

## 9th Circ. Affirms Toss Of Fight Against Calif. Tribal Wind Farm

By Ali Sullivan

*Law360 (October 28, 2022, 5:04 PM EDT)* -- The Ninth Circuit has affirmed a lower court's dismissal of a challenge from two California ranchers and their conservation group to a planned wind farm on tribal land, ruling that the initial decision was right to find the tribe was immune from the suit.

A three-judge panel found Thursday that the sovereign and economic interests of the Campo Band of Diegueno Mission Indians, now known as the Campo Kumeyaay Nation, required the dismissal of a suit brought by California activist group Backcountry Against Dumps. The group and its members, local ranchers Donna Tisdale and Joe E. Tisdale, told the court in their appeal that the \$400 million wind farm planned on the Campo Kumeyaay reservation in eastern San Diego County was opposed by the majority of tribal members.

The couple also contended that the Campo Kumeyaay, an intervenor in the district court action, was not an indispensable party to the suit because its interests were adequately represented by wind-farm developer Terra-Gen Development Co. LLC and the Bureau of Indian Affairs, which were named as defendants. But the Ninth Circuit disagreed, saying the defendants and the Campo Kumeyaay have different stakes in the suit.

"Even assuming that Terra-Gen shares the same interest as the band in defending the lease, it does not share the band's sovereign interest in self-governance and use of its natural resources," the opinion said.

The court found that a successful outcome for Backcountry would affect both the Campo Kumeyaay's rights under its lease agreement for the wind farm and "investments made in reliance on the agreement and expected jobs as revenue."

The public rights exception, which allows certain actions to proceed without required parties, also doesn't apply to the case, the court found, because the suit "plainly threatens the band's legal entitlements."

Ted J. Griswold, the primary attorney for the Campo Kumeyaay, told Law360 on Friday that the tribe is pleased with the ruling. The Campo Kumeyaay has decided to center its economy on its reservation's renewable resources — namely wind and solar power — and is "very, very happy" that construction on the wind farm can begin, he said.

The Tisdales, who own a ranch outside the Campo Kumeyaay reservation, sought to halt the wind farm

project in 2020 by suing the BIA, telling the district court that it would "cause significant environmental harms to tribal members and the surrounding community."

The lawsuit claimed the BIA failed to adequately consider the project's ecological effects, such as harm to the golden eagle, noise and light pollution, and wildfire risks, before approving it.

In Aug. 2021, U.S. District Judge Janis L. Sammartino found that the Campo Kumeyaay was a necessary party to the Tisdales' lawsuit, and the tribe's sovereign immunity prevented it from being joined as a party to the action.

A separate suit filed by Backcountry against the San Diego County Board of Supervisors, also implicating the wind farm, was dismissed earlier this month in California state court, again because the Campo Kumeyaay, with its sovereign immunity, could not be joined to the suit, according to the tentative ruling.

The BIA and counsel for the parties did not return requests for comment Friday.

Backcountry and the Tisdales are represented by Stephan C. Volker, Alexis E. Krieg, Stephanie L. Clarke and Jamey M.B. Volker of the Law Offices of Stephan C. Volker.

The BIA is represented by Todd Kim, Rachel Heron and Michelle Melton of the U.S. Department of Justice's Environmental & Natural Resources Division.

Terra-Gen is represented by Stacey L. VanBelleghem, Janice M. Schneider, Cherish A. Drain and Daniel P. Brunton of Latham & Watkins LLP.

The Campo Kumeyaay are represented by Kendra J. Hall and Rebecca L. Reed of Procopio Cory Hargreaves & Savitch LLP.

The case is Backcountry Against Dumps et al. v. U.S. Bureau of Indian Affairs et al., case number 21-55869, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting from Joyce Hanson. Editing by Adam LoBelia.