is not a legally protected interest [under Rule 19]." *Id.* at 883 (citing *Makah Indian Tribe*, 910 F.2d at 558). Here, on the other hand, a decision in Plaintiffs' favor would not only affect the Tribe financially, but would also impair the Tribe's sovereign interests, including "its use of its property, and its control of its resources, including pursuing its Energy Vision." 1st Cuero Decl. ¶ 46.

In sum, the Court finds that the Tribe has a substantial and legally protected interest in the Lease, and the benefits it already has derived and will continue to derive from the

Lease, that extends beyond a simple financial stake, including the Tribe's sovereign ability to control its resources and the bargained-for hiring preference the Lease contains.

Having so concluded, the Court also finds that the Tribe's ability to protect said interest would be impaired should the Court adjudicate this action absent the Tribe. In *Dawavendewa*, the Ninth Circuit concluded that "a judgment rendered in the [Navajo] Nation's absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the Navajo reservation," as "the Nation has an interest in determining the appropriate balance between lease terms." 276 F.3d at 1157 (citation omitted). There, the Navajo Nation noted that the lease in question "'cost Navajo water, Navajo coal, Navajo prime land, and the inevitable pollution of the Navajo homeland," but that "'[i]t is a bargained for price that the Navajo Nation alone paid in return for jobs for the Navajo people.'" *Id.* (citation omitted). Similarly, the Tribe's resources are "limited to non-arable land, wind, and sun," 1st Cuero Decl. ¶ 8; *id.* ¶ 23, but the Tribe entered into the Lease, which cost it wind and land, in order to generate necessary revenue for self-governance, *id.* ¶ 17.

The Ninth Circuit previously has recognized that "[i]mpairment may be minimized if the absent party is adequately represented in the suit," and that "[t]he United States may adequately represent an Indian tribe unless there is a conflict of interest between the United States and the tribe." *Shermoen*, 982 F.2d at 1318 (quoting *Makah*, 910 F.2d at 558) (internal quotation marks omitted). Plaintiffs conclusorily assert that "the Tribe's interests can be protected by both Terra-Gen and BIA." Opp'n at 27. However, as the Court concluded in the Intervention Order, here, Federal Defendants' interests differ from the Tribe's, given that Federal Defendants' overriding interest must be in complying with environmental laws, an interest that is meaningfully different from the Tribe's sovereign interest in ensuring that the Project is realized. *See* Intervention Order at 9–10 (citing *Dine Citizens*, 932 F.3d at 855; *Jamul*, 974 F.3d at 997; *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 489 F. Supp. 3d 1168, 1180–81 (D. Or. 2020)). Nor can Terra-Gen, which may share the Tribe's pecuniary interests, adequately represent the Tribe's sovereign

interests. *Id.* at 10 (citing *Dine Citizens*, 932 F.3d at 856); *see also Deschutes River Alliance v. Portland Gen. Electric Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021) (rejecting argument that the defendant could adequately represent a tribe's interests because "[the defendant] and the Tribe . . . have potentially divergent interests. [The defendant]'s interests in this litigation begin and end with the Project. By contrast, for the Tribe, the stakes of this litigation extend beyond the fate of the Project and implicate sovereign interests in self-governance . . . ."). Thus, no existing party can represent the Tribe in such a way as to minimize the prejudice the Tribe will suffer should this matter proceed in the Tribe's absence.

In sum, because the Court concludes that the Tribe has a significant interest in the subject of this litigation and that no existing Party in the litigation can adequately represent the Tribe's sovereign interests, the Tribe is a "necessary" party to this litigation.

C. Can the Tribe Be Joined?

Having found that the Tribe is a "necessary" party that must be joined if feasible, the Court must now determine whether the Tribe can, in fact, be joined. The Tribe asserts that it cannot be joined due to its tribal sovereign immunity, given that "Congress has not abrogated any aspect of the Tribe's sovereign immunity with respect to the issues raised in this action, nor has the Tribe waived its sovereign immunity here." Mot. Mem. at 21–22 (citations omitted). As the Tribe notes in its Reply, "Plaintiffs do not dispute that the Tribe has sovereign immunity." Reply at 3. Accordingly, the Court finds that, in light of the Tribe's sovereign immunity, it cannot be joined as a party in this action. *See Jamul*, 974 F.3d at 991 ("Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.") (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991)) (internal quotation marks omitted).

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D. In Equity and Good Conscience, Should the Case Proceed or Be Dismissed?

Given that the Tribe is a party that must be joined if feasible, and that joinder is not feasible given the Tribe's sovereign immunity, the Court now must decide whether, in equity and good conscience, the case should proceed or instead be dismissed. In so deciding, the Court will address each of the factors set forth in Rule 19(b) in turn.

1. Prejudice to the Tribe in Its Absence

The analysis under Rule 19(b) concerning the extent to which a judgment rendered in a party's absence may result in prejudice "'largely duplicates the consideration that made a party necessary under Rule 19(a).'" *Dine Citizens*, 932 F.3d at 857 (quoting *Am. Greyhound Racing*, 305 F.3d at 1025). Like in *Dine Citizens*, the Tribe would be prejudiced if this case were to proceed and Plaintiffs were to prevail, as the Tribe would lose tens of millions of dollars in revenue that it plans to use to fund its governance and "its ability to use its natural resources how it chooses." *Id.*; *see* Mot. Mem. at 19, 23.

Plaintiffs assert that prejudice is not an issue because "the challenged Project is not an ongoing, operating venture already providing jobs, generating power, and supplying revenue," and because "the FAA may require changes to the final configuration of the Project," so, "regardless of this litigation, the Project may never provide the benefits the Tribe assumes will come from its approval." MTD Opp'n at 28. However, the Court rejects these arguments for the reasons provided *supra* at Section II.B. The Court therefore concludes that this factor strongly favors dismissal.

2. The Extent to Which Any Prejudice Could Be Lessened

The Tribe contends that there is no way to shape relief in a way that would avoid prejudicing the Tribe. Mot. Mem. at 23–24. As the Ninth Circuit recognized in *Dine Citizens*:

> Although relief could be shaped to avoid prejudice in the short term, such as by remanding for further administrative review without vacating the permits and approval decisions in the meantime, the [Tribe] inevitably would be prejudiced if Plaintiffs ultimately succeeded and if, after further NEPA and ESA

> processes, Federal Defendants were not able to come to the same decisions without imposing new restrictions or requirements on the [Project].

932 F.3d at 858. As the Tribe correctly contends, it would suffer the same prejudice here. Mot. Mem. at 24. "Additionally, the delay associated with further review of the Project will prejudice the Tribe, which is reliant on the income that will be derived from the Project . . . to fund the programs designed to ensure the welfare of Tribal Members." *Id.*

Plaintiffs argue that "this suit is directed at BIA's failures to comply with the law, and any relief can and should be tailored to address those failures." MTD Opp'n at 27. However, Plaintiffs do not suggest how any relief can be tailored to address those failures in a way that would lessen the prejudice to the Tribe. Rather, as noted *supra* at Section II.B, the relief requested by Plaintiffs clearly would have an adverse impact on the Tribe. Plaintiffs also claim, as they did in their opposition to the Tribe's joinder motion, that "the Tribe's interests can be protected by both Terra-Gen and BIA." MTD Opp'n at 27. However, for the reasons provided *supra* at Section II.B, the Court finds that neither Terra-Gen nor the BIA adequately can represent the Tribe's interests, and therefore representation by these entities would not lessen the Tribe's prejudice. Accordingly, this factor strongly favors dismissal.

3. Whether Judgment in the Tribe's Absence Would Be Adequate

The Tribe concedes that the third factor weighs against dismissal. *See* Mot. Mem. at 24. "A judgment rendered in [the Tribe]'s absence would be adequate and would not create conflicting obligations, because it is Federal Defendants' duty, not [the Tribe]'s, to comply with NEPA and the ESA." *Dine Citizens*, 932 F.3d at 858. Accordingly, the Court has the power to grant the relief requested by Plaintiffs absent the Tribe. *See Shermoen*, 982 F.2d at 1319; *see also* Fed. R. Civ. P. 19, Advisory Comm. Notes – 1966 Amendment ("The third factor—whether an 'adequate' judgment can be rendered in the absence of a given person—calls attention to the extent of the relief that can be accorded among the parties joined.").

4. Whether Plaintiff Would Have an Adequate Remedy If Dismissed

The Tribe also rightfully assumes that the final factor disfavors dismissal. *See* Mot. Mem. at 24. As Plaintiffs assert, "[d]ismissal of this action would leave Plaintiffs without any remedy for BIA's unlawful approval" of the Lease and the Project. MTD Opp'n at 6; *see also Dine Citizens*, 932 F.3d at 858 ("Were this suit dismissed, Plaintiffs would have no alternate forum in which to sue Federal Defendants for their alleged procedural violations under NEPA and the ESA."). Nonetheless, "[the Ninth Circuit] ha[s] recognized that the lack of an alternative remedy 'is a common consequence of sovereign immunity.'" *Dine Citizens*, 932 F.3d at 858 (quoting *Am. Greyhound Racing*, 305 F.3d at 1025).

5. Balancing of the Rule 19(b) Factors

In sum, the first two factors strongly favor dismissal, and the second two weigh against dismissal. The Ninth Circuit has noted that there is a "'wall of circuit authority' in favor of dismissing an action where a tribe is a necessary party," *Dine Citizens*, 932 F.3d at 858 (quoting *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014)), and "'ha[s] regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs,'" *id.* (quoting *Am. Greyhound Racing*, 305 F.3d at 1025). Accordingly, "[a]lthough Rule 19(b) contemplates balancing the factors, when 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 the compelling factor." *White*, 765 F.3d at 1028 (quoting *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994)) (internal quotation marks omitted). In light of the unmitigable prejudice the necessary yet immune Tribe would suffer should this case not be dismissed, the Court concludes that this litigation cannot, in good conscience, continue in the Tribe's absence.

E. Does the Public Rights Exception Apply?

"The public rights exception is a limited 'exception to traditional joinder rules' under which a party, although necessary, will not be deemed 'indispensable,' and the litigation may continue in the absence of that party." *Dine Citizens*, 932 F.3d at 858 (citing *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988)). "The public rights exception is reserved

for litigation that 'transcend[s] the private interests of the litigants and seek[s] to vindicate a public right.'" *Id.* (quoting *Kescoli*, 101 F.3d at 1311). "The public rights exception may apply in a case that could adversely *affect* the absent parties' interests, but the litigation must not *destroy* the legal entitlements of the absent parties for the exception to apply." *Id.* (quoting *Kescoli*, 101 F.3d at 1311) (emphases in original) (internal quotation marks omitted).

Plaintiffs urge the Court to allow this action to proceed under the "public rights" exception. MTD Opp'n at 29–30. Plaintiffs argue that "[their] claims can be tailored so that they do not destroy the legal entitlements of the absent Tribe," and that, "like in *Hayes*[, *Trustee for Paul B. Hayes Fam. Trust, Dated Apr. 30, 2010 v. Bernhardt*, 499 F. Supp. 3d 1071 (N.D. Okla. 2020)], Plaintiffs' claims are directed at the BIA's inadequate environmental review in approving the Tribe's lease with Terra-Gen, rather than at the Tribe's legitimate interests under applicable law to manage its Reservation to benefit its members." *Id.* at 29. Plaintiffs assert that they ask the Court only to enjoin Federal Defendants rather than the Tribe, *id.*, and that "this litigation is not cutting off existing jobs, electricity generation, or revenue streams" given that "Terra-Gen has not received all necessary approvals to commence construction and operation of the Project," *id.* at 30. Because "the relief sought is focused upon BIA's approval activities, and not the *Tribe's* underlying decisions, the public rights exception should [apply]." *Id.* (emphasis in original).

However, the Court finds that this case is like *Dine Citizens* and *Kescoli*, because "the [L]ease[] . . . [is] valid only with approval by BIA. If the Record of Decision that granted such approval were vacated, then th[at] agreement[] would be invalid, and [the Tribe] would lose all associated legal rights." *Dine Citizens*, 932 F.3d at 860; *see also* Reply at 6 (noting that "Plaintiffs seek to invalidate [the Lease] through vacatur of the necessary federal approvals"); *id.* at 8 (similar); *id.* at 9–10 ("If Plaintiffs succeed in obtaining vacatur of the ROD that granted BIA's approval of the Lease between Terra-Gen and the Tribe, the Lease will be invalid and the Tribe will lose all associated legal rights.");

Joinder at 10. Because the litigation would destroy the Tribe's contractual rights under the Lease, the public rights exception cannot apply. Accordingly, this case cannot proceed in the Tribe's absence.

Nor is the Court convinced that this litigation transcends the litigants' private interests. Indeed, the FAC indicates that "Plaintiff BACKCOUNTRY AGAINST DUMPS . . . is a community organization comprising numerous individuals and families residing in eastern San Diego County and Imperial County who will be directly affected by the Project and its connected actions," and that the members of Backcountry Against Dumps "use the area affected by the Project for aesthetic, scientific, historical, cultural, recreational, quiet rural residential and spiritual enjoyment." FAC ¶ 16; *see id.* ¶ 20 (similar). It further alleges that "[c]onstruction and operation of the Project will harm Ms. Tisdale's use and enjoyment of her ranch and the surrounding natural resources, diminish her health, well being and quality of life in her senior years, and jeopardize her lifetime investment in her property." *Id.* ¶ 18; *see also id.* ¶ 19 (same as to Mr. Tisdale). Thus, despite Plaintiffs' protestations to the contrary, *see, e.g.*, MTD Opp'n at 29, it seems their private interests are a significant factor in the bringing of this litigation.

Given that the present litigation appears not to transcend the private interests of the Parties, and in light of the fact that it would destroy the absent Tribe's legal entitlements, the Court finds that the public interest exception does not apply.

CONCLUSION

In light of the foregoing, the Court **GRANTS** the Tribe's Motion to Dismiss (ECF No. 75), **OVERRULES** Plaintiffs' Evidentiary Objections (ECF No. 85), and **DENIES** Plaintiffs' Motion to Strike (ECF No. 86). Further, in light of this disposition, the Court also **DENIES AS MOOT** Terra-Gen's and Federal Defendants' Partial Motions to Dismiss (ECF Nos. 46, 60), Plaintiffs' Motion for Preliminary Injunction (ECF No. 65),

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and Terra-Gen's Motion to Strike (ECF No. 80). As this concludes the litigation in this matter, the Clerk of the Court **SHALL CLOSE** the file.

IT IS SO ORDERED.

Dated: August 6, 2021

Janis L. Sammartino

Hon. Janis L. Sammartino
United States District Judge