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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)

SHASTA VIEW IRRIGATION DISTRICT, KLAMATH DRAINAGE DISTRICT, VAN BRIMMER DITCH COMPANY, TULELAKE IRRIGATION DISTRICT, KLAMATH WATER USERS ASSOCIATION, BEN DUVAL, AND ROB UNRUH'S RESPONSE IN OPPOSITION TO HOOPA VALLEY TRIBE'S AND THE KLAMATH TRIBES' MOTIONS TO DISMISS FOR FAILURE TO JOIN A PARTY UNDER FED. R. DIV. P. 19

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Plaintiffs Shasta View Irrigation District, Tulelake Irrigation District, Klamath Water Users Association, Ben DuVal, Rob Unruh, Van Brimmer Ditch Company, and Klamath Drainage District (collectively, "Plaintiffs") hereby respond in opposition to the Hoopa Valley Tribe's (Hoopa) Motion to Dismiss (ECF No. 74) (Hoopa Motion) and the Klamath Tribes' (Klamath Tribes) Motion to Dismiss (ECF No. 75) (Klamath Motion). When applicable, Hoopa and the Klamath Tribes are hereafter referred to collectively as the "Tribes."

I. INTRODUCTION

Plaintiffs filed this litigation to obtain review of administrative determinations by the U.S. Bureau of Reclamation (Reclamation) that will injure Plaintiffs and their communities.[1] Specifically, Plaintiffs allege that Reclamation, in adopting certain operating procedures for the Klamath Project (Project) for 2019-2024 (herein, the "Action"), has acted in excess of its statutory authority, and contrary to both federal law (the Reclamation Act of 1902, Pub. L. No. 58-66, 32 Stat. 388, codified as 43 U.S.C. §§ 371-600e (Jun. 17, 1902) (Reclamation Act), and the determinations made in Oregon's Klamath Basin Adjudication, under section 8 of the Reclamation Act, govern the appropriation and distribution of water by the United States. Reclamation's *ultra vires* determinations in the Action to curtail the water deliveries available for irrigation have injured and will injure Plaintiffs and their communities by depriving them of water to which they are lawfully entitled, and force the irrigation district Plaintiffs to fail to meet their own water delivery obligations.

Plaintiffs have a right to judicial review under the Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (Jun. 11, 1946), codified in scattered sections as 5 U.S.C.

[1] Plaintiffs use "Reclamation" to refer to all Federal Defendants – both Reclamation and the named officers of Reclamation, unless otherwise indicated.

§§ 551-706, and, in that statute, Congress waived the sovereign immunity of the United States and Reclamation – the decision-maker that Plaintiffs contend has acted outside its authority. Nevertheless, the Intervenor Tribes insist they can close the courthouse to Plaintiffs by asserting they are required parties who must be joined under Rule 19 of the Federal Rules of Civil Procedure, claiming they have interests in federally reserved water and fishing rights, but who cannot be joined because they have sovereign immunity.

In so moving, the Tribes ignore, and ask the Court to ignore, several critical facts. First, Plaintiffs' claims are not directed at the Tribes and do not challenge any tribal businesses, contracts, leases, permits, or any other activity in which the Tribes have an interest. Nor do Plaintiffs challenge or seek to limit any federal reserved rights that the United States owns in trust for the Tribes. Plaintiffs seek declaratory relief aimed solely at Reclamation and remand to ensure Reclamation acts within its lawful discretion and complies with the law on a *prospective basis.*

Second, the United States acts as a trustee for the Tribes, and is affirmatively obligated to represent and protect any tribal interests in the federally reserved water and fishing rights. Reclamation, as tribal trustee, can and will adequately represent the Tribes' interests, if any, in responding to Plaintiffs' claims, just as the United States does in any proceeding to adjudicate and administer water rights.

Third, the Tribes' demand that this case be dismissed is inconsistent with principles of equity and good conscience. Through their Motions, the Tribes effectively claim that at least three tribes (the Hoopa, the Klamath Tribes, and the Yurok Tribe) in the Klamath Basin each, independently, have veto power over whether Plaintiffs are entitled to pursue this case or any similar cases. Meanwhile, within the past three years, each of these Tribes has brought actions

against the same decision-maker, seeking relief that would injure Plaintiffs. The Yurok Tribe is, presently, suing Reclamation in the Northern District of California over the same 2019 operations plan to require Reclamation to take action to injure Plaintiffs' interests, and the Klamath Tribes have filed a brief as an amicus in that action, again promoting relief detrimental to Plaintiffs.[2] The principles of equity that govern the Rule 19 indispensability analysis condemn this kind of one-way street, particularly where this case causes no prejudice to the Tribes. It is contrary to equity and the fundamental principles of law on which this Country are based to hold that Plaintiffs have no recourse when their water is taken away by unlawful government action, unless all three tribes agree to join in the suit. The Tribes' Motions should be denied.

II. BACKGROUND

A. The Klamath Basin Geography and Hydrology

The Klamath Basin occupies approximately 12,000 square miles in south-central Oregon and northern California. AR0076065. Upper Klamath Lake (UKL) is controlled by Link River Dam (owned and operated by Reclamation), such that it stores water during higher runoff periods that can be diverted for irrigation, or released to flow downstream, when natural run-off has diminished. AR0076117-8. The Klamath River proper begins downstream of Link River Dam and flows approximately 240 miles before it reaches the Pacific Ocean. AR0076037. Iron Gate Dam is approximately 64 miles downstream of Link River Dam. AR0076153. Salmon in the Klamath River cannot move upstream beyond Iron Gate Dam. AR0076166. Four major tributaries, and numerous smaller tributaries, add volume to the Klamath River as it flows downstream from Link River and Iron Gate Dams. AR0076076.

[2] Order Transferring Venue and Den. Mot. for Prelim. Inj. Without Prejudice, *The Klamath Tribes* v. *U.S. Bureau of Reclamation, et al.*, Case No. 18-cv-03078-WHO (N.D. Cal. July 25, 2018), ECF No. 73. Order Den. Mot. for Relief from J. and Clarifying Inj. Orders, *Yurok Tribe, et al.* v. *U.S. Bureau of Reclamation, et al.*, Case No. 16-cv-06863-WHO (N.D. Cal. Apr. 30, 2018), ECF No. 129.

B. The Reclamation Act and the Klamath Project

Congress enacted the Reclamation Act in 1902 to encourage land settlement and agricultural economies in the west. The Reclamation Act financed irrigation works, with construction costs repaid by Project water users. The Klamath Project (or Project) was authorized in 1905, one of the first projects authorized under the Reclamation Act. AR0001208.

The Reclamation Act requires Reclamation to comply with state law in the "control, appropriation, use, or distribution of water" unless those laws conflict with "specific," "clear," or "explicit" congressional directives "authorizing the project in question." *See California v. United States*, 438 U.S. 645, 665, 668, 674 (1978) ("Congress in the 1902 Act intended to follow state law as to appropriation of water and condemnation of water rights."). Section 8 of the Reclamation Act provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State of the Federal Government or of any landowner, appropriator, or use of water in, to, or from any interstate stream or waters thereof.

Reclamation Act, as amended, at § 8, 43 U.S.C. § 383.

In 1905, Oregon and California also enacted statutes to develop the Klamath Project. AR0001207-8. Under these state laws, land that was submerged and owned by the states could be reclaimed by farmers for irrigation use. Upon uncovering the submerged lands, state land title passed to the federal government for disposition to individuals under the Reclamation Act. In the federal act of February 9, 1905, Congress authorized the Secretary of the Interior to advance the Klamath Project, to lower the water levels of water bodies in Oregon and California, and "to dispose of any lands which may come into the possession of the United States as a result thereof

by cession of any State or otherwise under the terms and conditions of the national reclamation act." Act of February 9, 1905, Pub. L. No. 58-66, 33 Stat. 714.

Pursuant to Oregon law, on May 17, 1905, the United States Reclamation Service (the predecessor to Reclamation) filed a notice of appropriation in Oregon to all of the then unappropriated waters of the Klamath Basin for the Klamath Project. AR0001226. The notice provides that the United States intends that "water is to be used for irrigation, domestic, power, mechanical, and other beneficial uses in and upon lands situated [in the Klamath Basin in Klamath, Oregon and Modoc, California counties]." *Id.*

Today, farmers rely on water deliveries and make investments in crops based upon expected water deliveries. The Project irrigated land area is about 200,000 acres, with most of that acreage receiving water diverted from the Klamath River system. AR0001257.

C. State Water Law

Oregon follows the prior appropriation system:

> Under an appropriation system, as such systems developed in the West, the first party to divert water for a beneficial use has the right to continue to divert that amount of water without interference from subsequent appropriators so long as the water continues to be put to beneficial use. In case of shortages, the entire share of the most recent appropriator is lost before the share of the next latest appropriator is diminished. Under such a system, the date of appropriation and the amount of water appropriated are the critical facts in the determination of the relative rights of water users.

United States v. Or. Water Res. Dep't, 44 F.3d 758, 763 (9th Cir. 1994). Senior water rights are not enforceable against junior water rights absent adjudication. The means to determine the existence, quantification, and "priority" of water rights is through a state general stream adjudication. *See* Or. Rev. Stat. (ORS) 539.005-539.240. The McCarran Amendment (also known as the McCarran Water Rights Suit Act), 43 U.S.C. § 666, as codified, waives federal sovereign immunity for state general stream adjudications, and that waiver extends to federal

water rights reserved on behalf of Native American tribes. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 811-12 (1976). Once adjudicated, the state water agency can administer senior calls by priority within the state's comprehensive river system among all water users, including the United States under its federally reserved rights.

D. The Klamath Basin Adjudication

The State of Oregon commenced the Klamath Basin Adjudication (KBA) to determine the relative rights of use of the Klamath River and its tributaries in accordance with its general stream adjudication law. *See* ORS 539.005. Oregon law provided that all parties were required to file claims, and contested claims of water rights were subject to trial-type proceedings before the Office of Administrative Hearings and the Oregon Water Resources Department's Adjudicator. *See* ORS 539.100-539.110. Tulelake Irrigation District, a California entity, filed and adjudicated its claims in Oregon because its water rights are diverted in Oregon, and used in California. Following more than ten years of administrative contested case litigation, the Adjudicator issued the finding of fact and order of determination in 2013. In 2014, the Adjudicator corrected determinations and submitted them to the Klamath County Circuit Court. *See* Amended and Corrected Findings of Fact and Order of Determination, *In re Matter of the Determination of the Relative Rights to the Use of the Water of the Klamath River and Its Tributaries, Oregon Water Resources Department* (Feb. 28, 2014) (ACFFOD).[3] Consistent with ORS 539.150, the Klamath County Circuit Court is presently managing hearings to approve or modify the ACFFOD. Pursuant to ORS 539.130, 539.170, the Adjudicator's findings of fact and

[3] A complete copy of the ACFFOD is available at https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx

order of determination is of full force and fact and water use in Klamath Basin is presently subject to regulation pursuant to the ACFFOD.

With respect to irrigation water use in the Project, the Adjudicator confirmed rights with priority no later than May 19, 1905, for all Project lands, including those lands owned by the Plaintiffs. KBA_ACFFOD_07155, at AR0001326. The districts and individuals who deliver water to their constituents hold title to the water use rights. KBA_ACFFOD_07075-07082, at AR0001246-53. The ACFFOD found that the beneficial users of Project water hold a legal interest in the rights recognized in the ACFFOD for the purpose of beneficial use. KBA_ACFFOD_07075, at AR0001246. The use rights extend to so-called "live flow" and to water that is stored in UKL. KBA_ACFFOD_07086, at AR0001257. Additional water rights recognized in the ACFFOD for Project lands, including Van Brimmer Ditch Company, include priority dates as early as 1883. *See, e.g.*, KBA_ACFFOD_07141, at AR0001312.

E. The Klamath Tribes

The former Klamath Reservation, associated with the Klamath Tribes, lies upstream of UKL. The Klamath Tribes asserted water rights to a non-consumptive federal reserved right "to support game and fish adequate to the needs of Indian hunters and fishers" on the former reservation based on the language of the 1864 treaty between the Klamath Tribes and the United States. *United States v. Adair*, 723 F.2d 1394, 1410 (*Adair II*). The priority and nature of certain of the federal reserved water rights for hunting and fishing on the Klamath Tribes' former reservation were recognized in *Adair II*. The Ninth Circuit specifically left the quantification and scope of the right to Oregon's KBA. *Id.* at 1406 ("actual quantification of the [reserved] rights to use of the waters . . . will be left for judicial determination, consistent with the decree in this action, by the State of Oregon under the provisions of [the McCarran Amendment].").

The KBA Adjudicator evaluated the Klamath Tribes' water right claims, and each of the claims were denied. Title to water rights for tribal purposes is recognized only in the name of the United States as tribal trustee. *See, e.g.*, KBA_ACFFOD_04909.[4] The Adjudicator approved the United States' claim for specific water levels in UKL. However, until the judicial phase of the KBA is complete, the United States' right for specific water levels may not be used as a basis for a senior priority call against any water rights, including the Project rights, with a priority earlier than August 1908. KBA_ACFFOD_04943.[5] This is because the Klamath Tribes, along with the United States and water users in the Project, signed a "no-call" stipulation, providing in relevant part: "From the time this Amended Stipulation is filed . . . any exercise of the water rights determined for [the UKL level claims] shall not result in regulation curtailing use of water under any water rights having a priority date before August 9, 1908." *Id.* The no-call stipulation provides that it shall be in effect until "a judgment or decree (or amended judgment or decree) has been issued regarding [the UKL level claims] and is operative." KBA_ACFFOD_04944. By virtue of the no-call stipulation and consistent order, the United States and Klamath Tribes are legally precluded from calling on any water user with a priority before August 9, 1908, which include the 1905 and senior rights determined for the Project and owned by Plaintiffs and KWUA members. Consistent with the stipulation, the Klamath Tribes have not placed any call that would affect Plaintiffs' water use.

[4] An example of the ACFFOD's denial of the Klamath Tribes' claims is available at https://www.oregon.gov.OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_04908.PDF

[5] The "no-call" stipulation is included in the ACFFOD's Partial Order of Determination for Water Right Claims 622, which is available at https://www.oregon.gov/OWRD/programs/WateRights/Adjudications/KlamathAdj/KBA_ACFFOD_04938.PDF

The Adjudicator further denied all claims for off-reservation instream tribal water rights. *See, e.g.,* KBA_ACFFOD_05379.[6] In other words, the Adjudicator found no legal support for the United States' claim, as trustee for the Klamath Tribes, to certain instream flows in the Klamath River, because that river is outside the boundaries of the historic Klamath Reservation. *Id*. The Klamath Tribes have demonstrated no reliance on Reclamation's Action at issue in terms of investment in a new facility, additional job creation, or other similar assets at risk that have changed due to the Action, as defined below.

F. The Hoopa Valley Tribe

The Hoopa reservation is a 12-mile square on the Trinity River, a tributary of the Klamath River in California. The Trinity River enters the Klamath River approximately 200 miles downstream from Oregon's UKL. AR0076044. Neither Hoopa nor its trustee has ever sought to judicially or administratively determine the purpose or location, or to quantify, fishery water rights, in the KBA, under California law, or elsewhere. The time to file a claim in the KBA is long past. *See* ORS 539.200, 539.210. Like the Klamath Tribes, Hoopa has not demonstrated any investment based on Reclamation's Action; in contrast, Hoopa also is opposed to Reclamation's Action based on other grounds, and filed a 60-day notice asserting challenges to the Action. *See* Letter from Thomas P. Schlosser and Thane D. Somerville on behalf of the Hoopa Valley Tribe regarding Hoopa's 60-day Notice of Intent to file suite (Jul. 27, 2019) (a copy of which is attached as Ex. A to the Declaration of Paul S. Simmons in Support of Shasta View Irrigation District, et al.'s Response in Opposition to Motions to Dismiss for Failure to Join a Party Under Fed. R. Civ. P. 19.

[6] The ACFFOD's denial of the tribal Klamath River claims is available at https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_05375.PDF

G. Action by Reclamation

On December 21, 2018, Reclamation transmitted to the United States Fish & Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) a document titled, "The Effects of the Proposed Action to Operate the Klamath Project from April 1, 2019 through March 31, 2029 on Federally-Listed Threatened and Endangered Species" (Original BA). AR0013864. Reclamation prepared the Original BA pursuant to section 7(c) of the Endangered Species Act of 1973 (ESA) (Pub. L. No. 93-205, 87 Stat. 884, codified as amended as 16 U.S.C. §§ 1531-1544) at § 1536(c), to evaluate the potential effects to federally-listed species that could result from the continued operation and maintenance of the Project. AR0013865.

On February 15, 2019, Reclamation amended its proposed action, in the 2018 Biological Assessment Modified Part 4 (BA Amendment). AR0013257. Together, the Original BA and BA Amendment are referred to as the "Proposed Action." The Proposed Action states as follows:

> The [Proposed Action] for 2019 to 2024 consists of three major elements to meet authorized Project purposes, satisfy contractual obligations, and address protections for listed species and certainty for Project irrigators:
>
> 1. Store waters of the Upper Klamath Lake and Lost River.
> 2. Operate the Project, or direct the operation of Project facilities, for the delivery of water for irrigation purposes or NWR needs, or releases for flood control purposes, subject to water availability; while maintaining conditions in UKL and the Klamath River that meet the legal requirements under section 7 of the ESA.
> 3. Perform Operations and Maintenance necessary to maintain Project facilities.

See AR0000515.

On March 5, 2019, Reclamation issued a draft Environmental Assessment (draft EA) titled, "Implementation of Klamath Project Operating Procedures 2019-2024," and allowed two weeks for public comment. On March 29, 2019, NMFS issued its "Endangered Species Act Section 7(a)(2) Biological Opinion, and Magnuson-Stevens Fishery Conservation and

Management Act Essential Fish Habitat Response for Klamath Project Operations from April 1, 2019 through March 31, 2024" (NMFS BiOp). Also on March 29, 2019, USFWS issued its "Biological Opinion on the Effects of Proposed Klamath Project Operations from April 1, 2019, through March 31, 2024, on the Lost River Sucker and the Shortnose Sucker" (USFWS BiOp).

On April 1, 2019, Reclamation adopted and approved the Proposed Action as the Action (2019 Annual Operations Plan). *See* AR0000487. By its approval of the draft EA and Action, Reclamation determined it would limit the Klamath Project water diversions and deliveries based on section 7(a)(2) of the ESA and/or otherwise not make water available to Plaintiffs, including KWUA members and their patrons. The limitations include a cap on the Project's allocation as well as provisions to require a significantly diminished Project supply.

Under the Action, Reclamation will "operate, or direct the operation of," Project and Project-related facilities in a manner that will result in insufficient water for diversion and use by Plaintiffs Duval and Unruh, Plaintiff Districts' patrons, and KWUA members and their patrons – less than the irrigation users' water rights entitlements, contractual rights, and needs. The Action also includes an arbitrary "cap" on water deliveries to Plaintiffs, which is contrary to the water rights determined for the Klamath Project under Oregon's general stream adjudication.

III. ARGUMENT

A. Legal Standards

1. Motions to Dismiss for Failure to Join an Indispensable Party Are Disfavored

The Tribes move to dismiss pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure "for failure to join a party under Rule 19." Fed. R. Civ. P. (FRCP) 12(b)(7). Unlike the "liberal policy in favor of intervention" that supports a "broad[]" interpretation of the

requirements of Rule 24 "in favor of intervention,"[7] dismissals under Rule 12(b)(7) are disfavored. *Wildearth Guardians v. U.S. Fish & Wildlife Serv.*, No. CV 16-65-M-DWM, 2018 U.S. Dist. LEXIS 28833, at *7 (D. Mont. Feb. 22, 2018) (" 'Dismissal . . . is not the preferred outcome under the Rules.' " (citation omitted)); *see also Pyramid Lake Paiute Tribe v. Burwell*, 70 F.Supp.3d 534, 539 (D.D.C. 2014) ("[C]ourts are generally 'reluctant to grant motions to dismiss of this type.' " (quotations and citation omitted)). "Dismissal of a complaint for failure to join an indispensable party under Federal Rule of Civil Procedure 19 is 'warranted only when the defect is serious and cannot be cured.' " *Id.* at 540.

"The moving party has the burden of persuasion" on all elements of Rule 19 "in arguing for dismissal" under Rule 12(b)(7). *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). The moving party under Rule 12(b)(7) also "bear[s] the burden in producing evidence in support of the motion." *Tonasket v. Sargent*, 830 F.Supp.2d 1078 (E.D. Wash 2011). The Court must "accept as true the allegations in Plaintiff[s'] complaint and draw all reasonable inferences in Plaintiff[s'] favor." *Diṅe Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 851 (9th Cir. 2019) (citations omitted, alterations in original).

2. Overview of Rule 19

Rule 19 of the FRCP imposes a "three step inquiry": (1) "Is the absent party necessary (i.e., required to be joined if feasible) under Rule 19(a)?"; (2) "If so, is it feasible to order that the absent party be joined?" and (3) "If joinder is not feasible, can the case proceed without the absent party, or is the absent party indispensable such that the action must be dismissed?" *Salt*

[7] *See Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) ("liberal policy in favor of intervention"); *In re Estate of Ferdinand E. Marcos Hunan Rights Litig.*, 536 F.3d 980, 985 (9th Cir. 2008) ("requirements for intervention are broadly interpreted in favor of intervention").

River Project Agric. Improvement & Power Dist. v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012); *see also* FRCP 19. A person or entity is a " 'required party' " if:

> [E]ither "in that [party]'s absence, the court cannot accord complete relief among existing parties"; or if "that [party] claims an interest relating to the *subject of the action* and is so situated that disposing of the action in the [party]'s absence may . . . as a practical matter impair or impede the [party]'s ability to protect the interest" or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations *because of the interest*."

Dińe Citizens, 932 F.3d at 851 (quoting FRCP 19(a)(1)). If the party is "required" but cannot be joined, the court must next determine whether the party is "indispensable"; that is, " 'whether in equity and good conscience the action should proceed among the existing parties or be dismissed.' " *Id.* (quoting FRCP 19(b)). "The inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application." *Makah*, 910 F.2d at 558.

B. The Tribes Are Not Required Parties to This Case

1. The Federally Reserved Water and Fishing Rights Held in Trust for the Tribes Do Not Make the Tribes Required Parties to this Suit

The Tribes devote the majority of their required party analysis to asserting the nature and priority of their federally reserved water and fishing rights. Plaintiffs do not dispute, as a general proposition, that the United States owns certain federally reserved water and fishing rights, as trustee for the Tribes. However, the existence of such rights is not the controlling issue here (and certainly the location, nature, and quantification of such rights would be matters if dispute). Rather, the threshold issue is whether "the absent tribes possess *an interest in the pending litigation* that is 'legally protected.' " *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962, 970 (9th Cir. 2008) ("A crucial premise of mandatory joinder, then, is that the absent tribes possess *an interest in the pending litigation* that is "legally protected.' " (emphasis added)); *Dińe Citizens*, 932 F.3d at 851 (absent party must claim "a legally protected interest in the *subject matter of the litigation.*" (emphasis added)); *see also, Makah*, 910 F.2d at 558.

"The inquiry under Rule 19(a) 'is a practical one and fact specific,' " and " 'few categorical rules inform[] this inquiry.' " *Diṅe Citizens*, 932 F.3d at 851 (further quotations and citations omitted). Categorically, the "interest at stake . . . must be more than a financial stake" in the outcome of the dispute, "and more than speculation about a future event." *Cachil*, 547 F.3d at 970. Additionally, "an absent party has no legally protected interest at stake in a suit merely to enforce compliance with administrative procedures." *Id.*

a. The Tribes Mischaracterize the Nature of this Suit and Their Purported Interests Therein

In their effort to establish a legally protected interest in this suit, the Tribes focus on describing the importance and priority of their claimed federally reserved fishing and water rights. The Tribes insist this is a sufficient interest because this case involves "competing" claims to the "finite resources" of the waters of UKL and Klamath River. Hoopa Motion at 20; Klamath Motion at 8, 12. But this mischaracterizes Plaintiffs' Second Amended Complaint.

Plaintiffs seek judicial review of "agency action" under the APA. All of Plaintiffs' claims focus exclusively on Reclamation's administrative decisions to approve, adopt, and implement its Action. Plaintiffs allege that Reclamation, in doing so, acted contrary to law and in excess of its lawful authority under the ESA. Plaintiffs also assert that, under section 8 of the Reclamation Act, state law from the KBA is binding on state water users, including Reclamation. Further, Plaintiffs allege that their contracts with Reclamation limit its discretion to impose water shortage on Plaintiffs for ESA purposes. On each of their claims, Plaintiffs seek prospective declaratory relief and a remand of Reclamation's determinations:

- Second Am. Compl., ¶ 77: "Plaintiffs are entitled to a declaration that the contracts between Reclamation and the Association's members do not confer power or authority upon Defendants to curtail or limit [Plaintiffs'] use of water in order to benefit listed species or otherwise provide water for instream purposes."

- *Id.*, ¶ 85: "Plaintiffs are entitled to a declaration that Defendants' actions . . . in adopting and implementing the Action violate section 8 of the Reclamation Act and/or that Defendants must maintain, operate, and direct operations of the Project and Project-related facilities in accordance with section 8 of the Reclamation Act."
- *Id.*, ¶ 92: "Plaintiffs are entitled to a declaration that Defendants must maintain, operate, and direct operations of the Project . . . in accordance with the requirements of the Reclamation Act, and that Defendants' authorization of the Action . . . for ESA-listed species . . . are not activities authorized by any applicable law."
- *Id.*, ¶ 96: "Plaintiffs are entitled to a declaration that the maximum diversion cap of 350,000 acre-feet is not authorized or required by Oregon law, the Reclamation Act, or section 7(a)(2) of the ESA . . . ."[8]

Thus, as in *Sierra Club v. Watt*, 608 F.Supp. 305 (E.D. Cal. 1985), "the issues this suit tenders are not, by the terms of [P]laintiffs' pleading, an adjudication of property rights qua property rights; rather, the suit tenders . . . questions of statutory interpretation and administrative review." *Id.* at 322. This case does not involve federally reserved water and fishing rights owned by the United States in trust for the Tribes. Reclamation did not base its determinations in the Action on any duty to satisfy tribal trust obligations; the Action was based on determinations Reclamation made under the ESA. *See* AR0000813. By challenging those determinations in this lawsuit, Plaintiffs seek to ensure that Reclamation acts within its authority and to confirm that the ESA does not increase Reclamation's legal authority or separately authorize Reclamation to use water for ESA purposes in the manner of the Action. Reclamation, as the agency that administers the Project and that undertook the challenged Action, is the only necessary party to Plaintiffs' claims.

The nature of Plaintiffs' claims and the relief sought herein distinguishes this case from the circumstances in *Dińe Citizens.* In *Dińe Citizens*, the plaintiff conservation groups took

[8] Plaintiffs also seek a declaration on their alternative Fifth and Sixth Claims, "in order that Plaintiffs may ascertain their rights and Defendants' obligations pursuant to the ESA and the ESA regulations," including that "Reclamation must consider the best scientific and commercial data to meet its obligations to the extent that there is any discretion in adopting the Action." Second Am. Compl. at ¶¶ 102, 108 and p. 33.

direct aim at the absent tribe's interests by challenging the federal agencies' "opinions and approvals that authorized the continued operations" at a mine owned by the absent tribal corporation (NTEC) and a power plant in which the NTEC had a direct, and substantial, financial interest. *See Diné Citizens*, 932 F.3d at 848-50. Those conservation groups effectively sought to shut down the operation of the mine and power plant by filing suit for violation of ESA and the National Environmental Policy Act, eight months after the agencies provided the necessary permits and approvals for the power plant and mine, and after NTEC had "made a significant financial investment" therein. *Id.* at 849.

But no such facts, and no such practical consequences to the Tribes, are present here. None of Plaintiffs' claims, on their face or in their practical effect, seek to invalidate or limit federally reserved fishing or water rights, or is otherwise "aimed" at the Tribes' actions or interests.[9] The Tribes may disagree with Plaintiffs' position that Reclamation's determinations in the Action are *ultra vires,* but being a Tribe confers no legally protected interest in the resolution of this issue. To be certain, the Tribes have no protectable interest to ensure the continuation of Reclamation's unauthorized and unlawful process in directing Project operations. As the Ninth Circuit has repeatedly held, "the absent tribes 'have an equal interest in an administrative process that is lawful.' " *Cachil*, 547 F.3d at 977 (quoting *Makah,* 910 F.3d at 557); *cf. Fed. Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 120 (1960) ("[T]he general acts of Congress apply to Indians as well as to all others . . . .").

The Tribes, in fact, have "no legally protected interest in particular agency procedures," at all. *Makah,* 910 F.2d at 558. The Ninth Circuit relied on these principles in *Cachil* to hold

[9] *Cachil,* 547 F.3d at 972 (finding it "significant," in holding absent tribes were not required parties, that plaintiff did "not seek to invalidate compacts to which it is not a party" or "aim[]" its claims "at the other tribes or their gaming," but rather sought "to enforce a provision of its own Compact which may affect other tribes only incidentally." (further quotation and citation omitted)).

that the absent tribes had no legally protected interest in a claim challenging the agency's authority to unilaterally conduct draws of gaming device licenses, because the "absent tribes have an equal interest" in ensuring the agency "not conduct the draws of licenses ultra vires." 547 F.3d at 977.

Furthermore, unlike in *Diṅe Citizens,* Plaintiffs' successful prosecution of its claims to establish the bounds of Reclamation's discretion and authority in operating the Project would not have a retroactive effect *or* deprive the Tribes of water or fishing rights they currently enjoy. *See Diṅe Citizens,* 932 F.3d at 853 (tribes had protectable interest in the subject of the action because plaintiffs' challenge "does not relate only to the agencies' future administrative process, but instead may have retroactive effects on approvals already granted [because] [w]ithout the approvals the [m]ine could not operate."). The *Diṅe Citizens* court's description of *Makah* is also instructive, including the alterations to *the court made* in quoting the *Makah* decision:

> In *Makah*, we likewise held that absent tribes lacked a legally protected interest in a suit brought by the Makah Indian Tribe challenging the Secretary of Commerce's ocean fishing allotment "[t]o the extent that the Makah [sought prospective injunctive] relief that would affect only the ***future conduct*** of the administrative process." We also held, however, that absent tribes ***did*** have a legally protected interest "to the extent the Makah [sought] a reallocation of [***a particular prior year's***] harvest or challenge[d] the Secretary's [***prior***] inter-tribal allocation decisions."

Diṅe Citizens, 932 F.3d at 852-53 (alterations in original) (final two emphases added) (quoting *Makah*, 910 F.2d at 559). Here, any water already released by Reclamation under the adopted Action, quite literally, is already down the river. Plaintiffs do not seek to, and cannot, get it back. As relief, Plaintiffs seek rulings that define the parameters of Reclamation's authority going forward.

In fact, the relief Plaintiffs here seek is much less intrusive to any interests the Tribes may have than the claims in *Makah,* let alone *Diṅe Citizens.* Plaintiffs amended their complaint

to remove their request for injunctive relief, in order to clarify they are not seeking to prevent Reclamation from *lawfully* satisfying any of its other obligations under the law. If and to the extent Reclamation needs water to satisfy such obligations, there are a number of ways Reclamation could lawfully obtain the right to use that water.[10] While Plaintiffs removed their requests for injunctive relief to allow Reclamation the freedom to determine prospectively the best available option, this case is necessary to ensure Reclamation does not continue to unlawfully take that water from Plaintiffs and others who hold quantified and enforceable water rights in the UKL and Klamath River for irrigation. It is pure speculation, and therefore not a legally protectable interest, to assume that Reclamation will exercise none of its available options to lawfully secure any additional water it may need in the event Plaintiffs were to prevail. *Cachil*, 547 F.3d at 970.

Finally, the Tribes' heavy reliance on this Court's analysis of their interests in relation to the Motions to Intervene is also misplaced. *See* Hoopa Motion at 19; Klamath Tribes Motion at 8-9). In granting the Tribes leave to intervene, the Court relied exclusively on the requested injunctive relief Plaintiffs sought under the First Amended Complaint, to hold that the Tribes' water and fishing rights were significant protectable interests that would be impaired by this action. ECF No. 59:4-5. Moreover, the context was different. The requirements of Rule 24 are interpreted "broadly" in the applicant's favor because of the "liberal policy in favor of

[10] These options include: (a) leasing water rights that Plaintiffs or others hold in the UKL and Klamath River, under 445 Oregon Laws 2015 § 1-2; (b) purchasing such water rights from Plaintiffs or others under section 7 of the Reclamation Act, and leasing them for instream use under 445 Oregon Laws 2015 § 1-2; (c) condemning such water rights from Plaintiffs or others under the process set forth in section 7 of the Reclamation Act, and converting them to instream use under 445 Oregon Laws 2015 § 1-2; (d) obtaining limited licenses to use water in the UKL for instream purposes (as it did in 2015 and 2016), pursuant to ORS 537.143; and (e) obtaining water for instream purposes from other sources through similar means (i.e., Clear Lake, Gerber Lake, Howard Prairie Lake, Trinity River, Shasta River, Scott River, Salmon River). Further, as the Ninth Circuit suggested in *Adair II*, 723 F.3d at 1394, in the event the government finds it "has insufficient water to use former Klamath Reservation lands for the purposes Congress has designated," "Congress . . . has the power to acquire the additional water the Government may need by explicitly exercising its constitutional authority under article IV, section 3." *Id.* at 1419.

intervention." *See Wilderness Soc'y,* 630 F.3d at 1179. By contrast, dismissals like that requested by the Tribes under Rule 12(b)(7) are disfavored and granted only "reluctantly." *See Burwell,* 70 F.Supp.3d at 539; *accord Wildearth Guardians,* 2018 U.S. LEXIS 28833, at *4.[11]

b. The Tribes Lack a Legally Protectable Interest under the ACFFOD

In addition to lacking a legally protectable interest in the specific subject matter of Plaintiffs' Second Amended Complaint, the Tribes face an additional problem: under the ACFFOD, neither Tribe has any right or presently enforceable, legally protectable interest that is superior to Plaintiffs' water rights in UKL or the Klamath River.

As a consequence of the "no-call" stipulation in the ongoing KBA, neither the United States, the holder of that right, nor the Klamath Tribes, has any right at all to lake levels in UKL as against juniors earlier than 1908 in priority. *See* KBA_ACFFOD_04909, *infra* n.5. The Project water rights, held by Plaintiffs, all pre-date 1908. *See* KBA_ACFFOD_07155, at AR0001326. Accordingly, the Klamath Tribes do not have a legally protectable interest relating to Plaintiffs' claims in this case, and, the relief sought could not impair any relevant interest. Nor can this Court allow the Klamath Tribes to combine joinder principles and sovereign immunity to circumvent their settlement stipulation, specifically accepted under Oregon law.

Hoopa also cannot demonstrate a legally protectable interest related to Plaintiffs' claims. Neither Hoopa nor its trustee has ever sought a judicial or administrative determination of the existence, source, purpose, location, or quantity of any water rights, whether in the KBA or

[11] In a terse footnote, Hoopa claims that PacifiCorp, which it asserts operates the Klamath Hydroelectric Project (KHP) as a "licensee," is also a required party "due to the impacts Plaintiffs' suit would have on KHP license implementation and the ability to meet minimum flow requirements." Hoopa Motion at 9 n.3. This is the sum total of Hoopa's argument, and it should be disregarded by the Court as inadequately briefed and supported. Hoopa has not provided PacifiCorp's lease, provided any detail how it or the KHP would be impacted or impaired by this suit, or attempted to show that PacifiCorp cannot be feasibly joined or is indispensable.

elsewhere. Because 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. The authorities Hoopa cites to try to demonstrate that it has federal reserved water rights and their priority over Plaintiffs' rights, are based on circumstances that pre-date the ACFFOD, and thus are distinguishable on their facts. *See* Hoopa Motion at 6.

Finally, the Hoopa Tribe references other litigation in the Klamath Basin that they allege establish the senior priority of their undetermined, unquantified or presently unenforceable water rights. *See* Hoopa Motion at 6. For example, Hoopa cites to *Klamath Water Users Ass'n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000) for the proposition that "[c]ourts have previously recognized the Tribe's federal reserved water rights and the priority that the Tribe's rights have over Plaintiff's rights." *See* id. Any such reference in *Patterson* to relative priority of rights as between Plaintiffs and Hoopa amounts to *dicta* and must be disregarded. The actual legal issue in *Patterson* was whether irrigation interests are intended third party beneficiaries of a contract between a private utility and the federal government. *Patterson* at 1210-14. In background, the Ninth Circuit accepted several of the federal government's general assertions regarding tribes in the Klamath Basin, which has repeated in *dicta* also cited by Hoopa, including *Kandra v. United States*, 145 F.Supp.2d 1192 (D. Or. 2001) (cited in Hoopa Motion at 6).[12]

[12] The incorrect dicta was further repeated by the Federal Circuit in *Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019). To the extent *Baley* is construed to hold that there is an independent obligation or authority to allocate water for trust purposes, it is inconsistent with holdings of the Supreme Court, the Ninth Circuit, and a ruling of the Northern District of California that concerned the Klamath Basin. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) ("The government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."); *see also Morongo Band of Mission Indians v. Federal Aviation Admin.*, 161 F.3d 569, 574 (9th Cir. 1998) (agency must exercise trust responsibility within the context of its authorizing statute); Opinion and Order 14 (Mar. 8, 2005), *Pacific Coast Fed. of Fishermen's Ass'ns* v. *U.S. Bureau of Reclamation*, Civ. No. C 02-2006-SBA, 2005 U.S. Dist. LEXIS 36035 (N.D. Cal. Mar. 7, 2005) (trust responsibility to Yurok Tribe is discharged by compliance with generally applicable statutes and regulations).

It is imperative that the Court look to the determinations made in the KBA to determine what federally reserved rights, if any, have been secured for the Tribes in UKL and Klamath River to evaluate whether the Tribes have a legally protectable interest in this case. This is especially so if, as the Tribes' assert, this case involves competing claims to the waters in those sources.[13] These determinations demonstrate that the Tribes are not required parties.

2. Whatever Interests the Tribes Have Will be Adequately Represented by Reclamation in this Action

In addition to lacking a legally protected interest in this suit, the Tribes are not required parties because Reclamation can adequately represent their interests in this case.

a. There Is a Very High Bar for Overcoming the Presumption of Adequate Representation

"As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit." *Dińe Citizens*, 932 F.3d at 852 (quotations and citation omitted). There are three general factors relevant to this inquiry: (1) "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments"; (2) "whether the party is capable of and willing to make such arguments"; and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Id.* While application of these factors alone shows that Reclamation adequately represents any interests the Tribes may have in this suit, there are several presumptions that also inform the analysis.

[13] *See, e.g., California v. U.S.*, 438 U.S. at 678-79 (" '[F]or more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof,' and 'it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law . . . .' " (citation omitted)).

First, "[w]here an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). Second, this presumption is heightened further here because Plaintiffs' suit is against the government. " '[A] presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee.' " *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), abrogated on other grounds by *Wilderness Soc'y,* 630 F.3d at 1173 (citation omitted); *accord Arakaki*, 324 F.3d at 1086 ("In the absence of a '*very compelling showing to the contrary,*' it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." (citation omitted) (emphasis added)).

The government is "charged by law" with representing the Tribes' interests. " 'The federal government, including [Reclamation], has a trust responsibility to the Tribe[],' as trustee, which 'obligates [Reclamation] to protect the Tribe['s] interests in this matter.' " *Alto v. Black,* 738 F.3d 1111, 1128 (9th Cir. 2013) (citation omitted) (second alteration in original); *United States v. Mason*, 412 U.S. 391, 398 (1973) ("The United States serves in a fiduciary capacity with respect to [Native Americans]," and "as such, it is duty bound to exercise great care in administering its trust."); *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995) ("We have noted, with great frequency, that the federal government is the trustee of the Indian tribes' rights, including fishing rights."). Because of this trust responsibility, it is presumed that " '[t]he United States can adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the tribe.' " *Washington v. Daley*, 173 F.3d 1158, 1167 (1999) (citation omitted); *accord Makah*, 910 F.2d at 558 (same).

Third, this presumption of adequate representation is heightened even further here because the Tribes' asserted interests are *reserved* water and fishing rights. So complete is the government's unity of interest with the Tribes on such reserved rights that the government's waiver of sovereign immunity in the McCarran Amendment, 43 U.S.C. § 666, extends to the federally reserved rights of Native American Tribes. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 924 (9th Cir. 1986).

b. Reclamation Will Adequately Represent Tribal Interests in Reserved Rights Because of Its Trust Obligations

Reclamation can and will adequately represent the Tribes' interests, if any, in this suit. Reclamation and the Tribes undoubtedly have the same "ultimate objective[s]" to both defeat Plaintiffs' suit and ensure that Reclamation fulfills its obligations as trustee. *Cf. White Mountain*, 784 F.2d at 920 ("It is also clear that the federal government, as trustee for the tribes, is under an affirmative obligation to assert water claims on its beneficiaries' behalf."). It is the United States that actually holds water rights for tribal purposes in trust, and that has been confirmed in the KBA. *See* KBA_ACFFOD_04909, *infra* n.4. The Tribes have not identified any specific conflict with Reclamation arising in the context of this case, let alone the necessary "compelling showing," to overcome the multiple layers of presumptions of adequate representation.

Both Tribes heavily rely (and the Klamath Tribes exclusively rely) on this Court's ruling on the adequacy of representation in connection with the Tribes' Motions to Intervene. However, as indicated above, this analysis was conducted in connection with a different operative pleading, seeking different relief, under the different, "liberal" standard, of Rule 24. The Court made this point by making only the limited analysis for the " '[i]ntervention of right' " under Rule 24(a). ECF No. 61:7. To the extent the Court determines there is overlap between its

analysis of the adequacy of representation for Rule 24 and in the Tribe's Motions to Dismiss under Rule 12(b)(7), Plaintiffs urge the Court to exercise its discretion to reconsider non-final rulings. *See* FRCP 54(b). The Court's ruling on the Motions to Intervene, due to the intervention standard, specifically did not consider the separate impact of Reclamation's tribal trust obligations, particularly as applied to reserved tribal rights, and other authorities that undercut the Tribes' position. ECF No. 61:6-7.

The adequacy-of-representation factors further show the Tribes have failed to overcome the applicable presumptions. Hoopa first argues that Reclamation will not "undoubtedly" make all Hoopa's arguments because Reclamation has a different general interest in defending its decisions under the ESA and APA. This ignores that Reclamation not only has a strong interest to defend its federal reserved rights, but it has an affirmative trust obligation to do so.

This is distinct from the circumstances in *Diné Citizens*, on which Hoopa relies, because the federal defendants there "did not share" the same commercial interest in the "outcome" of the approvals for the mine and power plant as NTEC. *Diné Citizens*, 932 F.3d at 855. That case involved lease renewals for an ongoing mining operation, owned by a separate entity. There was also significant economic reliance on the existing mine, including investment of funds by NTEC once it received agency approvals. *Id.* at 853, 855. By contrast, here, Reclamation's interests and the Tribes' interests are "one and the same." *Id.* All federally reserved water and fishing rights are held in trust for the Tribes by the United States, and there has been no investment in a separate business involved. Nor is there any indication Reclamation has or would neglect to fully protect any reserved rights or the species of fish in which the Tribes claim a protectable interest.[14]

[14] *See Washington v. Daley*, 173 F.3d at 1158, 1168 (holding the government's trust obligations to the tribes allowed the government to represent the tribes interests where (a) the government and the tribes "agree that the [t]ribes have a treaty right to whiting [fish] in the area [at issue] . . . and that the [t]ribes are co-managers with the federal

Similarly, Hoopa does not identify how its interests would actually diverge from Reclamation's in this case. At best, Hoopa attempts to manufacture a conflict between Reclamation's duties with respect to other Klamath Basin tribes. But this alleged conflict is not at issue in this case; this case does not involve an inter-tribal conflict, or an allocation of tribal resources that could create a conflict in the United States' ability to represent all of the Tribes' interests. *See Daley,* 173 F.3d at 1168 (stating, "[a] conflict would arise only in regard to the level of allocations, which are not at issue here," and thus tribes failed to "demonstrate how such a conflict might actually arise in the context of this case").[15] Hoopa's reliance on past conflicts with Reclamation over other issues, and purported conflicts due to Reclamation's duties to Plaintiffs fails for similar reasons: Hoopa fails to demonstrate how these alleged conflicts would prevent Reclamation from adequately representing its interests in defending against Plaintiffs' suit.

Moreover, that Reclamation has certain trust obligations to the Tribes as well as other statutory obligations, does not create a recognized conflict. As stated by the Supreme Court:

> [I]t may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well. In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting

government of the resources in those regions," and (b) "there is no clear potential for inconsistency between the [government's] obligations to the [t]ribes and its obligations to protect the fishery resource.").

[15] All of the cases Hoopa cites to support its argument that a conflict exists between the Tribes and the federal government in relation to Plaintiffs' claims are distinguishable because they involve inter-tribal litigation. *See Manybeads v. United States*, 209 F.3d 1164, 1166-67 (9th Cir. 2000) (conflict between Hopi and Navajo tribes); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) ("In disputes involving intertribal conflicts, the United States cannot properly represent any of the tribes without compromising its trust obligations owed to all tribes.") (citations omitted); *see also Pit River Home & Ag. Coop. Ass'n v. United States*, 30 F.3d 1088, 1101 (9th Cir. 1994); *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1981); *Makah*, 910 F.2d at 560 (holding United States could not represent absent tribes because tribal interests conflicted amongst themselves).

> interests without the beneficiary's consent. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.

Nevada v. United States, 463 U.S. 110, 128 (1983) (applying this principle in the context of res judicata to hold the tribe was bound by the government's actions on its behalf).

Second, there is no indication that Reclamation is not "willing to make" all *necessary* arguments to preserve and protect the interests in issue. The only argument that Hoopa identifies is that Reclamation purportedly declined Hoopa's request that Reclamation file a motion to dismiss under Rule 12(b)(7), and that it "might" oppose such a motion. Plaintiffs recognize that this Court relied on this argument in ruling on the Motions to Intervene. ECF No. 61:6-7. However, the Ninth Circuit rejected this reasoning in reversing, for abuse of discretion, a dismissal based on the district court's ruling that the United States could not adequately represent a tribe "because the government did not support the [tribe's] motion to dismiss the suit under Rule 19." *Sw. Ctr. for Biological Diversity v. Babbit*, 150 F.3d 1152, 1154 (9th Cir. 1998). The Ninth Circuit reasoned:

> The district court's approach is circular: a non-party is "necessary" even though its interests are adequately represented on the underlying merits by an existing party, simply because that existing party has correctly concluded that it is an adequate representative of the non-party, and therefore opposes the non-party's preliminary motion to dismiss. The district court's approach would preclude the United States from opposing frivolous motions to dismiss out of fear that its opposition would render it an inadequate representative. The district court's approach would also create a serious risk that non-parties clothed with sovereign immunity, such as the Community, whose interests in the underlying merits are adequately represented could defeat meritorious suits simply because the existing parties representing their interest opposed their motion to dismiss . . . . [T]he government's decision not to support the Community's motion to dismiss does not support a finding that the Community is a necessary party.

Babbit, 150 F.3d at 1154. Mere differences over "litigation tactics" are not enough to defeat the presumption of adequate representation. *See Mich. Gambling Opposition v. Norton*,

No. CV 05-01181 (JGP), 2005 U.S. Dist. LEXIS 56445, at *6 (D.D.C. Sept. 1, 2005) (citation and quotations omitted).

Finally, because this case arises under the APA, review will be limited to the administrative record. *See Wildearth Guardians*, 2018 U.S. Dist. LEXIS, at *11-12 (citation omitted). Thus, the tribes " 'could not offer new evidence in the judicial proceeding that would materially affect the outcome of the case.' " *Id.* (quoting *Alto*, 738 F.3d at 1128).

Therefore, the Tribes have failed to make the "very compelling showing" necessary to overcome the presumption that Reclamation can adequately represent tribal interests in this case. *Arakaki*, 324 F.3d at 1086. Because the Tribes do not have a significantly protectable interest in the subject of Plaintiffs' suit, and their rights would not be impaired by proceeding in their absence, they are not "required parties" under Rule 19(a)(1)(B).

3. Nonjoinder of the Tribes Would Not Expose Reclamation to Inconsistent Obligations

The Tribes alternatively argue that they are required parties under Rule 19(a)(1)(B)(ii) because, if Plaintiffs were to prevail in their absence, it would expose Reclamation to inconsistent obligations: "complying with this Court's order . . . requiring full water deliveries to Plaintiffs or complying with its competing obligation to release water to fulfill the fishing and water rights of the absent Tribe(s) and its continuing legal obligations under the ESA." Hoopa Motion at 29-30.[16] This argument fails for three primary reasons.

First, to establish required party status through this prong of Rule 19, the Tribes must still establish a legally protected interest in the subject of this suit. *See* FRCP 19(a)(1)(B)(ii). For the reasons set forth in section III.B.1.a above, the Tribes have no such interest here.

[16] The Klamath Tribes joined in this section of Hoopa's Motion (*see* Klamath Tribes Motion at 11), and thus Plaintiffs address this argument as if it were made by both Tribes.

Second, the Tribes' argument relies on a mischaracterization of the relief Plaintiffs seek. As also explained in section III.B.1.a above, this case does not seek to prevent Reclamation from *lawfully* using water for any purpose. Thus, the "Hobson's choice" of purportedly inconsistent obligations does not exist and will not come to pass from any relief this Court may order in this case.

Finally, and perhaps most importantly, the Tribes misconstrue what "inconsistent obligations" means under Rule 19. As the Ninth Circuit held in *Dine Citizens,* in determining a factor that weighed against dismissal, a judgment rendered in the Tribes' absence, "would be adequate and would not create conflicting obligations, because it is the Federal Defendants' duty, not [the Tribes'], to comply with" the statutes at issue. 932 F.3d at 858. In this case, it is Reclamation that must comply with the Reclamation Act and limit its actions to those within its authority. Certainly, the Tribes cannot create inconsistent obligations by insisting that Reclamation must act unlawfully. *See, e.g., Cachil,* 547 F.3d at 977; *Makah,* 910 F.2d at 559.

Furthermore, the Tribes' threat that, they may, in the future, bring a suit against Reclamation that "could" result in an injunction, "*[s]hould* Reclamation fail to . . . release water necessary for Hoopa's right (or ESA-compliance)," does not create inconsistent obligations. Hoopa Motion at 30 (emphasis added). " 'Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident.' " *Cachil,* 547 F.3d at 976 (citation omitted). Not only is there presently no other court's order that could be breached, but the Tribes themselves admit they are speculating that they would even bring such an action, for an event that has not occurred.

C. Equity and Good Conscience Require That This Case Proceed Without the Tribes

1. Allowing the Tribes to Use Sovereign Immunity as a Sword to Set Up a One-Way Street Is Inconsistent with Equity and Good Conscience

Even if the Tribes were to establish "required" party status, this does not end the inquiry. The Court must also determine whether they are "indispensable" parties, such that this action must be dismissed in their absence or in "equity and good conscience" be allowed to proceed. FRCP 19(b). The Tribes argue that their sovereign immunity begins and ends the analysis. However, the Tribes are misusing their sovereign immunity as a sword to set up a one-way street dynamic where any tribes in the Klamath Basin could halt challenges to federal action that negatively affects the water supplies of any other persons who use and depend on that water, like Plaintiffs. Indeed, as indicated in the introduction, this is currently happening.[17]

Allowing the Tribes to assert immunity to preclude Plaintiffs from enjoying a right of access to the courts to obtain judicial review of adverse administrative determinations fails the "equity and good conscience" test. As one court observed, in refusing to allow an absent tribe who was "clear[ly]" a required party to turn its sovereign immunity "to its advantage":

> By this logic, virtually all public and private activity on Indian lands would be immune from any oversight under the government's environmental laws. This is neither the intent nor the import of Indian sovereign immunity.

Diṅe Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining Reclamation & Enf't, No. 12-CV-1275-AP, 2013 U.S. Dist. LEXIS 1401, at *6 (D. Colo. Jan. 4, 2013). After all, tribal "immunity is a shield . . . not a sword." *Gingras v. Think Fin.*, 922 F.3d 112, 128 (2d Cir. 2019). As another court held:

[17] The Yurok Tribe, in which the Klamath Tribes has appeared as an amicus party, are suing Reclamation in the Northern District of California, based on the very same Project operating procedures at issue in this case, under different causes of action. *See Yurok Tribe, et al. v. United States Bureau of Reclamation, et al.*, United States District Court for the Northern District of California, Case No. 3:14-cv-04405-WHO.

> Sovereign immunity is meant to be raised as a shield by the tribe, not wielded as a sword by the State. An absentee's sovereign immunity need not trump all countervailing considerations to require automatic dismissal. Instead, courts must carefully consider the circumstances of each case in balancing prejudice to the absentee's interests against the plaintiff's interest in adjudicating the dispute. The circumstances presented by this case raise constitutional questions about government conduct and implicate the absentee's contractual interests. Where no other forum is available to the plaintiff, the balance tips in favor of allowing this suit to proceed without the tribes. This conclusion does not minimize the importance of tribal sovereign immunity but, rather, recognizes that dismissal would have the effect of immunizing the State, not the tribes, from judicial review.

Auto. United Trades Org. v. State, 175 Wash.2d 214, 233-34 (2012).

A ruling that this case cannot proceed because of tribal immunity would condone an improper use of immunity by insulating federal government action from judicial review by all but the Tribes, and deprive Plaintiffs of their statutory and constitutional rights to access the courts to seek redress for Reclamation's unlawful acts, depriving Plaintiffs of their water rights. The inequity in such a ruling is enhanced by the fact that the Tribes' asserted interests in this case are federally reserved rights held in trust for the Tribes, the APA waives the United States' sovereign immunity that Plaintiffs claim, and the McCarran Amendment waives both the United States' and the tribal immunity for the adjudication and administration of federally reserved rights. *White Mountain,* 784 F.2d at 924. These facts, individually or when combined with the traditional Rule 19(b) factors discussed below, demonstrate that "equity and good conscience" require this case to proceed in the Tribes' absence.

2. The Rule 19(b) Factors Further Show that the Tribes Are Not Indispensable

Courts traditionally consider four nonexclusive factors under Rule 19(b): (1) the extent to which a judgment rendered in the Tribes' absence might prejudice the Tribes or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by "shaping the relief" or "other measures"; (3) whether judgment rendered in the Tribes' absence would be

adequate; and (4) whether Plaintiffs would have an adequate remedy if the action were dismissed for non-joinder. FRCP 19(b). These factors, which *must be weighed* by the Court, also favor allowing this case to proceed without the Tribes. *Id.; see also, e.g., Makah,* 910 F.3d at 559-60 (weighing factors even where tribes had sovereign immunity); *Manygoats v. Kleppe,* 558 F.2d 556, 558 (10th Cir. 1977) (same).

First, there is no prejudice to the Tribes or Reclamation from allowing this case to go forward without the Tribes. There is no risk of inconsistent obligations, and Plaintiffs merely seek to ensure that Reclamation complies with *all* of its lawful obligations, as stated above, and the Tribes cannot credibly claim to be prejudiced by a lawful administrative process. *Makah,* 910 F.2d at 559. There is no prejudice from the Tribes' absence because Plaintiffs' claims and requested declaratory relief do "not call for any action by or against the Tribe[s]." *Manygoats,* 558 F.2d at 558-59. Reclamation's tribal trust obligations also demand that it represent the Tribes' interests, which further "lessen[s]" any possible "prejudice." *Makah,* 910 F.2d at 560.

Further, Reclamation's trust obligations are not an unlimited deferral to any and all tribal claims. There is no independent general trust duty, and consequently there is no prejudice to the Tribes by requiring Reclamation to comply with generally applicable statutes and, specifically, its authorizing statute. "The government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *United States* v. *Jicarilla Apache Nation,* 564 U.S. 162, at 177. And, there is neither statutory authority nor any independent trust power that authorizes the United States to quantify and administer water rights. *See Morongo,* 161 F.3d at 574; Opinion and Order 14 (Mar. 8, 2005), *Pacific Coast Fed. of Fishermen's Associations v. U.S. Bureau of Reclamation,* Civ. No. C 02-2006-SBA (N.D. Cal.).

Second, the relief Plaintiffs seek could be further shaped to lessen any prejudice. Plaintiffs have already removed their requests for injunctive relief to avoid any unintended prejudice to the Tribes' interests, and identified a number of options that Reclamation has available to it to lawfully acquire the necessary rights or licenses to furnish water for other purposes. Plaintiffs would also not object to incorporating provisions into any judgment to allow Reclamation a reasonable period of time to take appropriate actions.

Third, a judgment rendered in the Tribes' absence would plainly be adequate, and thus strongly weighs against dismissal. This action is not directed at the Tribes' actions. The Tribes have no role in approving or implementing Reclamation's operating procedures for the Klamath Project, and no duties under the Reclamation Act or in connection with Plaintiffs' contracts with Reclamation. A judgment against Reclamation would be both adequate and complete.

The fourth factor weighs strongly against dismissal. There is no alternative forum by which Plaintiffs can obtain the relief they seek here against Reclamation: declaratory relief requiring Reclamation to comply with the law in approving and implementing operating procedures for the Klamath Project. While the Tribes suggest Plaintiffs could bring a takings case in the Federal Court of Claims to recover damages for the loss of water, and a takings claim *might* provide compensation, it would not stop Reclamation's unlawful actions. Thus, with such result, Plaintiffs would have to bring successive takings cases, on a yearly basis, at tremendous cost. This result also again creates a one-way street effect; where tribes can actively sue the United States to contest Klamath Basin operations, but tribal sovereignty precludes any forum for Plaintiffs to challenge the federal operations.

Therefore, "equity and good conscience" weighs against dismissal. While the Tribes generally enjoy sovereign immunity from suit, they are not using it here for its intended purpose

as a shield from unlawful state intrusions; they are using it as a sword to ensure they alone can affect Klamath Basin operations by preventing Plaintiffs exercising their statutory and constitutional rights to access the courts to stop unlawful governmental action.

D. The Court Should Alternatively Apply the Public Rights Exception

The Ninth Circuit, like many courts, has "adopted the 'public rights' exception to the traditional joinder rules." *Makah,* 910 F.2d at 559 n.6. "The public interest exception 'provides that when litigation seeks vindication of a public right, third persons who could be adversely affected by a decision favorable to the plaintiff are not indispensable parties.' " *Friends of Amador Cty. v. Salazar*, No. CIV. 2:10-348 WBS, 2011 U.S. Dist. LEXIS 142095, at *6 (E.D. Cal. Dec. 7, 2011) (quoting *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995)); *accord Dińe Citizens,* 932 F.3d at 858 (same). "[T]he exception generally applies where 'what is at stake are essentially issues of public concern and the nature of the case would require joinder of a large number of persons.' " *Friends of Amador* at *6 (quoting *Kickapoo,* 43 F.3d at 1500) (further quotation and citations omitted); *Watt,* 608 F.Supp. at 324 ("[P]ublic rights cases" involve, "by definition . . . constitutional, national statutory, or national administrative issues.").

This case meets these qualifications. Plaintiffs include public agencies, who are local governments representing the interests of the public. Ensuring that Reclamation complies with the Reclamation Act and state water law, and acts within its authority in operating a federal reclamation project affecting a hydrological system in two states and multiple separate water sources, is a matter of public concern affecting a large number of people. Reclamation's Klamath Project operations impact approximately 200,000 acres of irrigated agriculture, along with adjacent related economies in the basin. Plaintiffs alone have obligations to deliver water to hundreds of small farms, and associations with hundreds of members. A dismissal also has

ripple effects on the local economy, and other Reclamation operations, both in Oregon and in the other 17 western states where Reclamation operates water projects.

The public rights Plaintiffs seek to vindicate through this APA case are analogous to those the Ninth Circuit held qualified for the exception in *Makah.*

> Congress explicitly made FCMA regulations subject to judicial review [through the APA]. The Makah seek to use that tool to question whether the 1987 regulations were lawfully adopted in the first place. To the extent the Makah seek to enforce the duty of the PFMC and the Secretary to follow statutory procedures in the future, this is a "public right" and this action becomes one that potentially benefits all who participate in the ocean fishery.

Makah, 910 F.2d at 559 n.6. Similarly, here, even the Tribes would benefit from relief that ensures Reclamation follows the statutory requirements in the future because the Tribes have "equal interest" with everyone else "in an administrative process that is lawful." *Id.* at 559.

The Klamath Tribes insist, however, that this exception does not apply in this case because "it threatens to destroy the Tribes' entitlement to water for their own use." Klamath Tribes Motion at 14 (citing *Diṅe Citizens,* 932 F.3d at 860). While Plaintiffs acknowledge this limitation from *Diṅe Citizens,* it is not applicable here. This case presents a far different one from *Diṅe Citizens* and *Kescoli v. Babbitt,* 101 F.3d 1304 (9th Cir. 1996).[18] This case does not, in any fashion, threaten to "destroy" the Tribes' purported "entitlement to water." To the extent that the Klamath Tribes' "entitlement" refers to the federally reserved water rights owned by the United States and held in trust for the Tribes, those rights are at issue in the KBA. They are not

[18] *See Diṅe Citizens,* 932 F.3d at 860 (holding public rights exception did not apply because the implications of plaintiffs' claims is that Federal Defendants should not have approved the mining activities in their exact form, and "thus threatened NTEC's legal entitlements"); *Kescoli,* 101 F.3d at 1310-12 (public rights exception did not apply because plaintiffs' suit challenged a settlement agreement between the absent tribes and the government that dictated the conditions under which mining operations could be conducted).

at issue in this suit, which does not purport to change the results of the KBA.[19] To the contrary, Plaintiffs seek, in part, to prevent Reclamation from using water in a manner inconsistent with the determinations made in the KBA, *see* Second Am. Compl. ¶¶ 86-96, which are binding on Reclamation and the Tribes with respect to any federally reserved water rights in and to the UKL and Klamath River.

Plaintiffs do not anticipate adverse effects on any federally reserved water rights in which the Tribes claim an interest, and any incidental adverse effects on the Tribes' interests from Plaintiffs' suit can be handled by shaping the relief to Plaintiffs. In the end, it is a matter of significant public importance to a great many people that Reclamation follows the law. To accept the Tribes' argument that they are indispensable to such a case because they also claim an interest in the water sources at issue, solely to allow the Tribes to prevent the case from going forward, is inequitable and "sound[s] the death knell for any judicial review of executive decisionmaking." *Conner*, 848 F.2d at 1460. This cannot be allowed.

IV. CONCLUSION

For the foregoing reasons, the Tribes' Motions to Dismiss should be denied.

SOMACH SIMMONS & DUNN, PC

DATED: March 6, 2020

By */s/ Paul S. Simmons*
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[19] *Cf. Conner v. Buford*, 848 F.2d 1441, 1460 (9th Cir. 1988) (holding public rights exception applied where the "litigation against the government does not purport to adjudicate the rights of current [absent] lessees;" but "merely seeks to enforce the public right to administrative compliance" with environmental statutes).

PARKS & RATLIFF, P.C.

DATED: March 6, 2020

By */s/ Nathan J. Ratliff (as authorized on 3/6/2020)*
Nathan J. Ratliff
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CLYDE SNOW & SESSIONS, P.C.

DATED: March 6, 2020

By */s/ Reagan L.B. Desmond (as authorized on 3/6/2020)*
Reagan L.B. Desmond
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing will be e-filed on March 6, 2020, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

/s/ Paul S. Simmons
Paul S. Simmons