APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed September 8, 2022]

No. 20-36009
D.C. Nos. 1:19-cv-00451-CL
1:19-cv-00531-CL

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 Reclamation Office,
Defendants-Appellees,

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

No. 20-36020
D.C. Nos. 1:19-cv-00451-CL
1:19-cv-00531-CL

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 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.

OPINION

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. R. 19, of an action concerning the distribution of waters

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

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 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.

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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. 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

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[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).

(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]

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.

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[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.

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

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[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."

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.

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

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

No. 1:19-cv-00451-CL
No. 1:19-cv-00531-CL
(Consolidated)

[Filed September 25, 2020]

KLAMATH IRRIGATION DISTRICT, et al.; SHASTA VIEW IRRIGATION DISTRICT, et al., Plaintiffs,	)
v.	)
UNITED STATES BUREAU OF RECLAMATION, et al., Defendants.	)

ORDER

McSHANE, District Judge.

Magistrate Judge Mark D. Clarke has filed a Findings and Recommendation, ECF No. 89, concerning Motions to Dismiss filed by Intervenor-Defendant Hoopa Valley Tribe and Intervenor-Defendant the Klamath Tribes, ECF Nos. 74, 75. Judge

Clarke recommends that the motions be granted and the consolidated cases be dismissed.

Under the Federal Magistrates Act, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). If a party files objections to a magistrate judge's findings and recommendations, "the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

For those portions of a magistrate judge's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."). Although no review is required in the absence of objections, the Magistrates Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Id.* at 154. The Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the court should review the recommendation for "clear error on the face of the record."

In this case, Plaintiff Klamath Irrigation District ("KID") and Plaintiffs Shasta View Irrigation District, Klamath Drainage District, Van Brimmer Ditch Company, Tule Lake Irrigation District, Klamath Water Users Association, Ben Duval, and Rob Unruh (collectively "SVID Plaintiffs") have filed objections,

ECF Nos. 93, 94. Intervenor-Defendant Hoopa Valley Tribe and Intervenor-Defendant the Klamath Tribes have filed Responses to Plaintiffs' Objections, ECF Nos. 95, 96. The Court has reviewed the portions of the F&R to which Plaintiffs have objected *de novo* and finds no error. The Court therefore ADOPTS Judge Clarke's F&R. The consolidated cases are DISMISSED and final judgments shall be entered accordingly. All other pending motions are DENIED as moot.

It is so ORDERED and DATED this 25th day of September 2020.

s/Michael J. McShane
MICHAEL McSHANE
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

No. 1:19-cv-00451-CL
No. 1:19-cv-00531-CL
(Consolidated)

[Filed September 25, 2020]

KLAMATH IRRIGATION DISTRICT, et al.; SHASTA VIEW IRRIGATION DISTRICT, et al., Plaintiffs,	)
v.	)
UNITED STATES BUREAU OF RECLAMATION, et al., Defendants.	)

JUDGMENT

McSHANE, District Judge.

For the reasons set forth in the accompanying Order, these consolidated cases are DISMISSED without prejudice.

It is so ORDERED and DATED this 25th day of August 2020.

s/Michael J. McShane
MICHAEL McSHANE
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

No. 1:19-cv-00451-CL
No. 1:19-cv-00531-CL
(Consolidated)

[Filed May 15, 2020]

KLAMATH IRRIGATION DISTRICT, et al.; SHASTA VIEW IRRIGATION DISTRICT, et al., Plaintiffs,	)
v.	)
UNITED STATES BUREAU OF RECLAMATION, et al., Defendants.	)

FINDINGS AND RECOMMENDATION

CLARKE, Magistrate Judge

This case comes before the Court on two motions to dismiss under Rule 12(b)(7) for failure to join a required party under Rule 19, filed by the Intervenor-Defendants, Hoopa Valley Tribe and the Klamath Tribes (#74, #75). For the reasons below, the motions should be GRANTED, and these consolidated cases

should be dismissed. Previously filed motions to dismiss (#63, 64) should be denied as moot.

INTRODUCTION

This case centers around the water located in the Klamath Basin, and the groups of people who rely on that water for cultural, spiritual, agricultural, and economic subsistence. The history of these issues, between these parties, dates to the nineteenth century, at least. To say it is multifaceted is to lose the true complexity of the long timeline, the rich cultures, and the many adversities the people groups involved have faced and overcome. This includes the people groups of the Hoopa Valley Tribe and the Klamath Tribes, as well as the generations of farmers, irrigators, and families of water-users in the Klamath Basin. As the federal agency tasked with distributing water in this region, the Bureau of Reclamation has the nearly impossible job of complying with numerous important, long-standing obligations. In this time of frequent drought and water-scarcity, these obligations take on even more significance, conflict, and dire implications for everyone involved. The Court's task today is not to solve the ultimate predicament of competing water rights in the region, but to determine who is required to be at the table when these issues are challenged and decided. As discussed below, the Hoopa Valley Tribe and the Klamath Tribes are so required. Entitled to sovereign immunity, they cannot be forcibly joined. This case must be dismissed for failure to join a required party under Federal Rules of Civil Procedure 12(b)(7) and 19.

BACKGROUND

I. The Klamath Water Basin

The Klamath Basin occupies approximately 12,000 square miles in south-central Oregon and northern California. AR 76065. Upper Klamath Lake (UKL) is controlled by Link River Dam (owned and operated by Reclamation), such that it stores water during higher runoff periods that can be diverted for irrigation, or released to flow downstream, when natural run-off has diminished. AR 76117-8. The Klamath River proper begins downstream of Link River Dam and flows approximately 240 miles before it reaches the Pacific Ocean. AR 76037. Iron Gate Dam is approximately 64 miles downstream of Link River Dam. AR 76153. Salmon in the Klamath River cannot move upstream beyond Iron Gate Dam. AR 76166. Four major tributaries, and numerous smaller tributaries, add volume to the Klamath River as it flows downstream from Link River and Iron Gate Dams. AR 76076.

II. The Klamath Tribes and the Hoopa Valley Tribe

Since time immemorial, the Klamath Tribes and their members have used, and continue to use, the natural resources of the Klamath Basin in what is now the states of both Oregon and California for subsistence, cultural, ceremonial, religious, and commercial purposes. Gentry Decl., (Dkt. #31) ¶ 3. C'waam (Lost River sucker or *Deltistes luxatus*) and Koptu (shortnose sucker or *Chasmistes brevirostris*) have played a particularly central role in the Tribes' cultural and spiritual practices, and they were once the

Tribes' most important food-fish. *Id.* ¶ 4; *Klamath Tribes v. United States Bureau of Reclamation*, 2018 WL 3570865, at *1 (N.D. Cal. July 25, 2018).

In 1864, the United States and the 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, along with "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 and the Klamath and Moadoc Tribes and Yahooskin Bank of Snake Indians, October 14, 1864, 16 Stat. 707. The Ninth Circuit has recognized that the Tribes' treaty fishing rights include "the right to prevent other appropriators from depleting the streams waters below a protected level." *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983).

Similarly, the Hoopa Valley Tribe and its members have, since time immemorial, relied on the water and fish resources of the Klamath and Trinity Rivers, which both flow through its Reservation. The United States located and set aside the Hoopa Valley Reservation on August 21, 1864. *Mattz v. Arnett*, 412 U.S. 481, 490, fn. 9 (1973); *Short v. United States*, 202 Ct. Cl. 870, 875-980 (1973) (discussing Reservation history). On June 23, 1876, President Grant issued an Executive Order formally setting aside the Reservation for "Indian purposes." *Short*, 202 Ct. Cl. at 877. Traditional salmon fishing was one of the "Indian purposes" for which the Reservation was created. *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995).

The Klamath and Trinity Rivers flow through the Reservation, which encompasses a 12-mile square historically inhabited by Hoopa people. *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1370 (Fed. Cir. 2000).

In 1864, the United States determined the Reservation a suitable permanent homeland for Hoopa Indians for two principal reasons. The Reservation is within the heart of the Tribe's aboriginal lands, which Hoopa Indians occupied and fished upon for generations. *Parravano*, 70 F.3d at 542. Hoopa Indians possessed fishing and hunting rights long before contact with white settlers and their salmon fishery was "not much less necessary to [their existence] than the atmosphere they breathed." *Id*. at 542, quoting *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981). Second, the Reservation set aside resources of the Klamath and Trinity rivers for Hoopa people to be self-sufficient and achieve a moderate living based on fish. *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986) (noting Indians' right to take fish from the Klamath River for ceremonial, subsistence, and commercial purposes); *Parravano*, 70 F.3d at 544-546 (recognizing Hoopa's reserved fishing rights); *Baley v. United States*, 942 F.3d 1312, 1323 (Fed. Cir. 2019) (citing state and federal cases recognizing Hoopa reserved fishing rights).

In 1993, the Interior Solicitor published an opinion reaffirming Hoopa reserved fishing rights. Solicitor Opinion M-36979, October 4, 1993. Somerville Declaration, Exhibit A (Dkt. #24-1). Solicitor Leshy examined the "history of the reservations, the Indians'

dependence on the Klamath and Trinity River fisheries, the United States' awareness of that dependence, and the federal intent to create the reservations in order to protect the Indians' ability to maintain a way of life, which included reliance on the fisheries." *Id*., at 3. Solicitor Leshy found "it is now well established that the Yurok and Hoopa Valley Indians have federal reserved fishing rights, created in the nineteenth century when the lands they occupied were set aside as Indian Reservations." *Id*. at 14-15. "The . . . Hoopa Indians had a 'vital and unifying dependence on anadromous fish.'" *Id*. at 22. "[T]he Government intended to reserve for the [Hoopa] a fishing right which includes a right to harvest a sufficient share of the resource to sustain a moderate standard of living." *Id*. at 21; *Parravano*, 70 F.3d at 542-46 (citing Solicitor opinion with approval).

III. The Reclamation Act and the Klamath Project

Congress enacted the Reclamation Act in 1902 to encourage land settlement and agricultural economies in the west. The Reclamation Act financed irrigation works, with construction costs repaid by Project water users. The Klamath Project (or Project) was authorized in 1905, one of the first projects authorized under the Reclamation Act. AR 1208.

In 1905, Oregon and California also enacted statutes to develop the Klamath Project. AR 1207-8. Under these state laws, land that was submerged and owned by the states could be reclaimed by farmers for irrigation use. Upon uncovering the submerged lands, state land title passed to the federal government for

disposition to individuals under the Reclamation Act. In the federal act of February 9, 1905, Congress authorized the Secretary of the Interior to advance the Klamath Project, to lower the water levels of water bodies in Oregon and California, and "to dispose of any lands which may come into the possession of the United States as a result thereof by cession of any State or otherwise under the terms and conditions of the national reclamation act." Act of February 9, 1905, Pub. L. No. 58-66, 33 Stat. 714.

Pursuant to Oregon law, on May 17, 1905, the United States Reclamation Service (the predecessor to Reclamation) filed a notice of appropriation in Oregon to all of the then-unappropriated waters of the Klamath Basin for the Klamath Project. AR 1226. The notice provides that the United States intends that "water is to be used for irrigation, domestic, power, mechanical, and other beneficial uses in and upon lands situated [in the Klamath Basin in Klamath, Oregon and Modoc, California counties]." *Id*.

Today, farmers rely on water deliveries and make investments in crops based upon expected water deliveries. The Project irrigated land area is about 200,000 acres, with most of that acreage receiving water diverted from the Klamath River system. AR 1257. With few exceptions, this land is irrigated and farmed by private individuals or firms. The total value of agricultural products produced by the Project has been estimated at up to $300 million annually, and, in addition to the families directly supported by agriculture, numerous businesses provide goods and

services to farmers. S.A.C. TID ¶ 38 (#73). Agriculture supports a significant portion of the local tax base. *Id*.

IV. The State of Oregon's Klamath Basin Adjudication

The State of Oregon commenced the Klamath Basin Adjudication (KBA) to determine the relative rights of use of the Klamath River and its tributaries[1] in accordance with its general stream adjudication law. *See* ORS 539.005. Oregon law provided that all parties were required to file claims, and contested claims of water rights were subject to trial-type proceedings before the Office of Administrative Hearings and the Oregon Water Resources Department's Adjudicator. *See* ORS 539.100-539.110. Following more than ten years of administrative contested case litigation, the Adjudicator issued the finding of fact and order of determination in 2013. In 2014, the Adjudicator corrected determinations and submitted them to the Klamath County Circuit Court. *See* Amended and Corrected Findings of Fact and Order of Determination, In re Matter of the Determination of the Relative Rights to the Use of the Water of the Klamath River and Its Tributaries, Oregon Water Resources Department (Feb. 28, 2014) ("ACFFOD").

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[1] The KBA includes the stream systems within the greater Klamath River Drainage Basin, with the exception of the Lost River drainage, which is a closed drainage basin contiguous to the natural drainage basin of the Klamath River. The KBA does include Upper Klamath Lake, which is fed both by surface water entering from the north and west (the Williamson and Wood Rivers), and large springs and seeps located in the lakebed. ACFFOD 1-2.

Consistent with ORS 539.150, the Klamath County Circuit Court is presently managing hearings to approve or modify the ACFFOD. Pursuant to ORS 539.130, 539.170, the Adjudicator's findings of fact and order of determination is in full force and effect, and water use in Klamath Basin is presently subject to regulation pursuant to the ACFFOD.

With respect to irrigation water use in the Project, the Adjudicator confirmed rights with priority no later than May 19, 1905, for all Project lands, including those lands owned by the Plaintiffs. ACFFOD 7155, at AR 1326. The districts and individuals who deliver water to their constituents hold title to the water use rights. ACFFOD 7075-82, at AR 1246-53. The ACFFOD found that the beneficial users of Project water hold a legal interest in the rights recognized in the ACFFOD for the purpose of beneficial use. ACFFOD 7075, at AR 1246. The use rights extend to so-called "live flow" and to water that is stored in UKL. ACFFOD 7086, at AR 1257. Additional water rights recognized in the ACFFOD for Project lands, including Van Brimmer Ditch Company, include priority dates as early as 1883. *See, e.g.*, ACFFOD 7141, at AR 1312.

DISCUSSION

Federal Rule of Civil Procedure ("FRCP") 12(b)(7) authorizes dismissal of an action for failure to join a party required to be joined by FRCP 19. In evaluating the motion to dismiss, the court "must undertake a two-part analysis: it must first determine if an absent party is [required]; then, if the party cannot be joined due to sovereign immunity, the court must determine whether … in 'equity and good conscience' the suit

should be dismissed." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *Dine Citizens Against Ruining Our Env't v. BIA*, 932 F.3d 843, 851 (9th Cir. 2019). "The inquiry is a practical one and fact-specific." *Dine Citizens,* 932 F.3d at 851.

I. Hoopa Valley Tribe and the Klamath Tribes are required parties.

A party is required pursuant to FRCP 19(a)(1) if: (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. Though only one prong is necessary, Hoopa Valley Tribe and the Klamath Tribes satisfy both prongs of Rule 19(a)(1)(B).

Hoopa Valley Tribe and the Klamath Tribes (collectively, "Tribes" or "Intervenors") are required parties to this case because their legally protected treaty water and fishing rights are at a minimum coextensive with Reclamation's obligations to provide water for instream purposes under the ESA. As a practical matter, their ability to protect this interest would be significantly impaired if Plaintiffs' claims prevail. In addition, if Plaintiffs' claims are successful, it would leave Reclamation subject to a substantial risk of incurring multiple inconsistent obligations to provide

water for instream purposes and to deliver that same water to Plaintiffs for irrigation purposes.

a) Intervenors have a legally protected interest in their treaty water and fishing rights.

To satisfy Rule 19, an interest must be legally protected and must be "more than a financial stake." *Makah*, 910 F.2d at 558. "[A]n absent party has no legally protected interest at stake in a suit merely to enforce compliance with administrative procedures." *Id*. at 971. However, 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*, 932 F.3d at 851.

I. Plaintiffs' claims are not merely procedural.

Plaintiffs contend that their claims in this case are brought merely to enforce compliance with administrative procedures under the APA. They also contend that they have requested relief on a merely "prospective" basis that would not impair a right already granted to the Tribes. The Court disagrees.

Plaintiffs[2] Shasta View Irrigation District, Klamath Irrigation District, and other irrigators, farmers, and water-users, (collectively, "Plaintiffs" or "Water Users"), bring claims against the United States Bureau of Reclamation ("Reclamation") under the APA to set aside Reclamation's 2019-2024 Operations Plan for the Klamath Project ("Operations Plan"). Reclamation states that it developed the Operations Plan in conformance with (1) the Endangered Species Act's ("ESA") mandate that the agency ensure that actions it authorizes, funds, or carries out do not jeopardize the continued existence of listed species or destroy or adversely modify their designated critical habitat, 16 U.S.C. § 1536(a)(2); (2) reserved water rights held for tribal fishery needs; and (3) contractual agreements with Plaintiffs. The Operations Plan seeks to meet the requirements of the ESA by not diverting water to Project irrigators that would otherwise jeopardize endangered sucker fish in Upper Klamath Lake and threatened salmon in the Klamath River and/or adversely modify their critical habitat, if used for irrigation purposes. Pursuant to Section 7 of the ESA, Reclamation formally consulted with the National Marine Fisheries Service and the U.S. Fish & Wildlife Service on its Operations Plan, and each consulting

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[2] These cases were consolidated on July 1, 2019. Civ. No. 1:19-cv-00451-CL was determined to be the lead case. All citations to docket numbers refer to the docket in the lead case. After the motions to intervene were granted, Plaintiffs filed two separate Second Amended Complaints, the first filed by Plaintiff KID ("S.A.C. KID") (#70), and the second filed by TID and the remaining Plaintiffs ("S.A.C. TID") (#73). The claims contained in the complaints are substantially similar, and the Court will address the issues collectively.

agency provided a biological opinion to Reclamation that the Operations Plan would not jeopardize salmon or suckers, or adversely modify their critical habitat.

Plaintiffs' Second Amended Complaints allege, in essence, that Reclamation lacks statutory or other authority to comply with the ESA, or to protect tribal reserved water rights held for tribal fishery needs, by reducing the amount of water to be delivered to Project irrigators pursuant to their state water rights and their contracts with Reclamation. *See, e.g.,* S.A.C. TID (#73) ¶ 64 (alleging that "[n]either section 7(a)(2) of 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 and for Water Users or other Association members or their patrons"); S.A.C. TID (#70) ¶ 26 (alleging that Reclamation has "no discretion or authority to limit the amount of water" that KID and its landowners "are entitled to beneficially use under their water rights, to the extent such water is physically available, without otherwise condemning or appropriating KID's water rights and the rights of its landowners").

Plaintiffs argue that the relief they seek is "prospective," pointing to the fact that their complaints do not request relief in the form of an injunction. However, they do ask for a declaration "that Defendants must maintain, operate, and direct operations of the Project and Project-related facilities in accordance with the requirements of the Reclamation Act, and that Defendants' authorization . . . of collection and retention and use of stored water

for ESA-listed species, and use of stored water for ESA-listed species in the Klamath River, are not activities authorized by any applicable law." S.A.C. TID (#73) at ¶ 92 and 33 (Prayer for Relief) at ¶ 2; *see also* S.A.C. KID (#70) at ¶ 71 ("KID is entitled to a declaration that Defendant is violating Section 8 of the Federal Reclamation Act by unlawfully using water in UKL reservoir for instream purposes . . . during KID's irrigation season without a water right or other authority under state or federal law and thereby interfering with the vested water rights of KID, its landowners, and other water right holders to whom KID is legally obligated to deliver water.").

Thus, while Plaintiffs' claims are framed as procedural challenges brought under the APA, the main underlying contention is that Reclamation has no discretion to fulfill ESA or other instream obligations prior to fulfilling water delivery obligations to Plaintiffs, as determined by the State of Oregon's Klamath Basin Adjudication and the ACFFOD. As discussed below, this underlying contention, if successful, would ultimately either extinguish or conflict with Reclamation's obligations to provide water instream for ESA purposes, and those ESA obligations are coextensive with the treaty water rights of the Klamath Tribes and Hoopa Valley Tribe. Additionally, Reclamation's Plan of Operations covers the years from 2019-2024, thus any relief granted to Plaintiffs before 2025 would impair the Tribes' rights "already granted." Arguably, based on the caselaw discussed below, any impairment of the Tribes' rights at all, which have been well established in the Courts for decades, would

impair rights "already granted." For all of these reasons, the Plaintiffs' suit is not merely "procedural."

ii. Tribal water and fishing rights are, at the bare minimum, co-extensive with the government's obligations under the ESA.

Courts, including the Ninth Circuit, have held that Tribes' federally reserved treaty water and fishing rights are at least co-extensive with the government's obligations to provide sufficient water under the ESA for species survival and environmental purposes. "At the bare minimum, the Tribes' rights entitle them to the government's compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy." *Baley*, 942 F.3d at 1337 (affirming Hoopa has water right in Klamath River at least equal to what was needed to satisfy Reclamation's ESA obligations to protect SONCC coho from jeopardy); *Klamath Water Users Association v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000), cert. denied, 531 U.S. 812 (2000).

In addition, courts have repeated held and affirmed the priority that these federally reserved water rights have over competing irrigation rights. *Baley v. United States*, 134 Fed. Cl. 619, 668- 680 (2017), aff'd, 942 F.3d at 1341 (Fed. Cir. 2019) (holding Klamath irrigators' water rights are subordinate to Hoopa, Yurok, and Klamath Tribes' federal reserved water rights); *Patterson*, 204 F.3d at 1214 (Reclamation "has a responsibility to divert the water and resources needed to fulfill the [Hoopa Valley] Tribes' rights, rights that

take precedence over any alleged rights of the Irrigators"); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197, 1211 (D. Or. 2001) (denying Klamath irrigators request to enjoin Reclamation's 2001 operations plan to release flow for protection of salmon and senior tribal rights); *Hoopa Valley Tribe v. NMFS*, 230 F. Supp. 3d 1106, 1141-42 (N.D. Cal. 2017) (finding that injunction requiring additional water deliveries in Klamath "would also help protect [Hoopa's] fishing rights, which must be accorded precedence over irrigation rights").

This precedence has been upheld even when irrigators argue that state law provides for a different priority: "[Tribal treaty] rights are federal reserved water rights not governed by state law." *Baley*, 942 F.3d at 1430; *see also United States v. New Mexico*, 438 U.S. 696, 702 (1978) ("Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water.").

b) Tribes' ability to protect their interests would be significantly impaired if Plaintiffs' claims prevail.

Plaintiffs contend that the Oregon KBA, resulting in the 2014 ACFFOD, has entirely changed the legal landscape discussed above. They argue that all of the water rights and priorities in the Klamath Basin are now solely determined by the ACFFOD, and Reclamation has no discretion but to fulfill those obligations, regardless of its obligations under the ESA.

While this is not a case that directly asks the Court to determine the priority of the competing water rights in the Klamath Basin, the practical reality is that Plaintiffs seek a declaration that their adjudicated water rights under the 2014 Oregon ACFFOD, and the contract water rights between Reclamation and the Water Users, supersede Reclamation's water obligations under the ESA, which are coextensive with the government's water obligations to the Tribes. This would be a radical and extreme shift from the precedence established above.

In fact, Plaintiffs' Second Amended Complaints seek a declaration from the Court that Reclamation has no discretion to act in releasing the water that it stores, while also claiming that "Section 7(a)(2) of the ESA applies to actions with respect to which there is discretionary federal involvement or control." S.A.C. TID (#73) ¶ 68 *citing* 50 C.F.R. § 402.03; *Nat. Res. Def. Council v. Norton*, 236 F. Supp. 3d 1198, 1217 (E.D. Cal. 2017); *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1082 (9th Cir. 2001) (EPIC). The practical and legal effect of such a declaration is clear. If Reclamation has no discretion and no authority to act, then Reclamation has no obligation under the ESA at all, thus eliminating the need for the 2019 BiOp and all the other consultations that informed Reclamation's Plan of Operations. *Id.* By extension, if Reclamation has no authority to release water instream for ESA purposes, the longstanding metric for defining the "bare minimum" of the Tribes' treaty water rights and federally reserved water and fishing rights would be extinguished. For practical and logistical purposes, this

would have a significant detrimental impact on those rights.

Even if the practical implications of a declaration precluding Reclamation from releasing water for instream ESA purposes did not impair the Tribes' legally protected treaty rights, the second prong of Rule 19(B) would come into effect. Reclamation would be subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations – namely, the obligation to fulfill Plaintiffs' state law water rights on the one hand, and the obligation to release water instream to fulfill the Tribes' treaty water rights on the other. Thus, under either prong, the Intervenors are required parties under Rule 19(a)(1)(B).

c) Tribes' interests will not be adequately represented by the Bureau of Reclamation.

Plaintiffs argue that, even if the Tribes have an interest in the subject of the litigation in this suit it will not be impaired because the federal government will adequately represent that interest. As argued by the Tribes and acknowledged by Reclamation, this contention is not in line with the current controlling authority in the Ninth Circuit.

A non-party is adequately represented by existing parties if: (1) the interests of existing parties are such that they would undoubtedly make all of the non-party's arguments; (2) existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the

proceeding that existing parties would neglect. *Id*. "In assessing an absent party's necessity under Rule 19(a), the question whether that party is adequately represented parallels the question whether a party's interests are so inadequately represented by existing parties as to permit intervention of right under Rule 24(a)." *Id*. "The requirement of [Rule 24(a)] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing [inadequate representation] should be treated as minimal." *Trbovich v. United Mine Workers of Am*., 404 U.S. 528, 538, n. 10 (1972).

As discussed in this Court's Order on intervention (#61), Reclamation will not "undoubtedly" make all of the Intervenors' arguments. The Tribes are directly interested in how this proceeding would affect, as a practical matter, their federal reserved fishing and water rights, which are central to its culture, subsistence, and very existence. Reclamation has a different general interest in defending its decisions made pursuant to the ESA and APA. *Dine Citizens*, 932 F.3d at 854-856 (United States not adequate representative for tribal entity where it had a different general interest in defending compliance with federal law); *Murphy Co. v. Trump,* 2017 U.S. Dist. LEXIS 35959 (D. Or. Mar. 14, 2017) (federal representation of intervenors' interests inadequate where federal defendants' broader interests impair their ability to adequately represent intervenor's narrower interests); *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F. Supp. 791 (D. D.C. 1990) (United States had interest in defending agency authority, but the Tribe "has an interest in its own survival, an interest which it is entitled to protect

on its own"). The practical effect of Plaintiffs' requested relief would directly impair the Tribes' federal reserved fishing and water rights and the related resources that the Tribes rely upon. Only the Intervenors can adequately present and defend their distinct interest in the affected fish and water resources, and their interest in sovereign immunity.

II. This case should be dismissed.

Under Rule 19(b), if an absent party is required but cannot be joined, the court must determine whether in equity and good conscience the suit should be dismissed.

a. Sovereign immunity prevents Hoopa Valley Tribe and the Klamath Tribes from being joined and weighs heavily in favor of dismissal.

Although Hoopa Valley Tribe and the Klamath Tribes are required, they cannot be joined due to their sovereign immunity. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014) (reaffirming tribal sovereign immunity as settled law); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (Indian tribes enjoy sovereign immunity and cannot be sued without unequivocal waiver or Congressional abrogation).

Plaintiffs argue that, even if the Tribes are required, they can be joined under the terms of the McCarran Amendment. Plf Resp. 32 (#83). The McCarran Amendment (also known as the McCarran Water Rights Suit Act), 43 U.S.C. § 666, waives federal sovereign immunity for state general stream

adjudications, and that waiver extends to federal water rights reserved on behalf of Native American tribes. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 811-12 (1976). However, the waiver does not extend to the Tribes as parties, even in a McCarran Amendment case. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 567, n.17 (1983).

The Oregon Klamath Basin Adjudication was certainly a McCarran Amendment case. Plaintiffs argue that, by extension, the case at bar could be considered an "enforcement action" of the ACFFOD; indeed, KID's Second Amended Complaint states that the defendants' sovereign immunity is waived "pursuant to 43 U.S.C. § 666(a), as this is a suit for the administration of rights to the use of the water of the Klamath River system." ¶ 7. However, this is not a "state general stream adjudication case." Even if it were, the McCarran Amendment waives the sovereignty of the Indian rights at issue, not the sovereign immunity of the Tribes themselves. *San Carlos Apache Tribe of Arizona*, 463 U.S. at n. 17. The distinction is unnecessary here, however, as this is clearly not a McCarran Amendment case.

Sovereign immunity of a required party weighs heavily in favor of dismissal. *Republic of Philippines v. Pimentel*, 533 U.S. 851 (2008). Where an Indian tribe that cannot be joined due to sovereign immunity is required, courts in the Ninth Circuit regularly order dismissal. *Id.*; 932 F.3d at 857-58 (dismissal required due to inability to join required tribal entity); *White v. Univ. of Cal.,* 765 F.3d 1010 (9th Cir. 2014) (same); *Friends of Amador County v. Salazar*, 554 Fed. Appx.

562 (9th Cir. 2014) (same); *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 276 F.3d 1150 (9th Cir. 2002); (same); *Am. Greyhound Racing v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (same); *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992) (same); *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245 (D. Or. 2017) (same). For this reason, and the reasons below, this case should be dismissed.

b. In equity and good conscience, this case should be dismissed.

Under Rule 19(b) if a required party cannot be joined, the court must consider whether the case may proceed in the party's absence or whether the case should be dismissed. This decision is case specific and based on "equity and good conscience." The rule sets forth four non-exclusive factors for the court to consider: (1) to what extent 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. Prod. 19(b). None of the factors are determinative. Additionally, dismissal is often granted in cases involving an absent party's competing claims to finite natural resources. *Verity*, 910 F.2d at 558; *Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168 (W.D. Wash. 2014); *Keweenaw Bay Indian Cmty. v. State*, 11 F.3d 1341, 1346-47 (6th Cir. 1993).

In equity and good conscience, this case cannot proceed without Hoopa Valley Tribe or the Klamath

Tribes. First, as discussed at length above, judgment in the Tribes' absence would significantly prejudice their interest in fulfillment and protection of their reserved fishing and water rights. Second, there is no way this prejudice can be lessened because this case involves conflicting and mutually exclusive interests in finite natural resources. There is insufficient water to fully satisfy Plaintiffs' purported rights while also satisfying Reclamation's purported obligations under the ESA and treaty trust obligations to the Intervenors. Third, if Plaintiffs prevail, Reclamation will either have conflicting legal obligations to Intervenors (and under the ESA), which will likely lead to further litigation, or have no obligation to them at all, effectively distinguishing their treaty water rights. This would make judgment rendered in the Tribes' absence inadequate. Thus, three of the four factors of Rule 19(b) weigh in favor of dismissal.

Plaintiffs argue that allowing the Tribes to veto this litigation functionally closes the doors of justice to Plaintiffs and leaves them uniquely without recourse to ever being able to enforce their rights on their own terms. The Court disagrees. It is clear that the irrigators of the Klamath Basin have had many chances in federal court to challenge the priority of their water rights, and they have generally been unsuccessful each time. *See, e.g., Baley v. United States*, 134 Fed. Cl. 619, 668- 680 (2017), aff'd, 942 F.3d at 1341 (Fed. Cir. 2019) (holding Klamath irrigators' water rights are subordinate to Hoopa, Yurok, and Klamath Tribes' federal reserved water rights); *Patterson*, 204 F.3d at 1214 (Reclamation "has a responsibility to divert the water and resources needed

to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators"); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197, 1211 (D. Or. 2001) (denying Klamath irrigators request to enjoin Reclamation's 2001 operations plan to release flow for protection of salmon and senior tribal rights); *Hoopa Valley Tribe v. NMFS*, 230 F. Supp. 3d 1106, 1141-42 (N.D. Cal. 2017) (finding that injunction requiring additional water deliveries in Klamath "would also help protect [Hoopa's] fishing rights, which must be accorded precedence over irrigation rights"). The irrigators have not been denied intervention in any of the litigation brought by other parties, and there is no evidence that they would be denied intervention in the future.

Additionally, and as to the fourth Rule 19(b) factor, if the case is dismissed Plaintiffs will not be left completely without a forum. They can pursue monetary damages in the U.S. Court of Federal Claims, which would not require the Intervenors' presence, if they contend Reclamation violated their contract or Fifth Amendment rights. Plaintiffs argue that this is not an adequate forum because it would not remedy all of the due process interests they are asserting. However, when confronted with the competing interests of the Intervenors, Plaintiffs offer a variety of ways to remedy the situation without impacting the Tribes' reserved water rights, and nearly all of those ways involve some form of monetary compensation in exchange for the right to use the water at issue. *See* KID Resp. 17-20 (#82) (suggesting an instream lease, a limited license, a stay of the ACFFOD, condemnation of Plaintiffs' rights, and purchasing the rights voluntarily).

Moreover, Plaintiffs are currently seeking recourse through an investigation of Reclamation's actions in the Circuit Court of Marion County (Oregon state court) through a writ of mandamus. (#86-1-5). According to documents filed with the Court in recent weeks, this investigation has begun. (*Id.*; #87-1).

c. The Public Rights Exception does not apply in this case.

The Ninth Circuit, like many courts, has "adopted the 'public rights' exception to the traditional joinder rules." *Makah*, 910 F.2d at 559 n.6. "The public interest exception 'provides that when litigation seeks vindication of a public right, third persons who could be adversely affected by a decision favorable to the plaintiff are not indispensable parties.'" *Friends of Amador Cty. v. Salazar*, 2011 WL 6141291, at *2 (E.D. Cal. Dec. 9, 2011) (quoting *Kickapoo Tribe of Indians of Kickapoo Reservation in Kan. v. Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995)); *accord Dine Citizens*, 932 F.3d at 858 (same). "[T]he exception generally applies where 'what is at stake are essentially issues of public concern and the nature of the case would require joinder of a large number of persons.'" *Friends of Amador*, 2011 WL 6141291 at *2 (quoting *Kickapoo*, 43 F.3d at 1500) (further quotation and citations omitted); *Watt*, 608 F.Supp. at 324 ("[P]ublic rights cases" involve, "by definition . . . constitutional, national statutory, or national administrative issues.").

Plaintiff KID argues that this exception applies because KID is "a public entity holding property in trust for the constituent farmers it serves and is bringing this case on their behalf in a representative

capacity." Plf. KID Resp. 38 (#82). KID argues that Plaintiffs are "bringing this action to vindicate the important constitutional right to due process under the Fifth Amendment and curb an unlawful abuse of power by the federal government that has not only affected KID and its constituents, but also other water right owners and members of the public who do not own any water rights, but are economically suffering as a result of the government's actions." *Id*.

The Court recognizes the importance of the water rights at issue in this case, and it is clear that Reclamation's plans will have severe impacts on the local and regional economy in the Klamath Basin. However, the Plaintiffs' claims are not in the "public interest" as contemplated by the exception. The claims here are framed as administrative claims and civil rights claims for due process, but ultimately the interests of the Plaintiffs are private, economic interests, as belied by their own argument above. Plaintiffs' list of ways they believe Reclamation can satisfy the Plaintiffs' rights without impacting the Tribes' interests are also indicative of their monetary interests. Finally, as discussed above, the underlying contention of Plaintiffs' case is that Reclamation has no authority to act in accordance with the Endangered Species Act in order to benefit the environment, which is arguably the quintessential "public interest," especially when put into conflict with private economic interests. The public rights exception does not apply in this case.

RECOMMENDATION

The Motions to Dismiss (#74, 75) should be GRANTED and these consolidated cases should be dismissed. Previously filed motions to dismiss (#63, 64) should be denied as moot.

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due no later than fourteen (14) days after the date this recommendation is entered. If objections are filed, any response is due within fourteen (14) days after the date the objections are filed. *See* FED. R. CIV. P. 72, 6.

Parties are advised that the failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED this 15 day of May, 2020.

/s/ Mark D. Clarke
MARK D. CLARKE
United States Magistrate Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed January 11, 2023]

No. 20-36009
D.C. Nos. 1:19-cv-00451-CL
1:19-cv-00531-CL
District of Oregon, Medford

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. 20-36020
D.C. Nos. 1:19-cv-00451-CL
1:19-cv-00531-CL

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

and

KLAMATH IRRIGATION DISTRICT,
Plaintiff,

v.

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

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

ORDER

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**.

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.

APPENDIX F

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED

U.S. Constitution, Fifth Amendment

Amendment V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 1442
Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an

official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

(c) Solely for purposes of determining the propriety of removal under subsection (a), a law enforcement officer, who is the defendant in a criminal prosecution, shall be deemed to have been acting under the color of his office if the officer—

(1) protected an individual in the presence of the officer from a crime of violence;

(2) provided immediate assistance to an individual who suffered, or who was threatened with, bodily harm; or

(3) prevented the escape of any individual who the officer reasonably believed to have committed, or was about to commit, in the presence of the officer, a crime of violence that resulted in, or was likely to result in, death or serious bodily injury.

(d) In this section, the following definitions apply:

(1) The terms "civil action" and "criminal prosecution" include any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued. If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.

(2) The term "crime of violence" has the meaning given that term in section 16 of title 18.

(3) The term "law enforcement officer" means any employee described in subparagraph (A), (B), or (C) of section 8401(17) of title 5 and any special agent in the Diplomatic Security Service of the Department of State.

(4) The term "serious bodily injury" has the meaning given that term in section 1365 of title 18.

(5) The term "State" includes the District of Columbia, United States territories and insular

possessions, and Indian country (as defined in section 1151 of title 18).

(6) The term "State court" includes the Superior Court of the District of Columbia, a court of a United States territory or insular possession, and a tribal court.

28 U.S.C. § 1254
Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

43 U.S.C. § 371
Definitions

When used in sections 371, 376, 377, 412, 417, 433, 462, 466, 478, 493, 494, 500, 501, and 526 of this title—

(a) The word "Secretary" means the Secretary of the Interior.

(b) The words "reclamation law" mean the Act of June 17, 1902 (32 Stat. 388), and all Acts amendatory thereof or supplementary thereto.

(c) The words "reclamation fund" mean the fund provided by the reclamation law.

(d) The word "project" means a Federal irrigation project authorized by the reclamation law.

(e) The words "division of a project" mean a substantial irrigable area of a project designated as a division by order of the Secretary.

43 U.S.C. § 383
Vested rights and State laws unaffected

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, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 421
Acquisition of lands for irrigation project; eminent domain

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, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

43 U.S.C. § 666
Suits for adjudication of water rights

(a) JOINDER OF UNITED STATES AS DEFENDANT; COSTS
Consent is given to join the United States as a defendant in any suit (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. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) SERVICE OF SUMMONS
Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) JOINDER IN SUITS INVOLVING USE OF INTERSTATE STREAMS BY STATE
Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

Oregon Revised Statutes ("ORS")

ORS § 539.021

539.021 Determination by Water Resources Director of rights of claimants; transfer of action to director. (1) The Water Resources Director upon the motion of the director or, in the discretion of the director, upon receipt of a petition from one or more appropriators of surface water from any natural watercourse in this state shall make a determination of the relative rights of the various claimants to the waters of that watercourse.

(2) If an action is brought in the circuit court for determination of rights to the use of water, the case may, in the discretion of the court, be transferred to the director for determination as provided in this chapter. [1987 c.541 §2 (enacted in lieu of 539.020)]

ORS § 539.130

539.130 Findings of fact and determination of director; certification of proceedings; filing in court; fixing time for hearing by court; notice; force of director's determination. (1) As soon as practicable after the compilation of the data the Water Resources Director shall make and cause to be entered of record in the Water Resources Department findings of fact and an order of determination determining and establishing the several rights to the waters of the stream. The original evidence gathered by the director, and certified copies of the observations and measurements and maps of record, in connection with the determination, as provided for by ORS 539.120, together with a copy of the order of determination and findings of fact of the director as they appear of record in the Water Resources Department, shall be certified to by the director and filed with the clerk of the circuit court wherein the determination is to be heard. A certified copy of the order of determination and findings shall be filed with the county clerk of every other county in which the stream or any portion of a tributary is situated.

(2) Upon the filing of the evidence and order with the court the director shall procure an order from the court, or any judge thereof, fixing the time at which the determination shall be heard in the court, which hearing shall be at least 40 days subsequent to the date of the order. The clerk of the court shall, upon the making of the order, forthwith forward a certified copy to the department by registered mail or by certified mail with return receipt.

(3) The department shall immediately upon receipt thereof notify by registered mail or by certified mail with return receipt each claimant or owner who has appeared in the proceeding of the time and place for hearing. Service of the notice shall be deemed complete upon depositing it in the post office as registered or certified mail, addressed to the claimant or owner at the post-office address of the claimant or owner, as set forth in the proof of the claimant or owner theretofore filed in the proceeding. Proof of service shall be made and filed with the circuit court by the department as soon as possible after mailing the notices.

(4) The determination of the department shall be in full force and effect from the date of its entry in the records of the department, unless and until its operation shall be stayed by a stay bond as provided by ORS 539.180. [Amended by 1991 c.102 §7; 1991 c.249 §49]

ORS § 539.150

539.150 Court proceedings to review determination of director. (1) From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be like those in an action not triable by right to a jury, except that any proceedings, including the entry of a judgment, may be had in vacation with the same force and effect as in term time. At any time prior to the hearing provided for in ORS 539.130, any party or parties jointly interested may file exceptions in writing to the findings and order of determination, or any part thereof, which

exceptions shall state with reasonable certainty the grounds and shall specify the particular paragraphs or parts of the findings and order excepted to.

(2) A copy of the exceptions, verified by the exceptor or certified to by the attorney for the exceptor, shall be served upon each claimant who was an adverse party to any contest wherein the exceptor was a party in the proceedings, prior to the hearing. Service shall be made by the exceptor or the attorney for the exceptor upon each such adverse party in person, or upon the attorney if the adverse party has appeared by attorney, or upon the agent of the adverse party. If the adverse party is a nonresident of the county or state, the service may be made by mailing a copy to that party by registered mail or by certified mail with return receipt, addressed to the place of residence of that party, as set forth in the proof filed in the proceedings.

(3) If no exceptions are filed the court shall, on the day set for the hearing, enter a judgment affirming the determination of the Water Resources Director. If exceptions are filed, upon the day set for the hearing the court shall fix a time, not less than 30 days thereafter, unless for good cause shown the time be extended by the court, when a hearing will be had upon the exceptions. All parties may be heard upon the consideration of the exceptions, and the director may appear on behalf of the state, either in person or by the Attorney General. The court may, if necessary, remand the case for further testimony, to be taken by the director or by a referee appointed by the court for that purpose. Upon completion of the testimony and its report to the director, the director may be required to make a further determination.

(4) After final hearing the court shall enter a judgment affirming or modifying the order of the director as the court considers proper, and may assess such costs as it may consider just except that a judgment for costs may not be rendered against the United States. An appeal may be taken to the Court of Appeals from the judgment in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the judgment. [Amended by 1979 c.284 §165; 1989 c.691 §12; 1991 c.249 §50]

Fed. R. Civ. P. 12

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General*. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity*. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity*. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion*. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) RESULT OF PRESENTING MATTERS OUTSIDE THE PLEADINGS. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) MOTION FOR A MORE DEFINITE STATEMENT. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court

may strike the pleading or issue any other appropriate order.

(f) MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) JOINING MOTIONS.

(1) *Right to Join*. A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions*. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) *When Some Are Waived*. A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others*. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction*. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Fed. R. Civ. P. 19

Rule 19. Required Joinder of Parties

(a) PERSONS REQUIRED TO BE JOINED IF FEASIBLE.

(1) *Required Party*. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(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.

(2) *Joinder by Court Order*. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) *Venue*. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) WHEN JOINDER IS NOT FEASIBLE. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(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.

(c) PLEADING THE REASONS FOR NONJOINDER. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) EXCEPTION FOR CLASS ACTIONS. This rule is subject to Rule 23.

APPENDIX G

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MEDFORD DIVISON

Case No. 1:19-cv-00451-CL

[Filed January 17, 2020]

KLAMATH IRRIGATION DISTRICT,	)
	)
Plaintiff,	)
v.	)
	)
UNITED STATES BUREAU OF RECLAMATION, DAVID BERNHARDT, Acting Secretary of the Interior, in his official capacity, BRENDA BURMAN, Commissioner of the Bureau of Reclamation, in her official capacity, and ERNEST CONANT, Director of the Mid-Pacific Region, Bureau of	)

Reclamation, in his official capacity, and	)
JEFFREY NETTLETON, in his official	)
capacity as Area Manager for the	)
Klamath Area Reclamation Office.	)
	)
Defendants.	)
	)

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Nature of Action

1. Plaintiff Klamath Irrigation District ("KID" or "Plaintiff"), on behalf of itself and its landowners, brings this action for declaratory relief to protect their private property rights (i.e., vested water rights) from Defendants' regular, sustained, and ongoing violations of the Reclamation Act of 1902, Ch. 1093, 32 Stat. 388 ("Reclamation Act") and the Fifth Amendment to the United States Constitution.

2. The past, present, and future agency actions, inactions, findings, and conclusions that Plaintiff is asking the Court to declare unlawful are being carried out by Defendant United States Bureau of Reclamation ("Reclamation" or "Defendant") and its officers and agents pursuant to and in accordance with a Proposed Action and Amended Proposed Action evaluated by the National Marine Fisheries Service ("NMFS") and United States Fish and Wildlife Service ("FWS") (collectively the "Services"), as well as Defendant Reclamation, in their:

(a) Joint Biological Opinion on the Effects of the Proposed Klamath Project Operations from May 31, 2013, through March 31, 2023, on Five Federally Listed Threatened and Endangered Species ("2013 BiOp"),

(b) FWS 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 ("2019 FWS BiOP"),

(c) NMFS Biological Opinion, and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response for Klamath Project Operations from April 1, 2019 through March 31, 2024 ("2019 NMFS BiOP"), and

(d) Reclamation's Final Environmental Assessment Implementation of Klamath Project Operating Procedures 2019-2024 and related Finding of No Significant Impact ("OP").

3. Defendants have caused or are imminently prepared to cause Plaintiff and its landowners irreparable harm through the actions, inactions, decisions, findings, and conclusions analyzed in the foregoing documents.

4. The past, present, and future agency actions, inactions, findings, and conclusions Plaintiff is asking the Court to declare unlawful include, but are not limited to, the following:

(a) Defendants are unlawfully using 400,000 acre-feet (or more) of water in Upper Klamath Lake ("UKL") reservoir for instream purposes each year without a water right or other lawful authority under

Oregon law in violation of Section 8 of the Reclamation Act.

(b) Defendants are unlawfully capping the amount of water that Plaintiff and its landowners are entitled to receive from UKL reservoir at less than the amounts they are entitled to beneficially use under their water rights in violation of Section 8 of the Reclamation Act.

(c) Defendants are unlawfully divesting Plaintiff and its landowners of their vested water rights in the beneficial use of water in UKL reservoir, as elsewhere alleged in this Second Amended Complaint, without purchasing such rights, condemning them "under judicial process," or otherwise adhering to state law, in violation of Sections 7 and 8 of the Reclamation Act.

(d) Defendants are depriving Plaintiff and its landowners of their vested water rights in the beneficial use of water in UKL reservoir without due process of law in violation of the Fifth Amendment to the United States Constitution through the actions, inactions, findings, and conclusions generally identified above and more specifically alleged herein.

Jurisdiction, Venue, and Waiver of Sovereign Immunity

5. Jurisdiction arises under 5 U.S.C. §§ 701–706 and 28 U.S.C. §§ 1331, 2201, and 2202.

6. The acts alleged herein occurred in the District of Oregon and venue is therefore appropriate pursuant to 28 U.S.C. § 1391.

7. Defendants' sovereign immunity is waived pursuant to 5 U.S.C. § 702 because Plaintiff is making claims for equitable relief, not money damages. Defendants' sovereign immunity is also waived pursuant to 43 U.S.C. § 666(a), as this is a suit for the administration of rights to the use of the water of the Klamath River system.

Parties

8. KID is an irrigation district duly constituted and existing pursuant to ORS Chapter 545. KID and its landowners hold vested water rights entitling them to beneficially use live flow and water stored in UKL reservoir, for purposes of irrigation and other beneficial uses. Under Oregon law, all private property interests held by KID, including vested water rights, are held in trust for the benefit of its landowners. KID brings this action in a representative capacity to protect the rights of its landowners as much as its own, as well as the rights of water right holders outside its own boundaries to whom KID owes affirmative non-discretionary water delivery obligations.

9. Reclamation is a federal agency, or bureau, within the United States Department of the Interior. Reclamation holds a water right entitling it to store water in UKL reservoir to benefit the separate irrigation rights of KID, its landowners, and other water right holders within the Klamath Reclamation Project. Defendant does not have a water right, instream lease, or any other legal authorization under state or federal law to use water stored in UKL reservoir for instream purposes.

10. Defendant David Bernhardt is the Acting Secretary of the United States Department of the Interior. In such capacity, Defendant Bernhardt is directly responsible for administration of, and compliance with, federal reclamation law and other laws of the United States, including those pertaining to the Klamath Reclamation Project.

11. Defendant Brenda Burman is the Commissioner of the Defendant United States Bureau of Reclamation. In such capacity, Defendant Burman is directly responsible for administration of, and compliance with, federal reclamation law and other laws of the United States, including those pertaining to the Klamath Reclamation Project.

12. Defendant Ernest Conant is the Director of the Defendant United States Bureau of Reclamation Mid-Pacific Region Office. In such capacity, Defendant Conant is directly responsible for administration of, and compliance with, federal reclamation law and other laws of the United States, including those pertaining to the Klamath Reclamation Project.

13. Defendant Jeffery Nettleton is the Area Manager for the Defendant United States Bureau of Reclamation's Klamath Area Office. In such capacity, Defendant Nettleton is directly responsible for administration of, and compliance with, federal reclamation law and other laws of the United States, including those pertaining to the Klamath Reclamation Project.

Allegations Common to All Claims

14. The United States Congress enacted the Reclamation Act in 1902 to provide funding for irrigation projects in arid regions of the western United States.

15. Pursuant to Sections 7 and 8 of the Reclamation Act, Defendants are required to obtain water rights for Reclamation projects in accordance with state law, through appropriation, purchase, or "condemnation under judicial process."

16. Sections 7 and 8 of the Reclamation Act also require Defendants to comply with state laws relating to the control, use, or distribution of water.

17. Section 7 of the Reclamation Act, 43 U.S.C. § 421, states:

> 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 condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under such sections, to cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

18. Section 8 of the Reclamation, 43 U.S.C. § 383, provides in relevant part:

> Nothing in this Act shall be construed as affecting or intending 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 such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof.

19. In 1905, the Oregon Legislative Assembly sought to advance the purposes of the Reclamation Act and the development of a Reclamation project in the Klamath Basin, by enacting Chapter 5, Oregon Laws of 1905 and Chapter 228, Oregon Laws 1905.

20. Through enactment of Chapter 5, Oregon Laws of 1905 the State of Oregon granted to the United States, for purposes of irrigation and reclamation, authorization to lower the water level of certain lakes, including Upper Klamath Lake, and to use all or any part of the beds of such lakes for the storage of water in connection with reclamation or irrigation. By the same enactment, the State of Oregon ceded to the United States title to any land uncovered by the lowering of

such lakes, to use for purposes in furtherance of the 1902 Act.

21. Through enactment of Chapter 228, Oregon Laws 1905, the State of Oregon specifically described the manner in which water could be appropriated for Reclamation projects in Oregon. Chapter 228, Oregon Laws 1905 provides in relevant part as follows:

> Whenever the proper officers of the United States, authorized by law to construct works for the utilization of water within this State, shall file in the office of the State Engineer a written notice that the United States intends to utilize certain specified waters, the waters described in such notice and unappropriated at the time of the filing thereof shall not be subject to further appropriation under the laws of this State, but shall be deemed to have been appropriated by the United States; *provided*, that within a period of three years from the date of filing such notice the proper officer of the United States shall file final plans of the proposed works in the office of the State Engineer for his information; *and provided further*, that within four years from the date of such notice the United States shall authorize the construction of such proposed work.

22. On May 17, 1905, Defendant Reclamation filed notices of appropriation pursuant to Chapter 228, Oregon Laws 1905 to appropriate all the then-unappropriated waters of the Klamath Basin for the Klamath Reclamation Project. The notices stated that

"[t]he United States intends to use the above described waters in the operation of works for the utilization of water in the State of Oregon under the provisions of . . . the Reclamation Act," and that "[t]he Water is to be used for irrigation, domestic, power, mechanical and other beneficial uses in and upon lands situated in Klamath Oregon and Modoc California counties."

23. Following authorization of the Klamath Project, facilities were constructed, previously existing facilities were improved and incorporated into the Klamath Project, and individual landowners began applying water to beneficial use on their lands after entering into contracts with the United States to repay the costs of the irrigation works developed by the United States.

24. The Klamath Project is one of the oldest in the nation. As such, it is unique from most other Reclamation projects in that it was only authorized as a single-purpose irrigation project to meet the nation's objective of developing the West. The Klamath Project and other so-called "single-use" projects authorized under the original Reclamation Act of 1902 are fundamentally different from so-called "multi-use" Reclamation projects that were authorized by Congress later in time under the Reclamation Act of 1939 and subsequent statutes, which are congressionally intended to provide water for multiple different uses.

25. KID was formed in 1917 and thereafter entered into a contract with Reclamation in 1918 to repay the costs of construction, operation, and maintenance of the Klamath Project. The contract has since been amended several times, most notably in 1954. By virtue of its contract with Defendant, KID has a perpetual

obligation to operate and maintain certain irrigation works owned by the United States and an affirmative non-discretionary legal and contractual obligation to deliver water to fulfill the appurtenant water rights of its own landowners. KID also has a non-discretionary legal and contractual obligation to deliver water needed to fulfill water rights held by certain districts and landowners located outside KID's own boundaries. KID's contract specifically contemplates that ownership of the transferred works it currently operates and maintains, as well as any water rights held by Reclamation that are associated with KID, will be eventually be transferred to KID.

26. Defendant has no discretion or authority to limit the amount of water KID and its landowners are entitled to beneficially use under their water rights, to the extent such water is physically available, without otherwise condemning or appropriating KID's water rights and the rights of its landowners through judicial process in accordance with Oregon law.

27. On February 24, 1909, the Oregon Legislative Assembly enacted the Water Rights Act, which means and embraces ORS 536.050, 537.120, 537.130, 537.140 to 537.252, 537.390 to 537.400, 538.420, 540.010 to 540.120, 540.210 to 540.230, 540.310 to 540.430, 540.505 to 540.585 and 540.710 to 540.750.

28. Pursuant to ORS 537.110, all water within the state from all sources of water supply belongs to the public. However, subject to existing rights, individuals may obtain the right to use the public's water by applying for and obtaining a water right. Under Oregon law, the use of the public's water is a property right.

See e.g., ORS 307.010(1)(b)(D)). The property right is said to be usufructuary because, although a water right grants the right to use the public's water, ownership of the water itself remains vested in the public. Oregon courts have recognized that the right to the use of water constitutes a vested property interest which cannot be divested without due process of law.

29. Oregon law (ORS 539.007(11)) defines water rights established prior to the adoption of the Water Rights Act on February 24, 1909 as undetermined vested rights. The Water Rights Act provides at ORS 539.010(4) that undetermined vested rights are not to be impaired or affected by any of its provisions. However, ORS 539.010(4) of the Water Rights Act also provides that the scope and attributes of all undetermined vested rights are to be determined through an adjudication conducted in accordance with ORS Chapter 539.

30. The adjudication process set forth in ORS Chapter 539 consists of two phases: (1) an administrative phase, and (2) a judicial phase. During the administrative phase, the adjudicator investigates the waters at issue, hears claims and exceptions, and ultimately issues a Final Order of Determination setting forth the relative water rights of the parties. Once the Final Order of Determination is issued, it is filed with the circuit court having jurisdiction of the matter.

31. The Final Order of Determination reflects enforceable water rights under Oregon law, unless and until it is stayed pending the outcome of the judicial

phase or is amended or changed during the judicial phase of the adjudication process.

32. The circuit court proceeding culminates in the issuance of a decree finally determining the relative rights of all parties claiming a pre-1909 right to use the waters at issue, subject to any appeal.

33. In 1975, the State of Oregon initiated a general stream adjudication pursuant to ORS Chapter 539 of the waters of the Klamath Basin (hereafter "Klamath Adjudication"). The Klamath Adjudication satisfies the requirements of the McCarran Amendment, 43 U.S.C. § 666, and encompasses, *inter alia*, all pre-1909 state, federal, and tribal claims to the use of water stored in UKL reservoir and the portions of the Klamath River encompassed within the adjudication.

34. While the administrative phase of the adjudication of the waters of the Klamath Basin was pending, and upon the written advice of the Oregon Attorney General issued on March 18, 1996, the State of Oregon did not regulate or enforce pre-1909 water rights in the Klamath Basin, as such rights were wholly undetermined and regulation would necessarily involve pre-determination of the parties' claims. However, based on a U.S. Solicitor memorandum dated January 9, 1997, the United States took the position that it had an obligation to "use its best efforts to operate the Project consistent with existing water rights." Memorandum from Regional Solicitors to Regional Directors, Oregon Assistant Attorney General's March 18, 1996, Letter Regarding Klamath Basin Water Rights Adjudication and Management of the Klamath Project, Jan. 9, 1997, at 5.. While the

United States acknowledged that the precise nature of the existing rights relating to the Project were not known with certainty because the rights had not been adjudicated, it nevertheless believed these existing rights could be "reasonably estimated" and that the government had a duty to ensure the Project was "operated based on the best available information." *Id.* at 6.

35. At all times material prior to the completion of the administrative phase of the Klamath Adjudication, the United States asserted, and it was otherwise assumed, that all water rights associated with the Klamath Project were owned or held by the United States. The United States also asserted, and it was otherwise assumed, that the Klamath Tribes and others held water rights in UKL that were senior to those of KID and others within the Klamath Project. While the administrative phase of the Klamath Adjudication was pending, the United States distributed water from UKL based on these assumptions.

36. On March 7, 2013, thirty-eight (38) years after the commencing the general stream adjudication for the Klamath Basin, the State of Oregon, via the Water Resources Department ("OWRD"), issued its Findings of Fact and Final Order of Determination ("FFOD") and filed it with the Klamath County Circuit Court, thus completing the administrative phase of the adjudication.

37. In May 2013, the Services issued the 2013 BiOp, which analyzed modifications to the Bureau's operation of the Klamath Project, including the use of Project

water for augmented instream flows (the "Proposed Action"). At or shortly after the issuance of the 2013 BiOp, Reclamation adopted the Proposed Action. Thus, the Proposed Action described in the 2013 BiOp was formally adopted by Reclamation after the OWRD issued its FFOD.

38. Neither the 2013 BiOp nor the Proposed Action accounted for the effects of the FFOD issued in the Klamath Adjudication on March 7, 2013, despite the fact that it provided for modification once the effects were known:

> The potential effects of the Findings of Fact and Order of Determination on management of water in the Klamath Basin, including Reclamation's Project operations, are uncertain at present and will likely remain uncertain for several years. Therefore, the proposed action is not modified based on the Findings of Fact and Order of Determination. ***In the future, when the consequences of the adjudication are understood, the proposed action will be modified if necessary in accordance with parties' legal rights to beneficial use of water***. [emphasis added]

39. In February 2014, OWRD filed an Amended and Corrected Findings of Fact and Final Order of Determination ("ACFFOD") with the Klamath County Circuit Court.

40. Pursuant to ORS 539.130(4) and ORS 539.170, the ACCFOD is in full force and effect, and water is to

be distributed in accordance with the ACCFOD unless or until the ACCFOD is stayed either wholly or in part pursuant to ORS 539.180.

41. Following the issuance of the FFOD and the ACFFOD, the legal rights of the parties to this action were known and enforceable under Oregon law.

42. Reclamation has not sought to stay the ACCFOD either wholly or in part pursuant to ORS 539.180.

43. The issuance of the FFOD / ACFFOD fundamentally changed the legal paradigm governing the distribution of water in the Klamath Basin because it determined—counter to the previous assumptions of all parties—that Reclamation in fact does not hold all of the water rights associated with the Klamath Project. Specifically:

(a) Defendant Reclamation is the owner of a right to store water—specifically, a maximum annual volume of 486,828 acre-feet of water in UKL reservoir to benefit the separate water rights held by KID and other water right holders. KBA_ACFFOD_07060, 07084, 07117.

(b) Defendant Reclamation is only entitled to store water in UKL reservoir to satisfy the water rights of KID, its landowners and other secondary water right holders. KBA_ACFFOD_7061, 07075.

(c) KID, its landowners, and other districts and landowners within the Klamath Project hold water rights entitling them to use live flow and water the United States stores in UKL reservoir for the purposes

of irrigation and other beneficial uses. *See, e.g.*, KBA_ACFFOD_07075, 07084, 07086, 07160, 07061.

(d) Defendant Reclamation does not hold an instream water right entitling it to use water from UKL reservoir for instream purposes.

(e) The Klamath Tribes hold a water right entitling them to certain elevations of water in UKL at certain times of the year, but this right cannot be used to call the water rights of Klamath Project irrigators. KBA_ACFFOD_04941.

(f) Neither the Hoopa nor the Yurok tribe have vested but undetermined water rights in UKL.

(g) Now that the ACFFOD has been issued, Oregon law (e.g., ORS 537.130, ORS 540.270) prohibits the use of water from the waters within the scope of the Klamath Basin Adjudication without a water right (e.g., water right, determined claim, instream lease).

44. The ACFFOD is presently enforceable under Oregon law, and must be followed by all owners of determined claims pending the judicial review phase of the Klamath Basin Adjudication before the Klamath County Circuit Court. ORS 539.130; ORS 539.170. The Klamath County Circuit Court has not issued a stay pursuant to ORS 539.180.

45. Despite the issuance of the FFOD, and the subsequent issuance of the ACFFOD, Defendant Reclamation nevertheless formally adopted the Proposed Action described in the 2013 BiOp and continued to manage the Klamath Project in accordance with the 2013 BiOp without regard to the

enforceable determinations made in the Klamath Adjudication through March 29, 2019. In doing so, Defendant Reclamation unlawfully used water in UKL reservoir for instream purposes without a water right. Defendants did this notwithstanding the fact that KID, its landowners, and others hold water rights legally entitling them to beneficial use of such water and KID and its landowners could have entered into instream leases or other economic arrangements with Defendant Reclamation that would have enabled Defendants to lawfully use water instream. Defendant also limited the amount of water KID, its landowners, and other water right holders were entitled to beneficially use under their water rights even though Defendants did not have any lawful authority to restrict the beneficial use of water and Defendant had neither purchased nor condemned their rights "under judicial process" in accordance with Sections 7 and 8 of the Reclamation Act.

46. On December 21, 2018, Reclamation issued a Biological Assessment as part of a consultation process under the Endangered Species Act. Reclamation amended its proposed action on February 15, 2019 ("Amended Proposed Action"). Subsequently, on or about March 29, 2019, Reclamation adopted the 2019 FWS BiOp, 2019 NMFS BiOp, and 2019 OP analyzing the Amended Proposed Action. Under the Amended Proposed Action that Defendant has adopted and is now implementing, Defendant has decided to:

(a) Continue using water in UKL reservoir for instream purposes without a water right in violation of Section 8 of the Reclamation Act to a greater extent

than under the Proposed Action evaluated under the 2013 BiOp. *See e.g.*, 2019 FWS BiOp, Pg. 22, *et seq*.

(b) Continue limiting the amount of water that KID is able to deliver to itself, its landowners, and other water right holders to an amount that is less than their water rights to an even greater extent than the Proposed Action evaluated under the 2013 BiOp. *See, e.g.*, 2109 FWS BiOp, Pg. 24.

(c) Continue depriving KID and its landowners of their vested water rights as described in (a) and (b) above, without purchasing the vested rights or condemning the vested rights under judicial process in accordance with Oregon law, in violation of Sections 7 and 8 of the Reclamation Act.

(d) Continue denying KID and its landowners the due process to which they are entitled to under the Fifth Amendment of the United States Constitution before being divested of vested water rights as described above.

47. None of Plaintiff's rights to water in UKL have been transferred to Defendants, a process that requires the approval of the OWRD. Thus, Defendants have violated Sections 7 and 8 of the Reclamation Act, as well as the Fifth Amendment of the Constitution, by unlawfully seizing Plaintiff's water rights without purchasing or condemning them pursuant to the laws of the State of Oregon and without providing Plaintiff notice and a meaningful opportunity to be heard before an impartial decisionmaker.

48. Defendants do not intend to cure their unlawful actions alleged herein and their unlawful actions will continue if not declared unlawful.

49. This suit is necessary to administer the water rights to use the Klamath River system, as determined in the ACFFOD, because Defendants continue to flout the OWRD's decision as to what water rights Reclamation actually holds. Instead of complying with Sections 7 and 8 of the Reclamation Act and purchasing or appropriating the rights held by KID, as determined in the ACFFOD, Defendants have simply chosen to seize those rights and use them for their own purposes. It is therefore necessary for this Court to aid in the administration of the water rights determined in the ACFFOD, and hold unlawful and the actions of Defendants.

50. It is possible for Defendants to comply with the applicable law *and* use water in the manner they are using water today. Defendants, however, are simply choosing to disregard the law. Defendants' refusal to comply with the law is depriving KID, its landowners, and other water right holders of water they are legally entitled to beneficially use without due process of law causing significant financial, emotional, and socioeconomic harm to KID, its landowners, other water right holders to whom KID owes water delivery obligations.

FIRST CLAIM FOR RELIEF

(Violation of the APA – Section 8 of Reclamation Act)

51. KID reasserts and realleges ¶¶ 1 to 50, as though fully set forth herein.

52. A district court may hold unlawful any agency action that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)–(C).

53. Defendants' actions, inactions, findings, and conclusions in adopting and implementing the Amended Proposed Action evaluated in the 2019 FWS BiOp, 2019 NMFS BiOp, and 2019 OP violate Section 8 of the Reclamation Act, which requires Reclamation to comply with state law in the control, appropriation, use, or distribution of water and prohibits Reclamation from interfering with vested rights established under state law. By failing to abide by the ACFFOD, Reclamation has violated Section 8 of the Reclamation Act, which is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, power, privilege, or immunity, or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

54. Defendants' actions, inactions, findings, and conclusions in adopting and implementing the Amended Proposed Action and thereby using water stored in UKL reservoir for its own instream use

without a water right or other authority under the laws of the State of Oregon, in violation of Section 8 of the Reclamation Act, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, power, privilege, or immunity, or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

55. Defendants' actions, inactions, findings, and conclusions in adopting and implementing the Amended Proposed Action described in the 2019 FWS BiOp, 2019 NMFS BiOp, and 2019 OP, and unlawfully capping the amount of water that KID, its landowners, and others are entitled beneficially use under their vested water rights, violates Section 8 of the Reclamation Act and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, power, privilege, or immunity, or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

56. Defendants' actions, inactions, findings, and conclusions in adopting and implementing the Amended Proposed Action analyzed in the 2019 FWS BiOp, 2019 NMFS BiOp, and 2019 OP and thereby divesting KID and its landowners of the beneficial use of water under their water rights deprives KID of due process of law required by the Fifth Amendment to the United States Constitution, and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, power, privilege, or immunity, or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

57. Defendants' conduct as alleged herein is in excess of the authority granted to Defendants under Section 8 of the Reclamation Act and Defendants' contracts with KID. Accordingly, Reclamation's actions in adopting and implementing the Amended Proposed Action must be held unlawful.

SECOND CLAIM FOR RELIEF

(Violation of the APA – Section 7 of Reclamation Act)

58. KID reasserts and realleges ¶¶ 1 to 57, as though fully set forth herein.

59. A district court may hold unlawful any agency action that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)–(C).

60. Section 7 of the Reclamation Act 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. *See* 43 U.S.C. § 421.

61. Reclamation's actions, inactions, findings, and conclusions in adopting and implementing the Amended Proposed Action described in the 2019 FWS BiOp, 2019 NMFS BiOp, and 2019 OP, and thereby divesting KID and its landowners of their vested water rights without purchasing or condemning such rights

"under judicial process" in accordance with state law, violates Section 7 of the Reclamation Act.

62. Defendants' actions in violation of Section 7 of the Reclamation Act as alleged herein must be held unlawful.

THIRD CLAIM FOR RELIEF

(Violation of the APA – Arbitrary and Capricious Baseline)

63. KID reasserts and realleges ¶¶ 1 to 62, as though fully set forth herein.

64. A district court may hold unlawful any agency action that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)–(C).

65. The 2013 BiOp, which was not issued until May 31, 2013, acknowledged that the FFOD was issued on March 7, 2013, yet also concluded that the "potential effects" of the FFOD were "uncertain" and therefore the proposed action was "not modified based on the Findings of Fact and Order of Determination." (2013 BiOp at 3–4.)

66. The FFOD—and now the ACFFOD—defined the scope and attributes of enforceable water rights under Oregon law with priority dates of 1905. The effects of these water rights were known both at the time Defendant Reclamation received the 2013 BiOP during

the subsequent period of time Defendants have implemented the Proposed Action described in the 2013 BiOp. Despite this, Defendants continued to implement the Proposed Action through May 29, 2019 instead of modifying the Proposed Action to conform to the ACFFOD. Thereafter, Defendants adopted and implemented the Amended Proposed Action described in the 2019 FWS BiOp, 2019 NMFS BiOp, Findings of No Significant Impact ("FONSI"), and 2019 OP without proper consideration of the ACFFOD.

67. The decision not to develop an Amended Proposed Action that complies with the ACFFOD was arbitrary and capricious. Because this action violates the APA, it must be held unlawful.

FOURTH CLAIM FOR RELIEF

(Declaratory Judgment)

68. KID reasserts and realleges ¶¶ 1 to 67, as though fully set forth herein.

69. Under the Declaratory Judgment Act, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201.

70. Pursuant to 28 U.S.C. § 2202, a court granting a declaratory judgment may grant further necessary or proper relief.

COUNT 1

Violation of Section 8 of Reclamation Act

Unlawfully using water

71. Pursuant to 28 U.S.C. § 2201, KID is entitled to a declaration that Defendant is violating Section 8 of the Federal Reclamation Act by unlawfully using water in UKL reservoir for instream purposes in violation of the ACFFOD during KID's irrigation season without a water right or other authority under state or federal law and thereby interfering with the vested water rights of KID, its landowners, and other water right holders to whom KID is legally obligated to deliver water.

COUNT 2

Violation of Section 8 of the Reclamation Act

Unlawfully curtailing water

72. KID is entitled to a declaratory judgment that Defendants are violating Section 8 of the Reclamation Act by unlawfully capping the amount of water KID, its landowners, and other water right holders receiving water from KID are able to beneficially use under the ACFFOD and in accordance with Oregon law.

COUNT 3

Violation of Section 7 and 8 of Reclamation Act

(Condemnation without judicial process)

73. Pursuant to 28 U.S.C. § 2201, KID is entitled to a declaratory judgment stating that Defendants may

not divest KID and its landowners of their property interest in the beneficial use of water under their water rights as alleged herein without first purchasing or condemning "under judicial process" those same rights, pursuant to Sections 7 and 8 of the Reclamation Act, or otherwise acquiring such rights in accordance with Oregon law.

COUNT 4

Violation of the Fifth Amendment

(Right to Procedural Due Process)

74. KID reasserts and realleges ¶¶ 1 to 73, as though fully set forth herein.

75. The due process clause of the Fifth Amendment to the United States Constitution prohibits deprivations of liberty and property interests without due process of law.

76. Due process requires, at a minimum, notice and opportunity for meaningful hearing appropriate to the nature of the case.

77. Section 8 of the Reclamation Act and the ACFFOD authorize Defendant Reclamation to store water in UKL reservoir for the benefit of Plaintiff. In turn, Plaintiff and certain other water right holders have the exclusive right to beneficially use the water that Reclamation stores in UKL reservoir pursuant to Section 8 of the Reclamation Act and the ACFFOD.

78. Plaintiff's right to use water stored in UKL reservoir is a property interest, which Plaintiff cannot be deprived of without due process of law.

79. Defendants have deprived Plaintiff of the right to use water stored in UKL reservoir on a regular, sustained, and ongoing basis and will continue to do unless declaratory relief is entered. Defendants have done so without: (a) obtaining a stay of the ACFFOD pursuant to ORS 539.180 from the Klamath County Circuit Court; (b) obtaining an instream lease from Plaintiff in accordance with Oregon Senate Bill 206 (2015); (c) adhering to the procedural requirements of Section 7 of the Reclamation Act and purchasing Plaintiff's water rights or condemning them through judicial process; or (d) otherwise acquiring the right to use water which Plaintiff holds by lawful means.

80. Under Section 8 of the Reclamation Act, it is the Oregon Water Resources Department, not the Defendants, which is vested with authority to administer the ACFFOD and determine whether or to what extent the water rights that Plaintiff holds in UKL reservoir pursuant to the ACFFOD may be curtailed in any particular instance based on senior water rights located outside the boundaries of the Klamath Reclamation Project. The Oregon Water Resources Department has not issued an order or otherwise determined that Plaintiff's water rights must be curtailed in favor of any water right user outside the boundaries of the Klamath Reclamation Project.

81. By reallocating water in UKL reservoir to instream purposes without obtaining an instream lease from Plaintiff pursuant to SB 206 (2015), obtaining a stay of the ACFFOD pursuant to ORS 539.180, condemning Plaintiff's water rights in accordance with judicial process as provided in Section 7 of the

Reclamation Act, or being subjected to an order or determination from the Oregon Water Resources Department that Plaintiff's water rights must be curtailed in favor of a senior water user, Defendants have usurped the Oregon Water Resources Department and Klamath County Circuit Court's authority to administer the ACFFOD. This has, in turn, led to Defendants depriving Plaintiff of its property interests without due process of law, in violation of the Fifth Amendment.

82. Pursuant to 28 U.S.C. § 2201, KID is entitled to a declaratory judgment stating that the Defendants have divested Plaintiff and its landowners of their property interests in their water rights in violation of the Fifth Amendment to the United States Constitution.

83. Declaratory relief is appropriate in this case both because an actual injury has occurred in the past and will continue to occur in the future if declaratory relief is not entered. In addition, the Amended Proposed Action reflected in the 2019 FWS BiOp, 2019 NMFS BiOp, and 2019 OP Defendants have adopted, and any successor documents, will continue to cause injury to KID and its landowners that is substantively identical, in all material respects, to the injury that has been caused to KID under the adoption and implementation of the Proposed Action and prior 2013 BiOP. Therefore, KID and Reclamation have adverse legal interests and there is a substantial controversy between them of sufficient immediacy and reality to warrant the issuance of declaratory judgment.

PRAYER FOR RELIEF

WHEREFORE, KID prays for judgment and an order against each Defendant:

1. Declare Defendants actions under the APA unlawful;

2. For declaratory relief setting forth the rights of the parties' rights under the ACFFOD, the Reclamation Act and the Fifth Amendment to the United States Constitution;

3. For attorneys' fees, costs, and interest, as authorized by law; and

4. Any other relief the Court deems just and proper.

DATED: January 17, 2020

Respectfully submitted by,

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