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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Medford Division

KLAMATH IRRIGATION DISTRICT,

Plaintiff,

v.

UNITED STATES BUREAU OF
RECLAMATION et al.,

Defendants

SHASTA VIEW IRRIGATION
DISTRICT et al.,

Plaintiffs,

v.

UNITED STATES BUREAU OF
RECLAMATION et al.,

Defendants

| Consolidated Cases
| Case No. 1:19-cv-00451-CL (lead)
| Case No. 1:19-cv-00531-CL (trailing)

| **HOOPA VALLEY TRIBE’S MOTION
| TO DISMISS PURSUANT TO FRCP 12(b)(7)
| and 19; and MEMORANDUM IN SUPPORT**

| Request for Oral Argument

MOTION TO DISMISS

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CERTIFICATE OF COMPLIANCE WITH LR 7-1

Undersigned counsel certifies that the parties made a good faith, but unsuccessful, effort through telephone conference to resolve the issues herein in compliance with Local Rule 7-1.

MOTION TO DISMISS

Expressly reserving its sovereign immunity, the Hoopa Valley Tribe (herein, “Hoopa”) moves, pursuant to Federal Rule of Civil Procedure (“FRCP” or “Rule”) 12(b)(7), for an order dismissing this consolidated action for failure to join Hoopa, a party required by FRCP 19. Plaintiffs seek to prohibit the Bureau of Reclamation (“Reclamation”) from releasing water from Upper Klamath Lake (“UKL”), or letting water pass Link River Dam into the Klamath River, for instream fish flows. Plaintiffs seek to prevent instream flows in the Klamath River that are necessary to fulfill Hoopa’s on-reservation fishing rights and senior water rights reserved to Hoopa by federal law. Plaintiffs seek to preclude Reclamation from limiting water diversions to Plaintiffs regardless of impacts to fish species in the Klamath River or senior tribal rights.

Plaintiffs’ claims and requested relief, if granted, would significantly prejudice Hoopa due to adverse effects on tribal trust salmon species (including ESA-listed SONCC coho) and due to the practical impairment of its federal reserved fishing and senior water rights. Plaintiffs’ claims and requested relief also directly conflict with Reclamation’s obligation to not jeopardize the survival and recovery of fish species protected under the Endangered Species Act (“ESA”). Hoopa may not be joined because Hoopa has sovereign immunity, which it has not and does not waive here. In equity and good conscience, this action may not proceed without Hoopa. Hoopa also seeks dismissal pursuant to FRCP 12(b)(7) and 19 for failure to join the Yurok Tribe and the Klamath Tribes of Oregon, each of whom are required parties due to the impact that this proceeding would have on their federal reserved rights. This motion is based on the court file,

the accompanying memorandum, the Declarations of Byron Nelson, Jr. (Dkt. #22), Michael Orcutt (Dkt. #23), and Thane Somerville (Dkt. #24) and exhibits at Dkt. #24-1 through 24-4.¹

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Since time immemorial, Hoopa and its members have relied on the water and fish resources of the Klamath and Trinity Rivers, which both flow through its Reservation.² Hoopa holds federal reserved fishing rights, which may be exercised on its Reservation, as well as federal reserved water rights. Hoopa's Reservation is located within California and downstream from the Klamath Project that is operated by Reclamation. Reclamation's Project operations substantially dictate the amount of flow that will be released into the Klamath River downstream for the benefit of fish and water resources and Hoopa's reserved rights.

Plaintiffs seek to prohibit Reclamation from releasing water through Klamath Project facilities into the Klamath River for instream fish flows and for protection of Hoopa's reserved rights. Plaintiffs seek declaratory and other relief that such releases by Reclamation are unlawful. Plaintiffs' water rights are junior to Hoopa's rights. Yet, here, Plaintiffs claim entitlement to full satisfaction of their junior rights regardless of impact on Hoopa's senior rights downstream or on ESA-listed (and other) species that rely on water claimed by Plaintiffs.

As a federally recognized Indian tribe, Hoopa has sovereign immunity and cannot be joined as a party without its express consent and express waiver of sovereign immunity. Hoopa

¹ Following this Court's order granting Hoopa's request for limited intervention (Dkt. #61), Hoopa filed a motion to dismiss on November 8, 2019. Dkt. #64. No further briefing occurred on that motion. Plaintiffs subsequently filed second amended complaints. Dkt. #70 and #73. This motion replaces and supersedes Hoopa's prior motion to dismiss, but this motion continues to rely on the previously filed declarations and exhibits (Dkt. #22 through 24-4). In this motion, Hoopa seeks dismissal of all claims in both consolidated cases in their entirety.

² The Trinity River is the largest tributary to the Klamath River.

has not and does not waive its sovereign immunity here. Hoopa moves to dismiss this action pursuant to FRCP 12(b)(7) and 19 for failure to join Hoopa and other Klamath Basin tribes.

II. FACTUAL BACKGROUND

A. Hoopa Retains Federal Reserved Rights to Take Fish Within Their Reservation from the Klamath and Trinity Rivers For Ceremonial, Subsistence, and Commercial Purposes to Support a Moderate Livelihood.

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 Lesly 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 Lesly 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).

B. Hoopa Retains a Federal Reserved Water Right to an Instream Flow of Water Sufficient to Support and Maintain Hoopa's Fishing Rights in the Klamath and Trinity Rivers.

Creation of an Indian reservation by the United States includes an implied reservation of water to fulfill the purposes for which the reservation was created. *Arizona v. California*, 373 U.S. 546, 599-601 (1963) ("United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created"); *Winters v. United States*, 207 U.S. 564, 576-77 (1908) (United States implicitly reserved water for Indian Reservation and protecting those unquantified tribal water rights against upstream irrigators); *Baley*, 942 F.3d at 1337 (affirming that, at bare minimum, 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); *United States v. Adair*, 723 F.2d 1394, 1408-1411 (9th Cir. 1983), cert denied, 467 U.S. 1252 (1984) (reservation for Klamath Tribes included water to maintain tribal fishing rights). Water rights necessary to fulfill the purposes of the reservation exist whether the reservation was created by treaty or executive action. *Arizona*, 373 U.S. at 598; *Parravano*, 70 F.3d at 544-547.

Traditional salmon fishing is one purpose for which the United States established the Reservation at its location where Hoopa could take and sustain itself on fish from the Klamath and Trinity Rivers. *Parravano*, 70 F.3d at 546 (finding salmon fishing one purpose for which Reservation was created); *Eberhardt*, 789 F.2d at 1359-60 (same); Solicitor's Opinion M-36979; *Adair*, 723 F.2d at 1409 ("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").

Hoopa's water right for fishery purposes includes that amount of instream flow necessary to maintain the salmon fishery at harvestable quantities sufficient to fulfill the "moderate living" standard of Hoopa's federal reserved fishing rights. *Baley*, 942 F.3d at 1335-37; *Adair*, 723 F.2d at 1414-15 (holding Klamath Tribes "entitled to a reservation of water, with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights"); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981) (holding that fishing was one purpose for creation of Colville Reservation and that "the Colvilles have a reserved right to the quantity of water necessary to maintain the Omak Lake Fishery"); *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985) (Walton II); *United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982) (fishing was one purpose for creating Spokane Indian Reservation and "the Tribe has the reserved right to sufficient water to preserve fishing in the Chamokane Creek."); *Greely v. Confed. Salish & Kootenai Tribes*, 712

P.2d 754, 764-66 (Mont. 1985) (tribal reserved rights may include water for fisheries). In 1995, Reclamation's Regional Solicitor opined that Hoopa has a fishery-related water right that includes "the right to certain conditions of water quality and flow to support all life stages of fish." Dkt. #24-2, pp. 6-7. In November 2019, the Federal Circuit Court of Appeals held: "At the bare minimum, [Hoopa's] 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).

Courts have repeatedly recognized Hoopa's federal reserved water rights and the priority that Hoopa's rights have over Plaintiffs' 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); *Klamath Water Users Association v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000), cert. denied, 531 U.S. 812 (2000) (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"). In contrast, no case has ever held or suggested that Plaintiffs' junior rights to receive water deliveries from the Klamath Project may take precedence or be satisfied regardless of impacts to ESA-listed species or to senior tribal rights.

Reserved water rights to support Indian fishing rights are created by federal law and are not subject to state law water rights doctrines. *Adair*, 723 F.2d at 1411, fn. 19; *Baley*, 942 F.3d at 1339-1341. Such rights carry a priority date of the date that the federal reservation was established, at the latest. *Adair*, 723 F.2d at 1412-14; *Arizona*, 373 U.S. at 600. Hoopa's rights here (with an 1876 priority date at the latest) are senior to Plaintiffs' rights. *Baley*, 134 Fed. Cl. at 670. Hoopa's federal reserved water right to maintain its federal reserved fishing rights is non-consumptive. *Adair*, 723 F.2d at 1411; *Baley*, 942 F.3d at 1322. Non-consumptive reserved rights to maintain and preserve Hoopa's fishing rights are entitled to protection from upstream diversions even if not quantified. *Patterson*, 204 F.3d at 1214; *Joint Board of Control v. United States*, 832 F.2d 1127, 1132 (9th Cir. 1987), cert. denied 486 U.S. 1007 (1988) (BIA had duty and authority to implement minimum stream flows and water levels for Indian fishery before providing water to project irrigators, despite lack of quantification of Indian rights); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1033 (9th Cir. 1985), cert. denied, 474 U.S. 1032 (1985) (affirming order mandating release of water to preserve salmon eggs threatened by low post-irrigation season water flows and to protect tribal fishing rights); *Baley*, 942 F.3d at 1339-41. *Winters* also involved federal enforcement of unquantified federal reserved rights against junior upstream diversions. *Winters*, 207 U.S. at 576-77.

Hoopa's fishing right entitles it to harvestable quantities of salmon to support Hoopa's ceremonial and subsistence needs and commercial fishing opportunities consistent with the moderate living standard. *Eberhardt*, 789 F.2d at 1359. There also must be sufficient escapement of spawners to perpetuate fish runs to meet the moderate living standard. *Parravano*, 70 F.3d at 543-547. Hoopa's federal reserved water right consists of instream flow necessary to maintain its federal reserved fishery. *Adair*, 723 F.3d at 1410-11; *Walton*, 647 F.2d at 48; *Joint Board*,

832 F.2d at 1131-32; Somerville Decl., Exh. B (Dkt. #24-2), pp. 6-7 (Hoopa water right includes “the right to certain conditions of water quality and flow to support all life stages of fish”).

Plaintiffs challenge Reclamation’s plan for operating the Klamath Project (and releasing water for downstream fish) consistent with its ESA obligations. Reclamation is legally obligated to operate the Project in compliance with the ESA and provide downstream flows necessary to avoid jeopardy to SONCC coho. But, in addition, the quantity of Hoopa’s federal reserved water right is at least co-extensive with (and certainly greater than) the amount of water that is necessary for Reclamation to comply with its obligations under the ESA to ensure the survival and recovery of ESA-listed salmon (i.e., SONCC coho), a tribal trust species, in the Klamath River. *Baley*, 942 F.3d at 1337. Hoopa’s fishing rights entitle it to more than just the presence of salmon in the river, but rather to sustainable harvestable quantities. *Parravano*, 70 F.3d at 546-47; *Eberhardt*, 789 F.2d at 1359-1362; *United States v. Washington*, 853 F.3d 946, 958, 965-66 (9th Cir. 2017), *affirmed per curiam*, 584 U.S. ____ (2018) (“moderate living” standard requires protection of continued supply of fish). Plaintiffs seek to prevent Reclamation from releasing water through Project facilities for purposes of providing necessary flows to keep SONCC coho in the Klamath River from going extinct. These instream flows are also necessary for non-listed Chinook. Plaintiffs’ suit is an attempt to subordinate, as a practical matter, Hoopa’s senior entitlement to water for fish and ESA protections. Nelson Declaration (Dkt. #22), ¶ 15-16, 19-20; Orcutt Declaration (Dkt. #23), ¶ 24-28, 30. Hoopa is a required party.

C. Reclamation’s Project Operations Cause Direct and Significant Harm to Hoopa’s Reserved Fishing and Water Rights.

Subsequent to the Reservation’s establishment, anadromous fish of the Klamath River, including Chinook and Coho, have suffered significant harm from upstream impacts, including the Project, which diverts large amounts of water that would otherwise flow through the Klamath

River for the benefit of salmon. *PCFFA v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1085-87 (9th Cir. 2005). These impacts include habitat loss, increased water temperatures, and fish disease that thrives when fish must crowd together in low flows and increased water temperatures. *Id.*; *Hoopa Valley Tribe*, 230 F. Supp. at 1112 (enjoining Reclamation to release water to mitigate disease impacts to downstream Coho, which were also suffered by Chinook).

Federally owned Link River Dam, constructed for Project purposes in 1917, regulates Klamath River flows, blocking the majority of natural flow from reaching the Klamath River and the Reservation and depriving fish of water necessary for habitat and life functions. Project operations change the quantity of water that flows in the Klamath River as well as the timing of such flows in a way that varies from a natural flow regime. Water released from Link River Dam (a Project facility) proceeds through the downstream and privately-owned Klamath Hydroelectric Project (“KHP”) and ultimately into the Klamath River at Iron Gate Dam, which is part of the KHP and the furthest dam downstream on the River. The KHP has minimal reservoir storage capacity and, since 1996, flows in the Klamath River downstream of Iron Gate Dam have primarily been a function of the minimum water releases ordered by Reclamation for ESA compliance and tribal trust purposes from upstream Link River Dam. *PCFFA v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1232 (N.D. Cal. 2001); *Patterson*, 204 F.3d at 1212-13 (Reclamation controls releases from Link River Dam to provide flow in Klamath River).³

³ The KHP is subject to a federal license issued by the Federal Energy Regulatory Commission that requires minimum flow releases from Iron Gate Dam that also depend on releases from Link River Dam. *Patterson*, 204 F.3d at 1209-10. Due to the impacts that Plaintiffs’ suit would have on KHP license implementation and the ability to meet minimum flow requirements, PacifiCorp (the licensee) is also a required party that has not been joined.

Since 1996, Reclamation has operated the Project with operating plans that identify minimum flow levels in the Klamath River downstream of Iron Gate Dam for salmon protection. *PCFFA*, 138 F. Supp. 2d at 1232. Flows released from Link River Dam and ultimately from Iron Gate Dam downstream contribute the majority of instream flows utilized by fish in the Klamath River between Iron Gate Dam and the Trinity River confluence at the Hoopa Reservation. *PCFFA*, 426 F.3d at 1085 (“The flows past the Iron Gate dam into the Klamath River determine to a great extent the quantity of water available in the river.”). This is especially true in comparably dry years. Orcutt Decl. (Dkt. #23), ¶ 8. Following a massive anadromous fish kill that occurred in the Klamath River in 2002⁴, a report found that water releases from Iron Gate Dam made up 88% of the flow in the Klamath River 60 miles downstream and 73% of the flow in the Klamath River 130 miles downstream of Iron Gate Dam. Dkt. #24-3, pp. 16-17.

Coho are one species of anadromous salmon that historically thrived in the Klamath River that was harvested by Hoopa people. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1137 (describing Hoopa reliance on coho for “their subsistence, cultural identity, rituals, and economic well-being”). In 1940, SONCC coho salmon populations ranged between 150,000 and 400,000 naturally spawning fish annually. 62 Fed. Reg. 24588 (May 6, 1997). By 1997, this number had dropped to approximately 10,000 naturally produced adults. *Id.* Due to their depressed condition, the National Marine Fisheries Service (NMFS) listed coho in the Klamath River as threatened under the ESA. *Id.* NMFS found depletion, storage, and alteration of natural flows,

⁴ In 2002, following Reclamation’s resumption of Project deliveries and corresponding diminished Klamath River flows, an unprecedented fish kill of over 33,000 anadromous fish occurred in the lower Klamath River. *PCFFA*, 426 F.3d at 1089.

with the associated loss of habitat, increase in water temperature, and increased disease risks to be a major factor leading to the depressed populations. *Id.* at 24593-24595.

Being listed as “threatened,” the ESA restricts unauthorized “take” of coho in the Klamath River, including harvest, in order to avoid jeopardy and promote species recovery. 16 U.S.C. § 1538. The depleted populations and ESA take restrictions have significantly limited the Tribe’s ability to harvest coho since 1997. However, the Project impacts, ESA-listing, and currently depressed status of coho, do not affect, as a legal matter, Hoopa’s federal reserved rights to harvest coho or the United States’ affirmative obligation to act to preserve and restore that fishery for the Tribe’s benefit. *Parravano*, 70 F.3d at 547 (“the Tribes’ federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights”); *Washington*, 853 F.3d at 965-66 (holding State of Washington violated treaties promising an adequate supply of fish to provide a “moderate living” to Tribes by building culverts that diminished supply of anadromous fish for harvest).

Project impacts on natural flows and anadromous salmon in the Klamath River are well-documented. In 2013, NMFS prepared a Biological Opinion for the Project (the “2013 BiOp”), which confirmed that Project deliveries significantly impact flow levels and anadromous fish habitat in the Klamath River downstream of Iron Gate Dam.⁵ Fish disease resulting largely from depleted flow levels caused by Project diversions is a significant factor limiting survival and recovery of coho. 2013 BiOp, pp. 220, 222, 341 (“disease effects . . . likely have a substantial impact on the survival of juvenile coho salmon in [the Upper Klamath River reach].” “Of all the adverse effects of [Project operations], NMFS believes that the disease risk from *C. shasta* is

⁵The 2013 BiOp is available at:
<https://www.fws.gov/klamathfallsfwo/news/2013%20BO/2013-Final-Klamath-Project-BO.pdf>

the most significant to coho salmon.” *Id.*, p. 377. “NMFS believes the high incidence of disease in certain years within the mainstem Klamath River results largely from the reduction in magnitude, frequency, and duration of mainstem flows from the natural flow regime under which coho salmon evolved.” *Id.*, p. 341. This change in natural flow primarily results from the Klamath Project, which blocks flows at Link River Dam from entering the Klamath River.

Reclamation’s Project operations under the 2013 BiOp, combined with extremely dry conditions, led to recorded juvenile disease rates of 81% in 2014 and 91% in 2015. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1112. Despite these extraordinary impacts, Reclamation did not modify Project operations to address the disease outbreak and then vigorously opposed (with support from Plaintiffs here) Hoopa’s request for additional protective flows for fish in subsequent litigation. *Id.* at 1113-1146. Ultimately, the Court ordered an injunction requested by Hoopa over Reclamation’s (and Plaintiffs) objection, which required Reclamation to provide additional flow downstream for the protection of SONCC coho from disease impacts. *Id.* at 1146. That injunction remained in effect until NMFS released the new Biological Opinion in March 2019 that evaluated Reclamation’s Project operations that Plaintiffs now challenge here.⁶

Impacts to downstream salmon associated with Project operations have caused substantial litigation between Hoopa, Reclamation, and Plaintiffs, in which courts have unanimously confirmed Reclamation’s legal obligation to operate the Project in a manner that satisfies its ESA obligations and preserves senior tribal rights. *Baley*, 134 Fed. Cl. at 679-80, *aff’d*, 942 F.3d at 1335-1341 (Fed. Cir. 2019) (denying compensation to Klamath Basin irrigators for water

⁶ In July 2019, Hoopa submitted a notice of intent to sue Reclamation and NMFS because the flows provided in Reclamation’s 2019 operations plan, and approved by NMFS in the 2019 BiOp, violate the ESA and APA for failing to adequately protect SONCC coho. Dkt. #24-4. In November 2019, Reclamation and NMFS reinitiated consultation regarding Project operations. This reinitiated consultation will likely lead to a revised operations plan for 2020 and new BiOp.

released by Reclamation for ESA and tribal trust purposes in 2001 because tribal [Hoopa] water rights are senior and consist of at least the amount of water necessary for ESA compliance); *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1146 (enjoining Reclamation to release additional flow into Klamath River for protection of ESA-listed coho); *Patterson*, 204 F.3d at 1214 (Reclamation must release water from Link River Dam as needed to fulfill downstream Tribes' rights "that take precedence over any alleged rights of the Irrigators"); *Kandra*, 145 F. Supp. 2d at 1204-06 (denying irrigators' request to enjoin Reclamation's 2001 operations plan, finding that "Reclamation . . . has a responsibility to divert the water and resources needed to fulfill the Tribes' rights"); *PCFFA*, 138 F. Supp. 2d at 1251 (enjoining Reclamation from making Project deliveries when flows at Iron Gate Dam drop below levels necessary for coho). Reclamation's legal duty to release water for senior tribal rights and its ESA obligations takes precedence over any obligation to make irrigation deliveries. *Id.* Plaintiffs now seek declaratory relief that would directly conflict with these prior precedents and that would effectively reverse the established priority of water rights on the Klamath River – requiring full and complete satisfaction of Plaintiffs' junior rights regardless of impact on Hoopa's senior rights and regardless of impact that such diversions have on downstream fish, including those protected under the ESA.

Chinook salmon, another anadromous salmon species harvested by Hoopa with similar biological and habitat needs as coho, also suffer impacts from the low flows and unnatural flow regime caused by Project operations. Chinook were the primary victims of the 2002 fish kill that followed resumption of Project deliveries. *PCFFA*, 426 F.3d at 1089. In 2014 and 2015, 81% and 91% of sampled juvenile Chinook (used as a surrogate to measure disease levels in coho) were infected with *C. shasta* disease primarily in reaches of the Klamath River between Iron Gate Dam and the Reservation. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1112. In 2019,

California enacted regulatory protections and harvest restrictions for Spring Chinook in the Klamath River due to their increasingly imperiled status. Orcutt Decl. (Dkt. #23), ¶ 21. In 2018, NMFS published a 90-day finding on a petition to list the Upper Klamath-Trinity Rivers Chinook salmon as threatened or endangered under the ESA. 83 Fed. Reg. 8410 (2/27/18). NMFS identified disease associated with low flows and high temperatures as a primary threat to Chinook that warranted further investigation into the possible ESA-listing. 83 Fed. Reg. 8413. In 2017, due to depressed Klamath River Fall Chinook (KRFC) stocks, the Pacific Fishery Management Council closed all fishing in the Klamath Management Zone and restricted other ocean fisheries to the north and south. The combined tribal harvest allocation for adult KRFC in 2017 for the Hoopa and Yurok Tribes was limited to 814 fish to be divided amongst the two tribes, who have a combined membership of approximately 10,000 members. That tribal harvest allocation equated to less than one fish per ten tribal members for all of 2017. Dkt. #23, ¶ 14.

Development and operation of the Project has helped decimate a once-thriving fishery to near extinction. Klamath River flows at and upstream of the Reservation are governed primarily by Reclamation's Project operations and its releases out of Link River Dam and the subsequent releases from Iron Gate Dam. Reclamation's releases for protection of coho, required by the ESA, also help Chinook. Plaintiffs now seek relief to declare unlawful and preclude water releases for fish. Such relief would have a devastating, irreparable impact on the fish resources relied on and reserved by Hoopa, which are already in an imperiled condition due to the Project and other causes. Dkt. #23, ¶ 26-27, 30. Plaintiffs' suit and requested relief would directly impair Hoopa's reserved rights and cause significant prejudice to Hoopa. This case may not proceed in the absence of Hoopa, a required party that cannot be joined due to its sovereign immunity.

D. Plaintiffs Seek to Prevent Instream Water Releases for Fish, Which Would Impede and Impair Both ESA Compliance and Hoopa's Reserved Rights.

Plaintiffs challenge Reclamation's 2019 Project operations plan, approved in a BiOp issued by NMFS and FWS in March 2019, which allocates specific amounts of instream flow to Klamath River for fish. Such instream flows are required by the ESA (through the BiOp) and simultaneously fulfill, in part, Hoopa's senior reserved rights.⁷

Plaintiffs claim Reclamation's releases of water for downstream instream purposes (ESA compliance and fulfillment of Hoopa's reserved rights) are unlawful due to alleged impact to the Plaintiffs' junior water rights. Klamath Irrigation District ("KID") asks the Court to declare Reclamation's use of water for instream purposes (ESA and tribal trust) unlawful. Dkt. #70, ¶¶ 4(a)-(b), 71, 72. KID also seeks a declaration that Reclamation may not limit water deliveries to Plaintiffs on grounds that such water is required for downstream flow releases. *Id.* KID also argues that it is entitled to compensation for deprivation of its alleged rights. *Id.*, ¶¶ 26, 47, 73.

Shasta View⁸ seeks declaratory relief to prevent curtailment of Plaintiffs' water rights for any reason, including but not limited to ESA compliance or senior tribal water rights. Dkt. #73, ¶¶ 64-66. Shasta View claims that Reclamation regulates the Project for "environmental objectives" which limits water deliveries to Plaintiffs. *Id.*, ¶ 57. Shasta View claims that Reclamation acts *ultra vires* by curtailing deliveries of water to Plaintiffs when such curtailment

⁷ Plaintiffs have not sued NMFS and do not directly challenge the 2019 BiOp in this litigation. To avoid liability under the ESA, Reclamation must comply with terms and conditions of the 2019 BiOp as well as its statutory obligations under the ESA. *Bennett v. Spear*, 520 U.S. 154, 169-70 (1997) (explaining that federal agencies (like Reclamation) are effectively compelled to comply with requirements of Biological Opinions due to the significant liability that may result from unlawfully taking species listed under the ESA). Plaintiffs' requested relief would directly conflict with Reclamation's continuing legal obligations under the ESA.

⁸ "Shasta View" refers to all Plaintiffs in Case No. 19-cv-531, consolidated here.

occurs under the ESA. *Id.*, ¶ 76. Shasta View seeks a declaration that Reclamation’s collection, retention, and use of stored water for ESA-listed species in the Klamath River is unlawful. *Id.*, ¶ 92. Shasta View seeks a declaration that Reclamation may not cap Plaintiff’s use of water for ESA compliance. *Id.*, ¶ 96. Shasta View further seeks remand to Reclamation with direction to comply with the declaratory orders it seeks. *Id.*, Prayer for Relief, No. 5.

Plaintiffs seek relief designed to prohibit Reclamation from releasing any water from UKL or through Link River Dam for instream fish purposes into the Klamath River. Compliance with such an order would require Reclamation to violate the ESA and would also unlawfully prevent fulfillment of Hoopa’s reserved rights, effectively subordinating (as a practical matter) Hoopa’s senior rights to Plaintiffs’ junior rights upstream. Any proceeding that could result in such an extreme and devastating impact on Hoopa and its rights cannot go forward in Hoopa’s absence. *See* Nelson Declaration (Dkt. #22); Orcutt Declaration (Dkt. #23).

III. ARGUMENT AND AUTHORITY

A. Legal Standard for Rule 12(b)(7) Motion.

FRCP 12(b)(7) authorizes dismissal of an action for failure to join a party required to be joined by FRCP 19. In evaluating this motion to dismiss, the court “must undertake a two-part analysis: it must first determine if an absent party is [required]; then, if as here, 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.

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.

Hoopa is required pursuant to Rule 19(a)(1)(B)(i) because Hoopa claims an interest relating to the subject of the action [i.e., water and fish resources of the Klamath River] and is so situated that disposing of the action in Hoopa's absence would as a practical matter, impair or impede Hoopa's ability to protect its interest. Hoopa is separately required pursuant to Rule 19(a)(1)(B)(ii) because disposing of the action in Hoopa's absence would leave Reclamation subject to inconsistent obligations because of Hoopa's interest. Hoopa is also required under Rule 19(a)(1)(A) because Plaintiffs cannot obtain complete relief in Hoopa's absence. Although Hoopa is required, Hoopa cannot be joined due to its sovereign immunity. *Michigan v. Bay Mills Indian Community*, 572 U.S. ____ (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).

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." FRCP 19(b). FRCP 19(b) sets forth four non-exclusive factors for the Court to consider to determine whether to dismiss the case: (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. None of the factors, which partially overlap with the necessary party analysis, are determinative.

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. *Dine Citizens*, 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).

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). This case addresses Plaintiffs' competing claims to waters of the Klamath River that are junior in priority to Hoopa's competing senior rights. There is insufficient water to fully satisfy Plaintiffs rights while also satisfying Hoopa's rights. Dkt. #23, ¶ 28. Hoopa is a required party.

In equity and good conscience, this case cannot proceed without Hoopa. *Id.* A judgment in Hoopa's absence would significantly prejudice its interest in fulfillment and protection of its reserved fishing and water rights. There is no way this prejudice can be lessened because this case involves conflicting and mutually exclusive interests in finite natural resources. If Plaintiffs prevail, Reclamation will have conflicting legal obligations to Hoopa (and under the ESA) which will likely lead to further litigation. Plaintiffs will not be left without a forum, as they can pursue monetary damages in the U.S. Court of Federal Claims (CFC), which would not require Hoopa's presence, if they contend Reclamation violated their contract or Fifth Amendment rights.

B. Hoopa Is A Required Party Because the Relief Sought by Plaintiffs Would Impair or Impede, As A Practical Matter, Hoopa's Reserved Fishing Rights and Senior Reserved Water Rights Without Their Participation.

A party is required to be joined under Rule 19 if it claims a legally protected interest in the subject matter of the lawsuit and is so situated that the litigation as a practical matter would impair or impede their ability to protect it. *Hull*, 305 F.3d at 1023; *Shermoen*, 982 F.2d at 1317. The finding that a party is required is predicated only on that party having a claim to an interest. *Shermoen*, 982 F.2d at 1317. The person need not have a vested interest to be required under Rule 19(a). *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999). “Just adjudication of claims requires that courts protect a party’s right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party. *Shermoen*, 982 F.2d at 1317. “That the Tribes could litigate the issue [in the future] free of the constraints of res judicata and collateral estoppel does not by itself excuse their absence as necessary parties. Otherwise Rule 19(a) would become a nullity” *Hull*, 305 F.3d at 1024.

1. Hoopa's Interests in Fish and Water of the Klamath River Would be Directly Impaired or Impeded as A Practical Matter by Plaintiffs' Litigation.

Hoopa has a legally protected interest in federal reserved fishing and senior water rights that would be directly impaired and impeded if the Court grants the relief Plaintiffs seek. Orcutt Decl., Dkt. #23; Nelson Decl., Dkt. #22. On Hoopa's intervention motion, this Court ruled that Hoopa “has an interest in the waters that flow from Upper Klamath Lake that passes through the Klamath Project facilities into the Klamath River downstream.” Dkt. #61, p. 4; *see also Baley*, 942 F.3d at 1339 (Hoopa's “reserved water rights encompass Klamath Project water”). This Court also found that Plaintiffs' suit would impair or impede Hoopa interests. Dkt. #61, pp. 4-5. The interest analyses under Rules 19 and 24(a) are substantially identical. Moore's Fed. Practice [3d. ed], § 19.02[5][c] (operative language of Rule 19(a)(1)(B)(i) and Rule 24(a)(2) is identical

and the two rules are intended to mirror each other). Here, the Court should reach the same conclusions as it did in the intervention context and find that Hoopa is a required party.

Plaintiffs claim Reclamation's releases of water for downstream instream purposes (ESA compliance and fulfillment of Hoopa's reserved rights) are unlawful due to alleged impact to the Plaintiffs' junior water rights. Plaintiffs seek declaratory and other relief to prohibit Reclamation from releasing water from UKL or through Link River Dam into the Klamath River for instream purposes, such as protection of fish (whether ESA-listed or not) or fulfillment of Hoopa's federal reserved rights. Plaintiffs seek to prohibit Reclamation from limiting water deliveries to Plaintiffs regardless of impact to Klamath River fish and water resources and Hoopa's senior rights. Hoopa's interests in water and fish in the Klamath River depend on Reclamation releasing water through Klamath Project facilities. An order declaring such releases unlawful would directly and severely impair Hoopa's interests in fish and water resources in the Klamath River. Orcutt Decl. (Dkt. #23), ¶ 25-30; Nelson Decl. (Dkt. #22), ¶ 15-16, 20. Thus, Hoopa is a required party. *Dine Citizens*, 932 F.3d at 852 (party has legally protected interest at stake "where the effect of a plaintiff's successful suit would be to impair a right already granted").

This case addresses, as a practical matter, Plaintiffs' claims to the finite resource of waters of the Klamath River, which compete with and are mutually exclusive to Hoopa's senior rights. Plaintiffs do not ask this Court to quantify Hoopa's water rights or adjudicate the relative entitlements amongst the respective interstate water claimants. Yet Plaintiffs seek an order that would, without any interstate adjudication or quantification of respective rights, declare unlawful the release of water from Link River Dam into the Klamath River for instream fish flows and would require Reclamation to fully satisfy Plaintiffs' junior water rights regardless of impact to Hoopa. Such an order would directly contravene Hoopa's legally protected senior rights.

In *Verity*, the Ninth Circuit found that absent tribes were required parties to a suit challenging and seeking reallocation of ocean fishing harvest quotas. “The absent tribes had an interest in the suit because ‘any share that goes to the [plaintiff] Makah must come from other tribes.’” *Verity*, 910 F.2d at 559. “Claims for allocation of a limited resource do not present a situation in which multiple parties share compatible interests, but rather are more analogous to a request by a beneficiary to allocate a common fund.” *Goldmark*, 994 F. Supp. 2d at 1187-88. Where granting one share of a resource would come out of the share of the absent party, “such circumstances ‘present a textbook example . . . where one party may be severely prejudiced by a decision in his absence.’” *Id.* at 1188; *Hood ex rel. Mississippi v. City of Memphis*, 533 F. Supp. 2d 646 (N.D. Miss. 2008) (Tennessee was necessary party to Mississippi’s suit to enjoin Memphis from pumping groundwater claimed by Mississippi; the Court could not grant relief without Tennessee in suit because the states’ respective rights in aquifer were not determined).

Hoopa’s federal reserved water rights are senior in priority to Plaintiffs’ junior rights. *Baley*, 942 F.3d at 1335-1341. Prior appropriation principles require fulfillment of Hoopa’s rights prior to any of Plaintiffs’ rights. *Id.* The relief sought by Plaintiffs here would turn those principles on their head – requiring Plaintiffs’ junior rights to be satisfied before any water could be released for Hoopa’s downstream senior rights or for ESA compliance. The law does not support Plaintiffs’ claims.⁹ But due to the significant prejudice that this case would have on Hoopa’s interests, the Court cannot proceed to adjudicate Plaintiffs’ claims in Hoopa’s absence.

⁹ Plaintiffs have been wholly unsuccessful making similar claims. *Baley*, 134 Fed. Cl. at 679-80 (Reclamation’s withholding of water from plaintiffs to satisfy ESA and tribal trust obligations was not improper taking of plaintiffs’ water rights), *aff’d*, 942 F.3d at 1335-1341 (Plaintiffs water rights are subordinate to Hoopa federal reserved water rights); *Patterson*, 204 F.3d at 1214 (Reclamation must release water from Link River Dam to fulfill downstream Tribes’ rights “that take precedence over any alleged rights of the Irrigators”); *Kandra*, 145 F. Supp. 2d at 1204-06 (denying irrigators’ request to enjoin Reclamation’s 2001 operations plan,

Hoopa also has a specific interest in ensuring that Reclamation continues to release water out of UKL as necessary to protect threatened SONCC coho, a tribal trust species, from jeopardy in compliance with the ESA. The ESA prohibits any operation of the Klamath Project or water deliveries to Plaintiffs that could jeopardize listed species. In 2017, Hoopa obtained injunctive relief against Reclamation that led to preparation of a new BiOp to govern Klamath Project operations in compliance with the ESA. *Hoopa Valley Tribe*, 230 F. Supp. 3d 1106. That new BiOp, published in 2019, led to Reclamation's approval of the Klamath Project Operating Procedures challenged by Plaintiffs here. The 2019 BiOp requires Reclamation to set aside water and make specific releases into the Klamath River for protection of SONCC coho. Now here, in separate litigation in Hoopa's absence, Plaintiffs argue that such releases are unlawful. Plaintiff's suit, if successful, would directly impair Hoopa's interests in protection of tribal trust species in the Klamath River and the benefits of its prior litigation. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897-98 (9th Cir. 2011) (intervenors had protectable interest in federal administrative order that arose from prior litigation prosecuted by intervenors). Hoopa is a required party under FRCP 19 and this case must not proceed in its absence.

2. Reclamation Cannot Adequately Represent Hoopa's Interests.

Hoopa is not adequately represented here by Reclamation.¹⁰ Reclamation's interest is not the same as Hoopa's in this litigation. Reclamation has conflicts of interest due to competing responsibilities to Plaintiffs as well as competing duties to other Klamath Basin tribes. Reclamation has repeatedly failed to protect Hoopa's rights from impacts arising from the Klamath Project and has negotiated against Hoopa's rights without its consent or approval.

finding "Reclamation . . . has a responsibility to divert the water and resources needed to fulfill the Tribes' rights").

¹⁰ "Reclamation" collectively refers to all Federal Defendants named herein.

Nelson Decl. (Dkt. #22), ¶¶ 22-25; Orcutt Decl. (Dkt. #23), ¶ 29. In granting Hoopa intervention under FRCP 24(a)(2), this Court ruled that Reclamation does not adequately represent Hoopa's interests here. Dkt. #61, pp. 5-7. The adequacy of representation analysis under FRCP 24(a) parallels that under FRCP 19(a). *Shermoen*, 982 F.2d at 1318. As in the intervention context, the Court should find that Reclamation is not an adequate representative of Hoopa here.

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).

Reclamation will not "undoubtedly" make all of Hoopa's arguments. Hoopa is directly interested in how this proceeding would affect, as a practical matter, its federal reserved fishing and water rights, which are central to its culture, subsistence, and very existence. Reclamation has a different general interest in defending their 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 Hoopa’s federal reserved fishing and water rights and the fish and water resources that Hoopa relies upon. Nelson Decl. (Dkt. #22); Orcutt Decl. (Dkt. #23). Only Hoopa can adequately present and defend its distinct interest in the affected fish and water resources, and its interest in sovereign immunity.

The divergence of interests and potential arguments has already arisen here as Reclamation rejected Hoopa’s request that Reclamation file a motion to dismiss Plaintiffs’ litigation pursuant to FRCP 12(b)(7) for failure to join Hoopa and other required tribes. Somerville Decl. (Dkt. #24), ¶¶ 2-3. Despite a shared general interest in having Plaintiffs’ suits dismissed, Reclamation’s attorneys cited a pending case in which the United States argued that it is the only necessary Defendant in cases arising under the APA that challenge federal compliance with environmental laws like NEPA and the ESA. In that case, the District Court rejected the United States’ argument and dismissed the action for failure to join a required Indian tribe. *Dine’ Citizens*, 932 F.3d at 850. On July 29, 2019, the Ninth Circuit affirmed the Rule 19 dismissal, agreeing that the United States was not an adequate representative of the tribal entity and that the public rights exception did not apply.¹¹ *Id.* at 854-861. Here, Reclamation declined

¹¹ The United States’ argument in *Dine Citizens* was an unsupported attempted expansion of the “public rights” doctrine that allows, where appropriate, cases to proceed despite Rule 19 concerns. Courts narrowly apply the “public rights” doctrine to situations where the litigation “transcend[s] the private interests of the litigants and seek[s] to vindicate a public right.” *Kescoli*, 101 F.3d at 1311. If the requested relief would operate to destroy an absent party’s protected legal rights or entitlements, the public-rights doctrine is inapplicable and dismissal for nonjoinder under Rule 19 is required. *Id.* The “public rights” doctrine is wholly inapplicable here because Plaintiffs seek to protect their private rights. Dkt. #70, ¶ 1 (Plaintiff “brings this action . . . to protect their private property rights”); Dkt. #73, ¶ 38-41 (alleging harm to economic

Hoopa's request to move to dismiss under FRCP 12(b)(7) and stated they might oppose any such motion. Somerville Decl. (Dkt. #24), ¶ 3. Reclamation's position was not based on the merits of the proposed 12(b)(7) motion, facts specific to this case, or the merits of this litigation, but was based instead on the Department of Justice's general interest in taking consistent positions in its nation-wide litigation. *Id.* Reclamation also declined to file a motion to dismiss under FRCP 12(b)(6) in conflict with interests of Klamath Basin tribes. Somerville Decl. (Dkt. #24), ¶ 2-4.

Reclamation does not have the same interests as Hoopa and will not undoubtedly make all Hoopa's arguments. *Amador County*, 554 Fed. Appx. at 564 (United States failure to move for dismissal indicated divergence between tribal and federal interests). Without Hoopa's presence, Reclamation could continue to take litigation and settlement positions (based on general policies unrelated to Hoopa interests) that fail to adequately reflect and protect Hoopa's specific interests. Nor has Reclamation given any indication of any intent to represent Hoopa's interests in this litigation, as it "took no position" on Hoopa's intervention motion in which Hoopa affirmatively claimed Reclamation was an inadequate representative here. Dkt. #40.

Reclamation is not capable or willing to make all of Hoopa's arguments. The United States is not an adequate representative for an absent Tribe where a specific conflict of interest exists between the United States and the Tribe in the context of the case at issue. *Alto v. Black*, 738 F.3d 1111, 1128 (9th Cir. 2013) ("To be sure, conflicts can arise between the United States

interests and private rights). Plaintiffs seek to elevate their own private rights above Hoopa's rights without joining Hoopa. *Kescoli*, 101 F.3d at 1311-12 (finding plaintiff's suit was primarily private in nature, focused on private rights, and rejecting application of public rights doctrine). Proceeding with such a suit, which threatens to destroy Hoopa's legal entitlements in Hoopa's absence, is not permissible under FRCP 19 and Plaintiffs' suits must be dismissed. *Dine Citizens*, 932 F.3d at 858-861 (rejecting "public rights" doctrine, dismissing action under Rule 19); *Shermoen*, 982 F.3d at 1319 (same); *Amador County*, 554 Fed. Appx. at 566 (same); *Kescoli*, 101 F.3d at 1311-12 (same); *Hull*, 305 F.3d at 1025-27 (same).

and an Indian tribe; when they do, the government cannot adequately represent the Tribe's interests [though BIA was found to be an adequate representative in *Alto* due to no apparent conflict]”). Conflicts of interest preclude a finding of adequate representation where Federal Defendants owe trust duties to multiple tribes with conflicting interests in the litigation.

Manybeads v. United States, 209 F.3d 1164, 1166-67 (9th Cir. 2000); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994); *Pit River Home and Agricultural Coop. Ass'n v. United States*, 30 F.3d 1088 (9th Cir. 1994); *Conf. Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991); *Shermoen*, 982 F.3d at 1318; *Verity*, 910 F.2d at 560.

Reclamation cannot adequately represent Hoopa's interests here because a conflict exists relating to Reclamation's trust duties to provide water to satisfy the rights of the respective upstream and downstream Klamath Basin tribes. Hoopa (and Yurok) are downstream tribes that have rights and interests in water being released from Link River Dam for salmon. The upstream Klamath Tribes have rights and interests in water being retained in UKL for protection of suckers. *Baley*, 134 Fed. Cl. at 671. Broadly speaking, water kept in UKL benefits suckers, potentially to the detriment of salmon downstream; in contrast, water released downstream cannot be used for needs of suckers in UKL after its release. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1140. Release of water for Project irrigation harms both salmon and suckers. *Id.*

Reclamation presented this conflict between its obligations to upstream and downstream interests as a defense in *Hoopa Valley Tribe*. Opposing injunctive relief sought by Hoopa (and Yurok) in that litigation, Reclamation argued that release of additional water from UKL for salmon protection downstream could jeopardize sucker fish in UKL, which are a trust resource of the Klamath Tribes. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1140-42. Instead of reducing Project deliveries and providing water necessary for all ESA-listed species, Reclamation

vigorously opposed Hoopa's suit, in part, by pitting Reclamation's upper basin responsibilities against Hoopa's lower basin interests. *Id.* Reclamation cannot adequately represent Hoopa's interest here due to its competing tribal trust and ESA duties to upper basin resources. *Lujan*, 928 F.2d at 1500 (representation inadequate where "United States cannot adequately represent [absent tribe's] interest without compromising the trust obligations owed to [other] tribes").

There is also a conflict of interest between Reclamation's obligations to Hoopa and its obligations to Plaintiffs. Reclamation is responsible for delivering water to which Plaintiffs may be entitled from the Project to the extent consistent with federal law. Reclamation's obligations to Plaintiffs conflict with Hoopa's interest in maintaining flows in the Klamath River for fish. *NRDC v. Kempthorne*, 539 F. Supp. 2d 1155, 1188 (E.D. Cal. 2008) (United States was not adequate representative for absent water contractors in ESA litigation because "the Bureau is obligated to provide water under the contracts and to comply with the ESA at the same time."). Here, Reclamation has competing obligations to multiple parties with divergent interests in a limited water resource. *PCFFA*, 426 F.3d at 1085-86 (noting Reclamation's water management is especially difficult on Klamath River due to limited supply and many competing obligations). Managing the Project, Reclamation has regularly favored Plaintiffs' interests over Hoopa's interests. Nelson Declaration (Dkt. #22), ¶¶ 24-25; Orcutt Declaration (Dkt. #23), ¶ 29.

The specific history relating to Reclamation's management of the Klamath Project shows that it cannot adequately represent Hoopa's interests in this litigation. Hoopa (and other Klamath Basin tribes) have repeatedly sued or intervened against Reclamation for failure to adequately protect fish and water resources in the Klamath Basin from Project impacts. *See, e.g., Yurok Tribe v. U.S. Bureau of Reclamation*, Case No. 19-cv-4405-WHO (N.D. Cal.) (seeking injunction to protect SONCC coho from irreparable harm resulting from Reclamation's 2019

operations plan); *Klamath Tribes v. U.S. Bureau of Reclamation*, Case No. 18-cv-3078-WHO (N.D. Cal.) (seeking injunction to maintain water in UKL for protection of ESA-listed tribal trust resources); *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1106-46 (obtaining injunction against Reclamation requiring additional downstream flow released from UKL for protection of ESA-listed tribal trust resource); *PCFFA/Yurok Tribe v. U.S. Bureau of Reclamation*, 2005 U.S. Dist. LEXIS 36035 (N.D. Cal., March 8, 2005) (lawsuit alleging that Reclamation violated federal reserved fishing right of Yurok Tribe by failing to release adequate flow into Klamath River from UKL); *PCFFA*, 426 F.3d at 1082-94 (tribes intervened in support of challenge to Reclamation's project operations in 2002). This history of conflict and demonstrated failure of Reclamation to adequately protect Hoopa's interests from Project impacts further shows that Hoopa would add a necessary element to this litigation and that Reclamation cannot adequately represent Hoopa's interests here. Dkt. #22, ¶¶ 22-25; Dkt. #23, ¶ 29. *White*, 765 F.3d at 1027 (State University not adequate representative for absent tribal interests where their respective interests may "not necessarily remain aligned"); *Pac. NW Generating Coop v. Brown*, 822 F. Supp. 1479, 1511 (D. Or. 1993) (finding past litigation history relevant to inquiry).

Reclamation's multiple and conflicting obligations could lead (and have led) to taking litigation or settlement positions that Hoopa would not take or that conflict with Hoopa's interests. This is not unwarranted speculation. In 2009, the United States executed a conditional stipulation in the Oregon Klamath Basin Adjudication that would have guaranteed a set amount of water for Plaintiffs' Klamath Project diversions regardless of the downstream impacts on Hoopa and the fish and water resources it relies upon. *Schlosser*, Dewatering Trust Responsibility: The New Klamath River Hydroelectric and Restoration Agreements, 1 Wash. J. Env'tl. L. & Pol'y 42, 70-72 (2011); Nelson Decl. (Dkt. #22), at ¶ 25. In the conditional

stipulation, once effective, the United States agreed it would not assert tribal water or fishing rights theories or tribal trust theories on behalf of any Klamath Basin tribes (including the non-consenting Hoopa Valley Tribe) unless the Project exceeded its guaranteed water diversion amounts. *Id.* The conditional stipulation did not become effective due in part to Hoopa's relentless public advocacy against it; yet, its execution shows that the United States is willing in certain circumstances to disregard its responsibility to protect Hoopa's federal reserved rights in favor of the Project and Plaintiffs here. Reclamation cannot adequately represent Hoopa here.

3. Reclamation Will Have Conflicting Legal Obligations If Plaintiffs Prevail Without Hoopa's Joinder.

Hoopa will not be bound by any judgment rendered in its absence. *Dawavendewa*, 276 F.3d at 1155. Thus, if Plaintiffs were to prevail in Hoopa's absence, Reclamation would be bound by an order declaring release of water for instream fish flows unlawful while also being legally obligated to operate the Project in compliance with the ESA and to provide water sufficient to fulfill Hoopa's federal reserved water rights. *Baley*, 134 Fed. Cl. at 679-80 (holding government's decision in 2001 to withhold water from plaintiffs in order to satisfy ESA and tribal trust obligations was not improper taking of plaintiffs' water rights), *aff'd*, 942 F.3d at 1335-1341; *Patterson*, 204 F.3d at 1214 (Reclamation must release water from Link River Dam as needed to fulfill downstream Tribes' rights "that take precedence over any alleged rights of the Irrigators"); *Kandra*, 145 F. Supp. 2d at 1204-06 (denying irrigators' request to enjoin Reclamation's 2001 operations plan, finding that "Reclamation . . . has a responsibility to divert the water and resources needed to fulfill the Tribes' rights"). Cases involving competing interests in a scarce resource managed by the Defendant create a risk of inconsistent obligations that require joinder of all claimants. *Goldmark*, 994 F. Supp. 2d at 1187-88. Due to the

competing and mutually exclusive obligations that Reclamation would be left with in Hoopa's absence, Hoopa is required under FRCP 19(a)(1)(B)(ii).

In *Dawavendewa*, an individual sued Salt River Project (SRP) for employing a hiring policy required by SRP's lease with the Navajo Nation that required SRP to preferentially hire Navajos. The plaintiff sought to enjoin SRP from implementing the hiring policy. The Court found Navajo was an indispensable party, in part, because adjudication in the Navajo's absence would leave SRP with "intractable, mutually exclusive alternatives." 276 F.3d at 1158. "If the federal court granted [the] requested injunctive relief, SRP would be between the proverbial rock and a hard place – comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it. If, in resolving this quandary, SRP declines to abide by the injunction and instead continues to comply with its lease obligations, [plaintiff] would not be accorded complete relief. Thus, under Rule 19(a)(1), the Nation is a necessary party." 276 F.3d at 1156.

Here, if Plaintiffs prevail and obtain their requested relief, Reclamation would be between a similar rock and a hard place – faced with the choice of complying with this Court's order requiring, as a practical matter, full water deliveries to Plaintiffs or complying with its competing legal obligations to release water to fulfill the fishing and water rights of the absent Tribe(s) and its continuing legal obligations under the ESA.¹² Should Reclamation fail to honor its legal obligation to release water necessary for Hoopa's rights (or ESA-compliance), Reclamation would certainly be subject to a lawsuit that could result in a directly conflicting injunction. *Keweenaw Bay Indian Community*, 11 F.3d 1141 (6th Cir. 1993) (finding it likely that

¹² For the same reasons, Hoopa is required under FRCP 19(a)(1)(A) because Plaintiffs could not obtain complete relief in Hoopa's absence. Reclamation would be faced with choosing whether to comply with this Court's order requiring full water deliveries to Plaintiffs or its competing federal law responsibilities under the ESA and its tribal trust obligations that require flow releases to protect fish and tribal rights downstream. *Dawavendewa*, 276 F.3d at 1156.

absent tribes would seek legal recourse in the event that the judgment deprived them of fishing rights to which they believe they are entitled). Hoopa is required under FRCP 19(a)(1)(B)(ii).

C. This Action May Not Proceed in Hoopa's Absence.

1. Judgment in Hoopa's Absence Would Prejudice Hoopa and Existing Parties.

A judgment rendered in Hoopa's absence would result in significant prejudice to Hoopa. This first factor of the Rule 19(b) analysis overlaps substantially with consideration of whether an absent party is required under FRCP 19(a). *Dawavendewa*, 276 F.3d at 1162 (“The prejudice to the [Navajo] Nation stems from the same impairment of legal interests that makes the [Navajo] Nation a necessary party under Rule 19(a)(2)(i)”); *Clinton*, 180 F.3d at 1090 (determining prejudice under Rule 19(b) is essentially same inquiry as under Rule 19(a)). As described above, Hoopa will suffer significant prejudice from an order declaring it unlawful for Reclamation to release water for instream fish flows in the Klamath River, which flows are necessary not only to protect ESA-listed (and other) salmon species but also to fulfill Hoopa's senior reserved fishing and water rights. Such an order would as a practical matter subordinate Hoopa's senior rights to Plaintiffs' junior rights. Moore's [3d. ed] § 19.05[2][d] (prejudice may be unavoidable if absentee and party's claims are mutually exclusive; i.e., where case involves competing claims to finite resources). Reclamation will also be prejudiced due to the conflicting obligations that would exist if Plaintiffs prevailed in Hoopa's absence. Hoopa incorporates by reference its arguments relating to FRCP 19(a), which also support dismissal under FRCP 19(b).

Hoopa's right to intervene on the merits does not minimize the prejudice because such intervention would require Hoopa to waive its sovereign immunity, which it has not done here. *Wilbur v. Locke*, 423 F.3d 1101, 1114 (9th Cir. 2005) (intervention right does not minimize potential prejudice to absent tribe, because intervention would require sovereign immunity waiver); *Lujan*, 928 F.2d at 1500 (rejecting argument that absent Indian tribe “could minimize

the potential prejudice by intervening in the action and asserting its interests”); *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986) (“It is wholly at odds with the policy of tribal immunity to put the Tribe to this Hobson’s choice between waiving its immunity or waiving its right not to have a case proceed without it”). Sovereign immunity of a necessary party weighs heavily in favor of dismissal pursuant to Rule 19. *Pimentel*, 533 U.S. at 853 (when sovereign immunity is asserted, and the sovereign’s claims are not frivolous, dismissal must be ordered when there is a potential for injury to the absent sovereign’s interests); *White*, 765 F.3d at 1028 (noting “wall of circuit authority” favoring dismissal where required absent party has sovereign immunity); *Hull*, 305 F.3d at 1025 (noting the Ninth Circuit regularly finds immune Indian tribes indispensable and that other courts find that sovereign immunity of absent party forecloses balancing of interests and requires dismissal under Rule 19(b)).

2. There Is No Way to Shape Relief to Avoid the Prejudice.

“If the claims of a party and absentee are mutually exclusive, prejudice from non-joinder is virtually inescapable.” Moore’s [3d. ed.] § 19.05[2][d]. Here, the nature of Plaintiffs’ claims and requested relief forecloses any possibility to shape relief to avoid prejudice to Hoopa. Plaintiffs seek an order that would require Reclamation to honor Plaintiffs’ water rights in full prior to releasing any water for instream fish flows in the Klamath River downstream. Such an order is directly incompatible with Reclamation’s federal law obligations to provide water for fish under the ESA and its trust obligations to protect and fulfill Hoopa’s federal reserved rights.

Plaintiffs’ claims to the finite water resources of the Klamath River are mutually exclusive to those of Hoopa and other absent tribes. In cases involving competing claims to finite natural resources, courts have found no way to shape relief to avoid prejudice. *Goldmark*, 994 F. Supp. 2d at 1190-91 (no way to eliminate prejudice to absent tribes where tribal claimant sought exclusive authority to manage and harvest 100% of treaty resources to the exclusion of

other treaty tribes); *Verity*, 910 F.2d at 560 (no way to shape remedy where only “adequate” remedy would be at expense of absent tribes). When the parties’ interests are in a specified percentage of the pie, and the combined claims exceed 100% of the pie, the court cannot afford one relief without affecting the rights of the others. *Hodel*, 788 F.2d at 776. Here, there is “not enough pie to satisfy all.” *Id.*; *Verity*, 910 F.2d at 560.

Given the respective needs of Plaintiff irrigators and the fish downstream, Plaintiffs and Hoopa (and others) often compete for the same scarce water resources of the Klamath River at the same times of year. Orcutt Decl., Dkt. #23, ¶ 28. This is especially true in comparably dry years. *Id.*; *Baley*, 134 Fed. Cl. at 678 (Reclamation’s implementation of ESA obligations in 2001 left no water available for Klamath irrigators); *Kandra*, 145 F. Supp. 2d at 1197-99 (noting competing water demands in Klamath Basin). For example, flows necessary to limit disease impacts in Spring and early Summer directly compete with Plaintiffs’ irrigation needs during that same time. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1146 (entering injunction to make additional flow available from April 1 through June 15 to mitigate disease impacts). Water demands of Plaintiffs and Hoopa (and the Klamath Tribes upstream) often collectively exceed 100% of available water in the Klamath River. *Baley*, 134 Fed. Cl. at 678; *Kandra*, 145 F. Supp. 2d at 1197-99. There is insufficient water to satisfy Plaintiffs’ claims while adequately protecting ESA-listed species and Hoopa’s senior reserved rights downstream. Dkt. #23, ¶¶ 28, 30.

Plaintiffs seek an order that would effectively result in their rights superseding Reclamation’s obligations to provide flows for fish pursuant to the ESA and its tribal trust responsibilities. Even though their rights are junior to Hoopa under governing principles of prior appropriation and federal reserved rights, Plaintiffs’ requested relief would require that their rights be satisfied in full prior to Hoopa. Hoopa has a legally protected right to sufficient water

to implement and preserve its federal reserved fishing rights. Any relief that could, as a practical matter, impair or impede its federal reserved fishing or senior water rights would significantly prejudice Hoopa. Nelson Decl. (Dkt. #22); Orcutt Decl. (Dkt. #23). The prejudice cannot be minimized given the limited water resources in the Klamath and the directly competing nature of Plaintiffs' and Hoopa's claims. Plaintiffs' suits must be dismissed pursuant to FRCP 19.

3. Judgment Rendered in Hoopa's Absence Will Not Be Adequate.

The third factor in the Rule 19(b) analysis is “whether a judgment rendered in the [absent party's] absence would be adequate.” FRCP 19(b)(3). Here, the only “adequate” remedy for Plaintiffs would be at the expense of Hoopa who cannot be joined. *Amador County*, 554 Fed. Appx. at 566. Relief that prevents Reclamation from releasing water for instream purposes, or that requires the full water deliveries sought by Plaintiffs here, would conflict with Reclamation's existing and continuing legal duties under federal law. Absent Hoopa's joinder, Reclamation would have to choose which of its competing legal duties to honor – an order that prevents Reclamation from releasing water downstream for fish, or its ESA and tribal trust obligations that require such releases. Any impairment of Hoopa's rights or failure by Reclamation to comply with its ESA obligations would certainly be the subject of another lawsuit to enforce Reclamation's ESA and/or tribal trust obligations which could lead to a separate conflicting judgment and injunction. *Goldmark*, 994 F. Supp. 2d at 1191-92 (judgment would not be adequate “given the significant possibility that Defendants would face subsequent litigation on the same issues with potentially different results by the [absent tribes]”).

4. Plaintiffs Have an Alternative Forum.

The fourth factor in FRCP 19(b) is “whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.” FRCP 19(b)(4). There is likely no alternative forum in which Plaintiffs could obtain the relief they seek in Hoopa's absence, but Plaintiffs do

have an adequate remedy at law, which is a suit for monetary damages in the CFC. *Baley*, 134 Fed. Cl. 619 (seeking monetary damages arising from Reclamation's Project operations in 2001). Availability of this alternative forum favors dismissal here. *Shermoen*, 982 F.2d at 1320-21.

Plaintiffs allege that they have contract rights that have been violated and vested property rights that have been unconstitutionally taken by Reclamation without compensation. The harms allegedly suffered by Plaintiffs are economic; thus, Plaintiffs have an available adequate remedy at law that can be pursued in the CFC. Dkt. #73, ¶¶ 38-42 (alleging that water curtailment will harm Plaintiffs economically and will result in loss of farming income); Dkt. #70, ¶¶ 26, 47 (alleging Reclamation cannot deprive Plaintiffs of their water rights without condemnation or purchase). Shasta View expressly acknowledges and reserves its rights to seek damages in the CFC. Dkt. #73, ¶ 4. The fact that Plaintiffs have an adequate remedy at law in a different forum that does not require Hoopa's joinder supports dismissal under FRCP 19.

Even if Plaintiffs lacked any available forum, dismissal would still be appropriate. A Tribe's interest in sovereign immunity outweighs prejudice arising from lack of an alternative forum. *Dine Citizens*, 932 F.3d at 858; *Amador County*, 554 Fed. Appx. at 566; *Hull*, 305 F.3d at 1025; *Dawavendewa*, 276 F.3d at 1162; *Pit River*, 30 F.3d at 1088, 1102-03; *Lujan*, 928 F.2d at 1500; *Verity*, 910 F.2d at 560; *Goldmark*, 994 F. Supp. 2d at 1192; *Pimentel*, 533 U.S. at 853.

IV. CONCLUSION

Hoopa is a required party because proceeding with this action would, as a practical matter, significantly impair or impede Hoopa's ability to protect its federal reserved fishing and water rights and its interests in protecting tribal trust species pursuant to the ESA. Hoopa's sovereign immunity precludes its joinder in this action and the case cannot in equity and good conscience proceed without Hoopa. The Court should grant Hoopa's motion and dismiss this consolidated action in its entirety with prejudice.

Respectfully submitted this 14th day of February, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2020, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Oregon via the CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

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