

**In the Supreme Court of the United States**

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Diné Citizens Against Ruining Our Environment; San Juan Citizens Alliance;  
Amigos Bravos; Sierra Club; Center for Biological Diversity,  
*Petitioners,*

v.

Navajo Transitional Energy Co. LLC; Arizona Public Service Co.; Bureau of Indian Affairs;  
United States Department of the 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 Interior; United States Fish and Wildlife Service,  
*Respondents.*

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PETITIONERS' APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT  
OF CERTIORARI FROM MARCH 10, 2020 TO MARCH 24, 2020

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To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for  
the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioners Diné  
Citizens Against Ruining Our Environment, et al.,\* request that the time to file a petition for a writ  
of certiorari in this case be extended for 14 days to and including March 24, 2020. The United  
States Court of Appeals for the Ninth Circuit issued its opinion on July 29, 2019, *see* App. A, *infra*,  
and denied a timely petition for rehearing on December 11, 2019, *see* App. B, *infra*. Absent an  
extension of time, the petition therefore would be due on March 10, 2020. Petitioners are filing  
this application at least ten days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction  
under 28 U.S.C. § 1254(1) to review this case.

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\* Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent corporations and do not issue stock.

## Background

This case poses questions about whether and when non-federal entities are required and indispensable parties in a suit against a federal agency challenging agency action pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*

1. Federal Rule of Civil Procedure 19(a) provides that “[a] person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if,” *inter alia*, “that person claims an interest relating to the subject of the action and is situated so that disposing of the action in the person’s absence may,” *inter alia*, “as a practical matter impair or impede the person’s ability to protect the interest.” Fed. R. Civ. P. 19(a)(1)(B)(i). The Rule further provides that, “[i]f a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed,” in light of a non-exhaustive list of enumerated factors. Fed. R. Civ. P. 19(b).

2. a. The Navajo Mine is located in New Mexico on tribal trust lands of the Navajo Nation, a federally recognized Indian tribe with territory spanning Arizona, Utah, and New Mexico. App. A at 7. The 33,000-acre strip mine produces coal from which the Four Corners Power Plant generates electricity. *Ibid.* The mine, which has operated since the 1960s, operates pursuant to a surface mining permit issued by the Department of the Interior’s Office of Surface Mining Reclamation and Enforcement, pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* App. A at 7. For many years, a private company called BHP Billiton Navajo Coal Co. (BHP Billiton) owned and operated the mine under a lease from the Navajo Nation. *Ibid.*

The Four Corners Power Plant is owned by several utility companies, including respondent Arizona Public Service Co. (APS), which operates the power plant on behalf of all owners pursuant to a decades-old lease agreement with the Navajo Nation. App. A at 7. Under the lease agreement, the mine sells all of its coal exclusively to the power plant, which buys all of its coal exclusively from the mine. *Id.* at 7-8. The Navajo Nation also authorizes easements for rights-of-way over Navajo lands to the power plant; both the Navajo Nation and the Hopi Tribe authorize rights-of-way for power transmission lines on tribal lands. *Id.* at 8. The mine and power plant supply significant revenue for the Navajo Nation. *Ibid.*

b. In 2011, APS and the Navajo Nation amended the lease governing operation of the power plant. App. A at 8. The changes extended the term of the lease through 2041. *Ibid.* BHP Billiton (the owner of the mine at the time) sought a renewal of the existing surface mining permit for the mine and sought a new surface mining permit that would authorize mining activities in a new area within the larger area covered by the mine lease. *Ibid.* In 2013, the Navajo Nation created respondent Navajo Transitional Energy Co. (NTEC) for the purpose of buying the mine from BHP Billiton. *Id.* at 7.

The requests to renew and extend the mine lease and accompanying rights-of-way required approval of several bureaus within the Department of the Interior. App. A at 8. In July 2015, the relevant bureaus issued a Record of Decision, and the Deputy Secretary of the Interior then approved the permit renewal and extension. *Id.* at 9.

3. In 2016, petitioners—a group of conservation organizations—filed suit against the federal agencies and officials responsible for approving the permit renewal and extension, alleging that various agency actions violated the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* App. A

at 10. Petitioners sought declaratory and injunctive relief, including an order remanding the matter to the responsible agencies for further analysis required by the ESA and by NEPA. *Id.* at 11.

After the federal defendants filed an answer, APS intervened. App. A at 11. NTEC also sought to intervene for the limited purpose of filing a motion to dismiss pursuant to Federal Rules of Civil Procedures 19 and 12(b)(7). *Ibid.* The district court granted NTEC's motion to intervene as of right because NTEC now owns the mine. *Ibid.* NTEC then filed a motion to dismiss petitioners' claims, arguing that it is a required party due to its economic interest in the mine, that it cannot be joined because it has tribal sovereign immunity, and that petitioners' action could not proceed in the absence of NTEC. *Ibid.*; App. C, *infra*, at 2. Although dismissal of the case would have left the challenged agency actions in place, the federal defendants joined petitioners in opposing the motion to dismiss, arguing that the federal government is the only required party in an action seeking to enforce compliance with NEPA and the ESA. App. A at 11.

The district court granted NTEC's motion to dismiss. App. C. The court concluded that NTEC has a legally protected interest in the subject matter of the suit under Rule 19(a)(1)(B), which defines which parties are "[r]equired" parties who must be joined if feasible. *Id.* at 3; Fed. R. Civ. P. 19(a)(1)(B). The court further held that the federal defendants could not adequately represent NTEC's interest in the litigation. App. C at 4-6. And the court concluded that NTEC could not feasibly be joined as a party due to its tribal sovereign immunity. *Id.* at 5-7. Acknowledging that Rule 19 allows a suit to proceed without a required party when a court determines that, "in equity and good conscience, the action should proceed among the existing parties," Fed. R. Civ. P. 19(b), the district court concluded that the suit could not proceed without NTEC because of NTEC's tribal sovereign immunity. App. C at 7.

4. Petitioners appealed, and the Ninth Circuit affirmed. On appeal, the federal defendants participated as amicus curiae supporting petitioners' request that the court of appeals reverse the district court's dismissal order. App. A at 28 n.8.

The court of appeals agreed with the district court's conclusion that NTEC has a legally protected interest in the subject matter of this suit. App. A at 14-18. Although the court of appeals recognized both that a legally protected interest must be "more than a financial stake," *id.* at 14 (citation omitted), and that "an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures," *id.* at 15, the court concluded that NTEC's interest in the lease renewal and extension is legally protected and could be impaired by this suit, which "may have retroactive effects on approvals already granted for mining operations," *id.* at 18. The court went on to hold that no existing party adequately represents NTEC's interest in the litigation. *Id.* at 18-23. The court acknowledged that the federal defendants shared NTEC's interest in defending the challenged agency action, but concluded that that shared interest was insufficient because of the government's "overriding interest . . . in complying with environmental laws such as NEPA and the ESA." *Id.* at 21. The court also held that NTEC could not feasibly be joined in the suit because, as an arm of the Navajo Nation, it enjoys tribal sovereign immunity. *Id.* at 23-24.

Having thus determined that NTEC is a required party that cannot feasibly be joined, the court of appeals then turned to the question "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." App. A at 25 (quoting Fed. R. Civ. P. 19(b)). Considering the factors enumerated in the rule, the court of appeals affirmed the district court's conclusion that the suit could not proceed without NTEC. *Id.* at 25-28. The court of

appeals also rejected the request from petitioners and the United States to apply the so-called “public rights” exception, which permits litigation to proceed without a required party when the suit seeks to vindicate a public right. *Id.* at 28-33; *see Nat’l Licorice Co. v. NLRB*, 309 U.S. 350 (1940). The court acknowledged that petitioners “seek only a renewed NEPA and ESA process,” but concluded that because “the implication of their claims is that Federal Defendants should not have approved the mining activities in their exact form,” the suit “threatens NTEC’s legal entitlements.” App. A at 32-33.

5. Petitioners filed a timely petition for rehearing en banc. After calling for a response, the Ninth Circuit denied the petition on December 11, 2019. App. B.

### **Reasons For Granting An Extension Of Time**

The time to file a petition for a writ of certiorari should be extended for 14 days to and including March 24, 2020, for the following reasons:

1. The forthcoming petition will present one or more important questions of federal law that should be resolved by this Court. When a plaintiff sues a federal agency under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, challenging the agency’s compliance with federal law, the agency (including its officers) is ordinarily the only necessary defendant. The only question to be decided in an APA action is whether the challenged agency action should be set aside, based on the justification articulated by the agency itself. In such cases, the agency is the only necessary party to defend its own action. The APA does not authorize relief against any non-federal entity—and petitioners seek relief only against the federal defendants. The court of appeals’ holding to the contrary undermines important public rights established by Congress. Nothing in Federal Rule of Civil Procedure 19 makes any non-federal entity a required, let alone indispensable, defendant in an APA action. The participation of the relevant agency is adequate to

represent the interests of any party that benefited from the challenged agency action. The Ninth Circuit's holdings to the contrary conflict with decisions of other courts of appeals and should be reversed.

2. Petitioners have only recently retained Sarah Harrington as Supreme Court counsel for the filing of a petition for a writ of certiorari. Ms. Harrington was not involved in any earlier stage of the case. Additional time is necessary and warranted for counsel, among other things, to review the record in the case, research case law in other circuits, and prepare a clear and concise petition for certiorari for the Court's review.

3. No prejudice would arise from the extension. Even with the modest extension requested, and even if respondents obtain a 30-day extension of time to respond to the petition, the Court will be able to consider the petition during this Term.

4. The press of other matters before this Court makes the submission of the petition difficult absent an extension. Petitioners' counsel is counsel or co-counsel in several other cases in which filings are due in this Court in the next several months.

### **Conclusion**

For the foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended for 14 days to and including March 24, 2020.

Respectfully submitted,



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February 21, 2020