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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Medford Division

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KLAMATH IRRIGATION DISTRICT,

Plaintiff,

v.

UNITED STATES BUREAU OF RECLAMATION; DAVID BERNHARDT, Secretary of the Interior, in his official capacity; BRENDA BURMAN, Commissioner of the Bureau of Reclamation, in her official capacity; ERNEST CONANT, Director of the Mid-Pacific Region, Bureau of Reclamation, in his official capacity; and JEFFREY NETTLETON, in his official capacity as Area Manager for the Klamath Area Reclamation Office,

Defendants.

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

Plaintiffs,

v.

UNITED STATES BUREAU OF RECLAMATION; ERNEST CONANT, in his official capacity as the Regional Director of the Mid-Pacific Region of the United States Bureau of Reclamation; JEFFREY NETTLETON, in his official capacity as the Area Manager of the Klamath Basin Area Office of the United States Bureau of Reclamation,

Defendants.

Consolidated Cases

Case No.: 1:19-CV-00451-CL (lead)

Case No. 1:19-cv-00531-CL

**FEDERAL DEFENDANTS' RESPONSE
TO MOTIONS TO DISMISS**

Consolidated Defendants UNITED STATES BUREAU OF RECLAMATION; DAVID BERNHARDT, Secretary of the Interior, in his official capacity; BRENDA BURMAN, Commissioner of the Bureau of Reclamation, in her official capacity; ERNEST CONANT, Director of the Mid-Pacific Region, Bureau of Reclamation (“Bureau”), in his official capacity; and JEFFREY NETTLETON, Area Manager for the Klamath Basin Area Office, Bureau of Reclamation, in his official capacity (“Federal Defendants”), hereby respond to the motions to dismiss filed by the Hoopa Valley Tribes and Klamath Tribes (the “Motions to Dismiss”). *See* ECF Nos. 74 and 75. Although the position of the United States is that it is generally the only required party in litigation challenging final agency action under the Administrative Procedure Act (“APA”), 5 U.S.C. § 704, Federal Defendants do not dispute that the Ninth Circuit’s recent opinion in *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs* (“*Dine Citizens*”), 932 F.3d 843 (2019), is controlling authority in this case under the current state of the law in the Ninth Circuit and supports dismissal.¹

BACKGROUND

Plaintiffs, several irrigation districts and an irrigation water users association, have sued Federal Defendants under the APA to set aside the Bureau’s 2019-2024 Operations Plan for the Klamath Project (“Operations Plan”). The Bureau developed the Operations Plan in conformance with (1) the Endangered Species Act’s (“ESA”) mandate that the agency ensure that actions it authorizes, funds, or carries out do not jeopardize the continued existence of listed species or destroy or adversely modify their designated critical habitat, 16 U.S.C. § 1536(a)(2);

¹ In *Dine Citizens*, the Ninth Circuit denied a petition for rehearing *en banc* on December 11, 2019, *see* Dkt. Entry 85, No. 17-17320 (9th Cir.), but the Appellants in that case have filed with the Supreme Court an application to extend the time to file a petition for a writ of certiorari from March 10, 2020 to March 24, 2020. Dkt. Entry 2, No. 19A934 (S. Ct.). That application describes the petition as “forthcoming.” *Id.* at 6.

(2) reserved water rights held for tribal fishery needs; and (3) contractual agreements with Plaintiffs. The Operations Plan seeks to meet the requirements of the ESA by not diverting water to Project irrigators that would otherwise jeopardize endangered suckers in Upper Klamath Lake and threatened salmon in the Klamath River and/or adversely modify their critical habitat, if used for irrigation purposes. Pursuant to Section 7 of the ESA, the Bureau formally consulted with the National Marine Fisheries Service and the U.S. Fish & Wildlife Service on its Operations Plan, and each consulting agency provided a biological opinion to the Bureau that the Operations Plan would not jeopardize salmon or suckers, or adversely modify their critical habitat.

Plaintiffs' second amended complaints allege, in essence, that the Bureau lacks statutory or other authority to comply with the ESA or to protect tribal reserved water rights held for tribal fishery needs by reducing the amount of water to be delivered to Project irrigators pursuant to their state water rights and their contracts with the Bureau. *See, e.g.*, Sec. Amend. Compl. for Remand and Declaratory Relief ¶ 64 (ECF No. 73) (alleging that “[n]either section 7(a)(2) of the ESA, nor any other authority or obligation that may be asserted by Defendants, confers legal power or authorities on Defendants to curtail diversion and use of water by and for Water Users or other Association members or their patrons”); Sec. Amend. Compl. for Declaratory and Injunctive Relief ¶ 26 (ECF No. 70) (alleging that the Bureau has “no discretion or authority to limit the amount of water” that the Klamath Irrigation District (“KID”) and its landowners “are entitled to beneficially use under their water rights, to the extent such water is physically available, without otherwise condemning or appropriating KID’s water rights and the rights of its landowners”). Plaintiffs ask for a declaration “that Defendants must maintain, operate, and direct operations of the Project and Project-related facilities in accordance with the requirements

of the Reclamation Act, and that Defendants’ authorization . . . of collection and retention and use of stored water for ESA-listed species, and use of stored water for ESA-listed species in the Klamath River, are not activities authorized by any applicable law.” ECF No. 73 at ¶ 92 and 33 (Prayer for Relief) at ¶ 2; *see also* ECF No. 70 at ¶ 71 (“KID is entitled to a declaration that Defendant is violating Section 8 of the Federal Reclamation Act by unlawfully using water in UKL reservoir for instream purposes . . . during KID’s irrigation season without a water right or other authority under state or federal law and thereby interfering with the vested water rights of KID, its landowners, and other water right holders to whom KID is legally obligated to deliver water.”).

The Hoopa Valley Tribe and the Klamath Tribes (the “Tribes”) have been granted intervention for the limited purpose of filing motions to dismiss under Fed. R. Civ. P. Rule 12(b)(7) and Rule 19. The Tribes argue that they are required parties under Rule 19(a) who cannot be joined due to sovereign immunity and that the complaints should be dismissed in their absence under Rule 19(b). *See* ECF Nos. 74 and 75. Among other factors, the Tribes point to the effect this litigation would have on their tribal fishing rights and reserved water rights if Plaintiffs were to secure a declaratory judgment that Reclamation’s operation of the Project under the Operations Plan, to fulfill these rights and comply with the ESA, is unlawful and the risk of inconsistent obligations such an order would potentially impose on Reclamation. *See, e.g.*, ECF No. 74 at 1; ECF No. 75 at 2-3.

THE NINTH CIRCUIT’S *DINE CITIZENS* OPINION

In *Dine Citizens*, plaintiff Dine Citizens Against Ruining Our Environment brought claims under the APA alleging violations of the National Environmental Policy Act and also under the ESA’s citizen suit provision, challenging the Department of the Interior’s approval of

certain coal mining operations on the Navajo reservation. *Dine Citizens*, 932 F.3d at 847. The Navajo Transitional Energy Company, a corporation wholly owned by the Navajo Nation that owned the mine in question, moved to dismiss the action under Rules 19 and 12(b)(7), arguing “that it was a required party but that it could not be joined due to tribal sovereign immunity, and that the lawsuit could not proceed without it.” *Id.* at 847-48. The government opposed the motion, taking the position that the United States is generally the only required and indispensable defendant in such challenges to federal agency action under the APA. *Id.* at 850. However, the district court disagreed and granted the motion, concluding that (1) “the ‘relief Plaintiffs seek could directly affect the Navajo Nation . . . by disrupting its “interests in [its] lease agreements and the ability to obtain the bargained-for royalties and jobs;”” and (2) the United States did not adequately represent the Navajo Nation’s interests due to the Nation’s greater interests in the outcome of the litigation and a potential divergence of interest between the Navajo Nation and the United States. *Id.* *Dine Citizens* appealed, and the government filed an *amicus* brief in which it again took the position that the United States is generally the only indispensable defendant in such APA litigation. *Id.* at 858 n.8. On July 29, 2019, the Ninth Circuit issued an opinion affirming the district court’s grant of dismissal and rejecting the government’s position that the United States is generally the only required and indispensable defendant in such APA challenges to federal agency action. *Id.* at 858-61.

FEDERAL DEFENDANTS’ STATEMENT OF POSITION

The Ninth Circuit’s opinion in *Dine Citizens* is controlling authority in this case under the current state of the law in the Ninth Circuit and therefore supports the granting of the Motions to Dismiss. See *United States v. Gomez-Lopez*, 62 F.3d 304, 306 (9th Cir. 1995). Under *Dine Citizens*, the Tribes’ sovereign interests in their treaty fishing and federal reserved water rights

could be impaired by this litigation, and the Tribes appear to satisfy the other criteria for granting dismissal under Rule 19 under the Ninth Circuit's reasoning in that opinion. Federal Defendants therefore do not dispute that the Motions to Dismiss should be granted under the current state of the law in the Ninth Circuit. However, for the reasons stated in the government's *amicus* brief filed in *Dine Citizens*, Federal Defendants disagree with the ruling in *Dine Citizens* and reserve the right to assert in future proceedings that the United States is generally the only required and indispensable defendant in APA litigation challenging federal agency action.

Respectfully submitted this 6th day of March, 2020.

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