

1 Matthew Campbell, Colo. No. 40808*
Jason Searle, Colo. No. 57042*
2 Allison Neswood, Colo. No. 49846*
Malia Gesuale, Colo. No. 59452*
3 NATIVE AMERICAN RIGHTS FUND
250 Arapahoe Avenue
4 Boulder, CO 80302
(t): (303) 447-8760
5 mcampbell@narf.org
searle@narf.org
6 neswood@narf.org
gesuale@narf.org
7

8 *Counsel for the Havasupai Tribe and
the Hopi Tribe*

Paul Spruhan, N.M. No. 12513
Sage G. Metoxen, AZ No.030707**
Louis Mallette, N.M. No. 149453*
Tamara Hilmi Sakijha, N.Y. No.
5844204*
Navajo Nation Department of Justice
2521 Old BIA Building P.O. BOX 2010
Window Rock, AZ 86515
(t): (927) 871-6210
paspruhan@nndoj.org
smetoxen@nndoj.org
lmallette@nndoj.org
tsakijha@nndoj.org

Counsel for the Navajo Nation

9
10 Denten Robinson, AZ No. 24764
DR LAW PLLC
1930 E. Brown Road, Suite 103
11 Mesa, AZ 85203
(t): (480) 500-6656
12 denten@drlawfirm.com

13 *Counsel for the Havasupai Tribe*

14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF ARIZONA**
16

17 Arizona State Legislature, et al.,

18 Plaintiffs,

19 v.

20 Joseph R. Biden, Jr., et al.,

21 Defendants.
22
23
24
25
26
27
28

No. CV-08026-PCT-SMM

**TRIBAL NATIONS' RULE 24
MOTION TO INTERVENE FOR
LIMITED PURPOSE**

1 Pursuant to Federal Rule of Civil Procedure (“FRCP”) 24(a), or, in the
2 alternative 24(b), the Havasupai Tribe (“Havasupai”), the Hopi Tribe (“Hopi”),
3 and the Navajo Nation (collectively, “Tribal Nations”) respectfully move this
4 court to intervene in the above captioned case. The Tribal Nations seek to
5 intervene for the limited purpose of filing a motion to dismiss under Rules
6 12(b)(7) and 19(b). The proposed motion is attached as Exhibit A.

7 The Tribal Nations fulfill all the criteria to intervene as a matter of right
8 under Rule 24(a)(2) or, in the alternative, for permissive intervention under Rule
9 24(b)(1). The Tribal Nations seek intervention in support of the Defendants,
10 President Joseph R. Biden, Jr., et al. (“United States”) with respect to Plaintiffs’
11 claims regarding Baaj Nwaavjo I’tah Kukveni – Ancestral Footprints of the Grand
12 Canyon National Monument (“Ancestral Footprints” or “the Monument”).

13 Counsel for the Tribal Nations conferred with counsel for the parties to
14 determine their position on this motion. The Arizona Legislature was unable to
15 take a position on the Motion to Intervene. The United States indicated that it
16 would wait to see the filed motion before it takes a position on the Motion to
17 Intervene.

18 I. FACTUAL BACKGROUND

19 Ancestral Footprints receives its name from the Indigenous names given
20 to the area by the Havasupai and Hopi. 88 Fed. Reg. 55331, 55331 (Aug. 15, 2023)
21 (“Monument Proclamation”). Baaj nwaavjo (BAAHJ – NUH-WAAHV-JOH)
22 means “where Indigenous peoples roam” in the Havasupai language, and i’tah
23 kukveni (EE-TAH – KOOK-VENNY) means “our ancestral footprints” in the
24 Hopi language. *Id.* At the center of this region is the Grand Canyon. *Id.* Since time
25 immemorial, the Tribal Nations and several other indigenous nations have called
26 this region home. The area retains “profound historical, cultural, and religious
27 significance” to the Tribal Nations. *Id.*

1 In the early years of the National Parks Service, Congress created Grand
2 Canyon National Park (or “the Park”). Sadly, federal “conservation” of the Park
3 was used to justify denying Indigenous Peoples, including the Tribal Nations and
4 their members, access to their homelands. *Id.* The Tribal Nations continued their
5 traditions on the boundaries of the park, still within their sacred homelands.
6 Years later and after significant shifts in federal Indian policy, the Tribal Nations
7 advocated for additional protections to the federal public lands in the region.
8 These lands to the south, northeast, and northwest of the Park contain over “3,000
9 known cultural and historic sites, including 12 properties listed on the National
10 Register of Historic Places, and likely a great many more in areas not yet
11 surveyed.” *Id.* at 55333. They contain numerous archaeological sites and are
12 “havens for sensitive and endangered species – including the California condor,
13 desert bighorn sheep, and endemic plant and animal species” – all of which are
14 themselves “objects of independent historic or scientific interest.” *Id.* at 55332.
15 They contain the markers of historic and continued use by Tribal Nations,
16 including historic trail systems and evidence of ancient habitation. *Id.* at 55333-
17 34. Their landscapes tell a geographic, hydraulic, and biological history that
18 reaches back beyond even Tribal historical memory. *Id.* at 55335.

19 In recognition of these unique resources, on August 8, 2023, President
20 Biden established Ancestral Footprints National Monument. *See id.* at 55331.
21 Within the Proclamation, President Biden sought to empower the Tribal Nations
22 and several other sister tribal nations of the region to provide guidance and
23 recommendations on the management of the Monument. To that end, the
24 Proclamation established the Baaj Nwaavjo I’tah Kukveni – Ancestral Footprints
25 of the Grand Canyon Commission (“Commission”), a self-governing body made
26 up of elected Tribal officers from Indigenous Nations with cultural ties to the
27 region, of which the Tribal Nations are members. *Id.* at 55340.

28

1 The Arizona State Legislature, the Treasurer of the State of Arizona, an
2 Arizona county, and two Arizona towns have now filed this suit seeking to
3 overturn the Monument Proclamation. The Tribal Nations ask that this court
4 grant them intervention in this matter as they have significant interests in the
5 Monument Proclamation and Ancestral Footprints. Because the Tribal Nations
6 will necessarily be impacted by the outcome of this litigation and are not
7 adequately represented by the existing parties, the Tribal Nations are entitled to
8 intervention here.

9 **II. ARGUMENT**

10 **A. The Tribal Nations are Entitled to Intervene as a Matter of Right.**

11 Intervention as of right is governed by FRCP 24(a), which provides, in
12 relevant part:

13 On timely motion, the court must permit anyone to intervene who: . . .
14 (2) claims an interest relating to the property or transaction that is the
15 subject of the action, and is so situated that disposing of the action may
as a practical matter impair or impede the movant's ability to protect
its interest, unless existing parties adequately represent that interest.

16 Fed. R. Civ. P. 24(a).

17 The four-part test under Rule 24(a) requires:

18 (1) the applicant must file a timely motion; (2) the applicant must have
19 a "significantly protectable" interest related to the subject matter of the
20 action; (3) the disposition of the action may practically impair or
21 impede the applicant's ability to protect that interest; and (4) that
interest must not be adequately represented by the existing parties in
the lawsuit.

22 *WildEarth Guardians v. Provencio*, No. CV-16-08010-PCT-SMM, 2016 WL 8738252,
23 at *1 (D. Ariz. Aug. 11, 2016) (citing *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d
24 1173, 1177 (9th Cir. 2011)). In the Ninth Circuit, the requirements of Rule 24(a) are
25 interpreted "broadly in favor of . . . intervention[.]" *United States v. Oregon*, 913
26 F.2d 576, 587 (9th Cir. 1990), and the court's review is "guided primarily by
27 practical and equitable considerations." *Donnelly v. Glickman*, 159 F.3d 405, 409
28

1 (9th Cir. 1998). “When ruling on a motion to intervene as a matter of right, the
2 court accepts all of the applicant’s non-conclusory allegations as true.” *WildEarth*
3 *Guardians*, No. CV-16-08010-PCT-SMM, 2016 WL 8738252, at *1. The Tribal
4 Nations satisfy all requirements for Rule 24(a) intervention as of right.

5 **1. The Tribal Nations’ Motion to Intervene is Timely.**

6 Timeliness is a “threshold requirement for intervention.” *Oregon*, 913 F.2d
7 at 588. Timeliness is “determined by the totality of the circumstances” and hinges
8 on “three primary factors:” (1) the stage of the proceeding at which the applicant
9 seeks to intervene; (2) the prejudice the intervention would cause other parties;
10 and (3) the reason for and length of any delay. *Smith v. Los Angeles Unified Sch.*
11 *Dist.*, 830 F.3d 843, 854 (9th Cir. 2016). The Tribal Nations have filed this motion
12 to intervene just 10 weeks after the case was originally filed, and before the
13 United States has filed any responsive pleading. Granting intervention at this
14 stage would not prejudice any party, as there has been no answer filed, no
15 discovery conducted, and no scheduling conference. Nothing else about the
16 Tribal Nations’ intervention would prejudice any party. And lastly, there has
17 been no delay in the Tribal Nations’ intervention. Thus, the Tribal Nations’
18 motion is timely.

19 **2. The Tribal Nations have Significantly Protectable Interests in** 20 **the Present Litigation.**

21 An applicant has a “significant protectable interest” in an action if “(1) it
22 asserts an interest that is protected under some law, and (2) there is a
23 ‘relationship’ between its legally protected interest and the plaintiff’s
24 claims.” *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (citing *Nw. Forest*
25 *Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996)). In *United States v. City of*
26 *Los Angeles, California*, the Ninth Circuit set out an analytical framework for the
27 interest prong:
28

1 The interest test is not a clear-cut or bright-line rule, because no
2 specific legal or equitable interest need be established. Instead, the
3 interest test directs courts to make a practical, threshold inquiry, . .
4 . and is primarily a practical guide to disposing of lawsuits by
5 involving as many apparently concerned persons as is compatible
6 with efficiency and due process.

7 288 F.3d 391, 398 (9th Cir. 2002) (internal quotation marks, citations, and brackets
8 omitted). As this Court has stated, a “party has a sufficient interest for
9 intervention purposes if it will suffer a practical impairment of its interests as a
10 result of the pending litigation.” *WildEarth Guardians*, No. CV-16-08010-PCT-
11 SMM, 2016 WL 8738252, at *2 (quoting *California ex rel. Lockyer v. United States*,
12 450 F.3d 436, 441 (9th Cir. 2006)).

13 The importance of the Ancestral Footprints Monument to the Tribal
14 Nations and their members, as the stewards of these lands from time
15 immemorial, is centered in the lands’ role as “sacred components of the [Tribal
16 Nations’] origin and history[.]” Monument Proclamation at 55333. The region is
17 the Tribal Nations’ homeland, and within the three Monument areas are locations
18 held sacred by the Tribal Nations and their members. *Id.* Indeed, the
19 Proclamation details the history of how Ancestral Footprints were taken from the
20 Tribal Nations, and their efforts to maintain a relationship with these lands. *Id.* at
21 55331-553333.

22 As a result, the Tribal Nations were extensively involved in advocating for
23 the designation of Ancestral Footprints Monument. As President Biden
24 acknowledged in his remarks at the signing of the Monument Proclamation, the
25 Tribal Nations “fought for decades to be able to return these lands, to protect
26 these lands from mining and development, to clear them of contamination, [and]
27 to preserve their shared legacy for future generations.” DCPD-202300677:
28 Remarks on Signing a Proclamation Establishing the Baaj Nwaavjo I'tah Kukveni
- Ancestral Footprints of the Grand Canyon National Monument Near Tusayan,

1 Arizona, 2023 DAILY COMP. PRES. DOC. (Aug. 8, 2023).

2 The Tribal Nations are also members of the Grand Canyon Tribal
3 Coalition, an intertribal coalition whose member Tribal Nations are each
4 intimately connected to the region. In April of 2023, the Coalition formally
5 launched an effort to call on President Biden to designate Ancestral Footprints as
6 a national monument. House Natural Resources Committee Democrats, *Press*
7 *Conference – Baaj Nwaavjo I'tah Kukveni Grand Canyon National Monument*
8 *Designation Effort*, YOUTUBE (April 20, 2023), [https://www.youtube.com/
9 watch?v=spcVxJllzYo](https://www.youtube.com/watch?v=spcVxJllzYo). These efforts show that the Tribal Nations have a
10 significantly protectable interest in the challenge to the Proclamation—a federal
11 action the Tribal Nations supported and which protects these lands and sacred
12 places for their members. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th
13 Cir. 1995) (a party has a significantly protectable interest “in an action
14 challenging the legality of a measure it has supported.”); *see United States v.*
15 *Carpenter*, 526 F.3d 1237, 1240 (9th Cir. 2008) (concluding a party can have an
16 interest in preserving resources “for the use and enjoyment of their members.”).

17 The Presidential Proclamation at the heart of this case, standing alone, also
18 establishes the Tribes’ personal stake as sovereigns in this litigation. The Tribal
19 Nations have an interest in the monument Commission, established to ensure
20 that the care and management of the monument reflect the Tribal Nations’
21 expertise and values. Monument Proclamation at 55340. Through the
22 Commission, the Tribal Nations, as sovereign nations with government-to-
23 government relationships with the United States, are vested with authority to
24 provide guidance and recommendations on management of their sacred
25 ancestral lands within Ancestral Footprints. *Id.* The Arizona Legislature directly
26 attacks the Commission, seeking to abrogate the collaborative, government-to-
27 government management of Ancestral Footprints as established in the
28

1 Proclamation. This is a significant interest that may be impaired as a result of the
2 pending litigation. *WildEarth Guardians*, No. CV-16-08010-PCT-SMM, 2016 WL
3 8738252, at *2; cf. *Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007) (depriving a
4 sovereign of a procedural right, even if it would not guarantee a substantive
5 result, constitutes injury).

6 The Tribal Nations have several significantly protectable interests in
7 Ancestral Footprints grounded in their historical relationship with the region,
8 their history of advocacy to secure protections for it, and government-to-
9 government relationship in managing the monument through the Commission.

10 **3. The Tribal Nations' Interests May, as a Practical Matter, Be**
11 **Impaired by This Litigation.**

12 If a proposed intervenor "would be substantially affected in a practical
13 sense by the determination made in an action, he should, as a general rule, be
14 entitled to intervene." *Sw. Cntr. for Biological Diversity v. Berg*, 268 F.3d 810,
15 822 (9th Cir. 2001) (quoting Fed. R. Civ. P. 24 advisory committee's note to the
16 1966 amendment). After "finding that a proposed intervenor has a significant
17 protectable interest, courts have little difficulty concluding that the disposition of
18 the case may affect it." *WildEarth Guardians*, No. CV-16-08010-PCT-SMM, 2016
19 WL 8738252, at *2 (citing *Lockyer*, 450 F.3d at 442).

20 The broad relief requested by Plaintiffs is that Ancestral Footprints be
21 declared unlawful, enjoined, and set aside. Pls.' Compl. at 48, ECF No. 1. Such
22 relief would destroy the many practical and material protections that the Tribal
23 Nations advocated so hard for.

24 This litigation may also impair the Tribal Nations' interests in the
25 monument Commission. Plaintiffs challenge both the Proclamation and the
26 Antiquities Act based on the establishment of the Tribal Commission.
27 Specifically, Plaintiffs allege that the "Proclamation exceeds Defendants'
28

1 authority because the Antiquities Act does not authorize Defendants to grant
2 Native Americans a role in managing Monument land.” *Id.* at 45 (Count One).
3 Plaintiffs alternatively allege that “if the Antiquities Act does permit such
4 delegations, it is unconstitutional.” *Id.* The existence of the Commission is
5 immensely important for the Tribal Nations as it recognizes the importance of
6 these lands to the Tribes’ history, spirituality, and culture. The Commission is
7 permitted to provide “guidance and recommendations,” the Secretaries of
8 Interior and Agriculture must “meaningfully engage the Commission,” and the
9 Secretaries must consider “integrating the Indigenous Knowledge and special
10 expertise” of the Commission. Monument Proclamation at 55340.

11 The Commission builds upon the Executive’s fulfillment of its obligations
12 to protect and preserve Native religious practices, Executive Order No. 13007, 61
13 Fed. Reg. 26771 (May 29, 1996) [https://www.govinfo.gov/content/pkg/FR-](https://www.govinfo.gov/content/pkg/FR-1996-05-29/pdf/96-13597.pdf)
14 [1996-05-29/pdf/96-13597.pdf](https://www.govinfo.gov/content/pkg/FR-1996-05-29/pdf/96-13597.pdf), as well as the United States’ policy to “protect and
15 preserve for American Indians their inherent right of freedom to believe, express,
16 and exercise” their traditional religions, “including but not limited to access to
17 sites, use and possession of sacred objects, and the freedom to worship through
18 ceremonials and traditional rites.” 42 U.S.C.A. § 1996.

19 The Proclamation recognizes the history of dispossession of these lands
20 and the government-to-government relationship between the United States and
21 Tribal Nations. The Tribal Nations’ sovereign right to participate in the
22 management of their ancestral lands within Ancestral Footprints is therefore
23 squarely at issue in this case, and the Court should have “little difficulty”
24 concluding that the disposition of the case may affect the Tribal Nations’
25 interests. *WildEarth Guardians*, No. CV-16-08010-PCT-SMM, 2016 WL 8738252, at
26 *2.

27 **4. The Existing Parties Do Not Adequately Represent the Tribal**
28 **Nations’ Interests.**

1 The burden for showing inadequate representation is “minimal[,]” and is
2 satisfied if proposed intervenors can demonstrate that representation of their
3 interests “may be” inadequate. *Citizens for Balanced Use v. Mont. Wilderness Ass’n*,
4 647 F.3d 893, 898 (9th Cir. 2011) (citations omitted); *WildEarth Guardians*, No. CV-
5 16-08010-PCT-SMM, 2016 WL 8738252, at *2.

6 To determine whether the applicant’s interests are adequately represented
7 by existing parties, the Court considers:

8 (1) whether the interest of a present party is such that it will
9 undoubtedly make all the intervenor’s arguments; (2) whether the
10 present party is capable and willing to make such arguments; and
11 (3) whether the would-be intervenor would offer any necessary
12 elements to the proceedings that other parties would neglect.

13 *Nw. Forest Res. Council*, 82 F.3d at 838 (citations omitted). The “most important
14 factor” in assessing the adequacy of representation is “how the [applicants’]
15 interest compares with the interests of existing parties.” *Arakaki v. Cayetano*, 324
16 F.3d 1078, 1086 (9th Cir. 2003).

17 The Ninth Circuit has held that the United States cannot adequately
18 represent Tribal Nations’ interests where the Tribal Nations hold sovereign
19 interests in the outcome of the litigation not shared by the United States. *Diné*
20 *Citizens Against Ruining Our Environment v. Bureau of Indian Affs.*, 932 F.3d 843,
21 855 (9th Cir. 2019) (distinguishing *Sw. Cntr. for Biological Diversity*, 268 F.3d 810,
22 in which sovereignty and sovereign interests were not implicated). And even if
23 parties’ interests are presently aligned, if they will “not necessarily remain
24 aligned,” the proposed intervenor interest is not adequately represented. *Diné*
25 *Citizens*, 932 F.3d at 854 (citing *White v. Univ. of Cal.*, 765 F.3d 1010, 1027 (9th Cir.
26 2014)).

27 **(i) Because of Differing Interests, the United States is Not**
28 **Necessarily Capable or Willing to “Undoubtably” Make**
 All the Tribal Nations’ Arguments.

 “Inadequate representation is most likely to be found when the applicant

1 asserts a personal interest that does not belong to the general public.” 3B James
2 W. Moore et al., *Moore's Federal Practice*, ¶ 24.07[4], at 24-78 (2d ed. 1995). And
3 where the United States’ “overriding interest . . . must be in complying with [the
4 law],” rather than in the outcomes essential to tribal sovereignty and self-
5 governance, the United States is an inadequate representative of Tribal Nations.
6 *Klamath Irrigation Dist. v. United States Bureau of Reclamation*, 48 F. 4th 934, 944 (9th
7 Cir. 2022). Here, the Tribal Nations’ interests are grounded in their ancestral
8 relationship to the region and their decades-long efforts to protect these lands.

9 These interests include the need to protect irreplaceable sites, burials, and
10 resources critical to their cultural survival and the perpetuation of their ways of
11 life. Equally as important, the Tribal Nations also have governmental interests in
12 having a hand in the management of the lands within the Monument, via the
13 Commission. The Tribal Nations have knowledge, understanding, and
14 connection to Ancestral Footprints and its many places, intrinsically tied to their
15 sovereign and cultural survival, that goes well beyond Federal Defendants’
16 interests. The United States has far more generalized public interests underlying
17 its efforts to defend and preserve Ancestral Footprints. This is in part because the
18 United States’ constituency reaches far beyond the Tribal Nations’ constituencies,
19 and because the United States does not enjoy the same cultural and ancestral
20 connection to the lands as the Tribal Nations. And while the United States may
21 have an interest in defending its actions, its “overriding interest . . . must be in
22 complying with” applicable laws. *Id.* This interest “differs in a meaningful sense
23 from [the Tribal Nations’] sovereign interest” in ensuring protections for and a
24 governmental role in the management of their traditional homeland. *Id.* (citing
25 *Diné Citizens*, 932 F.3d at 856-57) (internal brackets omitted). Even if the Tribal
26 Nations and the federal government share similar goals and legal positions in
27 this litigation, the United States cannot adequately represent the Tribal Nations’
28

1 sovereign interests.

2 Even if it were the case that the Tribal Nations' and the United States'
3 interests were currently aligned in this matter, there is a very real risk of a policy
4 shift created by a change in presidential administration. Such a change raises the
5 possibility of a later divergence of interest. *See City of Los Angeles, Cal.*, 288 F.3d
6 at 403; *see also Western Energy All. v. Zinke*, 877 F.3d 1157, 1169 (10th Cir. 2017).
7 The changing wishes of the administration are "by no means, wholly irrelevant."
8 *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 529 (9th Cir. 1983). And this
9 potential divergence is not speculative. Former President and presumptive 2024
10 Republican presidential nominee Donald Trump has previously stated on the
11 2020 campaign trail that he would consider abolishing national monuments.
12 Steve Mistler, *Could Donald Trump Undo the Katahdin Woods and Waters National*
13 *Monument?*, New Hampshire Public Radio (Nov. 17, 2016),
14 [https://www.nhpr.org/2016-11-17/could-donald-trump-undo-the-katahdin-](https://www.nhpr.org/2016-11-17/could-donald-trump-undo-the-katahdin-woods-and-waters-national-monument)
15 [woods-and-waters-national-monument](https://www.nhpr.org/2016-11-17/could-donald-trump-undo-the-katahdin-woods-and-waters-national-monument). And he did just that to Bears Ears
16 National Monument—purporting to reduce its size from 1.35 to 0.20 million
17 acres, stripping protections for tribal resources, and reducing the power of the
18 tribal co-management Commission—and to Grand Staircase Escalante National
19 Monument and the Northeast Canyons and Seamounts Marine National
20 Monument. *See Juliet Eilperin & Joshua Partlow, Haaland urges Biden to fully*
21 *protect three national monuments weakened by Donald Trump*, Washington Post (June
22 14, 2021) [https://www.washingtonpost.com/climate-environment/](https://www.washingtonpost.com/climate-environment/2021/06/14/haaland-biden-national-monuments/)
23 [2021/06/14/haaland-biden-national-monuments/](https://www.washingtonpost.com/climate-environment/2021/06/14/haaland-biden-national-monuments/). It is also equally as plausible
24 that the United States may argue that the Commission aspect of the Proclamation
25 is severable, should it find it strategic to do so. *See, e.g. U.S. Reply in Support of*
26 *Mot. to Dismiss at 18, ECF No. 166, Garfield Cnty. et al. v. Biden et al.*, No. 22-cv-
27

1 00059 (D. Utah May 5, 2023) (arguing severability clause in Bears Ears National
2 Monument Proclamation results in favor of President). The Proclamation here
3 likewise contains a severability clause. Proclamation at 55342.

4 There is considerable doubt as to whether the United States will raise all of
5 the Tribal Nations' arguments, including considerable doubt as to whether the
6 United States plans to and will continue to raise the Tribal Nations' arguments.

7 **(ii) The Tribal Nations Offer Necessary Elements to the**
8 **Proceedings Other Parties Would Neglect.**

9 As the traditional stewards of these lands, the Tribal Nations have
10 "expertise apart from that of the [U.S. defendants]" and "offer[] a perspective
11 which differs materially from that of the present parties to this litigation."
12 *Sagebrush Rebellion*, 713 F.2d at 528. For this reason and those mentioned above,
13 the Tribal Nations are not adequately represented by the present parties to the
14 litigation.

15 Accordingly, all four prongs of the test for intervention as of right are
16 amply satisfied, and the Tribal Nations are entitled to intervention as of right.

17 **B. Alternatively, the Tribal Nations Meet the Requirements for**
18 **Permissive Intervention.**

19 If this court finds that the Tribal Nations have not established the
20 requirements for intervention as of right, the Tribal Nations respectfully request
21 that this court allow permissive intervention under Federal Rule of Civil
22 Procedure 24(b). "On timely motion, the court may permit anyone to intervene
23 who . . . has a claim or defense that shares with the main action a common
24 question of law or fact." Fed. R. Civ. P. 24(b). "In exercising its discretion, the
25 court must consider whether the intervention will unduly delay or prejudice the
26 adjudication of the original parties' rights." *Id.*

27 The Tribal Nations seek to intervene in this case for the purpose of
28

1 addressing the legal and factual issues raised by the Plaintiffs regarding
2 Ancestral Footprints, as well as addressing any potential remedy as a result of
3 the court's conclusion. Thus, Rule 24(b)'s common question requirement is met.
4 The second half of the permissive intervention test looks to timeliness and
5 prejudice to the parties. As stated previously, the Tribal Nations' motion is
6 timely, no prejudice will result from granting intervention, and the Tribal
7 Nations bring a perspective to the litigation distinct from that of the other parties
8 on the common questions of law and fact. *See Maverick Gaming LLC v. United*
9 *States*, No. 3:22-CV-05325, 2022 WL 4547082, at *2-4 (W.D. Wash. Sept. 29, 2022)
10 (allowing Tribe to permissively intervene so that the court can consider the
11 Tribe's Rule 19 motion to dismiss on the merits).

12 III. Conclusion

13 For the reasons stated above, the Tribal Nations respectfully request that
14 their *Motion to Intervene for Limited Purpose* be granted.

15 RESPECTFULLY SUBMITTED this 24th day of April 2024.

17 /s/ Paul Spruhan

18 Paul Spruhan, N.M. No. 12513
19 Sage G. Metoxen, AZ No.030707 **
20 Louis Mallette, N.M. No. 149453*
21 Tamara Hilmi Sakijha, N.Y. No. 5844204*
22 Navajo Nation Department of Justice
23 2521 Old BIA Building P.O. BOX 2010
24 Window Rock, AZ 86515
25 Phone: (927) 871-6210
26 Fax: (928) 871-6177
27 paspruhan@nndoj.org
28 smetoxen@nndoj.org
lmallette@nndoj.org
tsakijha@nndoj.org

Counsel for the Navajo Nation

Matthew Campbell, Colo. No. 40808*
Jason Searle, Colo. No. 57042*
Allison Neswood, Colo. No. 49846*

1 Malia Gesuale, Colo. No. 59452*
NATIVE AMERICAN RIGHTS FUND
2 250 Arapahoe Avenue
Boulder, CO 80302
3 Phone: (303) 447-8760
Fax: (303) 443-7776
4 mcampbell@narf.org
searle@narf.org
5 neswood@narf.org
gesuale@narf.org

6 *Counsel for Applicants Havasupai Tribe and Hopi Tribe*

7 Denten Robinson, AZ No. 24764
8 DR LAW PLLC
1930 E. Brown Road, Suite 103
9 Mesa, AZ 85203
Phone: (480) 500-6656
10 denten@drlawfirm.com

11 *Counsel for the Havasupai Tribe*

12 *Motion for Pro Hac Vice forthcoming
13 ** Motion for Admission pending

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Matthew Campbell, Colo. No. 40808*
Jason Searle, Colo. No. 57042*
2 Allison Neswood, Colo. No. 49846*
Malia Gesuale, Colo. No. 59452*
3 NATIVE AMERICAN RIGHTS FUND
250 Arapahoe Avenue
4 Boulder, CO 80302
(t): (303) 447-8760
5 mcampbell@narf.org
searle@narf.org
6 neswood@narf.org
gesuale@narf.org
7

8 *Counsel for the Havasupai Tribe and
the Hopi Tribe*

9 Denten Robinson, AZ No. 24764
DR LAW PLLC
10 1930 E. Brown Road, Suite 103
Mesa, AZ 85203
11 (t): (480) 500-6656
denten@drlawfirm.com
12

13 *Counsel for the Havasupai Tribe*

Paul Spruhan, N.M. No. 12513
Sage G. Metoxen, AZ No.030707**
Louis Mallette, N.M. No. 149453*
Tamara Hilmi Sakijha, N.Y. No.
5844204*
Navajo Nation Department of Justice
2521 Old BIA Building P.O. BOX 2010
Window Rock, AZ 86515
(t): (927) 871-6210
paspruhan@nndoj.org
smetoxen@nndoj.org
lmallette@nndoj.org
tsakijha@nndoj.org

Counsel for the Navajo Nation

14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF ARIZONA**

17 Arizona State Legislature, et al.,
18

19 Plaintiffs,

20 v.

21 Joseph R. Biden, Jr., et al.,
22

23 Defendants.
24

No. CV-08026-PCT-SMM

**TRIBAL NATIONS’ RULE 12(B)(7)
MOTION TO DISMISS**

25 Pursuant to Rules 12(b)(7) and 19(b) of the Federal Rules of Civil
26 Procedure, Limited Intervenors the Havasupai Tribe, the Hopi Tribe, and the
27 Navajo Nation (“the Tribal Nations” or “Limited Intervenors”) submit this
28

1 Motion to Dismiss with prejudice Plaintiffs' Complaint. The grounds for this
2 Motion are set forth in the accompanying Memorandum in Support. The Tribal
3 Nations respectfully request that the Court grant their Motion to Dismiss and
4 direct the Clerk of Court to dismiss Plaintiffs' Complaint.

5 Counsel for the Tribal Nations conferred with counsel for the parties to
6 determine their position on this motion. The Arizona Legislature Plaintiffs
7 oppose this Motion to Dismiss. The United States Defendants indicated that they
8 would wait to see the filed motion before they take a position on the Motion to
9 Dismiss.

10 **MEMORANDUM IN SUPPORT OF LIMITED INTERVENORS'**
11 **MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

12 **I. Introduction**

13 **A. This Litigation**

14 On August 8, 2023, President Joseph R. Biden issued a Presidential
15 Proclamation establishing Baaj Nwaavjo I'tah Kukveni - Ancestral Footprints of
16 the Grand Canyon National Monument ("Ancestral Footprints" or "the
17 Monument") in Arizona. 88 Fed. Reg. 55331 (Aug. 15, 2023) ("Proclamation").
18 The Monument encompasses lands to the northwest, northeast, and south of
19 Grand Canyon National Park (or "Park"). It stands within the traditional
20 homelands of numerous indigenous nations. In the Proclamation, President
21 Biden established a "Commission" of elected tribal officials to advise and
22 collaborate on the proper care and management of the Monument, in recognition
23 of the Tribal Nations' expertise and indigenous knowledge of the area.
24 Proclamation at 55340.

25 In this lawsuit, Plaintiffs challenge the Monument and the Proclamation.
26 More specifically, Plaintiffs allege that President Biden lacked statutory authority
27 to establish Ancestral Footprints under the Antiquities Act. Pls.' Compl. 42-45,
28

1 ECF No. 1 (“Complaint”). Plaintiffs challenge the Commission, *id.* at 45, alleging
2 that the Proclamation “exceeds Defendants’ authority because the Antiquities
3 Act does not authorize Defendants to grant Native Americans a role in managing
4 Monument land[,]” and alternatively alleging that “if the Antiquities Act permits
5 such delegations, it is unconstitutional.” *Id.* Plaintiffs seek a declaration that the
6 Monument is unlawful or unconstitutional and a permanent injunction against
7 the implementation and enforcement of the Monument. *Id.* at 48.

8 The Tribal Nations intervened in this action for the limited purpose of
9 filing this Motion to Dismiss under Federal Rule of Civil Procedure (“FRCP”)
10 12(b)(7) for failure to join a party under FRCP Rule 19.

11 **B. Tribal Nation Limited Intervenors**

12 The Tribal Nations are federally recognized Tribes that possess inherent
13 sovereign authority and government-to-government relationships with the
14 United States. They each hold inextricable ties to the Grand Canyon region
15 broadly and the Ancestral Monuments lands specifically. Indeed, Ancestral
16 Footprints receives its name from the Indigenous names given to the area by the
17 Havasupai and the Hopi. Proclamation at 55331. Baaj nwaavjo (BAAHJ – NUH-
18 WAAHV-JOH) means “where Indigenous peoples roam” in the Havasupai
19 language, and i’tah kukveni (EE-TAH – KOOK-VENNY) means “our ancestral
20 footprints” in the Hopi language. *Id.* Since time immemorial, the Tribal Nations
21 and several other sister tribal nations have called this region home and stewarded
22 these lands. The area retains “profound historical, cultural, and religious
23 significance” to the Tribal Nations. *Id.* The Tribal Nations retain permanent
24 homelands on reservations immediately adjacent to the Grand Canyon National
25 Park and areas protected by the Monument.

26 The Tribal Nations further enjoy the legal rights granted to them via the
27 Proclamation, including their role in the Commission, established to ensure that
28

1 the care and management of the monument reflect the Tribal Nations' expertise,
2 knowledge, and values. *Id.* at 55340. The Tribal Nations hold sovereign interests
3 in maintaining this government-to-government relationship with the United
4 States.

5 C. Legal Framework for Rule 12(b)(7) and Rule 19

6 Rule 12(b)(7) allows a party to seek an order dismissing a claim or action
7 "for failure to join a party under Rule 19." Fed. R. Civ. P. 12(b)(7); *see Am.*
8 *Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1027 (9th Cir. 2002). And Tribal
9 Nations that have not waived their immunity may make a special appearance for
10 the limited purpose of seeking dismissal. *Maverick Gaming LLC v. United States*,
11 658 F. Supp. 3d 966, 974 (W.D. Wash. 2023).

12 The purpose of Rule 19 is to give structure to the general consideration that
13 whenever feasible, the persons materially interested in the action should be
14 joined as parties so that they may be heard, and that when joinder cannot be
15 accomplished the case should be examined and a choice made between
16 proceeding and dismissing. Fed. R. Civ. P. 19 (advisory committee's note to the
17 1966 amendment). Under parts (a) and (b) of Rule 19, there are "three successive
18 inquiries." *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005).
19 "[F]irst, identify whether a party is required; second, identify whether the party
20 can be joined in the action; and third, if the absent party cannot be joined,
21 determine whether the action may proceed in its absence." *Havasupai Tribe v.*
22 *Anasazi Water Co. LLC*, 321 F.R.D. 351, 354 (D. Ariz. 2017); *accord Makah Indian*
23 *Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (describing the same process as
24 two-step). An absent party may be necessary and indispensable as to some counts
25 of an action and not as to others. *See Makah*, 910 F.2d at 559.

26 II. Argument

27 A. The Tribal Nations are Required under Rule 19(a)(1)(B).

28

1 The inquiry under Rule 19(a) is “practical” and “fact specific.” *Makah*, 910
2 F.2d at 558. In determining whether an absent party is necessary and “must” be
3 joined, the court considers “whether ‘complete relief’ can be accorded among the
4 existing parties, [or] whether the absent party has a ‘legally protected interest’ in
5 the subject of the suit.” *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir.
6 1992). If the absent party claims an interest in the subject of the action, the court
7 then determines if “disposing of the action in [their] absence may . . . as a practical
8 matter impair or impede [their] ability to protect the interest.” Fed. R. Civ. P.
9 19(a)(1)(B).

10 The test under Rule 19(a) substantially overlaps with the test for
11 intervention as-of-right under Rule 24(a). *Compare* Fed. R. Civ. P. 24(a) *with* Fed.
12 R. Civ. P. 19(a)(1)(B)(i); *cf. Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 489
13 F. Supp. 3d 1168, 1180 (D. Or. 2020), *aff’d*, 48 F.4th 934 (9th Cir. 2022) (noting
14 overlap between Rule 19 and Rule 24). Just as the Tribal Nations were entitled to
15 intervene as a matter of right, they are required parties under Rule 19.

16 **a. The Tribal Nations Claim an Interest in the Subject of the**
17 **Action.**

18 Rule 19 establishes that an absent party need only have a “claim” to a
19 legally protected interest relating to the litigation. Fed. R. Civ. P. 19(a)(1)(B); *see*
20 *Shermoen*, 982 F.2d at 1317-18. Because “[j]ust adjudication of claims requires that
21 courts protect a party’s right to be heard and to participate in the adjudication of
22 a claimed interest,” the ultimate resolution of the dispute has no bearing on
23 whether absent parties “claim” an interest and are necessary under Rule 19.
24 *Shermoen*, 982 F.2d at 1317; *White v. Univ. of Cal.*, 765 F.3d 1010, 1026-27 (9th Cir.
25 2014). The interest must be legally protected, *Diné Citizens Against Ruining our*
26 *Env’t v. Bureau of Indian Affs.*, 932 F.3d 843, 852 (9th Cir. 2019), and the court must
27 “carefully . . . identify the [Tribes’] interest at stake.” *Id.* at 851 (quoting *Cachil*

1 *Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962,
2 973 (9th Cir. 2008)). “It is generally enough that the interest is protectable under
3 some law, and that there is a relationship between the legally protected interest
4 and the claims at issue.” *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179
5 (9th Cir. 2011) (citation and brackets omitted) (analyzing similar requirement
6 under Rule 24).

7 The Tribal Nations have numerous protected interests in Ancestral
8 Footprints. President Biden’s Proclamation outlines the Tribal Nations’
9 relationship to this land since time immemorial and how the land has “sacred
10 components of the [Tribal Nations’] origin and history.” Proclamation at 55333,
11 55338. The Proclamation details the history of how Ancestral Footprints was
12 taken from the Tribal Nations, and their efforts to maintain a relationship with
13 these lands. *Id.* at 55331-55333. Because of their ties to these places, the Tribal
14 Nations were extensively involved in advocating for the designation of Ancestral
15 Footprints. As President Biden acknowledged in his remarks at the signing of the
16 Monument Proclamation, the Tribal Nations “fought for decades to be able to
17 return these lands, to protect these lands from mining and development, to clear
18 them of contamination, [and] to preserve their shared legacy for future
19 generations.” DCPD-202300677: Remarks on Signing a Proclamation Establishing
20 the Baaj Nwaavjo I’tah Kukveni - Ancestral Footprints of the Grand Canyon
21 National Monument Near Tusayan, Arizona, 2023 DAILY COMP. PRES. DOC. (Aug.
22 8, 2023). The Tribal Nations, therefore, claim an interest in this action because it
23 challenges the “legality of a measure [they have] supported.” *Idaho Farm Bureau*
24 *Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (analyzing interest for the
25 purposes of a Rule 24(a) motion to intervene); *Sagebrush Rebellion, Inc. v. Watt*, 713
26 F.2d 525, 527 (9th Cir. 1983) (same).

27
28

1 Additionally, the Tribal Nations claim direct interests in the establishment
2 and protections of Ancestral Footprints, which protects numerous resources vital
3 to the Tribal Nations, their members, and their shared cultural heritage and
4 lifeways tied to the landscape. *See United States v. Carpenter*, 526 F.3d 1237, 1240
5 (9th Cir. 2008) (affirming that for the purposes of a Rule 24(a) a party can have an
6 interest in preserving resources “for the use and enjoyment of their members.”);
7 *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011)
8 (same).

9 The Presidential Proclamation also establishes the Tribal Nations’ legally
10 protected interest as sovereigns in this litigation. The Commission, established to
11 ensure that the care and management of the Monument reflect the Tribal Nations’
12 expertise and values, epitomizes the historical nature of the Proclamation and the
13 Tribal Nations’ ties to these lands and sacred places. Proclamation at 55340.
14 Through the Commission, the Tribal Nations, as sovereign nations with a
15 government-to-government relationship with the United States, are vested with
16 authority to provide guidance and recommendations on management of their
17 sacred lands within Ancestral Footprints. *Id.* The Tribal Nations therefore have
18 governmental interests in this Commission and its role in the management of the
19 Monument.

20 The Proclamation, pursuant to the authority delegated to the President in
21 the Antiquities Act and elsewhere, outlines each of these interests. Not only does
22 it establish the Commission and protections for the land, but it enshrines the
23 Tribal Nations’ right to consult in the administration of the Ancestral Footprints
24 and its resources. *See* 54 U.S.C.A. § 320301; *City of Albuquerque v. U.S. Dept. Of*
25 *Interior*, 379 F.3d 901, 913 (10th Cir. 2004) (“If an executive order has a specific
26 statutory foundation it is given the effect of a congressional statute.”); *Indep. Meat*
27 *Packers Ass’n v. Butz*, 526 F.2d 228, 234 (8th Cir. 1975) (“Presidential
28

1 proclamations and orders have the force and effect of laws when issued pursuant
2 to a statutory mandate or delegation of authority from Congress.”). The
3 Proclamation builds upon the Executive’s fulfillment of its obligation to protect
4 and preserve Native religious practices, Executive Order No. 13007, 61 Fed. Reg.
5 26771 (May 29, 1996) [https://www.govinfo.gov/content/pkg/FR-1996-05-](https://www.govinfo.gov/content/pkg/FR-1996-05-29/pdf/96-13597.pdf)
6 [29/pdf/96-13597.pdf](https://www.govinfo.gov/content/pkg/FR-1996-05-29/pdf/96-13597.pdf), as well as the United States’ policy to “protect and
7 preserve for American Indians their inherent right of freedom to believe, express,
8 and exercise” their traditional religions, “including but not limited to access to
9 sites, use and possession of sacred objects, and the freedom to worship through
10 ceremonials and traditional rites.” 42 U.S.C.A. § 1996; *Lyng v. Nw. Indian Cemetery*
11 *Protective Ass'n*, 485 U.S. 439, 454, (1988) (the government should not be
12 discouraged from “accommodating religious practices like those engaged in” by
13 the Tribal Nations). It also builds upon the United States’ obligation to consult
14 with Tribal Nations, which at its core, is based on the government-to-government
15 relationship between the United States and Tribal Nations. Executive Order No.
16 13175: Consultation and Coordination with Indian Tribal Governments, 65 Fed.
17 Reg. 67249. Consultation is also based in statute and federal regulation. *See, e.g.*
18 36 C.F.R. § 800.2(c)(2)(ii) (National Historic Preservation Act requires
19 consultation with any tribal nation that attaches religious and cultural
20 significance to historic properties that may be affected). The Proclamation also
21 points to the United States’ policy of supporting tribal nation self-governance
22 through the Indian Self-Determination and Education Assistance Act, 25 U.S.C.
23 § 5301 *et. seq.* Proclamation at 55340. In their Complaint, Plaintiffs seek to
24 completely dismantle Tribal rights to the protection and management of their
25 lands and sacred places.

26 The Tribal Nations have numerous protectable interests in this litigation,
27 and there is a relationship between the legally protected interest and the
28

1 Complaint, which seeks to have the Proclamation and Commission declared
2 unlawful.

3 **b. Disposition of the Action May, as a Practical Matter, Impair**
4 **or Impede the Tribal Nations' Ability to Protect Their**
5 **Interests.**

6 Rule 19(a) requires the Tribal Nations to show that “disposing of the action
7 in [their] absence *may* . . . as a practical matter impair or impede [their] ability to
8 protect the interest.” Fed. R. Civ. P. 19(a)(1)(B)(i) (emphasis added). The word
9 “may” is “designed to liberalize the right to intervene in federal actions.” *Nuesse*
10 *v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967) (analyzing similar requirement under
11 Rule 24).

12 The broad relief requested by Plaintiffs is that Ancestral Footprints be
13 declared unlawful, enjoined, and set aside. Pls.’ Compl. at 48, ECF No. 1. Such
14 relief would destroy the many practical and material protections that the Tribal
15 Nations advocated so hard for. To justify their plea for this relief, Plaintiffs
16 specifically attack the Proclamation and the Antiquities Act, alleging that neither
17 may lawfully authorize the Commission and the Tribal Nations’ advisory role in
18 the management and care of Ancestral Footprints. *Id.* at 45. Any determination
19 that the Commission or the Antiquities Act is unlawful or unconstitutional would
20 impair the Tribal Nations’ interests in the Commission and in the protected
21 Monument lands and resources.

22 The Tribal Nations’ rights to access to these lands and places, to protection
23 of these lands and places, and to participate in the management of their ancestral
24 lands within Ancestral Footprints is therefore squarely at issue in this case, and
25 the Court should have “little difficulty” concluding that the disposition of the
26 case may affect the Tribal Nations’ interests. *WildEarth Guardians*, No. CV-16-
27 08010-PCT-SMM, 2016 WL 8738252, at *2 (analyzing the similar question under
28 Rule 24).

1
2 **c. Federal Defendants Cannot Adequately Represent the Tribal Nations' Interests.**

3 Rule 19(a) analysis includes a determination whether another party
4 "adequately represents" an intervening Tribe's interests in the case and would
5 therefore ensure that the Tribe's interest in the case is protected. *See Diné Citizens*,
6 932 F.3d at 852. The question of whether a party is adequately represented under
7 Rule 19(a) parallels the question posed under Rule 24(a) concerning intervention
8 as-of-right. *Shermoen*, 982 F.2d at 1318; *Klamath Irrigation Dist.*, 489 F. Supp. 3d at
9 1180 *aff'd* 48 F.4th 934 (9th Cir 2022). For the same reasons that the Tribal Nations
10 are inadequately represented and are entitled to intervene as of right under Rule
11 24(a), the Tribal Nations are inadequately represented for the purposes of being
12 a necessary party under Rule 19(a).

13 The burden for showing inadequate representation is "minimal[,] and is
14 satisfied if proposed intervenors can demonstrate that representation of their
15 interests "may be" inadequate. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*,
16 647 F.3d 893, 898 (9th Cir. 2011) (citations omitted); *WildEarth Guardians*, No. CV-
17 16-08010-PCT-SMM, 2016 WL 8738252, at *2.

18 To determine whether the applicant's interests are adequately represented
19 by existing parties, the Court considers:

- 20 (1) whether the interest of a present party is such that it will
21 undoubtedly make all the intervenor's arguments; (2) whether the
22 present party is capable and willing to make such arguments; and
23 (3) whether the would-be intervenor would offer any necessary
24 elements to the proceedings that other parties would neglect.

25 *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (citations
26 omitted). The "most important factor" in assessing the adequacy of
27 representation is "how the [applicants'] interest compares with the interests of
28 existing parties." *Arakaki, v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

1 The Ninth Circuit has held that the United States cannot adequately
2 represent Tribal Nations’ interests where the Tribal Nations hold sovereign
3 interests in the outcome of the litigation not shared by the United States. *Diné*
4 *Citizens*, 932 F.3d at 855. And even if parties’ interests are presently aligned, if
5 they will “not necessarily remain aligned,” the proposed intervenor’s interest is
6 not adequately represented. *Id.* at 854 (citing *White*, 765 F.3d at 1027).

7 **(i) Because of Differing Interests, the United States is Not**
8 **Necessarily Capable or Willing to “Undoubtably” Make All**
9 **the Tribal Nations’ Arguments.**

10 “Inadequate representation is most likely to be found when the applicant
11 asserts a personal interest that does not belong to the general public.” 3B James
12 W. Moore et al., *Moore’s Federal Practice* ¶ 24.07[4], at 24–78 (2d ed. 1995). And
13 where the United States’ “overriding interest . . . must be in complying with [the
14 law],” rather than in the outcomes essential to Tribal sovereignty and self-
15 governance, the United States is an inadequate representative of Tribal Nations.
16 *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F. 4th 934, 944 (9th Cir.
17 2022), *cert. denied*, 144 S. Ct. 342 (2023).

18 Here, the Tribal Nations’ interests are grounded in their collective ancestral
19 relationship to the region and their decades-long efforts to protect these lands,
20 burial sites, and sacred places. These interests include the need to protect
21 irreplaceable places and resources critical to their cultural survival and the
22 perpetuation of their ways of life. Equally as important, the Tribal Nations also
23 have sovereign governmental interests in management of the lands within the
24 Monument, via the Commission and through their elected Tribal representatives
25 to that Commission.

26 The Tribal Nations have knowledge, understanding, and connection to
27 Ancestral Footprints – intrinsically tied to their sovereign and cultural survival –
28 that goes well beyond Federal Defendants’ interests. The United States has far

1 more generalized public interests underlying its efforts to defend and preserve
2 Ancestral Footprints. This is in part because the United States' constituency
3 reaches beyond the Tribal Nations' constituencies, and because the United States
4 does not enjoy the same cultural and ancestral connection to the lands and sacred
5 places as the Tribal Nations.

6 While the United States may have an interest in defending its actions, its
7 "overriding interest . . . must be in complying with" applicable laws. *Id.* In this
8 case, the United States' overriding interest is in complying with the limits of the
9 Constitution and the Antiquities Act. This interest "differs in a meaningful sense
10 from [the Tribal Nations'] sovereign interest" in ensuring protections for and a
11 governmental role in the management of their traditional homeland. *Id.* (citing
12 *Diné Citizens*, 932 F.3d at 856-57) (internal brackets omitted). Even if the Tribal
13 Nations and the federal government share similar goals and legal positions in
14 this litigation, the United States cannot adequately represent the Tribal Nations'
15 sovereign interests.

16 The Tribal Nations' and the United States' interests may currently be
17 aligned in this matter, but there is a very real risk of a policy shift created by a
18 change in presidential administration. Such a change raises the possibility of a
19 later divergence of interest sufficient to satisfy the Tribal Nations' minimal
20 burden. *See United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 403 (9th Cir.
21 2002); *see also Western Energy All. v. Zinke*, 877 F.3d 1157, 1169 (10th Cir. 2017). The
22 changing wishes of the administration are "by no means, wholly irrelevant."
23 *Sagebrush Rebellion*, 713 F.2d at 529. And this potential divergence is not
24 speculative. Former President and presumptive 2024 Republican presidential
25 nominee, Donald Trump, has previously stated on the 2020 campaign trail that
26 he would consider abolishing national monuments. Steve Mistler, *Could Donald*
27 *Trump Undo the Katahdin Woods and Waters National Monument?*, New Hampshire
28

1 Public Radio (Nov. 17, 2016), [https://www.nhpr.org/2016-11-17/could-donald-](https://www.nhpr.org/2016-11-17/could-donald-trump-undo-the-katahdin-woods-and-waters-national-monument)
2 [trump-undo-the-katahdin-woods-and-waters-national-monument](https://www.nhpr.org/2016-11-17/could-donald-trump-undo-the-katahdin-woods-and-waters-national-monument). And he did
3 just that to Bears Ears National Monument—purporting to reduce its size from
4 1.35 to 0.20 million acres, stripping protections for tribal resources, and reducing
5 the power of the Tribal co-management Commission. See Juliet Eilperin & Joshua
6 Partlow, *Haaland urges Biden to fully protect three national monuments weakened by*
7 *Donald Trump*, Washington Post (June 14, 2021) [https://www.](https://www.washingtonpost.com/climate-environment/2021/06/14/haaland-biden-national-monuments/)
8 [washingtonpost.com/climate-environment/2021/06/14/haaland-biden-](https://www.washingtonpost.com/climate-environment/2021/06/14/haaland-biden-national-monuments/)
9 [national-monuments/](https://www.washingtonpost.com/climate-environment/2021/06/14/haaland-biden-national-monuments/). It is also equally as plausible that the United States may
10 argue that the Commission aspect of the Proclamation is severable should it find
11 it strategic to do so. See, e.g., U.S. Reply in Support of Mot. to Dismiss at 18, ECF
12 No. 166, *Garfield Cnty et al. v. Biden et al.*, No. 22-cv-00059 (D. Utah May 5, 2023)
13 (arguing severability clause in Bears Ears National Monument Proclamation
14 results in favor of President). The Proclamation here likewise contains a
15 severability clause. Proclamation at 55342.

16 As the Ninth Circuit acknowledged in *Klamath Irrigation*, other, active
17 litigation on questions similar or related to those at issue may “further increase[]
18 the likelihood that [the United States] will not ‘undoubtedly’ make all of the same
19 arguments that the Tribes would[.]” 48 F. 4th at 945. There is considerable doubt
20 as to whether the United States will raise all of the Tribal Nations’ arguments,
21 including considerable doubt as to whether the United States plans to and will
22 continue to raise the Tribal Nations’ arguments. The United States is not and
23 cannot be an adequate representative for the Tribal Nations.

24
25 **B. Joinder is Not Feasible as the Tribal Nations are Immune from Suit.**

26 As “distinct, independent political communities” with sovereign powers
27 that have never been extinguished, “Indian tribes have long been recognized as
28

1 possessing the common law immunity from suit traditionally enjoyed by
2 sovereign powers.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 58 (1978); see
3 *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014). Like all sovereigns,
4 Tribal Nations are free to assert or to waive their immunity. *Okla. Tax Comm’n v.*
5 *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). The Tribal Nations
6 have not waived their sovereign immunity in this matter. Nor has Congress
7 authorized the suit. Without such a waiver the Tribal Nations cannot be joined
8 as a party. See *Klamath Irrigation*, 48 F.4th at 947; *Diné Citizens*, 932 F.3d at 856.

9 **C. The Tribal Nations are Indispensable Parties such that in Equity**
10 **and Good Conscience, this Case Should Not Continue in Their**
11 **Absence.**

12 If a party required to be joined cannot be joined, “the court must determine
13 whether, in equity and good conscience, the action should proceed among the
14 existing parties or should be dismissed.” Fed. R. Civ. P. 19(b). The factors to be
15 considered include: “(1) the prejudice to any party or to the [Tribal Nations]; (2)
16 whether relief can be shaped to lessen prejudice; (3) whether an adequate
17 remedy, even if not complete, can be awarded without the [Tribal Nations]; and
18 (4) whether there exists an alternative forum.” *Dawavendewa v. Salt River Project*
19 *Agric. Improvement and Power Dist.*, 276 F.3d 1150, 1161-62 (9th Cir. 2002). But
20 these factors “are nonexclusive,” *Diné Citizens*, 932 F.3d at 857, and the court’s
21 decision whether to proceed “will turn upon factors that are case specific, which
22 is consistent with a Rule based on equitable considerations.” *Republic of*
Philippines v. Pimentel, 553 U.S. 851, 863 (2008).

23 The Ninth Circuit has “regularly held that the tribal interest in immunity
24 overcomes the lack of an alternative remedy or forum for the plaintiffs,” *Am.*
25 *Greyhound*, 305 F.3d at 1025, despite the general rule that “if no alternative forum
26 exists, a court should be extra careful before dismissing an action.” *Diné Citizens*,
27 932 F.3d at 857 (cleaned up) (citation omitted). Thus, “if the necessary party is
28

1 immune from suit, there may be very little need for balancing Rule 19(b) factors
2 because immunity itself may be viewed as the compelling factor.” *Diné Citizens*,
3 932 F.3d at 857 (cleaned up) (citation omitted); *Confederated Tribes of the Chehalis*
4 *Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991) (plaintiff’s interest
5 may be outweighed by a tribe’s sovereign immunity).

6 And with respect to the sovereign immunity of Tribal Nations, the Ninth
7 Circuit has found that there is a “wall of circuit authority” in favor of dismissing
8 actions where absent parties cannot be joined due to tribal sovereign immunity.
9 *Diné Citizens*, 932 F.3d at 858; *Klamath Irrigation*, 48 F. 4th at 947. In “virtually all
10 cases to consider the question” where the absent party was an Indian Tribe
11 invested with sovereign immunity, courts in the Ninth Circuit “dismiss under
12 Rule 19, regardless of whether [an alternate] remedy [was] available.” *Diné*
13 *Citizens*, 932 F.3d at 857 (citation omitted).

14 In this case, the factors enumerated in Rule 19(b) do not counsel otherwise.
15 The first factor “largely duplicates the consideration that [makes] a party
16 necessary under Rule 19(a)[,]” *Am. Greyhound*, 305 F.3d at 1025, which clearly
17 favors dismissal to protect the Tribal Nations’ interests. And because Plaintiffs
18 seek a declaratory judgment that the Monument and the Antiquities Act is
19 unlawful or unconstitutional and an injunction against the Monument’s
20 implementation, the court would not be able to shape relief to lessen or avoid
21 prejudice to the Tribal Nations. The third factor—the adequacy of the judgment
22 in the Tribal Nations’ absence—counsels against dismissal, as it is Federal
23 Defendants’ actions and orders, not the Tribal Nations’, that the Plaintiffs seek to
24 be enjoined. The fourth factor counsels against dismissal but has consistently
25 (and arguably invariably) not been enough to overcome the interest in Tribal
26 sovereign immunity. *Diné Citizens*, 932 F.3d at 857-58; *Am. Greyhound*, 305 F.3d at
27 1025.

28

1 The Tribal Nations are necessary parties whose joinder is infeasible due to
2 Tribal sovereign immunity. In light of the “wall of circuit authority” counseling
3 for dismissal, the Complaint must be dismissed.

4 **III. The Narrow Public Rights Exception Does not Apply to Claims that**
5 **Threaten Absent Tribal Nations’ Legal Entitlement and Sovereignty.**

6 The federal courts recognize a public rights exception to the joinder rules
7 when the lawsuit is narrowly restricted to the protection and enforcement of
8 public rights. *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 363 (1940). For the
9 public rights exception to apply, (1) “the litigation must transcend the private
10 interests of the litigants and seek to vindicate a public right,” and (2) “although
11 the litigation may adversely affect the absent parties’ interests, the litigation must
12 not destroy the legal entitlements of the absent parties.” *White*, 765 F.3d at 1028;
13 *Kescoli v. Babbit*, 101 F.3d 1304, 1311 (9th Cir. 1996); *Conner v. Burford*, 848 F.2d
14 1441, 1459 (9th Cir. 1988); *Union Pacific R.R. Co. v. Runyon*, 320 F.R.D. 245, 256-57
15 (D. Or. 2017).

16 However, the public rights exception is generally precluded in cases such
17 as this, where the lawsuit seeks to extinguish the Tribal Nations’ substantial legal
18 entitlements. *See Shermoen*, 982 F.2d at 1319 (concluding application of the public
19 rights exception inappropriate when a threat to Tribal Nations’ legal entitlements
20 is involved). Plaintiffs seek to extinguish the Tribal Nations’ advisory and co-
21 management rights granted to them in the Proclamation. Thus, the public rights
22 exception does not apply.

23 **IV. Conclusion**

24 For these reasons, the Tribal Nations respectfully request the Court to
25 dismiss Plaintiffs’ complaint.

26 RESPECTFULLY SUBMITTED this 24th day of April 2024.
27
28

1 /s/ Paul Spruhan
Paul Spruhan, N.M. No. 12513
2 Sage G. Metoxen, AZ No.030707**
Louis Mallette, N.M. No. 149453*
3 Tamara Hilmi Sakijha, N.Y. No. 5844204*
Navajo Nation Department of Justice
4 2521 Old BIA Building P.O. BOX 2010
Window Rock, AZ 86515
5 Phone: (927) 871-6210
Fax: (928) 871-6177
6 paspruhan@nndoj.org
smetoxen@nndoj.org
7 lmallette@nndoj.org
tsakijha@nndoj.org

8 *Counsel for the Navajo Nation*

9
10 Matthew Campbell, Colo. No. 40808*
Jason Searle, Colo. No. 57042*
Allison Neswood, Colo. No. 49846*
11 Malia Gesuale, Colo. No. 59452*
NATIVE AMERICAN RIGHTS FUND
12 250 Arapahoe Avenue
Boulder, CO 80302
13 Phone: (303) 447-8760
Fax: (303) 443-7776
14 mcampbell@narf.org
searle@narf.org
15 neswood@narf.org
gesuale@narf.org

16 *Counsel for the Havasupai Tribe and Hopi Tribe*

17
18 Denten Robinson, AZ No. 24764
DR LAW PLLC
19 1930 E. Brown Road, Suite 103
Mesa, AZ 85203
20 Phone: (480) 500-6656
denten@drlawfirm.com

21 *Counsel for the Havasupai Tribe*

22
23 *Motion for Pro Hac Vice forthcoming
**Motion for Admission pending

24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Arizona State Legislature, et al.,
Plaintiffs,
v.
Joseph R. Biden, Jr., et al.,
Defendants.

No. 3:24-cv-08026-PCT-SMM

**ORDER GRANTING TRIBAL
NATIONS' MOTION TO INTERVENE
FOR LIMITED PURPOSE**

IT IS ORDERED that the Tribal Nations' Motion to Intervene for Limited Purpose is GRANTED.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to file the Tribal Nations' Rule 12(b)(7) Motion to Dismiss.

IT IS FURTHER ORDERED that the parties shall brief the Tribal Nations' Motion to Dismiss according to the deadlines set forth in LRCiv 7.2.