No. 23-_____

IN THE
SUPREME COURT OF THE UNITED STATES

KLAMATH IRRIGATION DISTRICT,
Applicant,

v.

UNITED STATES BUREAU OF RECLAMATION; DEB HAALAND; SECRETARY TO THE INTERIOR, IN HER OFFICIAL CAPACITY; CAMILLE CALIMLIM TOUTON, COMMISSIONER OF THE BUREAU OF RECLAMATION, IN HER OFFICIAL CAPACITY; ERNEST CONANT, DIRECTOR OF THE MID-PACIFIC REGION, BUREAU OF RECLAMATION, IN HIS OFFICIAL CAPACITY; JARED BOTTCHER, IN HIS OFFICIAL CAPACITY AS ACTING AREA MANAGER FOR THE KLAMATH AREA RECLAMATION OFFICE; HOOPA VALLEY TRIBE; AND THE KLAMATH TRIBES,
Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nathan R. Rietmann
Rietmann Law P.C.
1270 Chemeketa Street,
NorthEast Salem,
Oregon 97301
503.551.2740

John P. Kinsey
Christopher A. Liseki
Wanger Jones Helsley P.C.
265 East River Park Circle, Suite 310
Fresno, California 93720
559.233.4800

Frederick R. Yarger
Counsel of Record for Applicant
Daniel N. Nightingale
William P. Sowers Jr.
WHEELER TRIGG O'DONNELL LLP
370 17th Street, Suite 4500
Denver, Colorado 80202
303.244.1800
yarger@wtotrial.com

March 30, 2023

PARTIES TO THE PROCEEDINGS

Applicant Klamath Irrigation District filed a complaint seeking declaratory relief in the District of Oregon against the United States Bureau of Reclamation ("Reclamation"), Deb Haaland, Secretary to the Interior, in Her Official Capacity; Camille Calimlim Touton, Commissioner of the Bureau of Reclamation, in Her Official Capacity; Ernest Conant, Director of the Mid-Pacific Region, Bureau of Reclamation, in His Official Capacity; and Jared Bottcher, in His Official Capacity as Acting Area Manager for the Klamath Area Reclamation Office (collectively "Defendants"). Following Oregon's adjudication of the parties' competing water rights in the Klamath Water Basin, Applicant sought to administer and enforce those rights in this proceeding. This matter was consolidated with a similar case filed against the same defendants by the Shasta View Irrigation District, Tulelake Irrigation District, Klamath Water Users Association, Klamath Drainage District, Rob Unruh, Van Brimmer Ditch Company, and Ben Duval, none of whom are parties to this Application. The district court permitted two Native American tribes, the Hoopa Valley Tribe and the Klamath Tribes (the "Tribes," and collectively with Defendants, "Respondents") to intervene. Applicant was plaintiff in the district court and appellant in the Ninth Circuit. Respondents were defendants in the district court and appellees in the Ninth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

No. 23-_____

IN THE
SUPREME COURT OF THE UNITED STATES

KLAMATH IRRIGATION DISTRICT,
Applicant,

v.

UNITED STATES BUREAU OF RECLAMATION, *ET AL.*,
Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.3 of the Rules of this Court, Applicant Klamath Irrigation District respectfully requests a 30-day extension of time, to and including May 11, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

The court of appeals denied Applicant's timely petition for panel rehearing and rehearing en banc on January 11, 2023 (order attached as Exhibit A). The time for filing a petition for a writ of certiorari, if not extended, will expire on April 11,

2023. This application is being filed more than ten days before that date. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

I. Introduction

1. This case concerns an issue of great importance to virtually every state in the Western United States: how the owner of adjudicated water rights may enforce and administer those rights against the adjudicated water rights of the federal government. The Ninth Circuit's holding effectively prevents all water rights holders except American Indian Tribes from administering their rights against the federal government, absent tribal consent to an administrative action. The federal government agrees this holding is problematic and therefore refused to defend the circuit precedent on which the opinion was based below. But because water rights cases rarely arise outside the American West, this precedent and the Ninth Circuit's holding here will likely represent the final word on this issue unless this Court grants certiorari.

II. Background

2. The issue presented here implicates the comprehensive regime for the adjudication and administration of water rights in the Western states, where water is scarce and requires the cooperation of states and the federal government to preserve and allocate among competing users. On the one hand, many Western states "have established elaborate procedures for allocation of water and adjudication of conflicting claims to that resource." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 804 (1976). At the same time, in 1902, Congress passed the Reclamation Act, a "leading example" of "cooperative

federalism" that "set[s] forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States." *California v. United States*, 438 U.S. 645, 650 (1978). Because the Reclamation Act "merely authorized the expenditure of funds in States whose citizens were generally anxious to have them expended," it left adjudication of competing water rights to the states, and Reclamation must comply with state water law in implementing its projects. *Id.* at 650–51, 675–76.

3. Correspondingly, in 1952, Congress enacted the McCarran Amendment to waive the federal government's sovereign immunity for water rights adjudications. *See* 43 U.S.C. § 666(a). The McCarran Amendment is "an all-inclusive statute concerning the adjudication of rights to the use of water of a river system." *United States v. Dist. Ct. In & For Eagle Cnty., Colo.*, 401 U.S. 520, 524 (1971). It eliminates the problems "that federal sovereign immunity placed on the ability of the States to adjudicate water rights," *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 564 (1983), by waiving sovereign immunity "(1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights." 43 U.S.C. § 666(a). This waiver covers suits concerning water rights the federal government holds in trust for native tribes. *Colorado River*, 424 U.S. at 810. It is designed to sweep *all* potential water claimants into comprehensive proceedings. *See id.* at 811.

4. Applicant is a special district located in Oregon formed to deliver irrigation water to farmers, landowners, and other water users from the Klamath

Water Basin. *See* 9th Cir. slip op. (attached as Exhibit B) at 14–15. In 2014, the Oregon Water Resources Department (the "Department") adjudicated all state and federal water rights in the Klamath Basin, determining the rights of both Applicant and Reclamation. *Id.* at 13–14. The Department concluded that the only relevant water right Reclamation holds is the right to store water in Upper Klamath Lake for the beneficial use of irrigators; it has *no right* to directly release instream water flows to satisfy its other legal obligations, including to satisfy tribal trust requirements. *See* Amended Corrected Findings of Fact and Order of Determination to the Klamath County Court, Oregon Water Resources Dept. (Feb. 28, 2014), at KBA_ACFFOD_07060, 07084,[1] Instead, Reclamation must satisfy its obligation in other ways, such as by purchasing or leasing water from other rights-holders or condemning those holders' rights through judicial process. *See* 43 U.S.C. 421 ("Where, in carrying out the provisions of this Act, it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation under judicial process.").

5. The Department's adjudication thus does *not* mean that the federal government *cannot* satisfy its obligations to the Tribes, nor does it nullify the

[1] The full text of the Department's Amended Corrected Findings of Fact and Order of Determination can be found at bit.ly/3ZhEA35. The findings and order span over 7,500 pages, but the Department has divided it up by page number for ease of navigation. The pages cited here are located in the second-to-last entry, entitled "Case 003 Corrected Partial Order of Determination" for Claim numbers 194, 211, 285, 289-299, 312, 317, and 321-324.

Tribes' water rights. It just means that Reclamation must fulfill its obligations through the proper process, which is designed to protect the rights of all water-rights holders, including Applicant, Reclamation, and the Tribes.

6. Nevertheless, in 2019, Reclamation adopted an operations plan under which it would continue to release water from Upper Klamath Lake to satisfy its other obligations without purchasing, leasing, or judicially condemning Applicant's water rights, thus limiting the amount of water Applicant can deliver to its members. 9th Cir. slip op. at 14.

III. Procedural History

7. Applicant brought this action against Reclamation and its officers for administration of the water rights from the Oregon adjudication, seeking a declaration of the rights of the parties under Oregon law, the Reclamation Act, and the Fifth Amendment. *Id.* at 15–16. The case was consolidated with a similar case other plaintiffs not party to this application filed against the same defendants. *Id.* at 15. Two Native American tribes—the Hoopa Valley Tribe in California and the Klamath Tribes in Oregon—intervened for the sole purpose of moving to dismiss the case for inability to join a necessary party (the Tribes) due to sovereign immunity. *Id.* at 15–16. Following *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019), the district court allowed the intervention and dismissed the case. 9th Cir. slip op. at 16.

8. Applicant appealed, and the United States defended the district court's judgment solely on the grounds that "affirmance appear[ed] to be compelled by circuit precedent," *i.e.*, *Diné Citizens*. *See* Federal Appellees' Answering Br.

(attached as Exhibit C) at 2. The United States noted that the Ninth Circuit decided *Diné Citizens* over its objection, argued that *Diné Citizens* "produces an anomalous result in that no one, except a Tribe, could seek review of agency action affecting that tribe's existing rights," and did "not concede that *Diné Citizens* was correctly decided." *Id.* at 1–2; *see also id.* at 17–18, 22–23 (similar arguments).

9. The Ninth Circuit nevertheless affirmed. It first held that the Tribes were necessary parties because Applicant's lawsuit "implicates the Tribes' long-established reserved water rights." 9th Cir. slip op. at 19. If Applicant succeeds, the court reasoned, "the Tribes' water rights could be impaired, so the Tribes are required parties under Federal Rule of Civil Procedure 19(a)(1)(B)(i)." *Id.* In reaching this conclusion, the court rejected Applicant's argument that the Tribes are not required parties because Reclamation can adequately represent their interests, finding under *Diné Citizens* that Reclamation's interest differed meaningfully from the Tribes' interest. *Id.* at 20–21. The court also rejected Applicant's argument that the McCarran Amendment waives the Tribes' sovereign immunity. In fact, it held that this case is not an "administration of previously determined [water] rights" under the McCarran Amendment at all—even though the very reason for this action is the harm Reclamation inflicted to Applicant's water rights adjudicated under state law. Instead, the court characterized the dispute as simply "an APA challenge to federal agency action." *Id.* at 25. Finally, the court held that the case should not proceed in equity and good conscience despite the absence of a necessary party. *Id.* at 26–28.

IV. Application for Extension of Time

10. The Ninth Circuit's ruling undermines the McCarran Amendment and the comprehensive regime for the regulation of water rights in the American West. By the Ninth Circuit's logic, Indian tribes will *always* be necessary parties to any suit against the federal government that touches on their water rights, Reclamation will *never* adequately represent tribal interests, and the McCarran Amendment will *never* waive tribal sovereign immunity. Thus, anytime a water-rights holder seeks to protect its rights against the federal government in federal court, affected tribes will always be able to intervene solely for the purpose of shutting down the action before it reaches the merits. The availability of this tactic will thus grant tribes "veto power" over other water users' actions to enforce their rights in federal court, frustrating the purpose of the McCarran Amendment and undermining the cooperative regime Congress has developed with Western states.

11. The practical implications of the Ninth Circuit's decision cannot be understated. Given the scarcity of water in the arid West, millions of citizens—as well as government agencies, water districts, and, of course, Indian tribes themselves—have a significant interest in a functioning regime to fairly regulate water distribution, a regime that includes both adjudication of competing water rights *and* administration of those rights once adjudicated. Because Reclamation plays such a key role in managing water in the West under the Reclamation Act (it is the single largest wholesale water supplier in the United States and supplies

water to one out of five Western farmers[2]), it will frequently be a party to both adjudication and administration proceedings. This is why Congress enacted the McCarran Amendment: without the ability to join the United States to these proceedings, state law adjudications of water rights would be meaningless.

12. The Ninth Circuit's holding effectively nullifies the key element of this vital statutory framework. Every Western state includes numerous Indian Tribes claiming water rights in virtually every water system alongside other water users. Thus, virtually every action to administer state-adjudicated water rights against Reclamation will implicate tribal rights, enabling at least one tribe to intervene as a necessary party and stop the case in its tracks, as occurred here. Allowing any party such veto power over administrative actions against Reclamation will destroy decades of work spent allocating water resources and deny water-rights holders the opportunity to be heard in a court of law. And given how rarely similar water rights disputes arise outside the Western United States, the ruling here will likely be the final say on this issue, absent this Court's review.

13. The requested 30-day extension is necessary because undersigned counsel from Wheeler Trigg O'Donnell has now joined as Applicant's counsel of record before this Court. Undersigned counsel did not represent Applicant below, and all counsel for Applicant request this additional time to work together in examining the record, analyzing relevant authorities, and ensuring submission of a

---

[2] *See* Bureau of Reclamation, *About Us – Fact Sheet*, http://bit.ly/3lJaBmY (Feb. 23, 2023).

thorough petition for this Court's review. In addition, Counsel of Record is currently in the midst of a two-week federal jury trial lasting until April 7, 2023. Undersigned counsel are subject to other competing deadlines as well, including an answer-opening brief due in the Colorado Court of Appeals on March 31, an answer-reply brief due in the Colorado Court of Appeals on April 11, a reply brief due in the Colorado Supreme Court on April 17, a reply brief due in the Colorado Court of Appeals on April 20, a petition for rehearing due in the Tenth Circuit on April 20, and a consolidated answer brief due in the U.S. Court of Appeals for the Tenth Circuit on April 27, 2023, in addition to pretrial and post-trial deadlines in a number of other cases. Counsel for Applicant will attempt to obtain extensions of time in these other cases as appropriate, but some of these deadlines have already been extended, and undersigned counsel requires additional time to prepare the petition for a writ of certiorari in this matter.

For the foregoing reasons, Applicant requests that the time within which it may file a petition for a writ of certiorari in this matter be extended for 30 days, to and including May 11, 2023.

Respectfully submitted,

Frederick R. Yarger
Counsel of Record
Daniel N. Nightingale
William P. Sowers Jr.
Wheeler Trigg O'Donnell LLP
370 17th Street, Suite 4500
Denver, Colorado 80202
303.244.1800

John P. Kinsey
Christopher A. Liseki
Wanger Jones Helsley P.C.
265 East River Park Circle,
Suite 310
Fresno, California 93720
559.233.4800

Nathan R. Rietmann
Rietmann Law P.C.
1270 Chemeketa Street,
NorthEast Salem,
Oregon 97301
503.551.2740

March 30 ,2023

Exhibit A

FILED

JAN 11 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KLAMATH IRRIGATION DISTRICT,

Plaintiff-Appellant,

and

SHASTA VIEW IRRIGATION DISTRICT; et al.,

Plaintiffs,

v.

UNITED STATES BUREAU OF RECLAMATION; et al.,

Defendants-Appellees,

HOOPA VALLEY TRIBE; THE KLAMATH TRIBES,

Intervenor-Defendants-Appellees.

No. 20-36009

D.C. Nos. 1:19-cv-00451-CL
1:19-cv-00531-CL
District of Oregon,
Medford

ORDER

SHASTA VIEW IRRIGATION DISTRICT; et al.,

Plaintiffs-Appellants,

and

KLAMATH IRRIGATION DISTRICT,

Plaintiff,

No. 20-36020

D.C. Nos. 1:19-cv-00451-CL
1:19-cv-00531-CL

v.

UNITED STATES BUREAU OF RECLAMATION; et al.,

Defendants-Appellees,

HOOPA VALLEY TRIBE; THE KLAMATH TRIBES,

Intervenor-Defendants-Appellees.

Before: WARDLAW, BRESS, and BUMATAY, Circuit Judges.

A majority of the panel has voted to deny both the petition for panel rehearing and rehearing *en banc* from Klamath Irrigation District and the petition for panel rehearing or in the alternative modification of decision from Shasta View Irrigation District, et al., in the consolidated appeals. Judge Bumatay has voted to grant Klamath Irrigation District's petition for panel rehearing.

The full court has been advised of the petition for rehearing *en banc* and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petitions for panel rehearing and rehearing *en banc* are **DENIED**.

Klamath Irrigation District, et al. v. U.S. Bureau of Reclamation, et al., Nos. 20-36009, 20-36020
BUMATAY, Circuit Judge, dissenting:

I voted for panel rehearing based on Klamath Irrigation District's belated argument that the Klamath Basin Adjudication is an *in rem* proceeding that may have resolved the Hoopa Valley Tribe's rights in the Upper Klamath Lake. I note that the District did not make this precise argument in its initial briefing to the court. In any case, if the District is correct, then it may call into question my conclusion that the McCarran Amendment was inapplicable. In my concurrence, I reasoned that because the Klamath Basin Adjudication did not determine the Hoopa Valley Tribe's water rights, this was not a McCarran Amendment administration case. If the panel had voted to re-hear this case, I would have revisited this issue.

Exhibit B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KLAMATH IRRIGATION DISTRICT,
Plaintiff-Appellant,

and

SHASTA VIEW IRRIGATION DISTRICT; TULELAKE IRRIGATION DISTRICT; KLAMATH WATER USERS ASSOCIATION; KLAMATH DRAINAGE DISTRICT; ROB UNRUH; VAN BRIMMER DITCH COMPANY; BEN DUVAL,
Plaintiffs,

v.

UNITED STATES BUREAU OF RECLAMATION; DEB HAALAND, Secretary of the Interior, in her official capacity; CAMILLE CALIMLIM TOUTON, Commissioner of the Bureau of Reclamation, in her official capacity; ERNEST CONANT, Director of the Mid-Pacific Region, Bureau of Reclamation, in his official capacity; JARED BOTTCHER, in his official capacity as Acting Area Manager for the Klamath Area

No. 20-36009

D.C. Nos.
1:19-cv-00451-CL
1:19-cv-00531-CL

Reclamation Office,
Defendants-Appellees,

HOOPA VALLEY TRIBE; THE KLAMATH TRIBES,
Intervenor-Defendants-Appellees.

SHASTA VIEW IRRIGATION DISTRICT; TULELAKE IRRIGATION DISTRICT; KLAMATH WATER USERS ASSOCIATION; KLAMATH DRAINAGE DISTRICT; ROB UNRUH; VAN BRIMMER DITCH COMPANY; BEN DUVAL,
Plaintiffs-Appellants,

and

KLAMATH IRRIGATION DISTRICT,
Plaintiff,

v.

UNITED STATES BUREAU OF RECLAMATION; DEB HAALAND, Secretary of the Interior, in her official capacity; CAMILLE CALIMLIM TOUTON, Commissioner of the Bureau of Reclamation, in her official capacity; ERNEST CONANT, Director of the Mid-Pacific Region, Bureau of Reclamation, in his official

No. 20-36020

D.C. Nos.
1:19-cv-00451-CL
1:19-cv-00531-CL

OPINION

capacity; JARED BOTTCHER, in his official capacity as Acting Area Manager for the Klamath Area Reclamation Office,
Defendants-Appellees,

HOOPA VALLEY TRIBE; THE KLAMATH TRIBES,
Intervenor-Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Michael J. McShane, District Judge, Presiding

Argued and Submitted December 7, 2021
San Francisco, California

Filed September 8, 2022

Before: Kim McLane Wardlaw, Daniel A. Bress, and Patrick J. Bumatay, Circuit Judges.

Opinion by Judge Wardlaw;
Concurrence by Judge Bumatay

SUMMARY*

Fed. R. Civ. P. 19 / Environmental Law

The panel affirmed the district court's dismissal, due to a lack of a required party under Fed. R. Civ. P. 19, of an action concerning the distribution of waters in the Klamath Water Basin by the U.S. Bureau of Reclamation.

Various parties appealed the dismissal of their action challenging Reclamation's current operating procedures, which were adopted in consultation with other relevant federal agencies to maintain specific lake levels and instream flows to comply with the Endangered Species Act ("ESA") and to safeguard the federal reserved water and fishing rights of the Hoopa Valley and Klamath Tribes (the "Tribes"). The Tribes intervened as of right, but then moved to dismiss the action on the ground that they were required parties who could not be joined due to their tribal sovereign immunity.

The panel held that the district court properly recognized that a declaration that Reclamation's operating procedures were unlawful would imperil the Tribes' reserved water and fishing rights. The panel affirmed the district court's conclusion that the Tribes were required parties who could not be joined due to sovereign immunity, and that in equity and good conscience, the action should be dismissed.

Specifically, the panel first examined whether the absent party must be joined under Rule 19(a). The Tribes have long-recognized federal reserved fishing rights, and these are

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

at a minimum co-extensive with Reclamation's obligations to provide water for instream purposes under the ESA. If the plaintiffs are successful in their suit, the Tribes' water rights could be impaired, and therefore, the Tribes are required parties under Rule 19(a)(1(B)(i). The panel disagreed with the plaintiffs' argument that the Tribes were not required parties to this suit because the Tribes' interests were adequately represented by Reclamation. Because Reclamation is not an adequate representative of the Tribes, the Tribes are required parties under Rule 19.

The panel next disagreed with the plaintiffs' argument that even if the Tribes were required parties under Rule 19, the suit should proceed because the McCarran Amendment waives the Tribes' sovereign immunity. The McCarran Amendment waives the United States' sovereign immunity in certain suits. 43 U.S.C. § 666(a). The panel held that even if the McCarran Amendment's waiver of sovereign immunity extends to tribes as parties, the Amendment does not waive sovereign immunity in every case that implicates water rights. The panel concluded that this lawsuit was not an administration of previously determined rights but was instead an Administrative Procedures Act challenge to federal agency action.

Finally, the panel examined whether in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The panel held that there was no way to shape relief to avoid the prejudice here because the plaintiffs' claims and the Tribes' claims are mutually exclusive. The panel concluded that the case must be dismissed in equity and good conscience.

Judge Bumatay concurred in the majority opinion except for Section V. He agreed with the majority opinion that

Tribes were necessary parties that were entitled to tribal sovereign immunity, and plaintiffs' actions must be dismissed under Rule 19(b). He wrote separately because, although he ultimately agrees that this case is not a McCarran Amendment case, the analysis requires more attention. He disagreed with the majority's suggestion that Administrative Procedures Act challenges or cases involving ESA obligations can never be McCarran Amendment cases.

COUNSEL

Christopher A. Lisieski (argued) and John P. Kinsey, Wanger Jones Helsley PC, Fresno, California; Nathan R. Rietmann, Rietmann Law PC, Salem, Oregon; for Plaintiff-Appellant Klamath Irrigation District.

Richard S. Deitchman (argued), and Paul S. Simmons, Somach Simmons & Dunn PC, Sacramento, California; Nathan J. Ratliff, Parks & Ratliff PC, Klamath Falls, Oregon; Reagan L.B. Desmond, Clyde Snow & Sessions PC, Bend, Oregon; for Plaintiffs-Appellants Shasta View Irrigation District, Tulelake Irrigation District, Klamath Water Users Association, Klamath Drainage District, Rob Unruh, Van Brimmer Ditch Company, and Ben Duval.

Thane D. Somerville (argued) and Thomas P. Schlosser, Morisset Schlosser Jozwiak & Somerville, Seattle, Washington, for Intervenor-Defendant-Appellee Hoopla Valley Tribe.

Rachel Heron (argued) and John L. Smeltzer, Attorneys; Jean E. Williams, Acting Assistant Attorney General; Environment and Natural Resources Division; United States

Department of Justice, Washington, D.C.; for Defendants-Appellees.

Jeremiah D. Weiner (argued), Rosette LLP, Sacramento, California, for Intervenor-Defendant-Appellee Klamath Tribes.

OPINION

WARDLAW, Circuit Judge:

This appeal concerns the distribution of waters in the Klamath Water Basin by the Bureau of Reclamation, which owns and operates the Klamath Project, a federal irrigation project. Shasta View Irrigation District, Klamath Irrigation District, and other irrigators, farmers, and water users appeal the dismissal of their action challenging Reclamation's current operating procedures, which were adopted in consultation with other relevant federal agencies to maintain specific lake levels and instream flows to comply with the Endangered Species Act and to safeguard the federal reserved water and fishing rights of the Hoopa Valley and Klamath Tribes. The Districts contend that compliance with those procedures violates the Administrative Procedure Act and the Reclamation Act because distributing water to fulfill the Tribal reserved waters deprives the Districts of waters they claim were lawfully appropriated to the Districts in a state adjudication proceeding. The Hoopa Valley and Klamath Tribes intervened as of right, but then moved to dismiss this action on the ground that they are required parties who cannot be joined due to their tribal sovereign immunity. Because the district court properly recognized that a declaration that Reclamation's operating procedures are unlawful would imperil the Tribes' reserved water and

fishing rights, we affirm its conclusion that the Tribes were required parties who could not be joined due to their sovereign immunity, and, that in equity and good conscience, the action should be dismissed.

I.

A. The Klamath Water Basin

The Klamath Water Basin (the Klamath Basin) stretches from south-central Oregon to northern California, occupying approximately 12,000 square miles. The Klamath Basin consists of a complex network of interconnected rivers, canals, lakes, marshes, dams, diversions, wildlife refuges, and wilderness areas.

Upper Klamath Lake (UKL), a major lake within the Klamath Basin, is shallow and averages only about six feet of usable water storage when full. Drought conditions in past years have led to "critically dry" conditions in the Klamath Basin, including in UKL. *See Baley v. United States*, 942 F.3d 1312, 1323–24 (Fed Cir. 2019). This problem has only grown more severe with time. Recently, the Klamath Basin has experienced "multiple extremely dry years that unfortunately appear to be the new normal."

The waters of the Klamath Basin serve as a critical habitat for several species of fish that are listed as endangered pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1531–1544, including the Lost River sucker and shortnose sucker. UKL, which comprises 64,000 acres, serves as the largest remaining contiguous habitat for endangered suckers in the Upper Klamath Basin. Due to "changing water elevation in [UKL] and recurring water quality problems," U.S. Dep't of the Interior, Off. of the Solic., Opinion Letter on Certain Legal Rights and

Obligations Related to the U.S. Bureau of Reclamation, Klamath Project for Use in Preparation of the Klamath Project Operations Plan (KPOP) (July 25, 1995) (Letter from the Solicitor); the population of endangered suckers has significantly declined. *See generally* U.S. Dep't of the Interior, Fish and Wildlife Serv., Biological Opinion on the Effects of Proposed Klamath Project Operations from April 1, 2019, through March 31, 2024, on the Lost River Sucker and the Shortnose Sucker, Opinion Letter (Mar. 29, 2019). The U.S. Fish and Wildlife service projected in 2019 that, over the next decade, "the [sucker] population [could] be[come] so small that it is unlikely to persist without intervention."

B. The Tribes

1. *Klamath Tribes*

Since time immemorial, the Klamath Tribes have utilized the water and fish resources of the Klamath Basin for subsistence, cultural, ceremonial, religious, and commercial purposes. *See United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983). In 1864, the United States and the Klamath Tribes entered into a treaty whereby the Tribes ceded their interests in millions of acres of land and retained a reservation of approximately 800,000 acres abutting UKL and several of its tributaries. The Klamath Tribes also retained "the exclusive right of taking fish in the streams and lakes included in said reservation, and of gathering edible roots, seeds, and berries within its limits." Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, art. 1, Oct. 14, 1864, 16 Stat. 707 (the 1864 Treaty).

We have acknowledged that "[i]n view of the historical importance of hunting and fishing, and the language of

Article I of the 1864 Treaty . . . one of the 'very purposes' of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle." *Adair*, 723 F.2d at 1409 (quoting *United States v. New Mexico*, 438 U.S. 696, 702 (1978)). The fish resources—particularly the *C'waam* (Lost River sucker) and *Koptu* (shortnose sucker)—of the Klamath Basin play an especially important role in the lives of the Klamath Tribes. "The Tribes' water right includes the right to certain conditions of water quality and flow to support all life stages of [these] fish." Letter from the Solicitor at 5 (citations omitted). These rights "necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights." *Adair*, 723 F.3d at 1414 (citations omitted).

Time and again, we have affirmed the critical importance of the Klamath Tribe's water and fishing rights in the Klamath Basin and its distributaries. *See, e.g.*, *Adair*, 723 F.2d at 1411 (recognizing that the Tribe's fishing rights include "the right to prevent other appropriators from depleting the streams[']waters below a protected level").

2. *Hoopa Valley Tribe*

The Act of April 8, 1864, ch. 48, 13 Stat. 39, authorized the creation of the Hoopa Valley Reservation, which is located in northern California along the Klamath River and its largest tributary, the Trinity River, as a permanent homeland for the Hoopa Valley Tribe (Hoopa). We have long held that traditional fishing is one of the central purposes for which, like the Klamath Reservation, the Hoopa Valley Reservation was created. *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995) ("Our interpretation accords with the general understanding that hunting and fishing rights arise by implication when a reservation is set

aside for Indian purposes."). Generations of Hoopa have relied on the water and fish resources provided by the Klamath River and the Trinity River, which flow from the UKL, for cultural, religious, practical, commercial, and ceremonial purposes. *See Parravano*, 70 F.3d at 542 (noting that "the Tribes' salmon fishery was 'not much less necessary to [their existence] than the atmosphere they breathed'") (quoting *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (alteration in original).

C. The U.S. Bureau of Reclamation

The U.S. Bureau of Reclamation (Reclamation), a federal agency housed within the U.S. Department of the Interior, oversees water resource management. The Reclamation Act authorizes Reclamation to carry out water management projects in accordance with state law regarding the control, appropriation, use, and distribution of water for irrigation purposes, except where state law conflicts with superseding federal law. 43 U.S.C. § 383. In 1905, the United States Reclamation Service, the predecessor to the Bureau of Reclamation, filed a notice of appropriation with the Oregon State Engineer, indicating its intent to utilize the waters of the Klamath Basin in accordance with the Reclamation Act, and began construction of the Klamath River Basin Reclamation Project (the Klamath Project). Today, Reclamation manages the Klamath Project in accordance with state and federal law.

Reclamation has the "nearly impossible" task of balancing multiple competing interests in the Klamath Basin. *Klamath Irrigation Dist. v. United States Bureau of Reclamation*, 489 F. Supp. 3d 1168, 1173 (D. Or. 2020). First, Reclamation maintains contracts with individual irrigators and the irrigation districts that represent them, under which the United States has agreed to supply water

from the Klamath Project to the irrigators, "subject to the availability of water." Letter from the Solicitor at 7. Simply put, Reclamation cannot distribute water that it does not have. "Water would not be available, for example, due to drought, a need to forego diversions to satisfy prior existing rights, or compliance with other federal laws such as the Endangered Species Act." *Id.*

Reclamation is also responsible for managing the Klamath Project in a manner consistent with its obligations under the ESA. The ESA "requires Reclamation to review its programs and utilize them in furtherance of the purposes of the [Act]." Letter from the Solicitor at 9. Specifically, the ESA, among other obligations, requires federal agencies to consult with specified federal fish and wildlife agencies to ensure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence" of any species listed for protection under the Act "or result in the destruction or adverse modification of" the species' critical habitat. 16 U.S.C. § 1536(a)(2). Since the early 2000s, Reclamation has incorporated operating conditions developed through consultation with federal fish and wildlife agencies to ensure that its operations do not jeopardize the existence of fish species protected by the ESA, including the Lost River sucker, the shortnose sucker, and the Southern Oregon/Northern California Coast coho salmon. These conditions include maintaining minimum lake levels in UKL and minimum stream flows in the Klamath River downstream from the lake to benefit the fish.

Finally, Reclamation must operate the Project consistent with the federal reserved water and fishing rights of the Klamath, Hoopa Valley, and Yurok Tribes that predated the Project and any resulting Project rights. "The [P]roject's

1905 water rights are junior to the reserved water rights of the tribes . . . ." Letter from the Solicitor at 2.

D. The Klamath Basin Adjudication

In 1975, the State of Oregon convened the Klamath Basin Adjudication (KBA) to adjudicate the relative rights of use of the Klamath River and its tributaries in accordance with its general stream adjudication law. *See* Or. Rev. Stat.§ 539.005. Oregon law required that all parties file claims of water rights and subjected contested claims to an administrative review conducted by the Oregon Water Resources Department and then judicial review conducted by the county circuit court. *See id.* §§ 539.021, 539.100, 539.130. For the purposes of the adjudication, a party is "[a]ny person owning any irrigation works, or claiming any interest in the stream involved . . ." *Id.* § 539.100. Parties filed claims beginning in 1990, and administrative hearings began in 2001. *Baley*, 942 F.3d. at 1321.

In 2013, the Adjudicator issued findings of fact and an order of determination, and in 2014, the Adjudicator submitted the Amended Corrected Findings of Fact and Order of Determination to the Klamath County Court (the ACFFOD). *See* Amended Corrected Findings of Fact and Order of Determination, In the Matter of the Determination of the Relative Rights to Use of the Water of the Klamath River and Its Tributaries, Oregon Water Resources Dept. (Feb. 28, 2014).[1] In accordance with Or. Rev. Stat. § 539.150, the Klamath County Circuit Court is currently managing hearings to approve or modify the ACFFOD.

[1] The ACFFOD may be found at https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_00001.PDF (last visited Aug. 9, 2022).

While the court holds these hearings, the ACFFOD regulates water use in the Klamath Basin. Or. Rev. Stat. §§ 539.130, 539.170.

E. Present Dispute

1. *Biological Opinions and Operating Procedures*

Reclamation issued a Biological Assessment in 2018 following consultation with the Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the Services) pursuant to section 7(c) of the ESA, 16 U.S.C. § 1536(c). The Biological Assessment evaluated the potential effects of Reclamation's plan to manage the Klamath Project on federally listed fish species. Reclamation subsequently amended its proposed action and adopted the Services' 2019 Biological Opinions, which analyzed the impact of the Amended Proposed Action on the sucker fish endemic to UKL, listed as endangered under the ESA, and the Oregon/Northern California coho salmon, listed as threatened under the ESA. In the Amended Proposed Action, Reclamation confirmed that it would continue using the water in UKL for instream purposes, including to fulfill its obligations under the ESA and to the Tribes, necessarily limiting the amount of water available to other water users who hold junior rights to the Klamath Basin's waters.

2. *The Water Users*

Klamath Irrigation District (KID) and Shasta View Irrigation District (SVID) (collectively, the Districts) are special irrigation districts in Oregon formed to deliver irrigation water from UKL to their members. Additional water users who are parties to this action include other irrigation and drainage districts, farmers, and landowners

whose land is served by the Klamath Project. All private property interests held by the water users are held in trust by the United States for the use and benefit of the landowners. *Baley*, 942 F.3d at 1321.

II.

On March 27, 2019, KID and other water users filed this action for declaratory and injunctive relief against the Bureau of Reclamation and its officials. Shortly thereafter, SVID and other water users also filed a complaint for declaratory and injunctive relief against Reclamation and its officials, alleging similar claims. All parties stipulated to consolidate the two cases. KID and SVID sought a declaration that Reclamation's operation of the Klamath Project pursuant to the 2019 Amended Proposed Action based on the Services' biological assessments was unlawful under the Administrative Procedure Act (APA). KID and SVID also sought to enjoin Reclamation from using water from UKL for instream purposes and limiting the amount of water available to the irrigation districts.

The Hoopa Valley and Klamath Tribes successfully moved to intervene as of right, arguing that they were required parties to the suit. KID and SVID then filed Second Amended Complaints (SACs) seeking declaratory relief only.

The Districts asked the court, *inter alia*, to "[d]eclare Defendants [sic] actions under the APA unlawful" and "for declaratory relief setting forth the rights of the parties' rights [sic] under the ACFFOD, the Reclamation Act and the Fifth Amendment . . . ." Specifically, the Districts' SACs alleged that Reclamation's Amended Proposed Action failed to abide by the ACFFOD because Reclamation intended to use water stored in UKL for its own instream purposes without

a water right or other authority under the laws of the State of Oregon, in violation of the APA and Section 8 of the Reclamation Act. The SACs also alleged that Reclamation's actions violated the APA and Section 7 of the Reclamation Act, which requires Reclamation to acquire property rights, such as the right to use water under Oregon law, through Oregon's appropriation process or "by purchase or condemnation under judicial process," using the procedure set out by Oregon law. Although the Districts' claims are framed as procedural challenges, their underlying challenge is to Reclamation's authority and obligations to provide water instream to comply with the ESA, an obligation that is coextensive with the Tribes' treaty water and fishing rights.

The Tribes moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(7) for failure to join a required party under Federal Rule of Civil Procedure 19, arguing that tribal sovereign immunity barred their joinder. In a well-reasoned opinion, the magistrate judge recommended that the district court grant the Tribes' motions and dismiss this case, and on September 25, 2020, the district court adopted the magistrate's decision in full. This timely appeal followed.

III.

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331. We have jurisdiction over the district court's final judgment dismissing Appellants' complaints pursuant to 28 U.S.C. § 1291.

We review a district court's decision to dismiss a case for failure to join a required party under Rule 19 for abuse of discretion, and we review any legal questions underlying that decision de novo. *See, e.g.*, *Alto v. Black*, 738 F.3d 1111, 1125 (9th Cir. 2013). We review de novo both the

proper interpretation of a federal statute, such as the McCarran Amendment, *see United States v. Tan*, 16 F.4th 1346, 1349 n.1 (9th Cir. 2021), and issues of tribal sovereign immunity, *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 991 (9th Cir. 2020).

IV.

Failure to join a party that is required under Federal Rule of Civil Procedure 19 is a defense that may result in dismissal under Federal Rule of Civil Procedure 12(b)(7). We engage in a three-part inquiry. We first examine whether the absent party must be joined under Rule 19(a). We next determine whether joinder of that party is feasible. Finally, if joinder is infeasible, we must "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

A.

A party is a "required party" and must be joined under Federal Rule of Civil Procedure 19 if:

> "(A) in that [party's] absence, the court cannot accord complete relief among existing parties; or (B) that [party] claims an interest relating to the subject of the action and . . . disposing of the action in [their] 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."

Fed. R. Civ. P. 19(a)(1).

> "Although an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, our case law makes clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted."

Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs., 932 F.3d 843, 852 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 161, 207 L. Ed. 2d 1098 (2020). In this case, the Districts argue that, as a result of the ACFFOD, Reclamation has neither a right nor any other legal authorization to use water stored in the UKL reservoir for instream purposes, a claim that, "as a practical matter," would impair Reclamation's ability to comply with its ESA and tribal obligations.

We have long recognized that the Tribes have "federally reserved fishing rights." *See Parravano*, 70 F.3d at 541. Indeed, in *Adair* we held that the Klamath Tribe has "the right to prevent other appropriators from depleting the streams waters below a protected level." *Adair*, 723 F.2d at 1411. In addition, the Federal Circuit has held that both the Hoopa and Klamath Tribes "have [] implied right[s] to water to the extent necessary for them to accomplish hunting, fishing, and gathering." *Baley*, 942 F.3d at 1337 (citation omitted). We agree with the district court that our case law establishes that the Tribes' water rights are "at a minimum

coextensive with Reclamation's obligations to provide water for instream purposes under the ESA." Thus, a suit, like this one, that seeks to amend, clarify, reprioritize, or otherwise alter Reclamation's ability or duty to fulfill the requirements of the ESA implicates the Tribes' long-established reserved water rights. The Districts' invocation of the APA does not alone render this suit merely procedural. Put simply, if the Districts are successful in their suit, the Tribes' water rights could be impaired, so the Tribes are required parties under Federal Rule of Civil Procedure 19(a)(1)(B)(i).

B.

The Districts argue that the Tribes are not required parties to this suit because the Tribes' interests are adequately represented by Reclamation. We disagree.

"[A]n absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit." *Dine Citizens*, 932 F.3d at 852 (quoting *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013)). Whether an existing party may adequately represent an absent required party's interests depends on three factors: (1) "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments;" (2) "whether the party is capable of and willing to make such arguments;" and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Id.* (quoting *Alto*, 738 F.3d at 1127–28).

Three years ago, in *Dine Citizens*, we addressed the application of Rule 19 when an absent tribe that cannot be joined due to sovereign immunity has a legally protected interest that would be impaired by a successful suit to set aside agency action under the APA. In *Dine Citizens*, a

coalition of conservation organizations sued the U.S. Department of the Interior over its reauthorization of coal mining activities on land reserved to the Navajo Nation. *Dine Citizens*, 932 F.3d at 847. The lawsuit specifically challenged agency approval of a variety of changes and renewals to the Navajo Transitional Energy Company's (NTEC) leases and mining permits on the grounds that the agency's actions violated the requirements of the ESA. *Id.* at 849–50. NTEC, a corporation wholly owned by the Navajo Nation, intervened for the limited purpose of filing a motion to dismiss under Rule 12(b)(7) for failure to join a party required under Rule 19 due to that party's sovereign immunity. *Id.* at 850. The district court granted the motion to intervene, then dismissed the case, concluding that "NTEC had a legally protected interest in the subject matter of [the] suit, because the 'relief Plaintiffs [sought] could directly affect the Navajo Nation . . . by disrupting its 'interests in [its] lease agreements . . . ." *Id.* (internal quotation marks and citations omitted). We agreed with the district court, holding that:

> although an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, our case law makes clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted.

Id. at 852. We concluded that "[a]lthough Federal Defendants ha[d] an interest in defending their decisions, their overriding interest . . . must be in complying with environmental laws such as . . . the ESA. This interest differs

in a meaningful sense from [the tribe's] sovereign interest in ensuring [continued access to natural resources]." *Id.* at 855.

Under *Dine Citizens*, Reclamation's and the Tribes' interests, though overlapping, are not so aligned as to make Reclamation an adequate representative of the Tribes. The Tribes' primary interest is in ensuring the continued fulfillment of their reserved water and fishing rights, while Reclamation's primary interest is in defending its Amended Proposed Action taken pursuant to the ESA and APA. While Reclamation and the Tribes share an interest in the ultimate outcome of this case, our precedent underscores that such alignment on the ultimate outcome is insufficient for us to hold that the government is an adequate representative of the tribes.

In *Dine Citizens*, we distinguished *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998) (per curiam), which the Districts cite heavily in support of their argument that the Tribes are adequately represented by Reclamation. In *Southwest Center*, we held that the government was an adequate representative of a tribe in a suit brought to stall the government from utilizing a newly built dam pending further environmental study. 150 F.3d at 1154–55. We concluded that the government and the tribe shared the same interest in "ensuring that the [dam was] available for use as soon as possible." *Id.* at 1154. *Dine Citizens* was distinguishable because "while Federal Defendants [in *Dine Citizens* had] an interest in defending their own analyses that formed the basis of the approvals at issue, [] they [did] not share an interest in the outcome of the approvals." *Dine Citizens*, 932 F.3d at 855 (emphasis omitted). The present action is analogous. While Reclamation has an interest in defending its interpretations of its obligations under the ESA in the wake of the

ACFFOD, it does not share the same interest in the water that is at issue here.

The Districts argue that Reclamation is an adequate representative of the Tribes because the federal government acts as a trustee for the federal reserved water and fishing rights of Native American tribes. The Districts contend that this relationship results in a "unity of interest." But a unity of some interests does not equal a unity of all interests. As discussed above, Reclamation and the Tribes share an interest in the ultimate outcome of this case for very different reasons. Further, our case law has firmly rejected the notion that a trustee-trustor relationship alone is sufficient to create adequate representation. *See id.*

Further, outside of this case, the Tribes are in active litigation over the degree to which Reclamation is willing to protect the Tribes' interests in several species of fish. This fact further increases the likelihood that Reclamation would not "undoubtedly" make all of the same arguments that the Tribes would make in this case, and would materially limit Reclamation's representation of the Tribes' interests. For all of these reasons, Reclamation is not an adequate representative of the Tribes, so the Tribes are required parties to this suit under Federal Rule of Civil Procedure 19.[2]

[2] KID argues that "even if the Tribes are somehow necessary parties to the APA claims seeking to administer the rights found in the ACFFOD . . . the Tribes clearly have no interest in whether KID's procedural due process rights are being violated." Thus, KID argues, the district court erred by failing to separately analyze the application of Rule 19 to KID's procedural due process claim. We disagree. Because the Tribes assert that they have senior water rights, a ruling on KID's procedural due process claim would necessarily implicate the Tribes' water rights for the same reasons discussed above.

V.

The Districts argue that even if the Tribes are required parties under Rule 19, the suit should proceed because the McCarran Amendment waives the Tribes' sovereign immunity. We disagree.

Native American tribes are "domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Comm.*, 572 U.S. 782, 788 (2014) (internal quotation marks and citations omitted). "Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe." *Dine Citizens*, 932 F.3d at 856 (quoting *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008)). "That immunity . . . is a necessary corollary to Indian sovereignty and self-governance," *Bay Mills*, 572 U.S. at 788 (internal quotation marks and citations omitted), and is critically important for the protection of tribal resources.

The McCarran Amendment waives the United States' sovereign immunity in suits:

> (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. § 666(a). While the McCarran Amendment "reach[es] federal water rights reserved on behalf of Indians," *Colo. River Water Conservation Dist. v. United*

States, 424 U.S. 800, 811–12 (1976), the Amendment only controls in cases "adjudicati[ng]" or "administ[ering]" water rights. 43 U.S.C. § 666(a). Even assuming the McCarran Amendment's waiver of sovereign immunity extends to tribes as parties, *but see Arizona v. San Carlos Apache Tribes of Arizona*, 463 U.S. 545, 567 n. 17 (1983), the Amendment does not waive sovereign immunity in every case that implicates water rights.

An "administration" of water rights under 43 U.S.C. § 666(a)(2) occurs after there has been a "prior adjudication of relative general stream water rights." *See South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985). However, not every suit that comes later in time than a related adjudication amounts to an administration under the Amendment. *Cf. id.* at 542 ("The McCarran Amendment was . . . not an attempt to resolve the whole field of water rights litigation."); *San Luis Obispo Coastkeeper v. U.S. Dep't of the Interior*, 394 F. Supp. 3d 984, 995 (N.D. Cal. 2019), *aff'd*, 827 F. App'x 744 (9th Cir. 2020) ("In sum, the purpose of the McCarran Amendment is not to waive sovereign immunity whenever litigation may incidentally relate to water rights administered by the United States. It is for determining substantive water rights by giving courts the ability to enforce those determinations . . . .").

The parties do not dispute that the Klamath Adjudication that resulted in the ACFFOD is an adjudication within the meaning of the McCarran Amendment. Indeed, we agree that the Klamath Basin Adjudication was a McCarran Amendment case. However, the parties disagree as to whether *this* case is an administration of that general stream adjudication within the meaning of the McCarran Amendment.

The Districts argue that this case is, in effect, an enforcement action to ensure that Reclamation complies with the terms of the ACFFOD. Reclamation and the Tribes disagree. Reclamation argues this suit is not an administration because the KBA is ongoing and the present suit is not one to administer rights that were provisionally determined in the administrative phase of that adjudication. The Klamath Tribes argue that this suit is not an administration because, rather than requesting that the government administer the various water rights at stake in the KBA in relation to one another, here the Districts seek to define the relationship between certain of the Districts' KBA-determined rights in relation to Reclamation's *obligations* under the ESA and the Reclamation Act.

We conclude that this lawsuit is not an administration of previously determined rights but is instead an APA challenge to federal agency action—specifically, Reclamation's Amended Proposed Action and Reclamation's authority to release water from Upper Klamath Lake consistent with the ESA and the downstream rights of the Hoopa Valley and Klamath Tribes. The Klamath Tribes argue that the rights adjudicated to them and others in the KBA do not define the extent of the Tribes' treaty-based interests in the water and fish resources of Upper Klamath Lake or its distributaries. And because Hoopa are a *California*-based tribe, their rights were not adjudicated in the *Oregon* KBA, so those rights cannot be "administered" in this proceeding within the meaning of the McCarran Amendment.

VI.

Having determined that the Tribes are required parties under Federal Rule of Civil Procedure 19 that cannot be joined due to sovereign immunity, we consider whether this

case should proceed in equity and good conscience. We agree with the district court that it should not.

To determine whether a suit should proceed among the existing parties where a required party cannot be joined, courts consider (i) potential prejudice, (ii) possibility to reduce prejudice, (iii) adequacy of a judgment without the required party, and (iv) adequacy of a remedy with dismissal. Fed. R. Civ. P. 19(b). Here, we are up against "a wall of circuit authority" requiring dismissal when a Native American tribe cannot be joined due to its assertion of tribal sovereign immunity. *See Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021) (internal quotation marks and citation omitted). In *Deschutes*, we considered whether the Clean Water Act could abrogate tribal sovereign immunity such that a tribe could be joined as a defendant in a citizen suit against Portland General Electric (PGE) over a hydroelectric project that PGE and the tribe co-owned and co-operated. In holding that sovereign immunity barred the tribe's joinder, we stated:

> The balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity. . . . If 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 . . . . [T]here is a wall of circuit authority in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity—virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternative] remedy is

> available, if the absent parties are Indian tribes invested with sovereign immunity.

Id. (alteration in original) (internal citations and quotations omitted).

"[P]rejudice to any party resulting from a judgment militates toward dismissal of the suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (emphasis omitted). Reclamation and the Tribes argue that if the Districts succeed in this suit, the government will be unable, as trustee of the Tribes' water rights, to operate consistent with those rights, and this will imperil tribal water rights. Specifically, Hoopa argues that the government's, and therefore the Tribes', water rights are senior to those of the irrigators, but a decision for the Districts on the merits in this suit could threaten that understanding.

In some circumstances, a court may lessen the prejudice to a nonparticipating party, and therefore push the balance against dismissal, if it provides protective provisions in its judgment, thoughtfully shapes the relief it grants, or takes other ameliorative measures. *See* Fed. R. Civ. P. 19(b)(2). The Districts argue that the district court can carefully craft its declaratory judgment to grant the Districts relief "without forestalling Reclamation's ability to acquire and use whatever water it needs to satisfy whatever obligations it has."

However, there is no way to shape relief to avoid the prejudice here because the Districts' claims and the Tribes' claims are mutually exclusive. The Districts seek a declaration that they hold senior water rights from UKL following the ACFFOD, and the Tribes seek to preserve their reserved water rights in those same waters. For example, fulfilling the Districts' irrigation needs in the spring and

early summer would require restricting the water flows necessary to limit disease in fish during that same period. *See Hoopa Valley Tribe v. Nat'l Marine Fisheries Servs.*, 230 F. Supp. 3d 1106, 1146 (N.D. Cal. 2017) (entering an injunction to make additional flow available from April 1 through June 15 to mitigate disease impacts). In cases involving competing claims to finite natural resources, courts have found that there is no way to shape relief to avoid prejudice. *See Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168, 1187–88 (W.D. Wash. 2014) (finding no way to eliminate prejudice to absent tribes where tribal claimant sought exclusive authority to manage and harvest all of treaty resources to the exclusion of other tribes); *Makah*, 910 F.2d at 560 (finding no way to shape remedy where only "adequate" remedy would be at expense of absent tribes). We also find no such path forward here, so this case must be dismissed in equity and good conscience.

VII.

Because the Tribes are required parties under Federal Rule of Civil Procedure 19 who cannot be joined due to sovereign immunity, and because this case in equity and good conscience should not proceed in the Tribes' absence, we **AFFIRM** the district court's dismissal of this action.

BUMATAY, Circuit Judge, concurring:

Our precedent requires us to affirm here. In *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, we made it "clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted." 932 F.3d 843, 852 (9th Cir.

2019). Given *Dine Citizens*, I agree with the majority that the Hoopa Valley and Klamath Tribes are necessary parties, they are entitled to tribal sovereign immunity, and the Irrigation Districts' actions must be dismissed under Rule 19(b) of the Federal Rules of Civil Procedure.

Yet I write separately because the Klamath Irrigation District's arguments on the McCarran Amendment are much closer than the majority presents. While I ultimately agree that this case is not a McCarran Amendment case, the analysis requires more attention. I thus join the majority opinion except for Section V.

The McCarran Amendment is a "virtually unique federal statute." *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 571 (1983). It waives federal sovereign immunity in "any suit" for the "adjudication" or "administration" of the "rights to the use of water of a river system or other source." 43 U.S.C. § 666(a). The Amendment recognizes the "highly interdependent" nature of water rights and the costs of "permitting inconsistent dispositions" of such rights among different proceedings. *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 819 (1976). By stripping sovereign immunity, Congress sought to "avoid[the] piecemeal adjudication of water rights" and to encourage their resolution in "unified proceedings." *Id.*

And the Supreme Court has construed the Amendment to strip sovereign immunity over tribal water rights held as "reserved rights" by the federal government. *United States v. District Court for Eagle Cnty.*, 401 U.S. 520, 524 (1971). Based on its text and underlying policy, the Court has held that the Amendment "reach[es] federal water rights reserved on behalf of Indians." *Colo. River Water Conservation Dist.*, 424 U.S. at 811. Because of the "ubiquitous nature of

Indian water rights," the Court observed that it would frustrate Congress's will to exclude those rights from water-rights suits. *Id.* So, at its core, the McCarran Amendment grants parties an opportunity to resolve competing water rights, including against reserved tribal water rights, in any suit for the adjudication or administration of certain water rights.

Given the unique nature of the McCarran Amendment, our Rule 19 adequacy analysis necessarily changes too. *See Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013) (Under Rule 19, we typically look to see whether an absent party's "interest will be adequately represented by existing parties to the suit."). As the Court emphasized, in McCarran proceedings, the federal government retains "responsibility [to] fully . . . defend Indian rights" and to ensure that "Indian interests [are] satisfactorily protected." *Colo. River Water Conservation Dist.*, 424 U.S. at 812. Thus, by consenting to join tribal water rights in water-rights adjudications, Congress entrusted the stewardship of those rights to the federal government. And so, in my view, Congress has determined that the federal government adequately represents reserved tribal water rights for Rule 19 purposes in McCarran proceedings.

Putting these pieces together, if a case falls within the scope of the McCarran Amendment, then sovereign immunity over reserved tribal water rights is stripped and the federal government becomes an adequate representative to fully defend those rights in court. Such a situation would render dismissal under Rule 19(b) unnecessary.

The important question here is, thus, whether the Irrigation Districts have brought a suit subject to the McCarran Amendment. I ultimately conclude that this case is not a McCarran Amendment case because of the presence

of the Hoopa Valley Tribe. The Hoopa Valley Tribe is a California-based tribe whose interest in the Klamath River was not adjudicated in the Klamath Basin Adjudication. And "[l]ogically, a court cannot adjudicate the administration of water rights" unless "those rights" were first determined elsewhere. *S. Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985). In other words, if the Hoopa Valley Tribe's rights to Klamath River water in Oregon were never adjudicated, then there would be nothing to "administ[er]" here.[1] 43 U.S.C. § 666(a)(2). As a result, this case cannot be a McCarran Amendment "administration" case.

But things are different with the Klamath Tribe. The Klamath Tribe is in Oregon and the Klamath Basin Adjudication did rule on its water rights. *See United States v. Oregon*, 44 F.3d 758, 769 (9th Cir. 1994). So if the Irrigation Districts seek to "execute [the Klamath Basin Adjudication], to enforce its provisions, to resolve conflicts as to its meaning, [or] to construe and to interpret its language," *S. Delta Water Agency*, 767 F.2d at 541 (simplified), as to the Klamath Tribe, then this case would be a McCarran Amendment "administration." I thus disagree with the majority's suggestion that Administrative Procedure Act challenges or cases involving Endangered Species Act obligations can never be McCarran Amendment cases. *See* Maj. Op. Section V.

[1] The Klamath Irrigation District contends that the Hoopa Valley Tribe has no rights to Klamath River water in Oregon. That might be so, but that needed to be litigated in another water-rights proceeding—not here—for this action to be a McCarran "administration."

For these reasons, I concur in the majority opinion except for Section V.

Exhibit C

Nos. 20-36009, 20-36020 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KLAMATH IRRIGATION DISTRICT,
Plaintiff-Appellant,

and

SHASTA VIEW IRRIGATION DISTRICT, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF RECLAMATION, et al.,
Defendants-Appellees,

and

HOOPA VALLEY TRIBE; THE KLAMATH TRIBES,
Intervenor Defendants-Appellees.

Appeal from the United States District Court for the District of Oregon
Nos. 1:19-cv-00451, 1:19-cv-00531 (Hon. Michael J. McShane)

FEDERAL APPELLEES' ANSWERING BRIEF

JEAN E. WILLIAMS
Acting Assistant Attorney General
JOHN L. SMELTZER
RACHEL HERON
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-0916
rachel.heron@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Court Rules

Regulations

Other Authorities

INTRODUCTION

Two years ago—over the federal government's objection—this Court held in *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 161 (2020), that a challenge to final agency action was properly dismissed under Federal Rule of Civil Procedure 19 where an absent tribe had a legally protected interest in the subject of the challenge and could not be joined due to sovereign immunity, notwithstanding that dismissal in those circumstances "arguably produce[s] an anomalous result in that no one, except a Tribe, could seek review" of agency action affecting that tribe's existing rights. *Id.* at 860-61 (internal quotation marks omitted).

The plaintiffs in the present case are irrigation districts that receive water from the Klamath Project, a federal irrigation project. The Bureau of Reclamation ("Reclamation") has adopted operating procedures for the Project that restrict the diversion of water for irrigation to maintain specified lake levels and instream flows to avoid jeopardy to fish species protected under the Endangered Species Act ("ESA"). As this Court and other courts have recognized, Reclamation's decision to maintain such minimum lake levels and stream flows under the ESA also partially safeguards federal reserved water rights held by certain Indian tribes to water levels capable of supporting their federal reserved fishing rights. The irrigation districts nevertheless seek declaratory relief that Reclamation lacks

authority to operate the Project in this way. Because granting that relief would imperil tribal water rights, and because the affected tribes have not consented to the consolidated actions, the district court followed *Diné Citizens* and granted motions to dismiss filed by two intervenor tribes, the Klamath Tribes of Oregon and the Hoopa Valley Tribe of California. Although Reclamation did not join the motions and does not concede that *Diné Citizens* was correctly decided, affirmance appears to be compelled by circuit precedent unless this Court revisits that precedent en banc.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because the claims pleaded by the two sets of plaintiffs, Klamath Irrigation District and Shasta View Irrigation District, *et al.*,[1] arise under a federal statute, namely, the Administrative Procedure Act ('APA"), 5 U.S.C. § 706. KID_ER-14. The district court's judgment was final because it resolved all claims against all defendants. KID_ER-3-5. This Court accordingly has jurisdiction under 28 U.S.C. § 1291.

[1] This brief will refer to the entire second set of plaintiffs, collectively, as "Shasta View Irrigation District."

The district court entered judgment on September 25, 2020. KID_ER-3.[2] Plaintiff Klamath Irrigation District filed a notice of appeal on November 19, 2020, or 55 days later. KID_ER-168-69. Plaintiff Shasta View Irrigation District filed a notice of appeal on November 23, 2020, or 59 days later. SVID_ER-29-32. Both appeals are timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUE

Whether the district court erred in dismissing the irrigation districts' challenges to federal agency action for failure to join a required and indispensable party under Federal Rule of Civil Procedure 19.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are reproduced in the Addendum to Shasta View Irrigation District's opening brief.

STATEMENT OF THE CASE

A. Reclamation's operation of the Klamath Project

The Klamath River Basin stretches from southern Oregon to northern California. KID_ER-7. From time immemorial, the basin and its resources, including Upper Klamath Lake, have been used by the Klamath Tribes "for subsistence, cultural, ceremonial, religious, and commercial purposes." KID_ER-8.

[2] Although the text of the final judgment lists *August* 25, 2020, as the date of the order, both the ECF header of that judgment and the header and text of the accompanying order show that it was filed on *September* 25, 2020. KID_ER-3-5.

Similarly, the Hoopa Valley and Yurok Tribes have from time immemorial relied on water and fish in the Klamath River, which flows from Upper Klamath Lake and ultimately through what are now the Hoopa and Yurok reservations in northern California. KID_ER-7-9.[3]

Upper Klamath Lake is a natural lake located in the Klamath River Basin. The lake is now a central feature of the Klamath Project, a federal reclamation project constructed by Reclamation under the Reclamation Act of 1902. KID_ER-7. A full account of the intricacies of the Project—and Reclamation's "nearly impossible" task in balancing the competing interests in the basin—are beyond the scope of this appeal. *Id.* For purposes of this case, the following overview of Reclamation's obligations suffices.

First, the Project holds water rights for irrigation purposes under state law, and Reclamation exercises those water rights consistent with federal reclamation law and contracts executed under it. To briefly summarize, the Reclamation Act, Pub. L. No. 57-161, 32 Stat. 388 (codified as amended at 43 U.S.C. § 371 *et seq.*), authorized and directed Interior to comply with state law regarding the appropriation of water for irrigation, except where state law conflicts with superseding federal law. 43 U.S.C. § 383. Oregon and California follow the "prior

[3] Although the Yurok Tribe is not a participant in this case, its rights are similarly situated to the Hoopa Valley Tribe, as discussed below. *See* pp. 8-9, *infra*.

appropriation" doctrine, which recognizes the superior right of the first person in time to divert and put water to a beneficial use. *Baley v. United States*, 942 F.3d 1312, 1320 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 133, (2020), (citing *Arizona v. California*, 298 U.S. 558, 565-66 (1936)). Accordingly, at the time it initiated the Project, the United States followed state law and administrative procedures to claim the right to use all waters in the basin that were not already appropriated. *Id.* The United States then entered into contracts with individual irrigators and irrigation districts representing them, under which the United States agreed to supply water from the Project to the irrigators. *Id.* at 1320-21. The United States "holds the water right that it appropriated" under state law "for the use and benefit of the landowners," who subsequently put that water to beneficial use. *Id.* at 1321 (quoting *Klamath Irrigation District v. United States*, 227 P.3d 1145, 1163-64 (Oregon 2010)).

Second, Reclamation must operate the Project consistent with the requirements of the ESA, 16 U.S.C. § 1531 *et seq.*, which—among other obligations—requires federal agencies to consult with specified federal fish and wildlife agencies to ensure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence" of any species listed for protection under the Act "or result in the destruction or adverse modification of" the species' critical habitat. *Id.* § 1536(a)(2). As relevant to this

case, two species of sucker fish that are endemic to Upper Klamath Lake and its tributaries are listed as "endangered" under the ESA, 53 Fed. Reg. 27,130 (July 18, 1988), and the Southern Oregon/Northern California Coast coho salmon, which spawns in the Klamath River downstream of the Project, is listed as "threatened." 62 Fed. Reg. 24,588 (May 6, 1997). Since the early 2000s, Reclamation has consulted with those relevant agencies regarding the impacts of Project operations on these listed fish. In the present case, the result of that consultation was a set of operating conditions that, when followed, ensure that Reclamation's operation of the Project will avoid jeopardy to listed species or adverse modification of their critical habitat. *See* KID_ER-14-15. These conditions, which Reclamation incorporated into its operations plan, include maintaining minimum lake levels in Upper Klamath Lake (to benefit listed sucker fish) and minimum stream flows in the Klamath River downstream from the lake (to benefit listed salmon). *See id.*

Third, Reclamation must operate the Project consistent with the federal reserved rights of affected Indian tribes. By way of background, under federal law, the establishment of a federal reservation implicitly reserves sufficient water to accomplish the purposes of the reservation. *Winters v. United States*, 207 U.S. 564, 576 (1908); *see also Cappaert v. United States*, 426 U.S. 128, 139 (1976); *Arizona v. California*, 373 U.S. 546, 598-600 (1963). Here, reservations for the Klamath, Hoopa Valley, and Yurok Tribes—along with federal reserved rights to fish and

associated rights to enough water to support the right to fish—were established decades before construction of the Project and thus predate Project rights. *See Baley*, 942 F.3d at 1321-23.

Turning first to the Klamath Tribes, in an 1864 treaty with the United States, the Klamath Tribes ceded their interest in millions of acres of land in exchange for a much smaller reservation adjacent to Upper Klamath Lake, and "the exclusive right of taking fish in the streams and lakes, included in said reservation." Treaty Between the United States and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, art. 1, 16 Stat. 707 (Oct. 14, 1864); *see also* KID_ER-8. At that time, the now-endangered sucker fish were a major food source for the Klamath Indians. *See Baley*, 942 F.3d at 1322-24, 1328, 1336-37; 53 Fed. Reg. at 27,130. Although Congress has since disestablished the Klamath Reservation, that act did not abrogate the Klamath Tribes' treaty fishing rights and associated water rights. *United States v. Adair*, 723 F.2d 1394, 1411-12 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

In the Klamath Basin Adjudication, a general adjudication of water rights in the Klamath Basin in Oregon that is presently ongoing in Oregon state court, the United States and Klamath Tribes claimed, *inter alia*, federal reserved water rights for the Tribes in Upper Klamath Lake, in the form of minimum lake levels necessary to support sucker fish and other resident fish species. *See* Corrected

Partial Order of Determination, *Klamath Basin General Stream Adjudication* 1 (Feb. 28, 2014).[4] Those rights were provisionally determined in the administrative phase of the adjudication and are currently enforceable under Oregon state law. *See id.* 4-7; KID_ER-12; *see also* Or. Rev. Stat. §§ 539.130(4), 539.170 (administratively determined rights are enforceable pending judicial review). Although the United States and Klamath Tribes stipulated and agreed not to assert those rights against the Project water rights during the pendency of the adjudication (now in its judicial review phase), that stipulation terminates upon the completion of the adjudication. *See* Dist. Ct. 1:19-cv-00451, ECF No. 84 at 5.

With regard to the Hoopa Valley and Yurok Tribes, reservation lands were set aside in a series of executive orders issued in 1855, 1876, and 1891. *Baley*, 942 F.3d at 1323; *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995). In 1988, Congress passed the Hoopa-Yurok Settlement Act, which partitioned the reserved lands between the Hoopa Valley and Yurok Tribes. *Parravano*, 70 F.3d at 542. Historically, and for generations since the establishment of these reservations, the Hoopa Valley and Yurok Tribes have depended on salmon and other fish species found in the Klamath and Trinity Rivers "for their nourishment and economic livelihood." *Id.* Indeed, one of the United States' purposes in selecting these

[4] *Available at* https://www.oregon.gov/OWRD/programs/WaterRights/-Adjudications/KlamathAdj/KBA_ACFFOD_04938.pdf.

riverine lands to set aside for the Tribes was to secure a salmon fishery for the Tribes, to preserve the Tribes' traditional fishing rights. *See id.* at 545-46; *see also Baley*, 942 F.3d at 1323.

Although the federal reserved water rights of the Hoopa Valley and Yurok Tribes have not been fully determined in a water-rights adjudication or congressional settlement, those rights have been recognized by the courts. Specifically, in 2001, Project irrigators brought a takings claim against the United States, alleging that the curtailment of Project water deliveries for ESA purposes constituted a taking of water rights. *Baley*, 942 F.3d at 1316. In defense of that claim, the United States asserted that waters released to avoid jeopardy to listed salmon were also consistent with the federal reserved water rights of the Tribes. *See id.* at 1334. The Federal Circuit agreed, confirming that the reserved water rights exist and are at least as great as necessary to avoid jeopardy to the listed salmon species. *Id.* at 1335-37. This Court has similarly recognized the need to operate the Project consistent with both the ESA and senior tribal water rights. *See Klamath Water Users Ass'n v. Patterson*, 204 F.3d 1206, 1213-14 (9th Cir. 1999), *cert. denied*, 531 U.S. 812 (2000).

B. This court's recent precedent regarding dismissal for failure to join a required and indispensable party

As stated above, this appeal ultimately turns on this Court's recent precedent regarding Federal Rule of Civil Procedure 19. Rule 19 provides that a nonparty to a lawsuit is "required to be joined if feasible" when one of two criteria is met:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) 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.

Fed. R. Civ. P. 19(a)(1).

When joinder of a required nonparty is not feasible—as, for example, when the nonparty is protected from suit by sovereign immunity—"the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed," *i.e.*, whether the nonparty is "indispensable" to the action. Fed. R. Civ. P. 19(b). In making the indispensability determination, courts consider four factors:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Id.

Two years ago, in *Diné Citizens*, this Court addressed how Rule 19 applies when an absent tribe, which cannot be joined without consent, has a legally protected interest that would be impaired by a successful APA lawsuit to set aside federal agency action. At issue in *Diné Citizens* was a lawsuit brought by groups concerned about the environmental and public health consequences of a coal mine located on tribal land within the Navajo Reservation and owned by an arm of the Navajo Nation. 932 F.3d at 847-48. The groups specifically challenged the federal agencies' approval of a lease between the tribe and its operating partner, granting of certain rights of way, and issuance of a mining permit, claiming that the agencies had failed to adequately perform analyses required by the National Environmental Policy Act and ESA. *Id.* at 849-50. The absent tribal entity intervened for the limited purpose of filing a motion to dismiss, arguing that it was

a required party under Rule 19(a) that could not be joined because it was shielded by tribal sovereign immunity, and that equity and good conscience demanded that the lawsuit be dismissed in its absence. *Id.* at 850.

The United States opposed dismissal of the claims, notwithstanding that it would benefit from dismissal as the named defendant in the case, urging that the federal government is the only required and indispensable defendant in an APA challenge to a federal agency's compliance with federal statutes through a final agency action. *Id.* This Court disagreed. Specifically, this Court held that the absent tribal entity was a required party to the litigation under Rule 19(a), notwithstanding that plaintiffs' challenge was solely to the federal agencies' compliance with federal statutes, because a judgment for the plaintiffs would impair the tribal entity's interest in the existing lease, rights-of-way, and permit. *Id.* at 852-53. In other words, "the litigation could affect already-negotiated lease agreements and expected jobs and revenue"—interests that the tribal entity already possessed, not merely interests that the tribal entity could one day seek to obtain. *Id.* at 853.

The Court also rejected the United States' argument that the absent tribal entity need not be joined because the federal government could adequately represent its interest in seeing the federal agency action upheld, noting that while the federal defendants "have an interest in defending their own analyses," they "do

not share an interest in the *outcome* of the approvals—the continued operation of" the tribe's mine and associated power plant. *Id.* at 855. The Court also noted that the Navajo Nation's interest in being able to operate a mine and power plant to support its population was not merely pecuniary but "sovereign" in nature. *Id.*

After concluding that the absent tribal entity could not be joined without consent, the Court turned to Rule 19(b)'s indispensability analysis and concluded that the district court did not err in dismissing the lawsuit. *Id.* at 857-58. In so doing, the Court acknowledged that two of Rule 19(b)'s four listed factors arguably weighed against dismissal—including the fact that the plaintiff groups "would have no alternate forum in which to sue Federal defendants for their alleged procedural violations" if the case were dismissed. *Id.* at 858. Nevertheless, the Court concluded that "[e]ven assuming that no alternate remedy exists," dismissal would be proper because "the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Id.*; *see also Deschutes River Alliance v. Portland General Elec. Co.*, Nos. 18-35867, 18-35932, 18-35933, __ F.3d. __, 2021 WL 2559477, at *7-8 (9th Cir. June 23, 2021) (citing *Diné Citizens* to dismiss ESA challenge to private-tribal hydroelectric project where action would implicate tribes' protected interests).

Finally, the Court declined to apply the "public rights" exception to traditional joinder rules to allow the lawsuit to go forward. *Diné Citizens*, 932 F.3d

at 858-61. It recognized that, in doing so, it was deviating from the law of the Tenth Circuit, which has refused to dismiss challenges in comparable circumstances to avoid producing the "anomalous result" that "[n]o one, except [a] Tribe, could seek review of . . . significant federal action relating to leases or agreements for development of natural resources on [that tribe's] lands," unless the tribe voluntarily waives its sovereign immunity. *Id.* at 860-61 (quoting *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977)). The Court nevertheless declared that anomaly a problem "for Congress to address, should it see fit." *Id.*

C. The present lawsuit

The plaintiffs in this lawsuit, Klamath Irrigation District and Shasta View Irrigation District, each sued the federal government under the APA, challenging the 2019-2024 operations plan for the Project, along with certain ESA analyses supporting that plan. KID_ER-14. In their operative complaints, the irrigation districts asked the district court both to set Reclamation's operations plan aside as unlawful *and* to enter a declaratory judgment setting forth certain restrictions on Reclamation's management of the Project.

Turning to each complaint separately, Klamath Irrigation District sought a judgment declaring that the operations plan violates state law—and thereby the provision of the Reclamation Act directing the United States to comply with state law where not inconsistent with federal law—because no "water right or other

authority under state or federal law" allows Reclamation to "interfer[e] with the vested water rights of [Klamath Irrigation District], its landowners, and other water right holders" or to "cap[]" the amount of water the district receives. KID_ER-113-14. The district likewise sought a declaration that Reclamation violated both the Reclamation Act and the Fifth Amendment's right to due process by depriving the district of its "property interest in the beneficial use of water . . . without first purchasing or condemning" those rights via judicial process. KID_ER-114-15.

Shasta View Irrigation District, for its part, claimed that "[n]either" the ESA "nor any other authority or obligation that may be asserted by Defendants, confers legal power or authorities on Defendants to curtail diversion and use of water by" the irrigation district. SVID_ER-202. The district also, like its co-plaintiff, claimed that Reclamation was violating state law and thus the Reclamation Act by using water from the Project to maintain in-stream flows for fish "without a water right or other authority," and sought a declaration that such use of water by Reclamation is not "authorized by any applicable law." SVID_ER-207, 210; *see also* SVID_ER-211 (seeking a declaration that capping water delivery to the irrigation district "is not authorized or required by Oregon law, the Reclamation Act, or" the ESA). The district additionally pleaded two claims asserting that particular aspects of Reclamation's ESA analysis were arbitrary and capricious. SVID_ER-211-16.

After the irrigation districts initiated their lawsuits, the Klamath and Hoopa Valley Tribes intervened for the limited purpose of filing motions to dismiss, arguing that because the irrigation districts' requested relief would impair the Tribes' federal reserved rights to sufficient lake levels and instream flows, the Tribes are required and indispensable parties under Rule 19 that cannot be joined due to sovereign immunity. *See* KID_ER-6. The irrigation districts opposed the motions to dismiss.

Although Reclamation had not itself moved to dismiss the claims against it on Rule 19 grounds, it concluded, upon review of the motions and this Court's decision in *Diné Citizens*, that dismissal was consistent with circuit law. Reclamation accordingly filed a short response to the motions indicating that under *Diné Citizens*, "the Tribes' sovereign interests in their treaty fishing and federal reserved water rights could be impaired by this litigation, and the Tribes appear to satisfy the other criteria for granting dismissal under Rule 19 under the Ninth Circuit's reasoning in that opinion." SVID_ER-125-26. Reclamation's response thus stated that, while the federal government continues to "disagree with" *Diné Citizens* and "reserve the right to assert in future proceedings that the United States is generally the only required and indispensable defendant in APA litigation," it "d[id] not dispute that the Motions to Dismiss should be granted under the current state of the law in the Ninth Circuit." SVID_ER-126.

The magistrate judge recommended in favor of dismissal, agreeing that granting the irrigation districts' requested relief could impair the absent Tribes' legally protected interests and that dismissal was warranted under *Diné Citizens*. KID_ER-13-26. Over the irrigation districts' objections, the district court adopted the magistrate's findings and recommendation in full and dismissed both complaints. KID_ER-4-5. These consolidated appeals followed.

SUMMARY OF ARGUMENT

Under this Court's precedent, dismissal of an APA challenge to final agency action is proper where granting the requested relief would impair an absent tribe's existing legally protected interest. This Court has applied that rule even where dismissal would deprive the plaintiff of any alternate forum for raising an APA challenge. And it has endorsed that rule even while acknowledging that the effect of the rule may be—in the words of Shasta View Irrigation District's opening brief—to create a "one-way street" in which the public may not obtain judicial review of certain categories of federal government action, absent a tribe's voluntary consent to suit.

The United States argued against application of such a rule in *Diné Citizens*, and it continues to disagree with that rule. But that disagreement does not change that *Diné Citizens* is the law of this circuit. Under that controlling precedent, the district court correctly dismissed the irrigation districts' lawsuits. Thus, unless this

Court revisits *Diné Citizens* or chooses to confine that case strictly to the facts presented, affirmance is warranted.

STANDARD OF REVIEW

This Court reviews a district court's decision to dismiss for failure to join a required party for abuse of discretion but reviews its underlying legal conclusions *de novo*. *Diné Citizens*, 932 F.3d at 851.

ARGUMENT

The district court appropriately dismissed in light of controlling circuit precedent.

As discussed above, *Diné Citizens* concerned an APA lawsuit challenging the lawfulness of *federal* action. Nonetheless, even in that context, this Court held that an absent tribal entity was a required party under Rule 19(a) because a judgment declaring the challenged federal approvals unlawful would impair the absent tribe's sovereign interest in those approvals. *Id.* at 852-53. The Court considered and rejected the view that the United States could adequately represent the absent tribes' interest, holding instead that, to be an adequate representative, the federal government must share an interest not only in seeing the challenged agency action upheld, but also in the ultimate "outcome" or consequence of upholding that action. *Id.* at 855. The Court further held that dismissal was proper in the tribal entity's absence, notwithstanding that dismissal would deprive APA

plaintiffs of a forum for challenging federal action. *Id.* at 858; *cf. Deschutes River Alliance*, 2021 WL 2559477, at *7-8.

Here, as in *Diné Citizens*, plaintiff irrigation districts challenge the lawfulness of federal agency action under the APA. And while the challenged agency action in this case is not, as in *Diné Citizens*, the federal approval of a lease or permit to which the absent Klamath and Hoopa Valley Tribes are parties, a judgment granting the relief requested by the irrigation districts could call into question the scope or existence of the Tribes' legal rights.

To briefly elaborate, the irrigation districts ask the court to hold—and enter declaratory judgment memorializing—that Reclamation is acting unlawfully because no "water right or other authority under state or federal law" allows Reclamation to withhold water or curtail water deliveries to the districts in order to maintain sufficient water levels for ESA-listed fish. KID_ER-113-14; *see also* SVID_ER-202 (alleging that no "other authority or obligation that may be asserted by Defendants, confers legal power or authorities on Defendants to curtail diversion"); SVID_ER-210 (alleging that Reclamation's actions are not "authorized by any applicable law"). Reclamation adopted its challenged operation plan in accordance with its responsibilities under the ESA, as discussed above. The requirements of the ESA apply without regard to the federal reserved rights of the intervenor Tribes. But as courts have recognized, the actions mandated by the ESA

for the protection of listed fish in the Klamath Basin are consistent with and can partially fulfill the senior federal reserved rights of the Klamath, Hoopa Valley, and Yurok Tribes. *Baley*, 942 F.3d at 1336-37; *see also Patterson*, 204 F.3d at 1213-14; KID_ER-17 (collecting cases). In seeking declarations that no authority permits the curtailment of Project water rights for purposes of retaining lake levels and stream flows for fish, the irrigation districts apparently seek relief that would preclude Reclamation from recognizing the senior tribal water rights and from operating the Project consistent with those rights. Because the lawsuits thus seek relief that would imperil tribal water rights, *Diné Citizens* controls.

Klamath Irrigation District argues that Rule 19 (and thus *Diné Citizens*) is inapplicable to this case—or, more precisely, that the Klamath and Hoopa Valley Tribes cannot assert tribal sovereign immunity as a barrier to joinder—because the McCarran Amendment, 43 U.S.C. § 666(a), effectively waives tribal sovereign immunity in the context of water adjudications. KID Op. Br. 22-49. This is incorrect.[5] True, the McCarran Amendment waives federal sovereign immunity

[5] Reclamation's response to the Tribes' motion to dismiss did not address the McCarran Amendment arguments presented in Klamath Irrigation District's opposition to that motion, which was filed simultaneous with Reclamation's response. And Reclamation, as neither the movant nor a party against whom dismissal was sought, did not file a response to the irrigation districts' objections to the special master's recommendation. Nevertheless, because Klamath Irrigation District now asks this Court to make circuit-level precedent broadly construing the McCarran Amendment's waiver of the United States' sovereign immunity, Reclamation offers this rebuttal to aid the Court's analysis.

and grants consent to the joinder of the United States in suits "for the adjudication of rights to the use of water of a river system or other source," 43 U.S.C. § 666(a), and the Supreme Court has held that this waiver applies to federal reserved water rights for tribes. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 809-13 (1976). Accordingly, tribal sovereign immunity is no barrier to the determination of federal reserved water rights in McCarran Amendment adjudications. But the district court correctly determined that the present case "is clearly not a McCarran Amendment case." KID_ER-21.

The McCarran Amendment applies to the comprehensive adjudication of all water rights among all claimants to a specified water source, *see generally Dugan v. Rank*, 372 U.S. 609, 617-18 (1963); *United States v. Oregon*, 44 F.3d 758, 763-70 (9th Cir. 1994), and to suits "for the administration of" rights already declared in a prior comprehensive adjudication. 43 U.S.C. § 666(a). Here, there is a comprehensive adjudication of water rights in the Klamath River Basin in Oregon—the Klamath Basin Adjudication. *Oregon*, 44 F.3d at 762-70. But that adjudication is still ongoing, as stated above. And the present suit is not one to "administer" rights that were provisionally determined in the administrative phase of that adjudication, notwithstanding that administratively determined rights are enforceable pending judicial review. *See* Or. Rev. Stat. §§ 539.130(4), 539.170. Instead, the irrigation districts challenge Reclamation's determinations under the

ESA and its authority to release water from Upper Klamath Lake consistent with the downstream water rights of the Hoopa Valley and Yurok Tribes. The rights of the California Tribes were not subject to adjudication in Oregon's Klamath Basin Adjudication. *Baley*, 942 F.3d at 1341. Any effort by the irrigation district to assert interests against the California Tribes is thus not the administration of rights determined as between parties to the Oregon adjudication.

For these reasons, this is not a McCarran Amendment case. Instead, like the underlying lawsuit in *Diné Citizens*, it is an APA challenge to federal agency action—as the irrigation districts' own complaints reflect. *See* KID_ER-97 (asserting that jurisdiction arises under 5 U.S.C. §§ 701-06 and 28 U.S.C. §§ 1331, 2201-02); SVID_ER-185 (same). *Diné Citizens* therefore controls.

To be clear, the federal government continues to have concerns about the constriction of the APA cause of action under *Diné Citizens*. As the United States argued to this Court in that case, holding that non-federal entities are necessary for an APA action to proceed undermines Congress' decision to waive the United States' sovereign immunity for suits brought under the APA and could "sound[] the death knell for any judicial review of executive decisionmaking." Brief of United States, Ninth Cir. No. 17-17320 at 10, 17 (quoting *Conner v. Burford*, 848 F.2d 1441, 1460 (9th Cir. 1988)); *see also Manygoats*, 558 F.2d at 559. This Court heard the United States' concern, acknowledged the problem, but nevertheless

decided that it did not change the Court's analysis. *See Diné Citizens*, 932 F.3d at 860-61. That conclusion is the law of this circuit, unless the Court revisits or narrows *Diné Citizens*. Until such time, dismissal appears to be the appropriate outcome here.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

s/ Rachel Heron

JEAN E. WILLIAMS
Acting Assistant Attorney General
JOHN L. SMELTZER
RACHEL HERON
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

July 1, 2021
DJ 90-1-2-15689; 90-1-2-15701

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 20-36009, 20-36020

I am the attorney or self-represented party.

This brief contains 5,109 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[**X**] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Rachel Heron

Date July 1, 2021