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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Medford Division

KLAMATH IRRIGATION DISTRICT,	Consolidated Cases
	Case No. 1:19-cv-00451-CL (lead)
	Case No. 1:19-cv-00531-CL (trailing)
Plaintiff,	
v.	HOOPA VALLEY TRIBE'S REPLY IN
	SUPPORT OF MOTION TO DISMISS
UNITED STATES BUREAU OF	
RECLAMATION et al.,	Request for Oral Argument
Defendants	
<hr/>	
SHASTA VIEW IRRIGATION	
DISTRICT et al.,	
Plaintiffs,	
v.	
UNITED STATES BUREAU OF	
RECLAMATION et al.,	
Defendants	
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REPLY IN SUPPORT OF MOTION TO DISMISS

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I. INTRODUCTION

Hoopa Valley Tribe (“Hoopa”) submits this consolidated reply to the responses timely filed by Shasta View Irrigation District et al., (“SVID”) (Dkt. #77) and Klamath Irrigation District (“KID”) (Dkt. #81) (collectively “Plaintiffs”) in opposition to Hoopa’s motion to dismiss (Dkt. #74).¹ Federal Defendants respond (Dkt. #76) that *Dine Citizens Against Ruining Our Env’t v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019) 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.”² Dkt. #76, p. 6. For reasons stated in its Motion to Dismiss (Dkt. #74), supporting declarations and exhibits (Dkt. ##22 – 24-4) and this reply, Hoopa requests the Court dismiss this consolidated action in its entirety with prejudice pursuant to FRCP 12(b)(7) and 19.

II. ARGUMENT IN REPLY

A. Hoopa Is A Required Party Pursuant to FRCP 19(a)(1)(B)(i).

1. Hoopa Has A Legally Protected Interest in the Subject Matter of this Litigation.

Hoopa is required under Rule 19(a)(1)(B)(i) because Hoopa “claims an interest relating to the subject of the action and is so situated that disposing of the action in [Hoopa’s] absence may . . . as a practical matter impair or impede [Hoopa’s] ability to protect the interest.” The Rule 19(a) inquiry is practical and fact specific. *Dine Citizens*, 932 F.3d at 851. The inquiry is identical to intervention of right under Rule 24(a)(2), which the Court granted Hoopa. Dkt. #61. Plaintiffs’ argument that a different standard applies to the required party determination under Rule 19(a) is wrong, as the interest and impairment inquiries of Rules 19(a)(1)(B)(i) and 24(a)(2)

¹ On March 12, 2020, KID also filed an untimely “amended” response brief (Dkt. #82). KID did not provide any errata or other explanation with its “amended” brief. Nor did KID seek leave of court or a stipulation to file a brief beyond the March 6, 2020 deadline set by the Court. Dkt #71.

² On March 24, 2020, the plaintiffs in *Dine Citizens* filed a petition for writ of certiorari in the United States Supreme Court.

mirror each other. Moore's Fed. Practice [3d. ed] § 19.02[5][c]. Plaintiffs offer no new evidence or argument that should change the Court's prior determination. Hoopa is a required party.

- a. Hoopa's Federal Reserved Fishing and Senior Water Rights, Its Interest in Klamath River Fish and Water Resources, and its Interest in Continued Protection of Threatened Salmon Pursuant to the ESA, Are Legally Protected Interests.

Hoopa has federal reserved rights to take fish from the Klamath and Trinity Rivers within its Reservation as well as federal reserved water rights to support the fishery, which water rights are senior in priority to those claimed by Plaintiffs. Dkt. #74, pp. 3-8; Dkt. #24-1, #24-2.

Implementation of Hoopa water rights depends on Reclamation's releases of water out of Link River Dam, releases which Plaintiffs contend are unlawful and beyond Reclamation's authority and which Plaintiffs seek to halt. *Id.*; Dkt. #70, ¶¶ 4(a)-(b), 71, 72; Dkt. #73, ¶¶ 64-66, 76, 96.

Hoopa has a federal reserved water right that is, at the bare minimum, equal in quantity to the amount needed to satisfy Reclamation's obligations to protect ESA-listed salmon from jeopardy. *Baley v. United States*, 942 F.3d 1312, 1337 (Fed. Cir. 2019). Reclamation's releases to protect ESA-listed species also implement, in part, Hoopa's senior reserved water rights in the Klamath River. *Id.* at 1337-41. In *Baley*, Klamath irrigators sought damages for Reclamation's releases of water from Upper Klamath Lake (UKL) to the Klamath River in 2001 to fulfill ESA obligations and tribal rights. In 2001, as in many years, there was insufficient water to satisfy the irrigators' claims to water while also providing necessary flow downstream for fish. The Federal Circuit affirmed denial of monetary compensation to the Klamath irrigators because Hoopa (and Yurok) federal reserved water rights are senior to the irrigators' rights. *Id.* The irrigators were not entitled to any water in 2001 because all the water available that year was necessary to satisfy tribal senior rights. *Id.* *Baley* rejected many of the same arguments raised here. *Id.* at

1340-41 (Hoopa rights need not be adjudicated before being implemented through Reclamation's releases out of UKL).³ See also *Baley v. United States*, 134 Fed. Cl. 619, 668-680 (2017).

The analysis and result in *Baley* are not unique. Hoopa's reserved fishing and water rights in the Klamath River and their seniority over Plaintiffs' rights are confirmed in the Ninth Circuit. *Parravano v. Babbitt*, 70 F.3d 539, 544-546 (9th Cir. 1995) (recognizing Hoopa reserved fishing rights); *Klamath Water Users Association v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000) (Reclamation "has a responsibility to divert the water and resources needed to fulfill the [Hoopa] 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) (injunction requiring Reclamation to deliver additional water to Klamath River "would also help protect the [Hoopa] Tribes' fishing rights, which must be accorded precedence over irrigation rights"). Hoopa's fishery-related water right includes "the right to certain conditions of water quality and flow to support all life stages of fish." Dkt. #24-2, pp. 6-7.

The full scope of Hoopa's water right has not been quantified, but Hoopa's senior water right consists of at least the amount of water necessary to prevent jeopardy to fish in the Klamath River. *Baley*, 942 F.3d at 1337. Plaintiffs contest Reclamation's authority to make the minimum releases required for ESA compliance. Dkt. #73, ¶76 (claiming Reclamation acts ultra vires by curtailing irrigation deliveries under the ESA); Dkt. #70, ¶ 4(a)-(b); 71, 72 (seeking order declaring Reclamation's instream flow releases and cap on irrigation deliveries unlawful). An order declaring Reclamation's releases from UKL unlawful would harm Hoopa's interests in

³ *Baley* plaintiffs, represented by SVID's counsel, petitioned for certiorari on March 13, 2020.

protection of ESA-listed coho in the Klamath River and would directly impair implementation of Hoopa's federal reserved water right, which is, at the bare minimum, equivalent to ESA flows.

As with intervention of right under FRCP 24(a)(2), which the Court granted (Dkt. #61), Hoopa need only "claim [] an interest relating to the subject of the action" to be "required" under FRCP 19(a)(1)(B)(i). Hoopa provides court decisions, federal solicitors' opinions, and declarations that confirm Hoopa's fishing rights and senior water rights in the Klamath River to support its fishery pursuant to federal law. Dkt. #74, pp. 3-9; Dkt. #24-1, #24-2. Hoopa provides evidence that water necessary to support its fishing rights and senior water rights in the Klamath River must pass through Link River Dam, a component of the federally managed Klamath Project that restrains water in UKL that would otherwise flow into the Klamath River. Dkt. #23, ¶ 7-8, 30; Dkt. # 24-3, pp. 16-17. *PCFFA v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1085 (9th Cir. 2005) ("flows past the Iron Gate dam [which depend on flows released from Link River Dam] into the Klamath River determine to a great extent the quantity of water available in the river"). Water necessary to protect SONCC coho, listed as threatened under the ESA, and non-listed Chinook must pass through Link River Dam. *PCFFA v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228 (N.D. Cal. 2001) (enjoining Reclamation from making irrigation deliveries to Plaintiffs if Klamath River flows fell below protected level). Hoopa fishing and water rights depend on Reclamation's continued release of water through Link River Dam. Plaintiffs' claims directly threaten to stop those releases, which would directly impair Hoopa rights and interests.

b. Plaintiffs' Arguments Repeatedly Mischaracterize Hoopa Rights and Interests.

Plaintiffs argue that Hoopa lacks an interest in this action because Hoopa (or the United States on Hoopa's behalf) did not submit claims in Oregon's Klamath Basin Adjudication ("KBA"). Such claims were not required. The Klamath River is an interstate river, flowing in

both Oregon and California. The KBA is not and cannot be an adjudication of all rights in the entirety of the Klamath River – rather, it is only an adjudication of those rights within Oregon. *United States v. District Court for Eagle County*, 401 U.S. 520, 523 (1971) (McCarran Amendment only addresses adjudications of rights in river system “within the particular State’s jurisdiction”). Hoopa, its Reservation, and its federal reserved fishing and water rights are in California. The McCarran Amendment, 43 U.S.C. § 666, does not confer jurisdiction on a state (i.e., an upstream state) to adjudicate portions of an interstate river located within a different state (i.e., a downstream state). *Id.* at 523. “This result is entirely logical, because a state court would not have jurisdiction over out-of-state water claimants.” Thomas H. Pacheco, *How Big is Big – The Scope of Water Rights Suits under the McCarran Amendment*, 15 Ecology L. Q. 627, 652 (1988). Thus, Oregon (in the KBA or otherwise) has no jurisdiction to adjudicate any portion of the Klamath River, or rights therein, which arise or are located outside of Oregon, including Hoopa’s out-of-state rights. *Id.* Due to Oregon’s lack of jurisdiction, neither Hoopa, nor the United States on Hoopa’s behalf, were required to submit claims in the KBA. *Id.*; *Eagle County*, 401 U.S. at 523; *Baley*, 942 F.3d at 1341 (Hoopa was not required to submit claims in KBA).

Plaintiffs assert that Hoopa lacks any claim or right to water in UKL. This argument mischaracterizes Hoopa’s interest. Hoopa has a senior federal reserved water right for fishery purposes, which is non-consumptive and entitles Hoopa to maintenance of an instream flow of water in the Klamath River adequate to maintain and protect its on-reservation fishing rights in California. *Patterson*, 204 F.3d at 1214; *Baley*, 942 F.3d at 1329. *See also United States v. Adair*, 723 F.3d 1394, 1410-11 (9th Cir. 1983); *Colville Conf. Tribes v. Walton*, 647 F.2d 42, 48 (1981); *Joint Bd. of Control v. United States*, 832 F.2d 1127, 1131-32 (9th Cir. 1987), which all recognize tribal water rights to support tribal fishing rights. The Klamath Project, at Link River

Dam, blocks flow from reaching the Klamath River downstream absent releases by Reclamation. Dkt. #23, ¶ 7. Water released from UKL at Link River Dam passes through the privately-owned Klamath Hydroelectric Project and ultimately into the Klamath River at Iron Gate Dam. Dkt. #23, ¶ 8. Due to the lack of substantial tributary contribution between Iron Gate Dam and the Reservation, Hoopa's federal reserved rights to support its on-reservation fishery require federal-managed releases out of UKL through upstream Link River and Iron Gate Dams. *Id.*; *PCFFA*, 426 F.3d at 1085 ("flows past the Iron Gate dam into the Klamath River determine to a great extent the quantity of water available in the river.") Any such releases to implement Hoopa's rights do not depend on and are not based on diversion or use rights held by Reclamation or Hoopa in UKL itself; rather, the releases are made to implement Hoopa's non-consumptive water rights in California, which are senior to any rights held by Reclamation or Plaintiffs. *Patterson*, 204 F.3d at 1214; *Baley*, 942 F.3d at 1329-41; *Adair*, 723 F.3d at 1410-11. Given the relationship of Hoopa's downstream rights to Klamath Project operations, the Federal Circuit affirmed that Hoopa's "reserved water rights encompass Klamath Project water." *Baley*, 942 F.3d at 1339.

SVID argues that "[b]ecause Hoopa lacks an enforceable water right as against the Project, it does not have a legally protected interest in Plaintiffs' claims, and the relief sought by Plaintiffs will not impair its interests." Dkt. #77, p. 20. The full scope of Hoopa's senior water right is unquantified, but that does not render it unenforceable against junior water users. *Winters v. United States*, 207 U.S. 564 (1908) (affirming injunction restraining appellants from diverting water away from Indian reservation based on unquantified tribal reserved rights); *Joint Bd.*, 832 F.2d at 1132 (BIA had authority to implement minimum flows for Indian fishery before providing water to project irrigators despite Indian rights being unquantified); *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 763 F.2d 1032, 1034-35 (9th Cir. 1985)

(affirming release of water from reservoir to preserve salmon based on unquantified tribal rights). *Baley* affirmed that Hoopa senior water rights (at least the bare minimum required to prevent jeopardy to fish) may be implemented ahead of Plaintiffs' junior rights even though Hoopa rights have not been fully adjudicated. *Baley*, 942 F.3d at 1339-41. The Ninth Circuit has also confirmed federal authority to protect Hoopa fishing and water rights through actions taken beyond the Reservation. *Patterson*, 204 F.3d at 1213-14 (affirming Reclamation duty to operate Link River Dam to implement Hoopa reserved rights); *Parravano*, 70 F.3d at 546-47 (affirming restrictions on non-Indian ocean fishing to protect Hoopa on-reservation fishing rights). Hoopa has legally enforceable senior water rights, federally reserved fishing rights, and interests in ESA compliance that all are threatened by Plaintiffs' effort to halt instream fish flows here.

Numerous cases confirm Hoopa's fishing and water rights and the priority of those rights over Plaintiffs' rights, but SVID argues that those cases "are based on circumstances that pre-date the ACFFOD, and thus are distinguishable on their facts." Dkt. #77, p. 20. The ACFFOD, which derives from Oregon's KBA, does not apply to Hoopa. Hoopa is not a party to the KBA and its claims were not addressed in the KBA. *Baley*, 942 F.3d at 1341. Plaintiffs' rights in the ACFFOD are junior to Hoopa's senior rights, which vested at the latest in 1876. Dkt. #24-2, p. 6. Nor does the ACFFOD affect Reclamation's duty to operate Link River Dam in compliance with the ESA. 16 U.S.C. 1536(a)(1) (prohibiting federal agency from engaging in any action likely to jeopardize ESA-listed species); *Patterson*, 204 F.3d at 1213. Plaintiffs are not entitled to any releases of water from the federal Klamath Project that would result in Reclamation violating the ESA. *Id.* The ACFFOD does not undermine the holdings or reasoning in *Patterson*, *Kandra*, *Hoopa Valley Tribe*, and *Baley* that confirm Hoopa's senior rights and Reclamation's legal obligation to operate the Project in accordance with the ESA and tribal rights.

KID also incorrectly argues that all previous cases adverse to its interests are irrelevant due to the ACFFOD. Dkt. #81, pp. 15-16. The Ninth Circuit's ruling in *Patterson* focused on Reclamation's ownership/control of Link River Dam. "Because Reclamation retains authority to manage the [Link River] Dam, and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators." *Patterson*, 204 F.3d at 1213. "Because Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the [Hoopa] Tribes' rights, rights that take precedence over any alleged rights of the Irrigators." *Id.* The ACFFOD does not alter Reclamation's ownership of the Dam; nor its legal duty to operate the Dam in compliance with the ESA and senior tribal rights. In *Kandra*, the Court recognized Plaintiffs' rights to water but found that Reclamation's obligations under the ESA and to tribes superseded those rights. Nor does the ACFFOD (entered in 2014) affect the result in *Baley* because that case involved the relative priority between Hoopa's senior downstream rights and Plaintiffs' junior rights. None of Plaintiffs rights have priority over Hoopa's senior rights.

SVID incorrectly argues that the Ninth Circuit's holding in *Patterson* regarding Reclamation's authority and duty to operate Link River Dam to implement the ESA and tribal rights is dicta. Dkt. #77, p. 20. In *Patterson*, the irrigators argued there was no legal duty to operate Link River Dam to meet ESA obligations and that tribal senior water rights were not relevant to Dam operations. *Patterson*, 204 F.3d at 1213. The Ninth Circuit rejected these arguments and held Reclamation has a duty to operate Link River Dam to comply with its ESA obligations and to implement downstream senior tribal water rights. *Id.* at 1213-14. Other courts, including the Federal Circuit in *Baley*, and the District of Oregon in *Kandra*, have followed the

ruling in *Patterson* regarding Reclamation's legal duty to operate Link River Dam for ESA compliance and tribal senior rights. SVID also offers its opinion that *Baley* is incorrectly decided but cites cases that have no bearing on the issues decided in *Baley*. Dkt. #77, n. 12.

The applicable binding case law is strongly against Plaintiffs. Despite decades of litigation involving Reclamation's operation of the Klamath Project, no court has held or even suggested that Plaintiffs' junior rights to receive water deliveries from the Klamath Project take precedence or may be satisfied regardless of impacts to ESA-listed species or senior tribal rights. All prior cases considered the rights of Plaintiffs and correctly found them inferior to Reclamation's obligations under the ESA and to Hoopa's senior rights. The ACFFOD, which addresses the relative rights and priorities of claimants in the Oregon portion of the Klamath Basin under Oregon state law, has no bearing on Reclamation's duties to operate the Klamath Project and Link River Dam in compliance with the ESA and senior tribal rights.

c. Hoopa's Interests Relate to the Subject of this Action.

Plaintiffs seek declaratory and other relief (e.g., remand) that Reclamation's instream flow releases from UKL are unlawful. Dkt. #70, ¶¶ 4(a)-(b), 71, 72; Dkt. #73, ¶¶ 64-66, 76, 96. Plaintiffs directly challenge Reclamation's substantive legal authority to make releases from Link River Dam for purposes of ESA compliance. Dkt. #73, ¶ 76 (claiming Reclamation acts ultra vires by curtailing irrigation deliveries based on ESA); Dkt. #70, ¶ 4(a)-(b); 71, 72 (seeking order declaring Reclamation's instream flow releases and cap on irrigation deliveries unlawful). Flows released under the ESA also implement, at least partially, Hoopa water rights. *Baley*, 942 F.3d at 1337-1341. Plaintiffs seek relief that would, as a practical matter, subordinate Hoopa's senior rights and interests to Plaintiffs' junior rights by preventing releases of water from Link River Dam into the Klamath River for instream purposes. Plaintiffs' suit (designed to prevent

Reclamation from releasing instream flow into the Klamath River for fish) plainly implicates and threatens Hoopa's rights and interests, which depend on the releases that Plaintiffs seek to halt.

2. Plaintiffs' Claims, If Granted, Would Impair Hoopa's Rights and Interests.

Plaintiffs make numerous arguments about why their claims do not threaten Hoopa interests. As described below, all the arguments fail. Hoopa's rights and interests are plainly threatened.

a. Plaintiffs' Claims Present A Substantive Challenge to Reclamation's Authority to Make Instream Flow Releases for ESA-Compliance and Senior Tribal Rights.

Plaintiffs incorrectly argue that their claims in this action are only procedural, rather than substantive. Dkt. #77, pp. 14-17 (arguing Plaintiffs' claims challenge administrative process); Dkt. #81, pp. 2, 26-27 (arguing that claims challenging agency process may go forward in Hoopa's absence). Plaintiffs are not merely challenging Reclamation's administrative process; they are directly challenging the substantive legality of Reclamation's final decision. Plaintiffs allege, as a substantive matter, that Reclamation lacks legal authority to release water from Link River Dam for ESA compliance or to implement senior tribal rights. The result Plaintiffs seek is for Reclamation to alter its decision and to make full water deliveries to Plaintiffs instead of, or before, providing water from Link River Dam for fish. Hoopa's interests are directly threatened.

Plaintiffs incorrectly argue that the decision in *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990) supports their argument. *Verity* supports dismissal. In *Verity*, the plaintiff (Makah) made both procedural and substantive challenges relating to an agency decision setting ocean fishing harvest quotas. *Id.* at 557. First, Makah challenged the substantive legality of the ocean fishing quotas set by the Secretary – arguing that the quotas were substantively unlawful and seeking declaratory and injunctive relief that would set a higher quota to its benefit (and correspondingly to others' detriment). *Id.* Second, Makah alleged the procedures the agency implemented to develop the regulation were unlawful. In its procedural claims, Makah alleged

that “the quotas were ‘the product of commitments made outside the administrative process’ and that “the Secretary adopted quotas set in secret negotiations, violated notice and comment requirements of the APA, and ignored a quota proposed by the Makah.” *Id.* The District Court dismissed Makah’s suit pursuant to Rule 19 for failure to join required parties. The Ninth Circuit affirmed dismissal of Makah’s claims that challenged the substantive decision and that sought a different allocation of fishing quotas that would affect other absent parties. *Id.* at 558-560. The Ninth Circuit reversed dismissal of Makah’s claims that related solely to the process utilized by the Secretary in adopting the regulation. *Id.* Allowing the claims challenging the administrative process to proceed, the Court recognized that the “scope of the relief available to the Makah on their procedural claims is narrow. None of the Makah’s other requests for relief would be appropriately considered in the absence of the other tribes.” *Id.* at 559.

Here, Plaintiffs’ complaints directly challenge Reclamation’s substantive legal authority to release water for instream fish flows and to limit water deliveries to Plaintiffs in order to meet ESA obligations and fulfill tribal rights. Plaintiffs allege that Reclamation’s decision to continue releasing water for ESA compliance during the years 2019-2024 is *ultra vires* – i.e., beyond its legal authority. Dkt. #73, ¶ 76 (alleging Reclamation acted *ultra vires*); Dkt. #70, ¶ 57 (alleging Reclamation acted beyond its authority). Plaintiffs allege that Reclamation cannot substantively rely on the ESA to place any cap on the amount of water that Plaintiffs receive. Dkt. #73, ¶96; Dkt. #70, ¶72. They seek a declaration confirming their legal entitlement to full water deliveries each year regardless of impacts that such deliveries will have on Reclamation’s ability to meet its obligations under the ESA or related impacts to senior tribal water rights. Dkt. #70, ¶ 4(b); Dkt. #73, ¶¶ 76-77, 92, 96. Plaintiffs do not merely challenge the pre-decisional administrative procedures used by Reclamation to develop its final decision. Rather, Plaintiffs’ challenge the

substantive legality of Reclamation's decision to continue releasing water instream for ESA compliance and tribal rights in the years 2019-2024, which could limit the full water deliveries that Plaintiffs claim under their contracts. Like *Verity*, Plaintiffs' suit seeks a different, more favorable, allocation of finite natural resources. Plaintiffs seek to have Reclamation's decision to release water for ESA compliance and tribal rights declared unlawful and to remand the matter to Reclamation with a directive to make a new decision providing full water deliveries to Plaintiffs. Dkt. #73, Prayer for Relief; Dkt. #70, ¶ 4(a)-(b), 68-72, Prayer for Relief.

The impacts that such a ruling would have on Hoopa are obvious. Hoopa has senior rights to water necessary to support its fishing rights. The ruling that Plaintiffs seek would declare it unlawful for Reclamation to release any water out of UKL for downstream fish flows unless and until Plaintiffs water rights are satisfied in full. The relief Plaintiffs seek would, as a practical matter, subordinate Hoopa senior rights to Plaintiffs (who are legally junior). There is typically not enough water to satisfy all of Plaintiffs' full contract water entitlement and flows for ESA-compliance. Orcutt Decl., Dkt. #23, ¶ 28. Fish populations are directly impacted and have significantly diminished due to water withdrawals from Klamath Project operations. Dkt. #23. SONCC coho are threatened with extinction. Klamath Chinook are increasingly imperiled. *Id.* Given the current perilous condition of salmon in the Klamath River and the species' reliance on flow out of Link River Dam to provide habitat in the Klamath River, it is possible that granting Plaintiffs' requested relief would lead to the extermination of salmon in the Klamath River, both coho and Chinook. Dkt. #23, ¶ 27. This would be an ecological disaster and would deprive Hoopa of sustenance they have relied upon for centuries. *Id.* It would negate the principal basis for locating the Hoopa Reservation along the Klamath River. Nelson Decl., Dkt. #22. Given the threatened impact to Hoopa's interests, this litigation may not proceed in Hoopa's absence.

Plaintiffs cite *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962 (9th Cir. 2008) (*Colusa*), which is distinguishable. There, the plaintiff sought to increase the total gaming licenses available under a compact with California. *Id.* at 971-72. Other gaming tribes were not required under Rule 19 because the suit would not have any impact other than potential increased competition. *Id.* Absent tribes gaming operations were not impaired (beyond more competition) by allowing more licenses to another tribe. *Id.* The facts here are different. While Hoopa's legal right to water would remain, the relief Plaintiffs seek would preclude Hoopa from receiving its water because Hoopa's rights depend on releases from Link River Dam at issue here. Unlike *Colusa* where there was no limit on the total number of gaming licenses, there is a limited amount of water available to meet competing demands here. Plaintiffs seek to increase the water they receive which, as a practical matter, would directly impair Hoopa interests.

SVID argues that Hoopa has no interest because it has shown no "investment" based on Reclamation's action. Rule 19 does not require a financial investment to establish interest, but even if it did, Hoopa has alleged such investment. Dkt. #22, ¶17-21. Hoopa's reserved rights include commercial harvest and the right to make a moderate living based on fish. *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986). The fact that the Klamath Project's water withdrawals have depleted fish populations to reduce Hoopa to a primarily subsistence fishery does not limit Hoopa's interest in this case; it increases it. Rather than just a matter of economics, Hoopa's interest here is a matter of survival for the Tribe and its people. Dkt. #22-23.

Nor are Plaintiffs correct that their claims and requested relief operate only prospectively. Plaintiffs challenge Reclamation's approved operations plan for 2019 through 2024. Dkt. #46-4; Dkt. #70, ¶ 2; Dkt. #73, ¶ 1, Prayer for Relief. Plaintiffs want Reclamation's decision approving

the 2019-2024 operations plan declared unlawful and the matter remanded for entry of a new decision providing full water deliveries to Plaintiffs over the remaining years of the operations plan. *Id.* This attack on Reclamation’s prior decision operates retroactively. *Dine Citizens*, 932 F.3d at 853 (suit challenging agency action operated retroactively, not just prospectively); *Kennedy v. U.S. DOI*, 282 F.R.D. 588 (E.D. Cal. 2012) (rejecting argument that challenge to agency action operated only prospectively; finding that *Verity* supported Rule 19 dismissal).

The fact that Plaintiffs now seek declaratory and not injunctive relief does not eliminate the impact. A declaratory judgment “has the same effect as an injunction in fixing the parties’ legal entitlements.” *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010), citing *Steffel v. Thompson*, 415 U.S. 452, 466-71 (1974). *See also Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971) (explaining that, ordinarily, declaratory relief has the same practical effect as an injunction). Although KID argues that Reclamation might just ignore this Court’s declaratory order, Hoopa expects that Reclamation would immediately stop releasing water into the Klamath River if this Court declared such releases unlawful. It is highly doubtful that Reclamation, a federal agency, would ignore or willfully disregard a binding directive from this Court. “A litigant who tries to evade a federal court’s judgment – and a declaratory judgment is a real judgment, not just a bit of friendly advice – will come to regret it.” *Walsh*, 620 F.3d at 782.

b. Collateral Estoppel Does Not Bar Hoopa’s Interest in Water Releases From UKL.

KID argues that “collateral estoppel” bars Hoopa from asserting any interest in water in UKL. Dkt. #81, pp. 12-13, 24. This argument is premised on the KBA and the ACFFOD, neither of which apply to Hoopa, who is not a party to the KBA nor bound by the ACFFOD. None of Hoopa’s rights or claims were presented or adjudicated in the KBA, nor were they required to be. *Supra*, pp. 4-5. The KBA and ACFFOD only address the relative rights of persons

in Oregon to waters within Oregon. *Id.* Collateral estoppel does not bar Hoopa's interest here. *Janjua v. Neufeld*, 933 F.3d 1061, 1065 (9th Cir. 2019) (collateral estoppel only bars relitigation of issues actually raised, contested, and submitted for determination in previous litigation).

c. Hoopa's Rights Need Not Be Finally Adjudicated to be A Required Party.

Plaintiffs argue Hoopa's interests will not be harmed because Hoopa's water rights have not been quantified and because Plaintiffs do not seek adjudication or quantification of Hoopa's rights here. A party is required under FRCP 19 if it "*claims* an interest relating to the subject matter of the action." FRCP 19(a)(1)(B). Nothing in FRCP 19 requires Hoopa's interest to be finally adjudicated to be a required party. Tribal reserved water rights need not be quantified prior to enforcement. *Supra*, pp. 6-7. In *Winters*, 207 U.S. 564, the Supreme Court affirmed an injunction against upstream diversions that threatened unadjudicated downstream tribal reserved water rights. In *Baley*, the Federal Circuit affirmed that Reclamation lawfully implemented Hoopa reserved water rights despite the lack of a final adjudication. *Baley*, 942 F.3d at 1337-41.

The fact that Plaintiffs' claims do not seek adjudication or quantification of Hoopa rights here does not reduce the practical harm of their suit in any respect. Here, without any such adjudication, Plaintiffs ask this Court to enter an order requiring full deliveries to Plaintiffs (who hold junior rights) regardless of any impact or harm that would result to Hoopa's senior water rights or to salmon species that Hoopa may harvest under its reserved fishing rights. If Plaintiffs obtain their requested relief, Hoopa will retain its senior right to water as a matter of law but will not actually receive any water until Plaintiffs junior rights are first satisfied in full. Such a result would plainly impair Hoopa interests as a practical matter. Impairment to Hoopa's interest goes beyond water rights, as Hoopa's reserved fishing rights provide a legally protected interest in

protection of coho and Chinook that would be directly harmed by an order preventing release of flows into the Klamath River and requiring full water deliveries by Reclamation to Plaintiffs.

d. Plaintiffs' Speculative Mitigation Proposals Confirm Hoopa's Interests Are at Risk.

As they did in opposing Hoopa's intervention, Plaintiffs again argue that Hoopa interests will not be harmed because Reclamation could mitigate impacts to Hoopa by purchasing or condemning Plaintiffs' rights or finding other water. Such contentions are speculative and illusory. Plaintiffs provide no evidence that there is even one person or entity who will voluntarily part with their water in exchange for money. Nor is there evidence that Reclamation could obtain sufficient water to satisfy its ESA obligations or on a timeframe that would ensure no adverse impact to ESA-listed species. KID argues that Reclamation could stay the ACFOD upon filing a bond to cover "all damages that may accrue by reason of the determination not being enforced." Dkt. #81, p. 18. This wrongly assumes that the ACFOD limits Hoopa rights. And even if Reclamation sought a stay, which is speculative, it is speculative to assume that the request for a stay would not be opposed by Plaintiffs or other water rights holders or be granted.

Plaintiffs suggest that the Court could delay implementation of its order to allow time for Reclamation to obtain substitute water for ESA-compliance and tribal water rights. This argument fails because: (1) there is no evidence that Reclamation intends to or could acquire sufficient water to fully satisfy its many obligations; (2) any water purchased from Plaintiffs or other substitute water would not have the senior priority date of Hoopa's existing water rights; and (3) if Reclamation does not or cannot (as is likely) acquire sufficient water, Plaintiffs' requested relief (a declaration prohibiting releases out of UKL to the Klamath River) would ultimately go into effect regardless of impacts to ESA-listed species or Hoopa's senior rights. Plaintiffs disregard the fundamental issue that Reclamation's releases for ESA and tribal

purposes are lawful and that Hoopa's rights are senior to Plaintiffs. As the Federal Circuit held in *Baley*, Plaintiffs are not entitled to compensation where Reclamation releases water to fulfill downstream tribal water rights that are senior to Plaintiffs. Nor are they entitled to any order that would subordinate federal law (the ESA) and senior tribal water rights to their junior interests.

Plaintiffs' arguments regarding possible ways to mitigate the impacts of their suit on Hoopa's interests simply confirms that their suit threatens to impair Hoopa's interests. Otherwise, there would be no need for the mitigation measures that Plaintiffs suggest. While the mitigation options listed in KID's brief are highly speculative, the direct impact of Plaintiffs' suit to Hoopa interests and its senior water and fishing rights is not. Absent continued releases of water from Link River Dam into the Klamath River, the salmon relied upon by Hoopa since time immemorial, including species currently listed under the ESA, will not survive. Dkt. #23.

Plaintiffs' focus on compensation for their rights through leasing, purchase, and condemnation also highlights that any injuries they suffer from Reclamation's release of water through Link River Dam for instream flows could be satisfied through legal (monetary) remedies rather than the harmful equitable relief they seek here. The fact that Plaintiffs could be made whole through money (as they suggest in their proposals for leasing, purchase, and condemnation) strongly militate against granting the harmful equitable relief they seek here.

e. The Threat to Hoopa Interests is Not Speculative.

Plaintiffs argue that Hoopa's concerns are speculative because Reclamation could ignore this Court's order. Dkt. #81, p. 26. A declaratory order is a binding directive that has the same practical effect on parties' legal entitlements as an injunction. Reclamation would have directly conflicting legal obligations if this Court granted Plaintiffs' requested relief. On one hand, it would be bound by its legal obligations to comply with the ESA and to operate Link River Dam

to fulfill downstream senior tribal water rights. *Patterson*, 204 F.3d at 1213-14. Simultaneously, should Plaintiffs' prevail on the merits, Reclamation would be subject to this Court's order barring any such releases for ESA-compliance or tribal rights until Plaintiffs' contract rights were satisfied in full. It is not speculative for Hoopa to assume that Reclamation would comply with this Court's order. The fact that Reclamation would be left with inconsistent and mutually exclusive legal obligations supports dismissal of this case under FRCP 19(a)(1)(B)(ii).

3. Hoopa's Interests Are Not Adequately Protected by Reclamation Here.

In its motion to intervene, Hoopa argued that Reclamation was not an adequate representative of its interests here. Dkt. #21. Reclamation's response on intervention did not dispute Hoopa's contention nor did it disclose any intent to represent Hoopa's interests at all in this litigation, as it simply "took no position" on Hoopa's intervention motion. Dkt. #40. Likewise, in its response to Hoopa's motion to dismiss, Reclamation again does not dispute Hoopa's claims regarding inadequate representation. Instead, Reclamation argues that Hoopa appears to satisfy the criteria for granting dismissal under Rule 19. Dkt. #76, p. 7.

On intervention, Hoopa established that Reclamation's representation of its interests may be inadequate. Dkt. #61, pp. 6-7. This Court found that Hoopa's interests are narrower than Reclamation's, that Reclamation would not "undoubtedly" make all of Hoopa's arguments, and that it "could, without the intervenors' presence, take litigation and settlement positions that fail to adequately reflect and protect the intervenors' specific interests." *Id.* at p. 7. That all remains true. The representation analysis under FRCP 24(a) parallels that under FRCP 19(a); thus, the Court should again find that Reclamation is not an adequate representative. *Shermoen v. United States*, 982 F.3d 1312, 1318 (9th Cir. 1992). SVID argues that intervention is granted more liberally than dismissal, but there is no authority that the representation analysis is different under FRCP 24(a)(2) and 19. In fact, FRCP 19 does not contain any language regarding

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adequate representation but courts have adopted the analysis from FRCP 24(a)(2) into the Rule 19(a) analysis because those two rules are intended to mirror each other. Moore's Fed. Practice [3d. ed] § 19.02[5][c]. The Court's prior determination of inadequate representation on intervention is correct, undisputed by Reclamation, and should be maintained here.

a. Reclamation Is Not an Adequate Representative Because Its Broader Interests Differ in a Meaningful Sense from Hoopa's Specific Interests.

Plaintiffs contend Reclamation will adequately represent Hoopa's interests in this case because Reclamation (as a federal agency) has a general trust obligation to Hoopa and because Reclamation allegedly shares the same general interest in defeating Plaintiffs' case. That Hoopa and Reclamation may share the same goal in defeating Plaintiffs' suit does not establish that Reclamation is an adequate representative of Hoopa's interests here for Rule 19 purposes. *Dine Citizens*, 932 F.3d at 855-56. In *Dine Citizens*, plaintiffs sued the Interior Department pursuant to NEPA, the ESA, and APA challenging administrative approvals of coal mining activities on Navajo lands. A Navajo entity intervened to file a motion to dismiss under Rule 19, as Hoopa did here. As with Hoopa, Interior has a trust obligation to Navajo. *United States v. Navajo Nation*, 537 U.S. 488, 495 (2003). Although Interior also shared an interest in defending the federal decisions, the Ninth Circuit found that Federal Defendants' "overriding interest . . . must be in complying with environmental laws such as NEPA and the ESA. This interest differs in a meaningful sense from [Navajo's] sovereign interest in ensuring that the Mine and Power Plant continue to operate and provide profits to the Navajo Nation." *Id.* at 855.

As in *Dine Citizens*, while Reclamation may share an interest in defending its approvals and analyses here pursuant to applicable federal laws, Reclamation does not share Hoopa's interest in the *outcome* of those approvals – the continued release of water necessary to protect the fish and water resources in the Klamath River that are relied upon by Hoopa people and that

support Hoopa's reserved rights. *Id.* Neither Reclamation nor any Federal Defendant will suffer, directly or indirectly, the consequences that Hoopa will suffer if Plaintiffs prevail and obtain their requested declaratory and injunctive relief. Hoopa has a sovereign interest in ensuring protection of Klamath River fish and water resources that are necessary for the subsistence and economy of Hoopa people now and in the future. Dkt. #22. While Reclamation may have a general interest in defending its agency action and authority, the Tribe "has an interest in its own survival, an interest which it is entitled to protect on its own." *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F. Supp. 791, 797 (D. D.C. 1990). *See also Murphy Co. v. Trump*, 2017 U.S. Dist. LEXIS 35959 (D. Or., March 14, 2017) (declining to find that federal government adequately represented proposed intervenor that had narrower interests than the United States).

b. Reclamation Is Not an Adequate Representative of Hoopa Because This Litigation Arises Out of Hoopa's Prior Successful Lawsuit Against Reclamation.

It is not clear that Reclamation intends to vigorously defend its approvals here. The Klamath Operating Procedures that Plaintiffs challenge here arise from litigation brought by Hoopa against Reclamation that ultimately resulted in injunctive relief requiring preparation of a new BiOp to govern Reclamation's Klamath Project operations as well as additional flow releases from Link River Dam for protection of ESA-listed species in the Klamath River. *Hoopa Valley Tribe v NMFS*, 230 F. Supp. 3d 1106 (N.D. Cal. 2017). Reclamation vigorously defended against Hoopa in that litigation. *Id.* Reclamation was aligned closely with Plaintiffs (who intervened in support of Reclamation) throughout that litigation and significantly resisted (ultimately unsuccessfully) Hoopa's requests for a new BiOp and for additional flow through Link River Dam for fish in the Klamath River. *Id.*; *see also Hoopa Valley Tribe v. NMFS*, 2018 U.S. Dist. LEXIS 73641 (April 30, 2018), at *21-29 (rejecting Reclamation's proposal to deliver 252,000 acre-feet of water to Klamath irrigators during 2018 season instead of implementing

injunction measures obtained by Hoopa to protect SONCC coho in Klamath River). The Ninth Circuit has found federal agencies to be inadequate representatives of intervenors' interests in cases challenging administrative actions that arose from prior litigation brought against the federal agency by that same intervenor. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 -98 (9th Cir. 2011); *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980); *Idaho Farm Bureau Federation*, 58 F.3d 1392, 1398 (9th Cir. 1995).

The *Hoopa Valley Tribe* litigation was only the most recent case where Reclamation's management of the Klamath Project has been challenged by Klamath Basin tribes, including Hoopa, due to Reclamation's failure to provide adequate water to fish resources affected by Reclamation's water deliveries to Plaintiffs and Klamath Project operations. Dkt. #74, p. 27-28 (summarizing cases). Reclamation has regularly aligned itself with Plaintiffs in defending against water releases for fish. *Id.* Given this history, Reclamation may be a reluctant defender of its approvals in this litigation. *Citizens for Balanced Use*, 647 F.3d at 897-98.

c. Reclamation Will Not Undoubtedly Make All of Hoopa's Arguments; Nor Is Reclamation Capable and Willing to Make Such Arguments.

Reclamation's reluctance to vigorously defend its action and to make Hoopa's arguments has already shown itself. Reclamation declined to move to dismiss Plaintiffs' case on any basis. Dkt. #24, ¶ 2-4. It is not apparent that Reclamation would present Hoopa's distinct sovereign interests in Klamath fish and water resources or its reserved fishing and senior water rights as a basis to defend its approvals in this case. Reclamation's answers do not assert those rights or interests as a possible defense. Dkt. ## 26, 27. Nothing in the existing record indicates that Reclamation will "undoubtedly make all of [Hoopa's] arguments" or that it "is capable and willing to make such arguments." *Citizens for Balanced Use*, 647 F.3d at 898. If this Court were to rule that Reclamation's approvals conflict with federal law, Reclamation's arguments

regarding appropriate relief may diverge significantly from Hoopa's. *Dine Citizens*, 932 F.3d at 855. Reclamation has conflicting obligations to Hoopa, the upstream Klamath Tribes, Plaintiffs, as well its general national interests. Hoopa, in contrast, has one interest: protection and preservation of Klamath River fish and water resources and its reserved fishing and water rights.

Plaintiffs argue that Reclamation's decision not to move for dismissal under Rule 19 is irrelevant. In *Friends of Amador County v. Salazar*, 554 Fed. Appx. 562, 564 (9th Cir. 2014), the Ninth Circuit found the United States was an inadequate representative for the interested Tribe and affirmed dismissal under Rule 19 after finding that the federal government's failure to move for dismissal under Rule 19 and failure to take any position on the Tribe's Rule 19 motion did "indicate divergent interests between the Tribe and the government." *Id.* at 564. There, the federal representative's conduct "caused the district court to suspect that the government favored judicial resolution of the lawsuit as opposed to early dismissal, and would seek to avoid taking positions contrary to its national Indian policy." *Id.* Here, Reclamation similarly declined to file a Rule 19 motion not based on the specific facts or issues in this case, but rather to maintain consistency with the litigation positions of the United States nationally. Dkt. #24, ¶ 2-4.

Plaintiffs rely on *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998). *Babbitt* is distinguishable because Hoopa has provided undisputed evidence showing that the reason why Reclamation failed to present its Rule 19 motion was not based on any finding that Reclamation would actually adequately represent the Tribe or that Hoopa's Rule 19 motion lacked merit. *Id.*; Dkt. #24, ¶ 2-4. Rather, Reclamation declined to file a Rule 19 motion in order to maintain consistency with arguments made in pending litigation nationally – a general interest that directly diverges with Hoopa's specific interest here. *Id.* In *Babbitt*, other than the federal decision not to file a Rule 19 motion, there was no indication of any divergence

of interest of any kind between the Tribe and the government and the Ninth Circuit found it “clear that the government would adequately represent [the Tribe’s] interest in that case.” *Babbitt*, 150 F.3d at 1154. Here, Reclamation’s decision not to file a Rule 19 motion based on broader national interests wholly unrelated to Hoopa is clear evidence of Reclamation’s inability to adequately represent Hoopa. *Friends of Amador County*, 554 Fed. Appx. at 564.

d. Reclamation’s General Trust Obligation to Hoopa Is Not Sufficient to Show Reclamation Is an Adequate Representative for Hoopa In This Litigation.

There is no *per se* rule (and none cited by Plaintiffs) that holds that the United States is always an adequate representative of an Indian tribe in litigation merely because of the federal government’s general trust obligation. In cases evaluating whether an Indian tribe is a required party in litigation involving a federal agency, the Ninth Circuit applies the normal test under Rule 19 that evaluates, for purposes of the adequate representation inquiry: (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor’s arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect. *Dine Citizens*, 932 F.3d at 852; *Babbitt*, 150 F.3d at 1154; *Shermoen*, 982 F.2d at 1318. Under Rule 19, the fact that Reclamation has a general trust relationship to Hoopa does not answer whether Reclamation can adequately represent Hoopa’s interests in the context of this specific litigation. *Id.*; *Wild Fish Conservancy v. Irving*, 2015 U.S. Dist. LEXIS 179960 (E.D. Wash., Feb. 26, 2015) (Reclamation not adequate representative of Indian tribes in suit that threatened the tribes’ interests in treaty fishing rights, due to federal agencies broader interests).

The Ninth Circuit has repeatedly held that the federal government is not an adequate representative of an Indian tribe for purposes of Rule 19 where it has potentially conflicting interests. *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023, n. 5 (9th Cir. 2002);

Confederated Tribes of the Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1500 (9th Cir. 1981); *Shermoen*, 982 F.2d at 1318; *Verity*, 910 F.2d at 560; *see also* Dkt. #74, p. 26. Plaintiffs cite *Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999) to support their adequate representation argument, but in that case the Court found the interests of the United States and affected tribes to be completely aligned. *Id.* at 1167-68. That is not the situation here. Reclamation's conflicting broader national interests, its competing duties to the upstream Klamath Tribes and to Plaintiffs, and its documented history of failing to protect Hoopa's rights from Project impacts preclude an adequate representation finding here. Dkt. #22, ¶ 24-25; Dkt. #23, ¶ 29. This direct evidence of multiple sources of conflict precludes any conclusion that Reclamation adequately represents Hoopa's interests. *NRDC v. Kempthorne*, 539 F. Supp. 2d 1155, 1187-88 (E.D. Cal. 2008) (Interior not adequate representative of absent water contractors due to conflicting interests).

In support of their argument that Hoopa is not required, Plaintiffs also cite to *Nevada v. United States*, 463 U.S. 110 (1983); *Arizona v. California*, 460 U.S. 605 (1983), and *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921 (9th Cir. 1986). Those cases do not support Plaintiffs' argument. Each of these cases involved situations in which the United States had affirmatively filed claims for water rights on behalf of Indian tribes in the context of comprehensive water rights adjudications. In each of those cases, the Courts confirmed that the United States was authorized by Congress in the context of water rights adjudications to assert claims on behalf of Indian tribes as well as on behalf of other federal interests, including reclamation projects. *Nevada*, 463 U.S. at 113, 116; *Arizona*, 460 U.S. at 608-609; *Hodel*, 784 F.2d at 922. In *Nevada* and *Arizona*, the Supreme Court rejected subsequent efforts to re-open long settled water decrees based on new arguments that the United States had previously inadequately represented the tribes' interests in part due to allegedly conflicting interests.

Nevada, 463 U.S. at 143-45 (holding that the Tribe was bound by the United States' prior affirmative representation of its interests in the water rights adjudication and that principles of res judicata barred a re-opening of the decree, which had been relied upon by the parties to the decree and their successors for over fifty years); *Arizona*, 460 U.S. at 620-28 (declining to re-open water rights decree based on principles of finality and finding that Indian tribes were bound by United States' prior affirmative representation of their interests in water rights adjudication). In *Hodel*, the Ninth Circuit rejected the Tribe's argument that the United States lacked authority to pursue the Tribe's water rights claims in a state court adjudication. *Hodel*, 784 F.2d at 924.

These cases confirm that the United States has authority to present water rights claims on behalf of Indian tribes in a water rights adjudication and that Indian tribes may be subsequently bound by the United States' affirmative representation in that context. This is mandated by direct Congressional policy, as expressed in the McCarran Amendment, which expressly provides state courts with jurisdiction to join the United States (on its own behalf and on behalf of Indian tribes) in state court water right adjudications. 43 U.S.C. § 666. The McCarran Amendment allows state courts to conduct comprehensive water rights adjudications that finally determine the rights of all claimants, including the United States and Indian tribes, within the court's jurisdiction. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The Supreme Court has recognized that "water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983). The holdings of the cases relied on by Plaintiffs are limited to the unique context of claims affirmatively filed by the United States on behalf of Indian tribes in water rights adjudications, which the case presently before this Court is not.

e. Reclamation's Multiple Conflicting Interests Preclude A Finding of Adequate Representation of Hoopa's Interests in this Litigation.

This case does not present a mere abstract possibility of conflict; it presents an actual conflict of interest arising out of the actual relationships and documented conduct, past and present, of the parties at issue. *Klamath Water Users Protective Ass'n v. United States Dep't of the Interior*, 188 F.3d 1034, 1038 (9th Cir. 1999) (finding that, despite general trust relationship, “a clear and present conflict” and an “adversary relationship” existed between Interior and the Klamath Basin tribes regarding Interior’s development of operating plan for Klamath Project). *See* Dkt. #22, ¶ 22-25 (describing Reclamation’s conflicts regarding the Klamath Project and Hoopa rights); Dkt. #23, ¶ 29 (describing Reclamation’s reliance on “competing duties and obligations to other interests, such as duties to the Plaintiff irrigators or duties to other affected Indian tribes, as a basis to curtail or attempt to limit flows in the Klamath River downstream of the Project”). In past litigation involving the Plaintiffs, Reclamation has been willing to act directly against Hoopa rights in favor of Plaintiffs’ interests. Dkt. #22, ¶24-25.

A finding that the United States is not an adequate representative of an Indian tribe under Rule 19 is appropriate where two or more tribes have potentially conflicting interests in the case. *Verity*, 910 F.2d at 560 (suit against agency could not proceed in absence of tribes with potential conflicting claims in fishery); Dkt. #74, pp. 26-27 (citing cases). Contrary to Plaintiffs’ characterization of such cases as “inter-tribal” litigation, the relevant cases involve situations, like here, where the United States is sued as a defendant and the question for Rule 19 purposes is whether the United States can adequately represent absent tribes with potentially conflicting interests. *Verity*, 910 F.2d at 560; *Lujan*, 928 F.2d at 1500; *Shermoen*, 982 F.2d at 1318.

Reclamation owes competing trust obligations to both Hoopa and the Klamath Tribes. Although both Hoopa and the Klamath Tribes share an interest in defeating Plaintiffs’ suit, the

Klamath Tribes have an interest in preserving lake levels in UKL that differs from Hoopa's interest in releasing water from UKL for instream flows. *Klamath Water Users Protective Ass'n*, 188 F.3d at 1039, fn. 1. This conflict inherently exists due to the respective tribes' geographic locations in the Klamath Basin and the specific needs of the trust species that each tribe relies upon. *Id.* It also exists due to Reclamation's pattern and practice of failing to provide adequate water for both trust species (in UKL and in the Klamath River), while instead delivering water to Plaintiffs. The relief requested in Plaintiffs' suit would exacerbate this conflict by precluding Reclamation from using water in UKL to fulfill its ESA obligations and forcing Reclamation to allocate an even more limited water supply between Plaintiffs and the respective tribal interests.

SVID also argues that Reclamation can adequately represent Hoopa because this case is brought pursuant to the APA and will be subject to administrative record review. This argument is meritless given that Hoopa's motion to dismiss does not depend on and is not limited to the administrative record. SVID's argument also ignores that the Ninth Circuit permits non-parties to intervene as defendants in support of the federal government in APA litigation. *Wilderness Soc'y v. U.S. Forest Service*, 630 F.3d 1173, 1179 (9th Cir. 2011). Even in APA cases, review is not strictly limited to the administrative record. *Fence Creek Cattle Co. v. U.S. Forest Service*, 602 F.3d 1125, 1131 (9th Cir. 2010). Extra-record evidence is permissible to determine appropriate relief. *Earth Island Inst. v. Evans*, 256 F. Supp. 1064, 1078 n. 16 (N.D. Cal. 2003); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001).

B. Hoopa Is Also Required Under FRCP 19(a)(1)(A) and 19(a)(1)(B)(ii).

KID argues that Reclamation will not be subject to conflicting obligations if Plaintiffs prevail because "there are multiple processes available through which Reclamation may satisfy its obligations to provide instream flows without violating the legal rights of Plaintiff." Dkt. #81,

p. 28. KID relies on its speculative mitigation proposals that are unsupported by any evidence and which also ignore that Hoopa's rights are, by law, senior to Plaintiffs' rights. If Plaintiffs succeed on this suit in Hoopa's absence, Reclamation could be subject to an order from this Court requiring full water deliveries to Plaintiffs while simultaneously being under legal obligation to operate Link River Dam to fulfill its obligations under the ESA and to downstream Indian tribes such as Hoopa who hold senior instream water rights to protect the fishery. *Patterson*, 204 F.3d at 1213. This is the type of quandary that Rule 19 is designed to avoid.

SVID argues that Hoopa is not required under FRCP 19(a)(1)(B)(ii) because, according to SVID, Hoopa has no legally protected interest. As discussed above, that is wrong. Second, SVID argues that its requested relief would not prevent Reclamation from lawfully using water. But that is illusory. There is not sufficient water to satisfy Plaintiffs' rights and to fulfill Reclamation's ESA obligations and Hoopa's senior water rights. Dkt. #23, ¶28. Plaintiffs want to receive all the available water first, regardless of impact to ESA-listed species or senior tribal rights. Should Plaintiffs obtain their requested relief, Reclamation would be left to decide which of its various legal obligations to violate (i.e., this Court's order or its continuing statutory or trust obligations). While Plaintiffs are wrong on the law and unlikely to prevail on the merits, the risk of inconsistent obligations makes Hoopa a required party under FRCP 19(a)(1)(B)(ii).

Citing *Dine Citizens*, SVID argues "the Tribes cannot create inconsistent obligations by insisting that Reclamation must act unlawfully." Dkt. #77, p. 28. First, Plaintiffs are wrong that Reclamation's compliance with the ESA and tribal rights is unlawful. Second, if this Court required full water deliveries to Plaintiffs, Reclamation would still be legally obligated to operate Link River Dam to meet its ESA obligations and to fulfill senior downstream rights. *Patterson*, 204 F.3d at 1213-14. Reclamation would be between the very rock and a hard place described in

Dawavendewa v. Salt River Project Agric. Improvement and Power Dist., 276 F.3d 1150 (9th Cir. 1991) because it would be forced to choose between compliance with this Court's order and meeting its other continuing obligations that were confirmed in *Patterson*, 204 F.3d at 1213-14.

For similar reasons, Hoopa is required under FRCP 19(a)(1)(A) because Plaintiffs cannot obtain complete relief in Hoopa's absence. Hoopa will not be bound by any decision here. Reclamation will still be legally obligated to operate Link River Dam to fulfill Hoopa's rights, which as the Court in *Baley* recognized are at a bare minimum equal to what is required to satisfy Reclamation's ESA obligations. Reclamation will also be obligated to comply with the ESA and the applicable Biological Opinion, not challenged in this case, which requires instream flow releases out of Link River Dam. Thus, even if this Court ordered that Reclamation must provide full water deliveries to Plaintiffs, Reclamation would still have a conflicting legal obligation to implement and protect Hoopa's fishing and water rights, which as a practical matter require releases out of Link River Dam challenged by Plaintiffs here. There is insufficient water to satisfy all of Reclamation's obligations. If Plaintiffs prevail, Reclamation would have to choose which of its competing legal obligations to honor. Plaintiffs suit will not provide complete relief.

C. Hoopa May Not Be Joined Due to Its Sovereign Immunity.

KID incorrectly argues that Hoopa's sovereign immunity from this suit has been waived by the McCarran Amendment, 43 U.S.C. § 666. First, no Plaintiff has alleged any claim for adjudication or administration of water rights in this case. Dkt. ## 70, 73. Thus, the McCarran Amendment is irrelevant. Second, the McCarran Amendment does not waive Hoopa's sovereign immunity as a party to litigation. The Supreme Court's decision in *San Carlos Apache Tribe*, cited by KID, confirms that the McCarran Amendment does not waive sovereign immunity of Indian tribes as parties to litigation. 463 U.S. at 567, n. 17; *Wagoner County Rural Water Dist. No. 2 v. United States*, 2008 U.S. Dist. LEXIS 14397 (N.D. Okla. 2008) (ruling, in suit seeking

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declaration of rights to water held in reservoir, that the McCarran Amendment does not waive sovereign immunity of Indian tribes as parties to litigation). Third, any waiver of sovereign immunity provided by the McCarran Amendment applies only to comprehensive water rights adjudications, which this case is not. *Dugan v. Rank*, 372 U.S. 609, 617-18 (1963). The McCarran Amendment provides no waiver for private suits between the United States and particular claimants. *Id.*; *Metropolitan Water Dist. v. United States*, 830 F.2d 139, 144 (9th Cir. 1987). Fourth, the reference to administration of water rights in the McCarran Amendment only applies to water rights that have first been adjudicated, which Hoopa's have not. *South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985). *Id.* There can be no suit for the administration of water rights where there has been no prior adjudication of the relative general stream water rights at issue. *Id.* The ACFFOD, arising out of the Oregon KBA, is inapplicable to Hoopa and does not adjudicate Hoopa rights. *Eagle County*, 401 U.S. at 523 (McCarran Amendment does not give state court jurisdiction over out-of-state claims). Last, any claims for administration of relative rights adjudicated in the Oregon KBA must be brought in that state court action, which remains pending. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976) (McCarran Amendment favors dismissal of federal action in deference to ongoing state proceedings). The Oregon state court would lack jurisdiction to enter orders limiting Hoopa's rights to Klamath River flow in California. *Eagle County*, 401 U.S. at 523; *Baley*, 942 F.3d at 1341 (Hoopa was not required to submit claims in KBA).

D. In Equity and Good Conscience, This Litigation Must Be Dismissed.

1. Hoopa Will Suffer Significant Prejudice If This Litigation Proceeds In Its Absence.

Plaintiffs argue that Hoopa will not be prejudiced by this litigation. However, an order declaring it unlawful for Reclamation to release water from Link River Dam for instream fish

flows will clearly prejudice Hoopa. Likewise, an order requiring Reclamation to make full water deliveries to Plaintiffs regardless of impacts to ESA-listed species in the Klamath River or to senior downstream tribal rights will prejudice Hoopa. Plaintiffs seek relief intended to require Reclamation to fully satisfy Plaintiffs' junior water rights each year before releasing any water into the Klamath River for ESA compliance or senior tribal rights. Given the imperiled status of Klamath River salmon species, the limited annual water supply in the Klamath Basin, and the dependence that salmon species have on releases from Link River Dam, the relief Plaintiffs request could result in extermination of anadromous salmon in the Klamath River. Dkt. #23, ¶¶ 25-27. Plaintiffs' suit directly threatens Hoopa's federal reserved fishing and water rights and the ability of Hoopa people to exercise those rights for subsistence, let alone a moderate living. *Id.*

Plaintiffs do not seriously dispute the impact that their requested relief would have on Hoopa. Instead, they again incorrectly argue that Hoopa waived its rights by not participating in the Oregon KBA. They also rely on their speculative mitigation proposals, effectively conceding that Hoopa will be harmed by their requested relief, which is the relevant inquiry under Rule 19(b). Plaintiffs argue no prejudice will result because they seek only declaratory relief, but this is based on their incorrect assumption that Reclamation could or would ignore this Court's order. Plaintiffs also fail to submit any evidence that challenges Hoopa's declarations relating to the prejudice that Hoopa will suffer from this case going forward. Hoopa will be prejudiced.

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

KID argues that there are "countless ways in which this court may shape the relief to avoid any prejudice to Intervenor" (Dkt. #81, p. 38), but fails to identify even one. SVID suggests that implementation of their requested relief could be temporarily delayed to allow Reclamation time to obtain substitute water through leasing or purchase. Dkt. #77, p. 32. As discussed above, that proposal fails to minimize the prejudice to Hoopa, because Plaintiffs fail to

address what happens if Reclamation is unable to obtain sufficient water. Plaintiffs would ultimately expect full water deliveries regardless of impact to ESA-listed species or tribal rights. The idea of a delayed effective date also fails to recognize that Hoopa holds senior rights which are entitled to fulfillment prior to Plaintiffs receiving any water under their junior rights. Just as Plaintiffs were not entitled to compensation in *Baley* when Reclamation released water to meet its ESA obligations and fulfill, in part, downstream senior tribal rights, Reclamation need not purchase, lease, or otherwise compensate Plaintiffs here for water released from Link River Dam to satisfy its ESA obligations and for implementation of senior downstream tribal water rights.

3. Relief Would Not Be Adequate.

SVID argues that judgment rendered in Hoopa's absence would be adequate, because Hoopa has no role in approving or implementing Reclamation's operating procedures for the Klamath Project. This misses the point that Reclamation, regardless of a judgment entered in Plaintiffs favor here, will also be obligated to operate Link River Dam in compliance with the ESA and implementation of Hoopa's senior water rights. *Patterson*, 204 F.3d at 1213-14. The relief sought by Plaintiffs here would cause at minimum confusion and uncertainty and force Reclamation to choose between honoring this Court's order or its continuing obligations under the ESA and to release water necessary for Hoopa's water and fishing rights.

4. Plaintiffs Have An Alternative Forum and Sovereign Immunity Favors Dismissal.

Neither Plaintiff seriously disputes the availability of an alternative forum. KID argues that it would not have an alternative forum for its procedural due process claim but that is only one of its many claims asserted. Dkt. #81, p. 38. SVID argues that pursuing monetary claims would be burdensome but otherwise concedes that such claims are available. Dkt. #77, p. 32.

SVID primarily argues that it is unfair that Hoopa (and other Klamath Basin tribes) can file suits challenging Klamath Project operations while Plaintiffs' suit here is subject to dismissal due to sovereign immunity. The Ninth Circuit rejected a similar argument in *Dine Citizens*, noting that sovereign immunity may lead to situations where legal recourse is precluded in cases affecting tribal rights. *Dine Citizens*, 932 F.3d at 861. SVID's argument is also misplaced for other reasons. First, there is no case brought by Indian tribes or others regarding Klamath Project operations in which participation of Klamath irrigators has been denied. SVID's counsel is currently representing Klamath Water Users Association (KWUA) (a Plaintiff here) as an intervenor in the Yurok's pending litigation in the Northern District of California regarding Klamath Project operations. KWUA, through the same counsel, intervened and opposed Hoopa's request to nominally increase flows to protect threatened coho in *Hoopa Valley Tribe*. Plaintiffs rights to participate, defend, and make claims in cases brought by others is unimpaired.

Nor does Hoopa argue that every lawsuit brought by Plaintiffs relating to Reclamation's Project operations must be dismissed in Hoopa's absence. *Patterson, Kandra, Baley (and Bennett v. Spear*, 520 U.S. 154 (1997)) were adjudicated without arguments raised under Rule 19. Here, however, Plaintiffs seek relief that directly threatens to destroy Hoopa's interests. Although Plaintiffs' legal rights are junior to Hoopa, and although the ESA clearly governs Reclamation's operation of Link River Dam and mandates release of flow to protect ESA-listed species in the Klamath River, Plaintiffs seek relief that would mandate full deliveries to Plaintiffs regardless of impact to ESA-listed species or tribal rights in the Klamath. This case as framed by Plaintiffs and the extreme nature of the claims and relief sought is *sui generis* and it must be dismissed.

There is nothing unusual or improper about a sovereign using its immunity to prevent a case from proceeding in its absence. Courts regularly dismiss cases under Rule 19 based on the

immunity of federal, state, tribal, and foreign governments. *See e.g., Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008) (case dismissed due to absent foreign sovereign; acknowledging that dismissal of a plaintiff's claims without an alternative forum is contemplated under sovereign immunity doctrine); *Delano Farms Co. v. Cal. Table Grape Comm'n*, 623 F. Supp. 2d 1144 (E.D. Cal. 2009) (dismissing action seeking declaratory relief on grounds that United States was required party that could not be joined due to sovereign immunity); *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995) (dismissing action brought by Indian tribe on grounds that State of Kansas was required party that could not be joined due to sovereign immunity); *Friant Water Authority v. Jewell*, 23 F. Supp. 3d 1130, 1147-50 (E.D. Cal. 2014) (finding State of California indispensable in suit brought by irrigation district); *White v. University of California*, 765 F.3d 1010, 1028 (9th Cir. 2014) (dismissing action for failure to join Indian tribe that could not be joined due to sovereign immunity and citing "wall of Circuit authority" favoring dismissal). Where a required party has immunity, there is little need for balancing in the Rule 19(b) inquiry, as immunity is the compelling factor. *Id.* at 1028. Thus, Plaintiffs contention that dismissal is disfavored is not correct where an immune sovereign is required. *Id.* Nor is it unusual for an immune sovereign to intervene for the sole purpose of dismissing the action under Rule 19. That is just what occurred in *Dine Citizens*. 932 F.3d at 850.

E. The Public Rights Exception Does Not Apply.

The public rights exception applies narrowly to litigation "that transcend[s] the private interests of the litigants and seek[s] to vindicate a public right." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996). Here, Plaintiffs' complaints confirm that they seek to validate and protect the private property rights of their member irrigators and landowners, not the broader public interest. Dkt. #70, ¶ 1 (Plaintiff "brings this action . . . to protect their private property rights"); Dkt. #73, ¶ 38-41 (noting that land within Project service area is irrigated and farmed by

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private individuals and firms and that Plaintiffs seek to prevent economic damage). The public rights exception does not apply to cases where the plaintiff's private interest is advanced even if the general basis of the action involves something of public interest. *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245, 256 (D. Or. 2017). Nor does this case require joinder of a large number of persons. *Kickapoo Tribe*, 43 F.3d at 1500 (public interest exception generally applies where nature of case would require joinder of large numbers of people). Also, as a practical matter, the relief Plaintiffs seek would destroy Hoopa's rights. *Dine Citizens*, 932 F.3d at 858-61 (denying application of public rights exception). Nor does Plaintiffs' allegation that Reclamation must comply with the law bring its case within the public rights exception. *American Greyhound*, 305 F.3d at 1026 ("Almost any litigation . . . can be characterized as an attempt to make one party or another act in accordance with the law"). The public rights exception does not apply here.

III. CONCLUSION

For the reasons provided in this reply as well as Hoopa's moving papers, declarations, and exhibits filed in support, Hoopa respectfully requests this Court dismiss this consolidated action with prejudice for failure to join required parties pursuant to FRCP 12(b)(7) and 19.

Respectfully submitted this 27th day of March 2020

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 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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