No. 22-1116

In the Supreme Court of the United States

KLAMATH IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES BUREAU OF RECLAMATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Federal Rule of Civil Procedure 19 required the dismissal of petitioner's claims challenging federal agency action governing the operation of a federal irrigation project, where the challenged actions—although taken to comply with the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*—are also protective of reserved water rights held by Indian tribes that cannot be joined as parties due to their tribal sovereign immunity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 48 F.4th 934. The order of the district court (Pet. App. 35-37) and the findings and recommendation of the magistrate judge (Pet. App. 40-66) are reported at 489 F. Supp. 3d 1168.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2022. A petition for rehearing was denied on January 11, 2023 (Pet. App. 67-69). On April 3, 2023, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including May 11, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the interaction of the judicial-review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq*., and Federal Rule of Civil Procedure 19, which concerns joinder of parties in a civil action. Specifically, the question presented is whether this APA suit challenging a decision of the Bureau of Reclamation (Bureau) was properly dismissed on the ground that, under Rule 19, the Tribes were indispensable parties that, due to their tribal sovereign immunity, could not be involuntarily joined as parties.

1. The APA provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review," 5 U.S.C. 704, except to the extent that a "statute[] preclude[s]" review or the challenged "action is committed to agency discretion by law," 5 U.S.C. 701(a). The APA further provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702. To that end, Congress expressly waived federal sovereign immunity with respect to any action in federal court under the APA "seeking relief other than money damages" by providing that such an action "shall not be dismissed * * * on the ground that it is against the United States or that the United States is an indispensable party." *Ibid.*; see *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260-263 (1999).

The final agency action at issue in this case is the adoption by the Bureau of operating procedures for the Klamath Project (Project) for the years 2019 to 2024. Pet. App. 51, 53, 88. Those procedures by their terms expire on March 31, 2024. *Id.* at 9, 15, 88. As relevant

here, the Bureau's action addressed constraints on Project operations imposed by the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq*. See Pet. App. 12-13, 15.

The Klamath Project is a federal irrigation project composed of "a series of lakes, rivers, dams, and irrigation canals in northern California and southern Oregon." *Bennett* v. *Spear*, 520 U.S. 154, 158 (1997); see Pet. App. 8. "Key features of the Project" include Upper Klamath Lake in Oregon; the nearby Link River Dam (which controls the Lake's water level); and the Klamath River, which rises at the dam's spillway and "flows from Oregon into California" before "enter[ing] the Pacific Ocean." *Baley* v. *United States*, 942 F.3d 1312, 1316, 1321 (Fed. Cir. 2019), cert. denied, 141 S. Ct. 133 (2020); see Pet. App. 42.

This Court in *Bennett* v. *Spear*, *supra*, addressed an earlier APA challenge concerning the Bureau's compliance with the ESA in its operation of the Project. *Bennett*, 520 U.S. at 157, 174-175. In that case, after the Bureau consulted the Fish and Wildlife Service (FWS), FWS issued a "Biological Opinion" under the ESA in which FWS determined that the Bureau's proposed operation of the Project was likely to jeopardize the continued existence of endangered fish species in the Project's waters: the Lost River sucker and the shortnose sucker. *Id*. at 158-159, 170. FWS then identified alternatives the Bureau could adopt that would avoid jeopardy to those two species, "includ[ing] the maintenance of minimum water levels" in the Project. *Id*. at 159. The Court determined that "two Oregon irrigation districts that receive Klamath Project water" and two water users had "standing to seek judicial review of the biological opinion." *Id*. at 157, 159.

Since that time, the Bureau has adopted "operating conditions developed through [ESA] consultation" to prevent jeopardy to the two endangered sucker species that are present in Upper Klamath Lake, as well as a threatened coho salmon species in the Klamath River in California, downstream of the Lake. Pet. App. 13. Those ESA-required operating conditions call for the maintenance of "minimum lake levels in [Upper Klamath Lake]" where the endangered suckers are endemic, and certain "minimum stream flows in the Klamath River" where the salmon have critical habitat. *Ibid.*; see *id.* at 8, 15, 51; see also *Baley*, 942 F.3d at 1324 nn.12-13 (explaining that "[t]he Lost River and shortnose suckers' only habitat is Upper Klamath Lake and nearby Project waters" and that "[t]he Klamath River downstream of the Iron Gate Dam in California has been designated a 'critical habitat' for the SONCC coho salmon") (citation omitted). Despite those operating conditions, "the population of endangered suckers has significantly declined," risking their extinction within a decade absent "'intervention.'" Pet. App. 8-9.

In 2019, after the Bureau's more recent consultations with FWS and the National Marine Fisheries Service (NMFS), those agencies issued Biological Opinions under the ESA addressing, respectively, the two endangered sucker species and the threatened salmon species. Pet. App. 14-15, 51-52.[1] In accordance with those Biological Opinions, the Bureau adopted its 2019-2024 operating procedures in order "to maintain specific lake levels and instream flows to comply with the [ESA]." *Id.* at 7; see *id.* at 15. The operations plan, though developed to ensure compliance with the ESA, also has the

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[1] NMFS is responsible for anadromous species like coho salmon.

effect of protecting (at least in part) the tribal fishing-based water rights discussed below.

2. In addition to ESA-based requirements, the Bureau's operation of the Project must account for various "competing interests in the Klamath Basin," including the interests of Indian tribes holding reserved water rights, as well as various water users with which the Bureau has contracted to supply water under the reclamation laws "'subject to the availability of water.'" Pet. App. 12 (citation omitted).

a. Under the doctrine of *Winters* v. *United States*, 207 U.S. 564 (1908), the establishment of an Indian reservation or other federal reservation, "by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976). The establishment of "Indian reservations" therefore results in a federal reserved water right in unappropriated water which vests no later than the date of the reservation and is "superior to the rights of future appropriators." *Ibid.*

As relevant here, the Klamath Tribes (in Oregon) and the Hoopa Valley Tribe and Yurok Tribe (both in California) "each hold rights to take fish from water sources" connected to their reservations. *Baley*, 942 F.3d at 1321-1323 (citation omitted) (rejecting prior appeal by Project water users). Those fishing rights and associated water rights include a "non-consumptive" right to Klamath Basin water that allows each Tribe "'to prevent other appropriators from depleting the [relevant] waters below a protected level,'" *i.e.*, the level needed to support the relevant fish populations. *Ibid.* (citation omitted). The Klamath Tribes' rights accordingly include a federal right to "minimum [water] levels

in Upper Klamath Lake." *Id.* at 1338.[2] The Hoopa Valley and Yurok Tribes' federal water rights cover the "Klamath River and the [water] flows therein." *Id.* at 1339. The tribal rights are "senior to those of the [Project's water users]." *Id.* at 1322, 1328, 1333 (concluding that the Klamath Tribes' water rights carry "a priority date of time immemorial" and that the California tribes' rights have priority dates of "at least 1891"); see Pet. App. 13 (tribal rights "predated the Project").

b. Other entities possess rights to water from the Klamath Basin in both Oregon and California. As an initial matter, in 1957, Congress approved the Klamath River Basin Compact between California and Oregon, Act of Aug. 30, 1957, Pub. L. No. 85-222, 71 Stat. 497,

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[2] The Klamath Tribes' 1864 treaty with the United States established the Klamath Reservation in Oregon and, in addition, expressly provided the Tribes "the exclusive right of taking fish in the streams and lakes, included in said reservation." Treaty Between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, art. I, Oct. 14, 1864, 16 Stat. 708; see *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 766-767 (1985). In 1901, the size of that reservation was significantly diminished. *Klamath Indian Tribe*, 473 U.S. at 760-761, 768-770. In 1954, the Klamath Termination Act (1954 Act), ch. 732, 68 Stat. 718, terminated the Klamath Reservation and ended federal supervision of the Klamath Tribes. See § 1, 68 Stat. 718 (25 U.S.C. 564 (2012)). The 1954 Act, however, specifically provided that "[n]othing in this Act shall abrogate any fishing rights or privileges of the tribe" or "any water rights of the tribe," § 14(a) and (b), 68 Stat. 722 (25 U.S.C. 564m(a) and (b) (2012)). See *Klamath Indian Tribe*, 473 U.S. at 761, 768. The 1954 Act therefore did not impair the Tribes' preexisting reservation-related fishing and water rights. *United States* v. *Adair*, 723 F.2d 1394, 1411-1412 (9th Cir.), cert. denied, 467 U.S. 1252 (1984). In 1986, the Klamath Tribes were restored as a federally recognized tribal entity. See Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (25 U.S.C. 566 *et seq.* (2012)).

one purpose of which is to provide an "equitable distribution and use of water among the two States and the Federal Government," Art. I, Subdiv. B, 71 Stat. 497. The Compact recognizes "vested rights to the use of waters originating in the Upper Klamath River Basin" that were "validly established and subsisting" under the "laws of the state in which the use or diversion is made." Art. III, Subdiv. A, 71 Stat. 498. The Compact also provides that it does not "deprive any * * * tribe, band or community of Indians of any rights, privileges, or immunities afforded under Federal treaty, agreement or statute" or "impair or affect any rights, powers or jurisdiction in the United States" or "its agencies * * * in, over and to the waters of the Klamath River Basin." Arts. X.A.2, XI.A, 71 Stat. 505.

In turn, an Oregon state statute, Or. Rev. Stat. §§ 539.005 *et seq.*, establishes "procedures for carrying out a general stream adjudication in Oregon" to determine ownership and priority of relevant water rights within that State, Or. Rev. Stat. § 539.005 (2021). See Pet. App. 13-14. In 1975, Oregon convened the Klamath Basin Adjudication under that law "to adjudicate the relative rights of use of the Klamath River and its tributaries" in Oregon. *Id.* at 13. In 2013 and 2014, the Oregon Water Resources Department issued determinations (totaling more than 7500 pages in length) in those proceedings, which are now pending on judicial review in Oregon state court. *Id.* at 14; see Pet. 8 & n.4.[3] While that judicial review is pending, Oregon law provides that "the division of water from the stream involved

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[3] The Oregon agency's relevant determinations are available at https://www.oregon.gov/owrd/programs/waterrights/adjudications/klamathriverbasinadj/pages/acffod.aspx.

* * * shall be made in accordance with the [agency's] order." Or. Rev. Stat. § 539.170 (2021).

c. The McCarran Amendment, 43 U.S.C. 666, makes the United States subject to certain state-law processes for determining and administering water rights. The Amendment waives the United States' immunity from suit "(1) for the adjudication of rights to the use of water of a river system or other source" and "(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 in the river or other source and is a necessary party to such suit. 43 U.S.C. 666(a). That statutory waiver of sovereign immunity is limited to state proceedings that provide a "general adjudication of 'all of the rights of various owners on a given [river system],'" *Dugan* v. *Rank*, 372 U.S. 609, 618 (1963) (citation omitted), that lies "within the particular State's jurisdiction," *United States* v. *District Ct. in & for the Cnty. of Eagle*, 401 U.S. 520, 523 (1971), and the subsequent administration of those rights. The McCarran Amendment's waiver of the United States' immunity extends to circumstances in which the United States is the nominal "owner" of water rights as the "trustee[]" of "federal water rights reserved for Indian reservations." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 810 (1976); see *id*. at 809-813; cf. *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 566 n.17 (1983) (stating that the Amendment "waive[s] sovereign immunity with regard to the Indian *rights* at issue" in "state comprehensive water adjudications," but not "the sovereign immunity of Indians as *parties* to [such proceedings]").

Consistent with the McCarran Amendment, the United States has participated in Oregon's Klamath

Basin Adjudication. As relevant here, in 2014, the Oregon Water Resources Department issued its final determination approving the United States' and Klamath Tribes' claim (Claim 622) for water in Upper Klamath Lake. See Corrected Partial Order of Determination, Water Right Claim 622, *In re Claim of the Klamath Tribes* (Or. Water Res. Dep't Feb. 28, 2014) (Oregon Order).[4] That order incorporated with modifications (*id.* at 2) an administrative law judge's proposed order, see Proposed Order, Claims 616 and 622, *In re Determination of the Relative Rights of the Waters of the Klamath River*, No. 286 (Or. Office of Admin. Hr'gs Apr. 16, 2012) (Proposed Order).[5]

The Oregon Water Resources Department stated that the claim of the United States and the Klamath Tribes embodies "non-consumptive (in-lake) water rights" to maintain water levels in the Lake based on the 1864 treaty between the United States and the Tribes that established the Klamath Indian Reservation and codified in federal law the Tribes' traditional fishing (and other) rights associated with those lands. Oregon Order 3, 8; Proposed Order 3, 6-7. The state agency "approved" that claim in the names of the Klamath Tribes and the Department of the Interior (as trustee); listed the claim's priority date as "time immemorial"; and defined the claim as an entitlement to specified "minimum" water levels in Upper Klamath Lake "to establish and maintain a healthy and productive habitat to preserve and protect the Tribes' hunting, fishing, trapping and gathering rights on [their] former reservation

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

[5] https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_04947.pdf.

land." Oregon Order 8-9 (capitalization altered); see Proposed Order 13-14 (finding that the "lake levels are necessary" to preserve "fishing rights guaranteed by the Treaty of 1864"). However, the United States and the Klamath Tribes have stipulated that—until a judgment "has been issued regarding [that claim]" on state judicial review of the Oregon Water Resources Department's decision "and is operative"—they will not assert that reserved right to curtail the use of water under (junior) "water rights having a priority date before August 9, 1908." Oregon Order 6-7 (¶ 2.a and ¶ 2.c.iii).[6]

The California-based Hoopa Valley Tribe and Yurok Tribe—which hold water rights in the Klamath River to support their reserved fishing rights downstream in California—and the United States as trustee of those tribal rights did not file claims in the Klamath Basin Adjudication, which involved only Oregon water rights. Pet. App. 27; see *Baley*, 942 F.3d at 1341 (explaining that Oregon's Klamath Basin Adjudication "cannot adjudicate water rights in another state").

3. Petitioner is a special irrigation district in Oregon that was formed under state law to deliver irrigation water to its members and that has contracted with the Bureau to operate and maintain certain Klamath Project irrigation works owned by the United States. Pet. App. 15, 95-96. In 2019, petitioner filed this APA action

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[6] The state agency noted that the Klamath Tribes had submitted a separate "claim [that was] duplicative of," rather than "additive" to, the claim filed on their behalf by the United States as trustee. Oregon Order 8. The agency accordingly denied that duplicative claim (Claim 616). *Ibid.*; accord Corrected Partial Order of Determination, Water Right Claim 616, *In re Claim of the Klamath Tribes* (Or. Water Res. Dep't Feb. 28, 2014), https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_04908.pdf.

for declaratory and injunctive relief, contending that the Bureau's 2019-2024 operating procedures for the Project "based on [FWS's and NMFS's] biological [opinions] w[ere] unlawful." *Id.* at 16; see *id.* at 87-88.

The Klamath Tribes and Hoopa Valley Tribe intervened for "the limited purpose of filing motions to dismiss." 11/6/2019 D. Ct. Order 1. In those motions, the Tribes argued that, under Federal Rule of Civil Procedure 19, this APA action against the Bureau should be dismissed because the Tribes were required parties to the case that were indispensable to its resolution but had not—and could not be—joined as parties without their consent due to their tribal sovereign immunity. See Pet. App. 40-41.

Rule 19(a), entitled "Persons required to be joined if feasible," provides that "[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" certain conditions are satisfied. Fed. R. Civ. P. 19(a)(1) (capitalization altered). As relevant here, such a person is a required party if "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 * * * as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i).

Rule 19(b) provides that "[i]f 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." Fed. R. Civ. P. 19(b). Rule 19(b) provides a non-exhaustive list of "[t]he factors for the court to consider" in making that "equity and good conscience" determination. *Ibid.* Those factors "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.

Ibid.

The government informed the district court that, although Ninth Circuit precedent concerning the application of Rule 19 in an APA action in which an Indian Tribe asserts an interest did not reflect the government's position, that binding circuit precedent in *Dine Citizens Against Ruining Our Environment* v. *Bureau of Indian Affairs*, 932 F.3d 843 (2019), cert. denied, 141 S. Ct. 161 (2020), "support[ed] dismissal." D. Ct. Doc. 73, at 3 (Mar. 6, 2020).

A magistrate judge recommended that the case be dismissed on Rule 19 grounds. Pet. App. 40-66. The district court adopted that recommendation and dismissed the action. *Id.* at 35-37.

4. On appeal, the government again explained that *Dine Citizens* had held "over the federal government's objection" that Rule 19 required dismissal of an APA challenge to federal agency action implicating tribal interests and that, under that "controlling circuit precedent," the district court correctly dismissed the case.

Gov't C.A. Br. 1-2, 18 (emphasis omitted). The court of appeals affirmed. Pet. App. 1-34.

a. The court of appeals first determined that the Tribes are "required parties" under Rule 19(a) that must be joined if feasible. Pet. App. 18-24. The court stated that "the Tribes' water rights are 'at a minimum coextensive with [the Bureau's] obligations to provide water for instream purposes under the ESA,'" and that the disposition of petitioner's APA action could "impair[]" "the Tribes' long-established reserved water rights" within the meaning of Rule 19(a) because the litigation could affect the Bureau's "ability or duty to fulfill the requirements of the ESA." *Id*. at 19-20. The court recognized that the Tribes' ability to protect that interest would not be impaired if the "interest w[ould] be adequately represented by existing parties to the suit." *Id*. at 20 (quoting *Dine Citizens*, 932 F.3d at 852). The court also agreed that, as in *Dine Citizens*, the governmental parties have "'an interest in defending their decisions'" and "share [with the Tribes] an interest in the ultimate outcome of this case." *Id*. at 22 (quoting *Dine Citizens*, 932 F.3d at 855). But the court stated that "[its] precedent underscores that such alignment on the ultimate outcome is insufficient." *Ibid*. "Under *Dine Citizens*," the court reasoned, "[the Bureau's] and the Tribes' interests, though overlapping are not so aligned as to make [the Bureau] an adequate representative of the Tribes," because the Bureau's "primary interest is in defending its [action] pursuant to the ESA and APA," whereas "[t]he Tribes' primary interest is in ensuring the continued fulfillment of their reserved water and fishing rights." *Ibid*.

b. The court of appeals further determined that the Klamath Tribes and Hoopa Valley Tribe could not be

involuntarily joined as parties because of tribal sovereign immunity. Pet. App. 24-27. The court noted that the McCarran Amendment waives sovereign immunity associated with "'federal water rights reserved on behalf of Indians,'" but it rejected petitioner's contention that the "Amendment waives the Tribes' sovereign immunity" in this case. *Id*. at 24-25 (citation omitted). The court explained that the McCarran Amendment applies only to "cases 'adjudicat[ing]' or 'administ[ering]' water rights." *Id*. at 25 (quoting 43 U.S.C. 666(a)) (brackets in original). The court concluded that "this lawsuit is not an administration of previously determined [water] rights but is instead an APA challenge to federal agency action." *Id*. at 27.

c. The court of appeals then determined that, under Rule 19(b), this case should be dismissed "in equity and good conscience." Pet. App. 27-30. The court noted that courts ordinarily consider the factors identified in Rule 19(b) to "determine whether a suit should proceed among the existing parties," but stated that "[h]ere, we are up against a 'wall of circuit authority' requiring dismissal" where a "tribe cannot be joined due to its assertion of tribal sovereign immunity." *Id*. at 27-28 (quoting decision that quotes *Dine Citizens*, 932 F.3d at 857). The court reasoned that "[t]he balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity" and that, in such circumstances, "immunity itself may be viewed as the compelling factor" such that there is "very little need for balancing Rule 19(b) factors." *Id*. at 28 (citation omitted). Although the court observed that "[i]n some circumstances," a court may adopt "ameliorative measures" to "lessen the prejudice

to a nonparticipating party," it found "no way to shape relief to avoid prejudice" here. *Id.* at 29-30.

d. Judge Bumatay concurred (Pet. App. 30-34) on the ground that "[the Ninth Circuit's] precedent requires [the court] to affirm here." *Id.* at 30. "Given *Dine Citizens*," Judge Bumatay "agree[d]" with the majority's Rule 19 rulings, *id.* at 30-31, but wrote separately to opine that "[petitioner's] arguments on the McCarran Amendment are much closer than the majority presents," *id.* at 31.

Judge Bumatay reasoned that "Congress [has] entrusted the stewardship of [tribal water] rights to the federal government" as trustee and therefore "has determined that the federal government adequately represents reserved tribal water rights for Rule 19 purposes in McCarran proceedings." Pet. App. 32. Judge Bumatay accordingly concluded that "dismissal under Rule 19(b) [would be] unnecessary" in such proceedings. *Id.* at 33. Judge Bumatay explained, however, that this case is not a McCarran Amendment "'administration' case" that involves the administration of the Hoopa Valley Tribe's water rights, because that California-based Tribe did not have an interest "adjudicated in [Oregon's] Klamath Basin Adjudication" under the McCarran Amendment. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 14-23, 30-35) that the Ninth Circuit erred in affirming the dismissal under Rule 19 of its APA suit challenging the Bureau's 2019-2024 operating plan. Petitioner further contends (Pet. 24-30) that, although there is a "lack of a circuit split on the precise issues raised" in this case, the decision of the court of appeals "is in tension" with decisions of other courts of appeals, Pet. 25, and, in any event, the

question presented is sufficiently important to warrant review. The government agrees that the court of appeals in this case, following its decision in *Dine Citizens Against Ruining Our Environment* v. *Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019), cert. denied, 141 S. Ct. 161 (2020), erroneously applied Rule 19 to require dismissal of this suit under the APA. And questions concerning the application of Rule 19 in APA actions challenging final agency action, and if or when an Indian Tribe's assertion of sovereign immunity may require dismissal of an APA action, may warrant this Court's review in a future case.

This case, however, would be a poor vehicle to address those questions, for multiple reasons. Petitioner's focus on the McCarran Amendment significantly distracts from the relevant Rule 19 and APA analysis. But even accepting petitioner's McCarran Amendment framing on its own terms, this case would not be a suitable vehicle in which to consider a significant aspect of petitioner's position because petitioner has expressly waived in this Court (Pet. 13 & n.6) its argument that this case is itself a "McCarran Amendment proceeding" for the administration of previously adjudicated water rights, for which Congress has waived the sovereign immunity of the United States from proceedings for the administration of water rights held by the United States for Indian Tribes. Furthermore, this Court's review of the Rule 19 dismissal in this particular case is unwarranted because petitioner has previously lost its underlying merits contentions, including in a district court case that petitioner has recently appealed to the Ninth Circuit, where petitioner will have an opportunity to assert its water-rights based arguments. This according-

ly is not an instance in which a plaintiff has been denied a forum. The Court should deny certiorari.

1. The court of appeals concluded, based on its *Dine Citizens* decision, that this suit under the APA for judicial review of the Bureau's action must be dismissed under Rule 19 because the Tribes are indispensable parties to that review. That conclusion was incorrect. The court's error, however, was not due to the McCarran Amendment contentions that petitioner advances. The error resulted from the court's erroneous application of Rule 19 in this case. That application was erroneous in at least two ways.

a. First, assuming *arguendo* that the Tribes claim a relevant "interest relating to the subject of the action" for judicial review of the Bureau's final agency action to comply with the ESA, the Tribes are not required parties for that APA review under Rule 19(a) because they are not "so situated that disposing of the action in [their] absence may * * * as a practical matter impair or impede [their] ability to protect the interest," Fed. R. Civ. P. 19(a)(1)(B)(i). In an APA suit like this case, an aggrieved person challenges the final action of a federal agency, 5 U.S.C. 701(b)(1), 703, 704, and relief is limited to relief against the federal government itself, 5 U.S.C. 702, 706. And where, as here, the government defends its action on the legal and factual grounds on which that action was based, the government's defense ordinarily will "as a practical matter" sufficiently "protect" an "interest relating to the subject of the [suit]" (Fed. R. Civ. P. 19(a)(1)(B)(i)) that those who benefit from the government's action might properly assert. See, *e.g.*, *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996). It is the federal government that has the primary interest in upholding its own action.

And because judicial relief under an APA suit like this properly runs only against the federal government, whatever beneficial effects might result for a third party from the challenged agency action are derivative of that agency action and thus should ordinarily be regarded as sufficiently protected on judicial review by the government's defense of its action.

The court of appeals recognized that "[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." Pet. App. 20 (citation omitted). And the court made clear that the governmental defendants here "share [with the Tribes] an interest in the ultimate outcome of this case." *Id.* at 22.

The court of appeals nevertheless determined that, under *Dine Citizens*, "alignment on the ultimate outcome is insufficient" and that the Bureau was not "an adequate representative of the Tribes" because its "primary interest is in defending its [action] pursuant to the ESA and APA," whereas "[t]he Tribes' primary interest is in ensuring the continued fulfillment of their reserved water and fishing rights." Pet. App. 22. That analysis is mistaken. The motivations underlying the government's defense of its own action are not the focus under Rule 19, which instead asks whether "as a practical matter" the government's defense of its action would adequately "protect" the Tribes' interest in the challenged operations plan, Fed. R. Civ. P. 19(a)(1)(B)(i). Although the court of appeals noted disagreements between the government and the Tribes in other cases over the "degree" to which the government is willing "to protect the Tribes' interests," Pet. App. 23, those disagreements did not alter the court's determination that "[the gov-

ernment] and the Tribes share an interest in the ultimate outcome of this case," *id.* at 22, which challenges the Bureau's own operations plan that the Bureau adopted for the purpose of complying with the ESA.

The potential consequences of the court of appeals' holding and traditional APA practice confirm the court's error. The court's approach could affect not only cases in which (as here) a person who is determined to be a required party cannot be joined as a party, but also cases in which required parties can ultimately be joined. Because the motivations of private entities that benefit from federal agency action very frequently are different than the agency's motivation for defending its own action, the court's rationale could lead to a practice under which the (potentially numerous) private entities that benefit from a federal agency action must generally be joined as required parties in an APA suit for judicial review of that action. See Fed. R. Civ. P. 19(a)(2) (providing that "the court must order that the person be made a party"). Indeed, under the court of appeals' application of Rule 19(a) here, if applied more generally, a plaintiff seeking APA review apparently would be required to plead in its complaint the names (if known) of such persons, presumably by identifying them based on the agency proceedings, and then plead the plaintiff's "reasons for not joining [them]." Fed. R. Civ. P. 19(c). But that has not been the traditional practice in APA litigation. The Ninth Circuit's approach to Rule 19(a) in this case, if extended more broadly, thus could significantly burden and complicate APA litigation and spawn collateral disputes over whether an absent person actually has a sufficient interest to require joinder if feasible.

b. Second, even if the Tribes were persons that were required to be joined if feasible under Rule 19(a), the Tribes were not indispensable parties in this case under Rule 19(b) whose nonjoinder required that the case be dismissed "in equity and good conscience," Fed. R. Civ. P. 19(b).

Rule 19's "terminology and practice relating to joinder developed from equity and equitable doctrines." 7 Charles Alan Wright et al., *Federal Practice and Procedure* § 1601, at 5 (3d ed. 2019). At equity, the standard "often applied by this [C]ourt" for determining whether a person was "so indispensable that a court of equity will not proceed to final decision without [joining] them" was articulated in *Shields* v. *Barrow*, 58 U.S. (17 How.) 130 (1855), which stated that a person is indispensable if a final decree cannot be made in their absence without "'leaving the controversy in such a condition that its final termination may be wholly inconsistent with *equity and good conscience*.'" *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U.S. 77, 80 (1920) (quoting *Shields*, 58 U.S. (17 How.) at 139) (emphasis added). Rule 19(b) adopts that italicized language from *Shields* as the relevant test. See *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 124 (1968) (*Provident*).

In *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), this Court examined the equitable principles governing "the joinder of parties to litigation determining private rights" and concluded that the equitable balance applies differently in proceedings for "the protection and enforcement of public rights." *Id.* at 363 (citing *Shields'* application of equitable joinder rules to suits over private contracts). The Court observed that "even in private litigation" involving private contracts, "dif-

ferent considerations" can apply where "the rights asserted arise independently of any contract," "even though their assertion may affect the ability of [a contracting party] to fulfill his contract." *Ibid.* And in the "public rights" context, the Court explained that litigation "restraining the unlawful actions of the defendant" may proceed without joining as parties those with whom the defendant has contracted—"even though the restraint prevented [the defendant's] performance of the contracts"—because an independent "public right was vindicated by restraining the unlawful actions." *Id.* at 366. The Court accordingly determined that public-rights principles should apply in a proceeding against an employer under the National Labor Relations Act, 29 U.S.C. 151 *et seq*., under which employees who had entered contracts with the employer that "were the fruits of unfair labor practices" were "not indispensable parties" to proceedings to restrain the employer's unlawful conduct. *National Licorice Co.*, 309 U.S. at 361, 366.

That "public rights" principle also generally applies in suits for judicial review challenging federal agency action under the APA where it is not feasible to join the third-parties who benefit from the agency action. See, *e.g.*, *Southern Utah Wilderness Alliance* v. *Kempthorne*, 525 F.3d 966, 967, 969 n.2 (10th Cir. 2008) (private lessees are not indispensable parties in APA challenge to agency decision to issue the leases); *Jeffries* v. *Georgia Residential Fin. Auth.*, 678 F.2d 919, 929 (11th Cir.) ("[W]hen litigation seeks vindication of a public right, third persons who could be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties."), cert. denied, 459 U.S. 971 (1982). The conclusion that an APA suit ordinarily may

proceed in those circumstances is consistent with the APA's granting of a "general right to judicial review" to "'person[s] suffering legal wrong because of agency action'" or "'adversely affected or aggrieved by agency action.'" *Darby* v. *Cisneros*, 509 U.S. 137, 146 (1993) (quoting 5 U.S.C. 702).

The court of appeals' decision, by contrast, would prevent a plaintiff from challenging the lawfulness of federal agency action where, as here, the action directly benefits a person who cannot be joined as a party defendant to the review proceedings. The APA does not itself categorically displace Rule 19 because the APA does not affect "the power or duty of the court to dismiss any action or deny relief" on an "appropriate legal or equitable ground." 5 U.S.C. 702. But the general purposes of the APA and its public-rights underpinnings support the conclusion that permitting a suit against the federal government to proceed on a claim for APA review without an absent person who cannot be joined as a defendant would ordinarily be consistent with "equity and good conscience," Fed. R. Civ. P. 19(b).

The factors identified in Rule 19(b) reinforce that conclusion. First, an APA plaintiff would not typically "have an adequate remedy if the action were dismissed for nonjoinder," Fed. R. Civ. P. 19(b)(4), because often no "satisfactory alternative forum exists," *Provident*, 390 U.S. at 109.

Second, a "judgment rendered in the person's absence" would not materially "prejudice that person or the existing parties." Fed. R. Civ. P. 19(b)(1). The existing parties—the APA plaintiff and the governmental defendant(s)—would not be prejudiced because the APA review can be litigated to judgment without participation by potential third-party defendants.

With respect to the nonparty, an APA judgment has the potential to hold the agency action unlawful, and thereby eliminate the benefit that the agency action would have provided to the nonparty. But any such benefit would have been contingent as a practical matter while the agency action was subject to APA judicial review. And because APA relief runs only against the federal government, not against third parties like tribes, a judgment holding the agency action unlawful would leave those persons in the same position that they would have been in if the federal agency had never taken the action in the first place.

Finally, ordinarily, "a judgment rendered in the [third] person's absence would be adequate," Fed. R. Civ. P. 19(b)(3), in a suit under the APA because such a judgment would "settl[e] [the] dispute[]" as a whole. *Provident*, 390 U.S. at 111.

Of course, if a Tribe believes that its interest and perspectives will not be sufficiently placed before the court, it may seek to intervene in the case or file an amicus brief to set forth its position and supporting arguments.

2. Although in our view the court of appeals erred in affirming the dismissal of this case under Rule 19, the Court should deny certiorari. Petitioner contends that although there is no "circuit split on the precise issues raised" in this case, Pet. 25, this Court's review is warranted because the court of appeals' decision is in "tension with the broader [Rule 19] holdings" of other courts of appeals, Pet. 25-27, and because the case presents important questions for the adjudication of "water rights" cases, Pet. 24, 28-30. See Pet. 14-23. Contrary to petitioner's submission, this case would not be a suitable

vehicle for addressing Rule 19 issues, and it does not otherwise warrant this Court's review.

a. First, petitioner's heavy focus on the McCarran Amendment and related water-rights issues significantly distracts from the relevant Rule 19 and APA issues. As it did in the court of appeals, petitioner continues to approach this case through the lens of water-rights adjudications involving distinct and complex issues that are not present in the mine run of APA cases that might arguably implicate Rule 19. See, *e.g.*, Pet. 14-23.

Indeed, petitioner's Rule 19 arguments themselves involve water-rights contentions, several of which are highly specific to this case. Petitioner, for instance, argues (Pet. 31) that proceeding with this particular suit would not impair or impede the Tribes' interests under Rule 19(a) because petitioner merely seeks to "require [the Bureau] to obtain water from [p]etitioner first, using lawful means including purchase, appropriation, or judicial condemnation," before the Bureau may institute the Project water and flow levels required by federal law under the ESA. That case-specific contention about the nature of petitioner's Rule 19 argument does not warrant review. Moreover, although the government does not agree with petitioner's position, the Bureau's 2019-2024 operations plan at issue in this case, which reflects water levels adopted for ESA-compliance reasons, does not address whether the Bureau must obtain additional water rights and therefore is not itself inherently inconsistent with petitioner's theory.[7]

[7] Petitioner might present its water-rights contention in a claim for retrospective compensation for an alleged Fifth Amendment taking of property, but petitioner does not purport to assert any takings claim here (see Pet. App. 106-114) and, as discussed *infra*, petitioner failed in its previous attempt to do so.

Relatedly, petitioner argues (Pet. 34) that the court of appeals erred in its Rule 19(b) analysis involving potential prejudice to the Tribes because the court purportedly made a "mistaken assumption" about what petitioner's APA challenge ultimately seeks. No review is warranted to correct such a "mistaken assumption" about a specific claim in a specific case.

In other respects as well, petitioner continues to argue various tangential water-rights issues that do not implicate issues warranting this Court's review. For instance, petitioner argues (Pet. 7 n.3) that the California-based Hoopa Valley Tribe "forfeited" its water rights by failing to submit a claim in Oregon's Klamath Basin Adjudication. That contention is incorrect because Oregon's Klamath Basin Adjudication did not adjudicate rights to water in California like the rights of the Hoopa Valley Tribe. *Baley* v. *United States*, 942 F.3d 1312, 1341 (Fed. Cir. 2019) (rejecting the same forfeiture argument with respect to the Hoopa Valley Tribe), cert. denied, 141 S. Ct. 133 (2020); see p. 10, *supra*. But the most salient point for present purposes is that if this Court were to grant review, petitioner's various case-specific water-rights contentions would lead the parties and the Court into an exceptionally complicated area of the law, as reflected in the length that it takes simply to describe the interstate water compact, the McCarran Amendment, Oregon law, reclamation law, and tribal water-rights principles that petitioner's contentions would implicate. See pp. 5-10, *supra*. This case therefore would not be a suitable vehicle to address more generally applicable questions of how Rule 19 should apply in cases of APA judicial review, including in cases in which agency action affects interests of an Indian tribe.

b. Second, even if the Court were inclined to take into account petitioner's McCarran Amendment and related water-rights contentions, the case would provide a poor vehicle for review. Petitioner continues to take the position that this case is "a McCarran Amendment proceeding" because it is a case for the "administration of water rights" for which the McCarran Amendment provides a waiver of the United States' sovereign immunity with respect to tribal water rights, even as petitioner also says it is not relying on that point here. Pet. 30 & n.13; see Pet 13. But if this Court were to grant review on the basis that (as petitioner argues) the decision below "destabilize[s]" the McCarran Amendment's comprehensive framework for adjudicating and administering water rights, Pet. 14 (emphasis omitted); see, *e.g.*, Pet. 1, 14-23, petitioner's submission would seem to raise the logically antecedent question whether the McCarran Amendment in fact does supply a waiver of immunity applicable to this case. The court of appeals held that it does not. Pet. App. 24-27. Yet that question is not before the Court in this case, because petitioner has expressly waived any continuing challenge to what petitioner contends is the court of appeals' "incorrect" holding on that point. Pet. 13 n.6.

c. Finally, this Court's review is unwarranted because petitioner has previously lost on its underlying contentions regarding the Bureau's ESA compliance in Klamath Project operations and currently has a pending appeal in the Ninth Circuit in which it will be presenting its state-law water-rights-based arguments. This accordingly is not an instance in which a dismissal has left a plaintiff with no alternative forum in which to present its arguments and seek relief.

Courts in several previous cases have rejected challenges to the Bureau's decisions to operate the Project consistent with the ESA in the face of petitioner's assertion of water rights for its water-user members. For instance, the Ninth Circuit in *Klamath Water Users Protective Ass'n* v. *Patterson*, 204 F.3d 1206, 1209-1210 (*KWUPA*), cert. denied, 531 U.S. 812 (2000), addressed a contract-based challenge to the Bureau's 1997 operations plan filed by the Klamath Water Users Protective Association (also known as the Klamath Water Users Association) of which petitioner is a member. See *In re Klamath Irrigation Dist.*, 69 F.4th 934, 943 n.9 (9th Cir. 2023), petition for cert. pending, No. 23-216 (filed Sept. 5, 2023). The court of appeals rejected that challenge and held, as relevant here, that "the requirements of the ESA * * * override the water rights of the Irrigators." *KWUPA*, 204 F.3d at 1213.

Later, petitioner was the "lead plaintiff" in a takings case alleging that the Bureau's temporary termination of the Project's water deliveries to water users in 2001 "in order to meet the requirements of the [ESA]" constituted a Fifth Amendment taking without just compensation of the users' "rights to use Klamath Project water." *Baley* v. *United States*, 134 Fed. Cl. 619, 625, 645 (2017), aff'd, 942 F.3d 1312 (Fed. Cir. 2019), cert. denied, 141 S. Ct. 133 (2020). Petitioner voluntarily dismissed its own separate claims from the case, *id.* at 645, but the case continued as a class action including all landowners claiming a right to irrigation water from the Project in 2001, including the water-user members of the "Klamath Irrigation District" (*i.e.*, petitioner). *Id.* at 644. The Federal Circuit, like the Court of Federal Claims, rejected those claims, holding that the Bureau's ESA-based actions did not impair the class's water

rights because the Klamath Tribes, Hoopa Valley Tribe, and Yurok Tribe had "rights to an amount of water that was at least equal to what was needed to satisfy the Bureau of Reclamation's ESA obligations" and those tribal water rights were senior to the water rights of the class members. *Baley*, 942 F.3d at 1337; see *id.* at 1333-1334, 1337-1339. To the extent petitioner contends that the Bureau must obtain water rights by purchase from petitioner (and its members) to conduct operations needed to comply with the ESA, *Baley* resolved that contention against petitioner.

Finally, petitioner is currently a party in an action—and has appealed a district court judgment in that case—in which the government, the Klamath Tribes, the Hoopa Valley Tribe, the Yurok Tribe, and the Oregon Water Resources Department (among others) are parties that would be bound by the judgment. See *Yurok Tribe* v. *U.S. Bureau of Reclamation*, No. 3:19-cv-4405, 2023 WL 1785278 (N.D. Cal. Feb. 6, 2023), appeal pending, Nos. 23-15499, 23-15521 (9th Cir.) (petitioner's opening brief is due Oct. 16, 2023). The district court's judgment arose from a dispute concerning the Bureau's 2020 decision during severe drought conditions to "release water from [Upper Klamath Lake] in an effort to comply with the ESA" with respect to the listed salmon species downstream in the Klamath River, which resulted in a reduction of water for petitioner to provide to its members, and a subsequent 2021 order by the Oregon Water Resources Department that purported to restrict the Bureau's operations. *Id.* at *5-*6; see *id.* at *4.

The Oregon Water Resources Department—which had conducted the Klamath Basin Adjudication—ordered the Bureau to stop the "distribution, use or release" of

stored water from Upper Klamath Lake except for "amounts that may be put to beneficial use" under a water right held for irrigators. *Yurok Tribe*, 2023 WL 1785278, at *6; see *id.* at *5 & n.4 (discussing the "KA 1000" water right). The district court, however, held that the "Bureau must comply with the ESA in operating the Klamath Project," and that the ESA accordingly preempted the contrary state-law order. *Id.* at *19. Petitioner will presumably continue to argue in its appeal of the district court's judgment that the state-law order properly prohibited the Bureau from releasing stored water from the Project unless the Bureau acquires irrigators' claimed water rights, as petitioner argues in this case. There is no reason for the Court to grant review here to determine whether petitioner should be able to litigate that issue in this case as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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