No. 22-_____

In the Supreme Court of the United States

KLAMATH IRRIGATION DISTRICT,
Petitioner,

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, RESPONDENTS,
Respondents,

HOOPA VALLEY TRIBE; THE KLAMATH TRIBES,
Intervenor Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 11, 2023

QUESTION PRESENTED

"[N]o problem" in the American West is "more critical than that of scarcity of water." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 804 (1976). To address this critical problem, Congress created an all-inclusive regime to ensure water is fairly allocated among all users claiming a right to water in a particular source. Under this regime, the responsibility to comprehensively adjudicate water rights falls to the States, which hold complex proceedings that often last decades and settle the rights of hundreds of users. These state adjudications include the federal government, whose sovereign immunity has been waived for that express purpose under the McCarran Amendment. 43 U.S.C. § 666(a).

The United States' waiver of sovereign immunity extends not just to its own water rights, but to reserved water rights the government holds on behalf of Native American tribes. *Colo. River*, 424 U.S. at 811. Given "the ubiquitous nature of Indian water rights" in the West, *id.*, the *Colorado River* rule is a crucial feature of the state-federal water rights regime. The rule ensures *all* water rights in a water system can be adjudicated in a single proceeding, resulting in decrees that conclusively determine how much water each rights-holder can use and the priority of each right during shortages.

The decision below tears a hole in this regime. Applying circuit precedent the United States itself believes to be incorrect and refuses to defend, the Ninth Circuit invented a rule under which one particular set of parties, Native American tribes, can

veto any other water user's attempt to vindicate state-adjudicated water rights against the federal government. According to the Ninth Circuit, Federal Rule of Civil Procedure 19 requires a tribe to be joined as an indispensable party in any suit against the federal government that implicates federal water rights held on behalf of the tribe. Yet because of tribal sovereign immunity, those suits cannot actually proceed absent the tribe's consent. The result is that state-adjudicated water rights are meaningless against the federal government if any tribe objects. This is true even where, as here, the suit does not seek to prevent the United States from honoring tribal water rights, but only seeks to ensure that it does so consistent with the outcome of a decades-long water adjudication in which the United States itself was a party. Given the number of water sources in which tribes can claim an interest in the West, the Ninth Circuit's rule will dominate water proceedings across this vast region, severely compromising the century-old system for determining rights in the West's scarcest and most important resource.

The question presented is:

> Whether Federal Rule of Civil Procedure 19 requires dismissal of an action challenging a federal agency's use of water subject to state-adjudicated water rights if a Native American tribe asserts an interest in the suit and does not consent to joinder.

PARTIES TO THE PROCEEDINGS

Petitioner 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 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; 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, Petitioner 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 petition. 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. Petitioner 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.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Klamath Irrigation District, et al.*; *Shasta Irrigation District, et al. v. United States Bureau of Reclamation, et. al.*, Nos. 1:19-cv-00451-CL, 1:19-cv-00531 (Consolidated) (D. Oregon) (Findings and Recommendation of Magistrate Judge Clarke recommending dismissal of consolidated cases, issued May 15, 2020, Pet. App. 40; Order adopting Findings and Recommendation of Magistrate Judge and dismissing consolidated cases, issued Sept. 25, 2020, Pet. App. 35; Final Judgment entered Sept. 25, 2020).

- *Klamath Irrigation District et al. v. United States Bureau of Reclamation et al.*, No. 20-36009 (9th Cir. 2022) (Opinion affirming dismissal of action, Pet. App. 1, and Judgment issued September 8, 2022; Order denying petition for panel rehearing and rehearing *en banc* issued January 11, 2023, Pet. App. 67).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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JURISDICTION

The court of appeals entered its opinion and judgment on September 8, 2022, and denied petitioner's timely petition for rehearing en banc on January 11, 2023. Pet. App. 1, 67. On April 3, 2023, Justice Kagan granted petitioner's application to extend the time to file his petition for a writ of certiorari until May 11, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED

This case involves a number of constitutional, statutory, and rules provisions:

- U.S. Constitution, amendment V;
- Federal Rules of Civil Procedure 12(b)(7) and 19;
- 28 U.S.C. §§ 1442 and 1254;
- 43 U.S.C. §§ 371, 383, 421, and 666; and
- Oregon Revised Statutes ("ORS") §§ 539.021 and 539.130.

For ease of reference, these provisions are excerpted in full in the Appendix. Pet. App. 70–85; *see also* Sup. Ct. R. 14.1(f), (i).

INTRODUCTION

The question presented in this case is of vital importance to every State in the Western United States. The McCarran Amendment, in combination with the holding of *Colorado River*, enables a State court to adjudicate *all* water rights within a basin or river system in a single, comprehensive proceeding, allowing parties to rely on those adjudicated rights and assert them against other users—including the federal government, which is often the most important water user within a basin. In the Ninth Circuit, however, Native American tribes now have veto power over any suit against the federal government implicating water rights, if the tribe "claims an interest relating to the subject of the action" within the broad meaning of Federal Rule of Civil Procedure 19. By granting tribes this unique power, the Ninth Circuit has gravely undermined the federal-state water rights framework, rendering thousands of adjudicated water rights functionally unenforceable.

The federal government agrees this holding is wrong. It has repeatedly refused to defend *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019), the circuit precedent on which the opinion below was based. Indeed, below the United States reiterated its concerns with *Diné Citizens* and objected to its application in this case. Rather than reconsidering that troubling precedent, however, the Ninth Circuit reaffirmed and expanded it.

The real-world consequences of the Ninth Circuit's holding are severe. Property rights that cannot be asserted in court are not property rights at all. The

Ninth Circuit's ruling deprived thousands of farmers and ranchers in Oregon's Klamath Water Basin of their ability to vindicate water rights in Oregon's Upper Klamath Lake against the federal government after they spent more than 38 years in litigation to obtain a comprehensive adjudication of all state and federal rights in that source.

The outcome here is concerning enough. But the implications of the decision below reach far beyond the Klamath Water Basin. The United States includes 574 Native American tribes,[1] hundreds of which can claim federal reserved water rights in every Western State. The Ninth Circuit's erroneous ruling grants tribes, and tribes alone, power to shut down an enormous number of suits against the federal government implicating water rights in this vast region, severely undermining the comprehensive, century-old regime Congress implemented to allocate water in the West.

STATEMENT

1. This case involves the comprehensive regime for adjudication and administration of water rights in the American West, where "no problem" is "more critical than that of scarcity of water." *Colo. River*, 424 U.S. at 804. Preservation and allocation of this scarce resource requires extensive cooperation between the States and the federal government. To this end, Western States "have established elaborate procedures for allocation of water and adjudication of

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[1] Mainon A. Schwartz, Cong. Research Serv., R47414, *The 574 Federally Recognized Indian Tribes in the United States* (2023).

conflicting claims to that resource." *Id.* (collecting examples).

This federal-state system arose because of the enormous role the United States plays in water distribution in the west. With the 1902 passage of the Reclamation Act, "Congress set 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). Reflecting a spirit of "cooperative federalism," the Reclamation Act does not supplant existing state systems for adjudication and administration of water rights. *Id.* at 650–51. Instead, it requires deference to these systems and obligates the federal government to comply with them in implementing water reclamation projects:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws….

43 U.S.C. § 383. Thus, in fulfilling its duties under the Reclamation Act, the federal government must "appropriate, purchase, or condemn necessary water rights in strict conformity with state law." *California*, 438 U.S. at 665.

Initially, however, the federal government's sovereign immunity limited "the ability of the States to adjudicate water rights" by precluding joinder of the federal government to water rights proceedings. *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 564 (1983); *see also McCarran Amendment and Water Rights Adjudications*, U.S. Dept. of Justice, Natural Resources Division (Mar. 20, 2023), https://www.justice.gov/enrd/mccarran-amendment-and-water-rights-adjudications (explaining that, before the McCarran Amendment, "federal water rights could only be adjudicated in actions filed (or not opposed) by the United States" and the federal government "voluntarily sought the adjudication of its water rights in [only] a limited number of early cases"). Congress removed this obstacle in 1952 through the McCarran Amendment. *See San Carlos Apache*, 463 U.S. at 548–49.

Importantly, this Court held in *Colorado River* that the McCarran Amendment's immunity waiver extends beyond rights the government holds for itself. It also "reach[es] federal water rights reserved on behalf of Indians,"[2] implicitly recognizing that the federal government can adequately represent and protect those rights. 424 U.S. at 810–11. The Amendment's language and underlying policy "dictate[]" this construction. *Id.* If any party were

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[2] The federal government has authority "to reserve waters for the use and benefit of federally reserved lands." *United States v. Dist. Ct. In and For Cnty. of Eagle*, 401 U.S. 520, 522–23 (1971). These "reserved rights" exist as of the time before a State's admission to the Union and "extend to Indian reservations." *Colo. River*, 424 U.S. at 805.

"permitted to claim immunity from suit" in a water rights proceeding, "such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users," either preventing the full adjudication of water rights or frustrating their enforcement. *Id.* Given "the ubiquitous nature of Indian water rights" in the West, "a construction of the Amendment excluding those rights from its coverage would [therefore] enervate the Amendment's objective." *Id.*

The McCarran Amendment is thus "an all-inclusive statute concerning the adjudication [and administration] of rights to the use of water of a river system." *Eagle Cnty.*, 401 U.S. at 524. By waiving the federal government's sovereign immunity as to both its own water rights and reserved water rights on behalf of tribes, the Amendment advances "the important federal interest in allowing all water rights on a river system to be adjudicated in a single comprehensive state proceeding." *San Carlos Apache*, 463 U.S. at 551.

2. In the context of this all-inclusive federal-state regime, the State of Oregon has established a legal framework for the adjudication of competing water rights within its borders. These adjudications proceed in two steps. First, the Director of the Oregon Water Resources Department (the "Department") or a designee (the "Adjudicator") makes an initial determination of the parties' water rights in a given water source. *See* ORS § 539.021. Second, a court reviews that determination. *See* ORS §§ 539.130(1)–(2), 539.150. During the judicial stage, Oregon law treats the Adjudicator's initial determination of water rights as valid, binding, and enforceable "unless and

until its operation shall be stayed." ORS § 539.130(4); *United States v. State of Or.*, 44 F.3d 758, 764 (9th Cir. 1994).

In 1975, the Department initiated an adjudication for all state and federal rights to divert or use water from Oregon's Upper Klamath Lake and other waters of the Klamath Basin within Oregon's territorial jurisdiction (the "Klamath Adjudication"). Pet. App. 13–14. The basin comprises approximately 12,000 square miles of interconnected rivers, canals, lakes, marshes, dams, diversions, wildlife refuges, and wilderness areas in south-central Oregon. Pet. App. 8. Upper Klamath Lake is the primary source of water for irrigation. *See id.* Most irrigation water rights in the lake are associated with lands within the Klamath River Basin Reclamation Project (the "Klamath Project"), the development and construction of which were authorized pursuant to the Reclamation Act of 1902. Pet. App. 11–12. The United States Bureau of Reclamation ("Reclamation") manages the project. *Id.*

Petitioner is an irrigation district that operates and maintains irrigation works within the Klamath Project. Pet. App. 15. Petitioner filed claims for irrigation water rights in the Klamath Adjudication on behalf of itself and its members. *See* Pet. App. 101–02. Reclamation, other irrigation districts, and various Native American tribes, including the Klamath Tribes, also filed claims in that proceeding, but the Hoopa Valley Tribe in California did not. *See id.*[3]

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[3] For this reason, the Ninth Circuit held that the Klamath Adjudication did not adjudicate the Hoopa's rights. Pet. App. 27.

In 2013, the Department concluded the initial stage of the Klamath Adjudication, Pet. App. 14, adjudicating all state and federal water rights in Oregon's Upper Klamath Lake and other waters through the Amended Corrected Findings of Fact and Order of Determination to the Klamath County Court (Feb. 28, 2014) (the "Amended Findings and Order").[4] The Adjudicator concluded that the only relevant water right Reclamation holds is the right to store water in Upper Klamath Lake to benefit separate irrigation rights owned by Petitioner and other irrigators. Amended Findings & Order at KBA_ACFFOD_07084. Consistent with this conclusion, the Adjudicator determined that Petitioner and other irrigation districts own water rights entitling them to use both "live flow" and water

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That is incorrect. The Klamath Adjudication is an in rem proceeding that addresses all rights anyone holds in Upper Klamath Lake or the Oregon portions of the Klamath Basin. *See Waters of Willow Creek v. Orchards Water Co.*, 236 P. 487, 493 (Or. 1925) (comprehensive water rights proceedings are "in the nature of a proceeding *in rem*"); *Shaffer v. Heitner*, 433 U.S. 186, 199 n.17 (1977) (defining "in rem" proceeding as one that seeks to determine "the interests of all persons in designated property"). The Hoopa were therefore required to submit any claims they may have had to water from those sources in the Klamath Adjudication. *See Klamath Irrigation Dist v. United States*, 227 P.3d 1145, 1166 (Or. 2010). By failing to do so, the Hoopa forfeited these claims. *See id.*

[4] The Amended Findings and Order can be found at https://www.oregon.gov/owrd/programs/waterrights/adjudications/klamathriverbasinadj/pages/acffod.aspx. They span over 7,500 pages, but the Department created an index and search feature for ease of navigation.

stored in Upper Klamath Lake. *Id.* at KBA_ACFFOD_07155.[5]

The Adjudicator rejected the water rights claims filed by the Klamath Tribes, but recognized the United States holds water rights in trust for them, entitling them to certain elevations of water in that lake at certain times of year. The Klamath Tribes cannot use this right to call Petitioner's water rights, however. Amended Findings & Order at KBA_ACFFOD_04941, 07061, 07075, 07084, 07086, 07160. The Adjudicator did not recognize Reclamation as having any right to use stored water in Upper Klamath Lake to augment instream flows in the Klamath River for the benefit of endangered species or tribes in California. *Id.* at KBA_ACFFOD_07060, 07084. The Adjudicator also found that "any potential claimant who has failed to timely file a claim in the Adjudication shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant." KBA_ACFFOD_00014.

Before the issuance of the Amended Findings and Order, water rights in Upper Klamath Lake and the Klamath River were undetermined and not subject to

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[5] "Live flow" refers to "what the river is running at any time based on natural conditions (snowmelt, rain, dry weather)." Central Oregon Irrigation District, *Frequently Asked Questions*, https://coid.org/wp-content/uploads/2022/04/Drought-FAQ.odt (2022). If, for example, 1,000 cubic feet per second ("cfps") of water flows into Upper Klamath Lake and 500 cfps flows out of it, the lake has 500 cfps of "live flow" and 500 cfps of stored water.

state regulation. KBA_ACFFOD_00001. Therefore, in the 1990s, Reclamation began diverting stored water from the lake to augment instream flows in the Klamath River to meet its Endangered Species Act ("ESA") and tribal trust obligations in California. Importantly, while no water rights for this purpose were granted in the Adjudication, the Amended Findings and Order do not prevent Reclamation from continuing to store water in Upper Klamath Lake to meet its obligations. The result of the Oregon adjudication means only that Reclamation must satisfy its obligations 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 [the Reclamation 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."). In other words, the Klamath Adjudication simply requires Reclamation to fulfill its obligations to the Tribes through the proper process, which is designed to protect the rights of all water-rights holders, including tribes.

Reclamation did not do that. Instead, in 2019, it published an operations plan under which it would continue using the water in Upper Klamath Lake for instream purposes, including to fulfill its obligations under the ESA and to the Tribes, without buying, leasing, or judicially condemning Petitioner's water rights. Pet. App. 15. This plan limits the amount of water available to Petitioner, thus harming its members. *Id.*

3. On March 27, 2019, Petitioner brought this action against Reclamation to vindicate rights adjudicated in the Klamath Adjudication, alleging that Reclamation's 2019 operations plan was unlawful under the Administrative Procedure Act ("APA") because it violated the Amended Findings and Order, the Reclamation Act, and the Fifth Amendment. Pet. App. 15–16. Importantly, Petitioner did not and does not seek to *prevent* Reclamation from satisfying its obligations to the Tribes or under the ESA; it seeks only to require Reclamation to respect state-adjudicated water rights in doing so. Other water users filed a similar suit, and the two cases were consolidated. Pet. App. 16.

The Tribes intervened solely to move to dismiss under Rule 12(b)(7) for inability to join a necessary party. *See* Pet. App. 16; Federal Appellees' Ans. Br., Dkt. Entry No. 25 at 16, *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation et al.*, No. 20-36009 (9th Cir.) ("Govt. Br."). The district court allowed the intervention, and the Tribes moved to dismiss under *Diné Citizens*, circuit precedent critical to this petition. *Id.*

Diné Citizens involved an environmental challenge to the federal government's approval of a coal mining lease between a tribe and its operating partner. 932 F.3d at 849–50. The absent tribe intervened, as the Tribes did here, solely to seek dismissal for failure to join a necessary party. *Id.* at 850. The trial court dismissed the case, over the United States' opposition, and the Ninth Circuit affirmed, reasoning that (1) the tribe was a necessary party because the litigation could impair its interest in the lease, *id.* at 852–53, (2) the federal government could not adequately

represent the tribe because, despite its interest in defending its approval of the lease, the government had no interest in the continued operation of the mine, *id.* at 855, and (3) the tribe's immunity required dismissal of the case, regardless of whether the plaintiffs had another remedy, *id.* at 857–58.

Consistent with its opposition to dismissal in *Diné Citizens*, Reclamation did not join the Tribes' motion to dismiss here. Instead, it filed a response noting that, although *Diné Citizens* appeared to require dismissal, "the federal government continues to disagree with *Diné Citizens* and reserves the right to assert in future proceedings that the United States is generally the only required and indispensable defendant in APA litigation." Govt. Br. at 16.

The assigned magistrate judge recommended that the district court grant the Tribes' motion, employing the same reasoning as *Diné Citizens*. Pet. App. 49–66. The district court adopted that recommendation and dismissed the case. Pet. App. 35–37. Petitioner appealed. The federal government again defended the district court's judgment on the ground that "affirmance appear[ed] to be compelled by [*Diné Citizens*]" but maintained its position that *Diné Citizens* was wrongly decided. Govt. Br. at 1–2; *see also* Govt. Br. at 17–18, 22–23.

The Ninth Circuit nevertheless affirmed. It first agreed with the magistrate judge that, "if the Districts are successful in their suit, the Tribes' water rights could be impaired," making the Tribes required parties under Rule 19(a). Pet. App. 20. The court then rejected Petitioner's argument that Reclamation could adequately represent the Tribes' interests because,

under *Diné Citizens*, "Reclamation's and the Tribes' interests, though overlapping, are not so aligned as to make Reclamation an adequate representative of the Tribes." Pet. App. 22. Next, the court held that the McCarran Amendment did not apply to waive the Tribes' sovereign immunity such that they could be joined to the lawsuit without consent, because, in the Ninth Circuit's view, this is not a McCarran Amendment proceeding. Pet. App. 27.[6] Finally, citing "a wall of circuit authority requiring dismissal when a Native American tribe cannot be joined due to its assertion of tribal sovereign immunity, … regardless of whether an alternative remedy is available" for the existing parties, the court concluded that the case could not "proceed in equity and good conscience" under Rule 19(b) and required dismissal. Pet. App. 27–30. The Ninth Circuit's holding thus leaves Petitioner no way to challenge the Bureau of Reclamation's Upper Klamath Lake operations plan and vindicate the rights adjudicated to it in the Klamath Adjudication in federal court.

The Ninth Circuit denied en banc rehearing, Pet. App. 68–69, and this petition followed.

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[6] Although incorrect, this holding is immaterial and Petitioner does not challenge it here. Because the Tribes are *not* indispensable parties under Rule 19, the case can proceed without them. Whether they are immune from suit under the McCarran Amendment is therefore irrelevant.

REASONS TO GRANT THE PETITION

I. The question presented is exceptionally important because the Ninth Circuit has destabilized the comprehensive regime for adjudication of water rights in the American West.

The decision in this case has grave implications for the "all-inclusive" regime Congress and the States rely on for "the adjudication of rights to the use of water of a river system" in the Western States. *Eagle Cnty.*, 401 U.S. at 524. The Ninth Circuit has granted Native American tribes effective veto power over all water rights cases against the federal government if those cases arguably affect their interests. By the Ninth Circuit's logic, tribes will always be required parties in any water rights case that touches on their interests, the McCarran Amendment will never waive their sovereign immunity, and Rule 19(b) will always require dismissal of the action. As a result, tribes will *always* be able to intervene solely to terminate a case before it reaches the merits, as the Tribes successfully did here. The result is that adjudicated water rights in systems that potentially implicate tribal rights cannot be enforced against the federal government—often the most powerful and important user in a particular basin—without tribal consent. This is true even where, as here, all state and federal water rights in the water body at issue have been adjudicated in accordance with the McCarran Amendment.

Given the ubiquity of tribal water rights in the West, the practical effect of the Ninth Circuit's ruling will be to require all tribes with an interest in a given water system to consent to any suit against the federal government implicating that system; any non-

consenting tribe can end the suit. The availability of this exclusive veto power will cripple the statutory system Congress created and prevent millions of users from protecting their water rights.

A. The Ninth Circuit's ruling grants Native American tribes veto power over federal water rights cases against the federal government.

The implications of the Ninth Circuit's ruling begin with its holding that the Tribes are required parties under Rule 19. As relevant here, that rule provides that a party is "required" and "must be joined" to a suit if it "claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party's] absence may … as a practical matter impair or impede the [party's] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i).

The Ninth Circuit held that the Tribes were "required parties" under this rule based on their "rights to water to the extent necessary for them to accomplish hunting, fishing, and gathering" and corresponding "right to prevent other appropriators from depleting the streams waters below a protected level." Pet. App. 19 (cleaned up). These rights, the court continued, are "coextensive with Reclamation's obligations to provide water for instream purposes" to protect endangered wildlife under the ESA. *Id.* Although Petitioner does not seek to undermine those federal obligations (only to ensure that they are carried out in a manner that respects its own state-adjudicated water rights), the court found that success on Petitioner's claims "would impair Reclamation's ability to comply with its ESA and tribal obligations." *Id.* Because "the Tribes' water rights could be

impaired" as a result, the Ninth Circuit concluded "the Tribes are required parties." Pet. App. 20.

By this reasoning, any Native American tribe with an interest in a given water system will be a necessary party to any federal case involving that system against the federal government, even though the McCarran Amendment waives sovereign immunity to enable adjudication *and subsequent administration* of all state and federal water right claims. Whenever a water user seeks to compel Reclamation to comply with a state water rights adjudication, it necessarily "seeks to amend, clarify, reprioritize, or otherwise alter Reclamation's ability or duty to fulfill the requirements of the ESA" or its other legal obligations. *Id.* According to the Ninth Circuit, such suits automatically "implicate[] the [t]ribes' long-established reserved water rights," making tribes required parties even if Reclamation can still satisfy its duties to them regardless of the case's outcome (which is Petitioner's position here). *Id.*

This case is not limited to its facts; the logic of the holding below applies to any water system in the West that touches on tribal rights. The Ninth Circuit held the Tribes were required parties even though Petitioner seeks only to compel Reclamation to comply with the water rights determinations in the Amended Findings and Order and fulfill its other duties lawfully. *See* Pet. App. 108–14 ¶¶ 59–62, 73, 79–81. If this is enough to make the Tribes required parties here, Pet. App. 19–20, the same will be true any time a water user sues the federal government to enforce its compliance with a state adjudication involving a water system in which a tribe holds reserved rights.

Further, by the Ninth Circuit's logic, the federal government will *never* adequately represent tribal interests such that the tribe's joinder is unnecessary. It is widely recognized that, if "an existing party adequately represents the interest that would be impaired or impeded," then the "absent person is not a required party" under Rule 19 and need not be joined. Steven S. Gensler & Lumen N. Mulligan, *Rule 19. Required Joinder of Parties*, 1 FED. R. CIV. P., RULES AND COMMENTARY RULE 19 (Feb. 2023 Update) (collecting cases). The Ninth Circuit, however, has now held (in both this case and *Diné Citizens*) that a shared "interest in the ultimate outcome of [the] case" is not enough for the federal government to adequately represent a tribe if their interests in the practical consequences of the case do not align perfectly. Pet. App. 22 (citing *Diné Citizens*). Here, for instance, the court reasoned that Reclamation's interest in "defending its [actions] pursuant to the ESA and APA" "differs in a meaningful sense from the tribe's sovereign interest in ensuring continuing access to natural resources." *Id.* (cleaned up). For the Ninth Circuit, this means Reclamation can never adequately represent the Tribes, Pet. App. 22–23, even though the Klamath Tribes' rights to water in Upper Klamath Lake derive from rights the United States is required to hold in trust for them, KBA_ACFFOD_04938, 04945.

This will always be true in water rights cases. Reclamation itself is not a direct user of water; it instead manages and administers water (and therefore water rights) for a wide range of federal and state interests. So while Reclamation will always have an interest "in defending its interpretations of its obligations under [federal statutes] in the wake of [a

state water-rights adjudication]," it will rarely, if ever, "share the same interest in the water" as an affected tribe from a functional standpoint. Pet. App. 23. Under the Ninth Circuit's ruling, this distinction categorically prevents Reclamation from ever adequately representing tribes in water rights cases.

The takeaway is that tribes with reserved rights in a given water system will always be required parties to any federal proceeding to administer state-adjudicated rights against the federal government. But because tribes have sovereign immunity, Pet. App. 24, it will be impossible for parties to join them to such lawsuits. Moreover, these circumstances will *always* require dismissal of the lawsuit. Pet. App. 27–30. If a required party cannot be joined, Rule 19(b) requires a court to "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed," considering factors including:

> (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….
>
> (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.

Fed. R. Civ. P. 19(b).

The Ninth Circuit largely bypassed these factors, reasoning that, "[i]f the necessary party is immune from suit," there is "very little need for balancing [the] Rule 12(b) factors because immunity itself may be viewed as the compelling factor." Pet. App. 28. Thus, where a tribe is a required party, its immunity from suit requires dismissal under Rule 19(b), "regardless of whether an alternative remedy is available" for the other parties. *Id.* Indeed, the only Rule 19(b) factors the Ninth Circuit considered were possible prejudice to the Tribes and the trial court's purported inability to lessen that prejudice; it did not account for any countervailing considerations. Pet. App. 27–30.

This means that, absent uniform consent to a lawsuit from all potentially affected tribes, courts will be required to dismiss anytime a private party tries to compel the federal government to comply with a state adjudication of water rights in a system that implicates reserved tribal rights. The Ninth Circuit's ruling thus grants affected tribes veto power over such cases, irrespective of their merits.

B. The Ninth Circuit's ruling severely undermines the regime for water rights adjudication in the West and will "sound the death knell" for judicial review in all similar cases.

In practice, the veto power the Ninth Circuit's decision creates will severely undermine the "all-inclusive" regime "concerning the adjudication of rights to the use of water of a river system" in the American West. *Eagle Cnty.*, 401 U.S. at 524. The point of the McCarran Amendment is to facilitate adjudication and administrative proceedings, and the inability to administer adjudicated rights against

even one rights holder "could materially interfere with the lawful and equitable use of water for beneficial use by the other water users." *Colo. River*, 424 U.S. at 811; *see also Eagle Cnty.*, 401 U.S. at 525. That is why this Court construed the Amendment to cover reserved tribal water rights in the first place. *Colo. River*. 424 U.S. at 810–11, 819.

The Ninth Circuit's ruling endangers this regime. It enables tribes not just to escape federal actions to administer state-adjudicated water rights but to shut them down entirely. If *only* tribes can adequately represent interests in federal reserved water rights, *and* tribes cannot be joined to a suit due to sovereign immunity, then no rights holder can enforce rights adjudicated to it in a comprehensive water rights proceeding, as the McCarran Amendment contemplates, if the affected tribes do not consent. Tribes will be able to compel dismissal of any water rights proceeding in federal court in which they claim an interest through the veto tactic the Ninth Circuit created here. The result is that no federal water rights case that implicates tribal interests may proceed without the consent of *all* affected tribes.

Given "the ubiquitous nature of Indian water rights" in the West, *Colorado River*, 424 U.S. at 811, this veto power will dominate water proceedings across this vast region. While "Indian reserved rights generally attach to whatever water sources may be within or adjacent to the reserved lands, it is generally understood that reserved rights do not necessarily require that the water source be encompassed within the reserved lands." Cynthia Brougher, *Indian Reserved Water Rights Under the* Winters *Doctrine: An Overview*, Congressional Research Service Report

for Congress at 4 (June 8, 2011). Instead, "courts have allowed tribes to draw water from various sources as necessary to fulfill the reservation purpose." *Id.* With "more than 300 land areas in the United States administered as federal Indian reservations, any of which theoretically includes an implied right to sufficient water to satisfy the purpose of the reservation," tribes can claim an interest in an enormous number of water systems throughout the West. Christian Termyn, *Federal Indian Reserved Water Rights and the No Harm Rule*, 43 COLUM. J. ENVTL. L. 533, 545 (2018).[7] In the Ninth Circuit, tribes

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[7] *See also* Carla J. Bennett, *Quantification of Indian Water Rights: Foresight or Folly?*, 8 UCLA J. of Env't L. & Pol'y 267, 268 (1989) ("Virtually all federal Indian Reservations are located in the western United States."); *see, e.g.*, N.C. State University Center for Environmental and Resource Economic Policy, *Challenges of adjudicating Native American water rights in the western United States* (Nov. 12, 2019), https://cenrep.ncsu.edu/2019/11/12/challenges-of-adjudicating-native-american-water-rights-in-the-western-united-states/ (map showing water rights adjudication status of Western Native American tribes and depicting tribal lands touching water systems throughout American West); Josie Garthwaite, *Stanford study reveals the changing scope of Native American groundwater rights—and opportunities for better freshwater management*, Stanford News Service (Aug. 3, 2018), https://news.stanford.edu/press/view/22397 ("[C]ourt decrees and settlements have resolved or proposed rights for tribes in western states to use more than 10.5 million acre-feet of surface water and groundwater annually."); Kaye LaFond, *Interactive Map: Indian Water Rights in the Colorado River Basin*, WaterNews, Circle of Blue (July 10, 2015), https://www.circleofblue.org/2015/world/interactive-map-indian-water-rights-in-the-colorado-river-basin/ ("Combined, [Native American tribes in the Colorado River Basin] hold rights to a substantial portion of the Colorado River's flow: roughly 20

can now shut down virtually every federal water case concerning those systems, leaving water users no way to administer their rights in federal court.

State courts are not a viable alternative. Under the Reclamation Act, the federal government plays a key role in managing water in the West and is frequently one of the most critical parties to water rights adjudications filed in state court.[8] Because the government is entitled to remove any state court actions brought against it to federal court, *see* 28 U.S.C. § 1442(a)(1), any water user who tries to administer its rights against the government in state court will be powerless to prevent removal.[9] Once removed, the case will again be subject to dismissal under the Ninth Circuit's ruling here.

At bottom, the decision below, combined with the federal government's right of removal, closes both the federal *and* state courthouse doors to water rights

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percent, or 3.6 billion cubic meters (2.9 million acre-feet), which is more water than Arizona's total allocation from the river.").

[8] Reclamation is the single largest wholesale water supplier in the country and supplies water to a fifth of Western farmers. *See* Bureau of Reclamation, About Us—Fact Sheet, https://www.usbr.gov/main/about/fact.html (Feb. 23, 2023).

[9] The risk of removal in such cases is not abstract. To administer the rights adjudicated to it, Petitioner moved for a preliminary injunction in the state court where the Klamath Adjudication is currently pending, but Reclamation successfully removed the case to federal court under 28 U.S.C. § 1442(a)(1). *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, No. 1:21-CV-00504-AA, 2022 WL 1210946, at *1 (D. Or. Apr. 25, 2022). The district court denied Petitioner's motion to remand. *Id.* Petitioner's mandamus petition is currently pending.

holders in the West whenever their case implicates the federal government and the reserved rights of Native American tribes. By granting a party the power to stop those proceedings at their outset, the Ninth Circuit's decision denies water users the ability to be heard in court over water disputes, a result that will cause severe disruption and put decades of time and resources to waste.

The United States agrees. As it explained in *Diné Citizens*, dismissal of APA cases for inability to join a tribe as a required party "would deprive [plaintiffs] of any forum for their claims" against the federal government when those claims touch on tribal rights. Br. of the United States as *Amicus Curiae* in Support of Reversal, Dkt. No. 20, *Diné Citizens Against Ruining Our Env't v. U.S. Bureau of Indian Affairs*, No. 17-17320, 2018 WL 948523, at *17 (9th Cir. Feb. 16, 2018) ("Govt. *Diné Citizens* Br."). This "produce[s] an anomalous result by ensuring that no one, except the Tribe, [can] seek review of the federal government's compliance" with the relevant law, an outcome that "could severely limit APA review of federal agency action." *Id.* In this way, the Ninth Circuit's "holding that non-federal entities are necessary for an APA action to proceed" not only "undermines Congress' decision to waive the United States' sovereign immunity for suits brought under the APA," it could also "sound the death knell for any judicial review of executive decisionmaking." Govt. Br. at 22; *see also id.* at 1–2, 17–18. The government "does not countenance such an outcome." Govt. *Diné Citizens* Br. at *17.

II. This case is an excellent vehicle to answer the question presented and resolve conflicting circuit precedent under Rule 19.

This case is an excellent vehicle to address the issue presented. While the Ninth Circuit has required dismissal of APA actions for inability to join Native American tribes before, *Diné Citizens*, 932 F.3d at 856–58, this is the first time it has done so in a case involving the administration of state-adjudicated water rights under the McCarran Amendment and the Reclamation Act. The decision below therefore provides a new default rule for all similar water rights cases going forward, under which tribes alone are empowered to prematurely terminate litigation, thereby impairing the results of the many state water adjudications since passage of the McCarran Amendment and denying other water-rights holders the ability to protect their rights in those cases. The Ninth Circuit's erroneous rule will also undermine any future state law adjudications of water rights—such as one recently announced in Washington[10]—and discourage States from initiating those proceedings in the first instance. As use of the Ninth Circuit's rule expands, the damage to Congress's comprehensive water rights regime will grow more severe. This case affords the Court a critical, early opportunity to intervene before the harm becomes too great.

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[10] *See* Jimmy Norris, *Plans for Nooksack adjudication are underway*, Dept. of Ecology, State of Washington (Jan. 20, 2023), https://ecology.wa.gov/Blog/Posts/January-2023/Plans-for-Nooksack-adjudication-are-underway.

The lack of a circuit split on the precise issues raised by the Ninth Circuit's ruling is no reason for the Court to forgo certiorari. As an initial matter, the Ninth Circuit's holding under Rule 19 is particularly problematic in the water context, where the Court has already held (at least implicitly) that the federal government *can* adequately represent tribal interests in federal reserved water rights. *Colo. River*, 424 U.S. at 812 (explaining that the federal government has the "responsibility fully to defend Indian rights" in water adjudications). The Ninth Circuit's contrary holding cannot be squared with this long-established rule. Additionally, while no other circuit has addressed whether a trial court must dismiss a water rights case specifically for inability to join an allegedly affected tribe, the decision below is in tension with the broader holdings of several other circuits regarding what parties are required in APA challenges to agency action more generally.

In *Thomas v. United States*, for example, the Seventh Circuit held that a tribe was not a required party to a lawsuit that challenged agency action setting aside the results of an election that would have amended tribal membership criteria. 189 F.3d 662, 667–69 (7th Cir. 1999). The tribe's "strong interest in matters" relating to the litigation was "not enough in itself to make [the tribe] a necessary party." *Id.* at 668. The lawsuit was "a challenge to the way certain federal officials administered an election for which they were … responsible," so only the government was a necessary party. *Id.* at 667. The Ninth Circuit applied an opposite rule here, holding that the potential effect on "the Tribes' long-established reserved water rights" made their presence necessary. Pet. App. 20.

The Ninth Circuit's ruling is in even greater tension with holdings from the D.C. and Tenth Circuits. In *Ramah Navajo School Board, Inc. v. Babbitt*, the D.C. Circuit held that certain tribes were not required parties because their only interest was in defending challenged agency action, and the federal government would adequately protect that interest as a defendant. 87 F.3d 1338, 1351 (D.C. Cir. 1996). The plaintiffs alleged the government violated certain procedures when deciding how to distribute funds allocated by statute to certain Native American tribes. *Id.* at 1341–43. Assuming the nonparty tribes had an interest in those funds, the court concluded "the United States may adequately represent that interest" because "no conflict [existed] … between the [government's] interest and the interest of the nonparty [t]ribes." *Id.* at 1351. In direct contrast to the Ninth Circuit's holding in this case, the shared interest in the outcome *was* sufficient to avoid dismissal under Rule 19. *Contra* Pet. App. 22–23.

The same tension exists with Tenth Circuit precedent. In *Sac & Fox Nation of Missouri v. Norton*, the Tenth Circuit held that an absent tribe was not a required party to a suit challenging the government's plan to seize a tract of land for the tribe because the government could adequately represent the tribe's interests. 240 F.3d 1250, 1258–60 (10th Cir. 2001). While the tribe had "an economic interest in the outcome of th[e] action," that did not make the tribe a necessary party, because the government's "interest in defending [its] determinations [was] 'virtually identical' to the interests of the [tribe]"—both wanted the court to uphold the government's plan. *Id.* at 1259. Again, the alignment of interests in the litigation

outcome rendered the tribe's presence unnecessary.[11] And, again, this holding directly conflicts with the Ninth Circuit's holding here.

In sum, the Seventh, D.C., and Tenth Circuits have all held that, absent a conflict of interest with the government, tribes are not required parties to lawsuits that challenge agency action, the D.C. and Tenth Circuits reasoning that the federal government *can* adequately protect tribal interests whenever they "share an interest in the ultimate outcome of [the] case." Pet. App. 23 (Ninth Circuit reaching opposite conclusion). This reasoning echoes the United States's long-held position that, "[i]n a suit [challenging federal agency action], the agency's defense of its own action is adequate as a matter of law; no other defendants are required." Govt. *Diné Citizens* Br. at 7.[12] This case presents a clean opportunity to resolve

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[11] *See also Kansas v. United States*, 249 F.3d 1213, 1226–28 (10th Cir. 2001) (tribe not required in lawsuit challenging "propriety of an agency decision" regarding whether certain land qualified as "Indian land" under federal statute because interests of existing defendants, including the government, were "substantially similar, if not identical, to the [t]ribe's interests in upholding the [federal government's] decision"); *cf. Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977) (case could proceed without tribe because "[d]ismissal of the action for nonjoinder of the [t]ribe would produce an anomalous result" by which "[n]o one, except the [t]ribe, could seek review" of the relevant agency action).

[12] *See also, e.g.*, Govt. Br. at 16 ("[T]he United States is generally the only required and indispensable defendant in APA litigation."); Br. of United States as Amicus Curiae in Support of Appellants, *Mont. Wildlife Fed'n v. Haaland*, No. 22-35549, 2023 WL 2167617, *11 (9th Cir. Feb. 14, 2023) (same); Answering Br. for Fed. Appellees, *West Flagler Assocs., Ltd. et al. v. Haaland*, No. 22-5022, 2022 WL 4977318, at *11 (D.C. Cir. Oct. 3, 2022)

this tension over whether any party that shares the government's interest in a given litigation outcome must be joined to a suit challenging agency action.

Even putting aside the split in authority, the question presented merits review on its own. The Ninth Circuit's holding will cause—indeed, has already caused—immense damage to the state-federal water rights framework. The Klamath Adjudication began in 1975, is still ongoing, has cost millions of dollars, and will adjudicate the rights of hundreds of water rights holders who supply water to thousands of users. *See* Pet. App. 13–14. If tribal sovereign immunity can be used as a sword to stop the parties to that adjudication from enforcing their rights, as occurred here, a great deal of that time and resources will have been wasted, and many of the rights adjudicated in that proceeding will be effectively nullified. *Cf. Eagle Cnty.*, 401 U.S. at 525 ("[U]nless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value."). Multiply these harms by the number of other water rights adjudications implicating tribal rights that have occurred since the McCarran Amendment's passage in 1952, and the consequences of the Ninth Circuit's ruling become staggering.

(same); Fed. Appellees' Final Resp. Br., *Scotts Valley Band of Pomo Indians v. U.S. Dep't of Interior*, No. 21-5009, 2021 WL 1265224, at *18 (D.C. Cir. Apr. 5, 2021) (same).

Nearly all Native American land is located within the Ninth and Tenth Circuits. *See* U.S. Dept. of Agric., *Forest Service National Resource Guide to American Indian and Alaska Native Relations* 6, D-3 Table D.2 (Apr. 1997), https://www.fs.usda.gov/spf/tribalrelations/documents/publications/national-resource-guide-ver2.pdf. This means that only those two circuits are likely to address the Rule 19 and McCarran Amendment questions this case raises; indeed, they account for most of the cases that cite the McCarran Amendment and Reclamation Act. *See* 43 U.S.C. § 666 (41 of 74 circuit-level Westlaw citing references and 67 of 101 district-level Westlaw citing references originate from Ninth and Tenth Circuits); 43 U.S.C. § 383 (41 of 48 circuit cases and 56 of 60 district cases); 43 U.S.C. § 421 (six of nine circuit cases and 13 of 16 district cases) (last accessed May 9, 2023). In denying Petitioner's request for rehearing en banc, the Ninth Circuit confirmed it will not revisit its position.

Regardless of when and how other circuits weigh in on these important issues, the Ninth Circuit's ruling by itself merits review. That court has jurisdiction over seven Western States that encompass a population of over 65 million people—approximately a fifth of the country. *See* Quick Facts: Population Estimates, July 1, 2022, U.S. Census Bureau, https://www.census.gov/quickfacts/geo/chart/US/PST045222 (indicating population for each State, with those within the Ninth Circuit totaling over 65 million out of 333 million). Scarcity of water is one of the most important problems facing this vast region, *Colo. River*, 424 U.S. at 804, yet the decision below severely undermines the legal framework to

determine and administer rights in that scarce and vital resource.

Finally, the Ninth Circuit's secondary conclusion—that this was not a McCarran Amendment proceeding at all and therefore did not waive the tribes' sovereign immunity, Pet. App. 27—is no bar to certiorari. While erroneous,[13] it is immaterial. The only way dismissal could be required here is if both (1) the Tribes are required and indispensable parties; and (2) they have sovereign immunity that prevents their joinder. A holding that the Tribes are *not* required or indispensable parties, therefore, will be dispositive. Whether the McCarran Amendment waived their sovereign immunity is thus irrelevant.

III. The Ninth Circuit's holding is wrong.

The Ninth Circuit's ruling has drastic implications for water rights in the American West. It is also

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[13] The Ninth Circuit drew a distinction between "an administration of previously determined rights" under the McCarran Amendment and "an APA challenge to federal agency action," as if the two were mutually exclusive. Pet. App. 27. That is incorrect. The McCarran Amendment does not create a private right of action for the administration of water rights, see 43 U.S.C. § 666, nor does the Reclamation Act. *See* 43 U.S.C. § 383; *Long v. Salt River Valley Water Users' Ass'n*, 820 F.2d 284, 288 (9th Cir. 1987). The APA, by contrast, *does* confer "a general cause of action upon persons 'adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984) (quoting 5 U.S.C. § 702). An APA lawsuit thus provides the proper procedural mechanism by which water-rights holders can administer their state-adjudicated rights against the federal government.

erroneous; the Ninth Circuit's conclusions regarding both prongs of Rule 19 are wrong.

A. The Tribes are not required parties.

The Ninth Circuit's fundamental premise—that the Tribes are required parties—is incorrect for at least two reasons.

First, the Tribes do not have an interest that Petitioner's action could "impair or impede" under Rule 19(a)(1)(B)(i). The Ninth Circuit's contrary view is based on the premise that Petitioner is seeking to cut off the flow of water to the Tribes from Upper Klamath Lake. *See* Pet. App. 18–20 (basing ruling on Tribes' "federally reserved fishing rights," "right to prevent other appropriators from depleting the streams waters below a protected level," and "rights to water to the extent necessary for them to accomplish hunting, fishing, and gathering"). That is incorrect.

The relief Petitioner seeks will not prevent Reclamation from satisfying its obligations to the tribes. Although it asks for declarations that Reclamation acted unlawfully and currently lacks water rights to divert water from Upper Klamath Lake for instream purposes, these declarations cannot and do not stop Reclamation from fulfilling its duties to the Tribes. Instead, they simply require Reclamation to obtain water from Petitioner first, using lawful means including purchase, appropriation, or judicial condemnation. *See* Pet. App. 92–93 ¶¶ 14–18; Pet. App. 102–05 ¶¶ 45, 46(c)–(d), 47, 50; 43 U.S.C. § 421. The Tribes' interest is in the water itself, not the method by which Reclamation acquires it.

Second, this action will not "impair or impede" any interests the Tribes may have in Upper Klamath Lake because the federal government *does* adequately protect those interests. *See Colo. River*, 424 U.S. at 812 (citing federal government's "responsibility fully to defend Indian rights" as one basis for extending McCarran Amendment immunity waiver to cases involving tribal rights government holds in trust). As noted, "an absent person is not a required party under Rule 19(a)(1)(B)(i) if an existing party adequately represents the interest that would be impaired or impeded." Gensler & Mulligan, *supra* 17 (collecting cases). The logic behind this rule is straightforward: "If a party remaining in the case is both capable of and interested in representing the interests of the absent party, the party's exit or exclusion from the suit exposes it to no additional risk of an adverse decision." *De Csepel v. Republic of Hungary*, 27 F.4th 736, 748 (D.C. Cir. 2022).

That is the case here. Reclamation and the Tribes both "seek the same result:" to defeat Petitioner's claims for declaratory relief and uphold Reclamation's 2019 operations plan. *Id.* And "as trustee for the Indians," including the Klamath Tribes, Reclamation is obligated to defend the Tribes' interest to the fullest extent possible. *San Carlos Apache*, 463 U.S. at 566 n.17; *see also Colo. River*, 424 U.S. at 812 ("The Government has not abdicated any responsibility fully to defend Indian rights…."); Amended Findings & Order at KBA_ACFFOD_04945. Consequently, Reclamation has "the incentive to make every argument on the merits that the absent [Tribes] would or could make." *De Csepel*, 27 F.4th at 748. The Tribes' presence is therefore not necessary within the meaning of Rule 19.

The Ninth Circuit held that Reclamation could not adequately represent the Tribes' interests because their *motivations* differed. Pet. App. 22. The court did not explain why these different motivations matter, however, and Rule 19(a)(1)(B)(i) indicates they should not. All that matters under the rule is whether the litigation could "impair or impede" the absent party's interest, but adequate representation from an existing party based on a shared interest in the outcome of the case eliminates that risk. So long as a party has the ability and the appropriate incentives, as Reclamation does, to pursue an outcome that would protect the absent party's interest, the absent party is not "required" under Rule 19. Gensler & Mulligan, *supra* 17 (collecting cases).

The Ninth Circuit's motivation-centric rule will have troubling consequences. Agency action will *always* affect members of the public differently from how it affects the agency itself, so the agency's motivation for defending its action will always differ from that of an absent third party. If this difference means the litigation may "impair or impede the [absent party's] ability to protect [its] interest," Fed. R. Civ. P. 19(a)(1)(B)(i), Rule 19 will swallow the APA just as much in general as it does the McCarran Amendment in water rights cases specifically. That cannot be the correct reading of Rule 19.

B. This case can proceed "in equity and good conscience" without the Tribes.

Even if the Tribes were required parties, the case still "should proceed among the existing parties" "in equity and good conscience" without the Tribes under the Rule 19(b) factors. Fed. R. Civ. P. 19(b). The first

three factors—prejudice to the parties, the court's ability to lessen the prejudice, and the adequacy of a judgment in the absence of the Tribes—all favor reversal because the prejudice to the Tribes is outweighed by other interests. The relief Petitioner seeks would not impair the Tribes' rights to water; it would simply compel Reclamation to purchase, lease, or judicially condemn Petitioner's water before supplying it to the Tribes. The Ninth Circuit's assessment of the prejudice factor operates under the mistaken assumption that Petitioner seeks to "restrict[] the water flows necessary" for the Tribes to exercise their hunting and fishing rights. Pet. App. 29. That is simply not the case. Finally, the last factor—the availability of an adequate remedy if the action is dismissed for nonjoinder—likewise favors reversal because dismissal will close the courthouse doors to Petitioner, preventing it from vindicating the rights adjudicated to it in the Klamath Adjudication against Reclamation.

The Ninth Circuit paid no heed to these considerations, instead holding that "there [was] very little need for balancing Rule 19(b) factors because [the Tribes'] immunity … may be viewed as the compelling factor." Pet. App. 28. None of the cases the court cited to support this conclusion involved the "virtually unique" federal-and-state system for the adjudication of water rights, *San Carlos Apache*, 463 U.S. at 571, which specifically waives sovereign immunity to ensure all water claimants can appear in adjudication proceedings and administer their rights afterward. For this system to be effective, such cases must be allowed to proceed without Native American tribes, as this Court recognized in *Colorado River* when it held that the McCarran Amendment waives

sovereign immunity with respect to tribal water rights. 424 U.S. at 810–11. Equity and good conscience, not to mention express Congressional direction, dictate this result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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