RIETMANN LAW, P.C.
1270 Chemeketa St. NE
Salem, Oregon 97301
Tel: 503-551-2740
Fax: 888-700-0192

Nathan R. Rietmann (OSB #053630)

WANGER JONES HELSLEY, P.C.
265 E. River Park Circle, Suite 310
Freson, California 93720
Tel: 559-233-4800
Fax: 559-233-9330

John P. Kinsey (Cal. Bar No. 215916
Christopher A. Lisieski
(Cal. Bar. No. 321862)
Admitted pro hac vice on 06/05/19

Attorneys for: Klamath Irrigation District

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MEDFORD DIVISON

KLAMATH IRRIGATION DISTRICT,

Plaintiff,

v.

UNITED STATES BUREAU OF RECLAMATION,

Defendant.

SHASTA VIEW IRRIGATION DISTRICT et al.,

Plaintiff

v.

UNITED STATES BUREAU OF RECLAMATION et al.,

Defendants.

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

PLAINTIFF KLAMATH IRRIGATION DISTRICT'S MEMORANDUM IN OPPOSITION TO INTERVENORS' MOTIONS TO DISMISS

ORAL ARGUMENT REQUESTED

{}

TABLE OF CONTENTS

Page(s)

{}

TABLE OF CONTENTS (CONTINUED)

Page(s)

{}

TABLE OF AUTHORITIES

Page(s)

Federal Cases

{}

TABLE OF AUTHORITIES

Page(s)

Federal Cases (Continued)

{}

TABLE OF AUTHORITIES

Page(s)

Federal Cases (Continued)

{}

TABLE OF AUTHORITIES

Page(s)

Federal Cases (Continued)

State Cases

Statutes

{}

TABLE OF AUTHORITIES

Page(s)

Statutes (Continued)

{}

TABLE OF AUTHORITIES

Page(s)

Statutes (Continued)

Other Authorities

{}

1. INTRODUCTION

In this action for declaratory relief, Plaintiff Klamath Irrigation District ("KID") asks the Court to declare that Defendant United States Bureau of Reclamation ("Reclamation") is acquiring water for instream purposes through a process (or lack thereof) that violates the Reclamation Act of 1902, KID's contracts with Reclamation, and KID's right to procedural due process guaranteed by the Fifth Amendment to the United States Constitution. KID Second Amended Complaint. (Dkt. #73.)

Intervenors the Hoopa Valley Tribe and Klamath Tribes (collectively, "Intervenors"), seek to prevent the Court from reaching the merits of Plaintiff's claims by moving for dismissal pursuant to Fed. R. Civ. P. 12(b)(7) and 19. *Hoopa MTD* (Dkt. #74); (Dkt. #75), asserting they are "required parties" that cannot be joined based on the doctrine of sovereign immunity. Thus, Intervenors assert the Court cannot in "equity and good conscious" hear the case in the required party's absence. Fed. R. Civ. P. 19.

Intervenor Hoopa Valley Tribe's arguments for dismissal are premised on the assertion that "Plaintiff is seeking to prohibit Reclamation from releasing water through Klamath Project facilities into the Klamath River for instream fish flows." *Hoopa MTD* (Dkt. #74, Pg. 2). Intervenor Klamath Tribes, in turn, contends KID is seeking a declaration that "holding and using water for purposes of compliance with the ESA" is unlawful. Klamath MTD at 6 (Dkt. 75). Based on these characterizations of KID's arguments, Intervenors' argue they are "required parties" because their fishing and water rights would

be adversely impacted if the court prohibited Reclamation from using water for instream purposes. From the same premise, Intervenors contend that in "equity and good conscious" this case cannot proceed in their (voluntary) absence.

Intervenors' arguments are entirely predicated upon a mischaracterization of KID's claims. Under Oregon law and the Reclamation Act of 1902, there are multiple processes through which Reclamation may *lawfully* hold and use water in the Upper Klamath Lake reservoir (hereinafter, "UKL Reservoir") for instream purposes—none of which would affect Intervenors' rights. Specifically, the declaratory relief KID seeks *would not* prohibit Reclamation from "holding and using water for purposes of compliance with the ESA," exactly as it is currently. The declaratory relief KID seeks also would not alter any legal obligation Reclamation owes to Intervenors, or impair any water right held by Intervenors. KID merely requests Reclamation to obtain whatever amount of instream water it needs to satisfy its legal obligations in accordance with available legal processes, rather than in contravention of law and KID's water rights.

Once it is recognized this is a procedural case, Intervenors' arguments for dismissal will crumble. "An absent party has no legally protected interest at stake in a suit to enforce compliance with administrative procedures." *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F3d 843, 852 (9th Cir. 2019). The only exception to this rule is "where the effect of a Plaintiff's successful suit would be to impair a right already granted." *Id.* Here, KID asks the Court for declarations concerning the lawfulness of the processes through which Reclamation is currently choosing to meet its ESA and other legal

obligations. Intervenors have no legally protected interest in *how* Reclamation meets its obligations to provide instream flows, particularly when those processes are unlawful.

Because Intervenors have no legally protected interest in the administrative mechanisms through which Reclamation obtains water for instream purposes to meet its Endangered Species Act ("ESA") (or other) obligations, a declaration requiring Reclamation to acquire water for instream purposes lawfully—*i.e.*, through administrative processes that comply with the Reclamation Act of 1902, Plaintiff's contracts with Reclamation, and the Fifth Amendment—would not impair any right already granted to Intervenors. Accordingly, all of Intervenors particularly arguments for dismissal pursuant Fed. R. Civ. P. 12(b)(7) and (9) fail and Intervenors motions to dismiss should be denied.

Even if Intervenors could assert this case cannot proceed in Intervenors' absence, this case should not be dismissed. KID seeks declaratory relief so that the relative water rights of KID and Reclamation may be properly and lawfully administered. The McCarran Amendment, 43 U.S.C. § 666, waives the sovereign immunity of United States and federally recognized Indian Tribes in suits for the administration of water rights. *Arizona v. San Carlos Apache Tribe,* 463 U.S. 545, 103 (1983). The reason KID has not fully joined Intervenors in this case has nothing to do with sovereign immunity, and everything to do with the fact that the dispute giving rise to this action concerns the administration of water rights owned by KID and Reclamation, not the water rights of Intervenors. Thus, to the contrary, Intervenors' sovereign immunity has been waived, and Intervenors may be joined for all purposes.

Finally, before turning to more specific consideration of the issues presented by Intervenors' motions, it is important to recognize that the arguments KID and Intervenors are making are merely opposite sides of the exact same coin. Intervenors' fundamental contention is that Reclamation is legally prohibited from meeting its obligations to KID because doing so would allegedly violate the ESA and its tribal trust obligations. KID, however, does not seek to have this Court adjudicate Reclamation's obligations to Intervenors. Rather, KID seeks a judgment declaring that, whatever obligations Reclamation may have, it cannot satisfy those obligations in a manner that does not violate the law—including the Federal Reclamation Act, KID's contract's with Reclamation, and the Fifth Amendment to the Oregon Constitution.

Simply put, KID did not file this case to contest whatever obligations Reclamation may have to Intervenors. KID understands that Reclamation must comply with the ESA, and fulfill whatever obligations it has to Intervenors. The fact that Reclamation may have obligations to Intervenors, however, does not give it permission to violate the law, decline to honor its contract with KID, or decline to provide procedural due process in accordance with the Fifth Amendment before depriving KID, or any other party, of their property interests in their water rights. The purpose, intent, and effect of this action is to obtain declaratory relief establishing that Reclamation must satisfy ***all*** of its obligations—whatever those obligations may be—in accordance with the law.

KID is not trying to simply turn the tables and obtain declaratory relief that would require Reclamation to honor Plaintiff's legal rights at the expense of Reclamation's other

legal obligations as Intervenors fear. Rather, KID merely seeks a declaration that Reclamation, in satisfying all of its obligations, may not violate the law.

2. LEGAL AND FACTUAL BACKGROUND[1]

The Reclamation Act of 1902 authorized the Klamath Reclamation Project (the "Klamath Project") for the singular purpose of providing water for irrigation. As such, the Klamath Project is fundamentally different from most other Reclamation projects, which are multiple use projects in which water stored in the project may be used for environmental, municipal, or a range of other purposes besides irrigation.

A. The Klamath General Stream Adjudication

In 1975, the State of Oregon commenced a general stream adjudication ("Adjudication") to comprehensively determine and quantify pre-1909 water rights in the Klamath River and its tributaries pursuant to ORS Chapter 539. The waters of the UKL Reservoir was encompassed within the scope of the Adjudication. The United States Supreme Court has long recognized that in Oregon's adjudication process, "[a]ll claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding." *Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 447–48 (1916).[2]

---

[1] Additional legal and factual background is contained in Plaintiff's Memorandum in Opposition to the Klamath Tribes and Hoopa Valley Tribe's motions to intervene, which is incorporated herein in its entirety by reference.

[2] Originally, the United States and the Klamath Tribes took the position that they need not participate in the Adjudication in order to *preserve* water rights that accrued under federal law." *United States v. State of Or.*, 44 F.3d 758, 763 (9th Cir. 1994). The Ninth Circuit, however, rejected these claims, "hold[ing] that the Klamath Basin

The Oregon Water Resources Department has conducted the Adjudication pursuant to Oregon law, which sets forth a general stream adjudication process for quantifying and determining state and federal water rights established prior to the adoption of Oregon's Water Rights Act in 1909, including federal reserved water rights of the United States and Indian Tribes. *See* O.R.S. Chapter 539; *Pac. Live Stock*, 241 U.S. at 447–48 (the purpose of Oregon's general stream adjudication process is to obtain "a complete ascertainment of ***all existing rights***") (emphasis added). Oregon's power to adjudicate the federal reserved water rights of the United States and tribes is derived from Congress' 1952 enactment of the McCarran Amendment, 43 U.S.C. § 666, which waives the sovereign immunity of the United States and Indian Tribes in (1) general stream water rights adjudications, *and* (2) suits for the administration of such water rights. *Arizona v. San Carlos Apache Tribe,* 463 U.S. 545 (1983).

On February 28, 2014, the State of Oregon entered its Amended and Corrected Findings of Fact and Order of Determination ("ACFFOD") in Klamath County Circuit Court. The ACFFOD quantified ***all*** pre-1909 water rights in UKL Reservoir, including the water rights of Plaintiff and Reclamation, for the very first time. Pursuant to O.R.S. 539.130(4), the ACFFOD took full force and effect at such time unless its operation was stayed, either fully or in part, pursuant to O.R.S. 539.180. To date, no stay of the

adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment." *Id.* at 770.

ACFFOD has been issued. Consequently, ORS 539.170 requires that the waters of UKL Reservoir be distributed in accordance with the ACFFOD.

B. Klamath Irrigation District's Water Rights

KID's rights were confirmed in the ACFFOD. As an irrigation district, KID holds water rights and other property in trust for its patrons. O.R.S. 545.253. The property KID holds in trust includes both secondary rights to use water stored in UKL Reservoir, and rights to live flow in the Klamath River, with priority dates of 1883, 1884, and 1905.[3] *Rietmann Dec.,* Exhibit 2, at 42, 45, 59-73, 87, 134, 139 (Dkt. No. 46). The season of use for all of KID's water rights is March 1st to October 31st. Although KID's water rights are for irrigation, domestic, and incidental use, Plaintiff and its patrons are entitled to lease any portion of its water rights instream pursuant to 445 Oregon Laws 2015 § 1-2. Plaintiff may also transfer any portion of its water rights to other landowners who need water for irrigation. *Id.*

KID's "right to the use of water constitutes a vested property interest which cannot be divested without due process of law." *Skinner v. Jordan Valley Irr. Dist.,* 137 Or. 480, 491, *modified on denial of rehearing,* 137 Or. 480 (1931).

C. Reclamation's Right to Storage

The ACFFOD also adjudicated Reclamation's rights. Notably, Reclamation does not hold any water right to use water from UKL Reservoir or the Klamath River for

instream purposes. Rather, Reclamation holds a 1905 primary ***storage*** right in UKL Reservoir obtained under the laws of the State of Oregon. Pursuant to this right, Defendant Reclamation is entitled to ***store*** a maximum annual volume of 486,828 acre-feet of water in Upper Klamath Lake "to benefit the separate irrigation rights recognized for the Klamath Reclamation Project." *Rietmann Dec.,* Exhibit 2, at 44, 68 (Dkt. #46). Reclamation does not own a water right entitling it to use water in the UKL Reservoir for instream purposes and admits as such. (Dkt. #26. ¶ 42(e)).

D. Intervenors' Water Rights

1. Klamath Tribes' Water Rights in UKL Reservoir

The Klamath Tribes have a water right in UKL Reservoir that is held in trust for them by the United States. *Rietmann Dec.,* Exhibit 3, at 10 (Docket No. 46). The express purpose or use of the water right is to provide "minimum lake levels in Upper Klamath Lake to establish and maintain a healthy and productive habitat to preserve and protect the tribes' hunting, fishing, trapping and gathering rights on former reservation land." *Id.* at 11. The priority date of the water right is "time immemorial." However, the water right the United States holds in trust for the Klamath Tribes also specifically provides that the water right "shall not result in regulation curtailing use of water under any water rights having a priority date before August 9, 1908." *Id.* at 8. Thus, the water right in UKL Reservoir that the United States holds in trust for the tribes is expressly subordinate to the 1905 water rights of Plaintiff and cannot, by its terms, interfere with the exercise of Plaintiff's water rights in the UKL Reservoir.

2. Hoopa Valley Tribe's Unadjudicated California Water Rights

The ACFFOD does not include any federal reserved water right for the Hoopa Valley Tribe in UKL Reservoir or any portion of the Klamath River in Oregon. *See* Amicus Curiae Brief of the State of Oregon, *Baley et al. v. United States,* U.S. Court of Appeals for the Federal Circuit, Case No. 18-1323, Docket No. 93, at 26. Nor does the Hoopa Valley Tribe in this proceeding claim to have any federal reserved water rights in Oregon. *Hoopa Rely In Support of Motion to Intervene,* at 10 (Doc. No. 49). Indeed, during the thirty-nine (39) years that elapsed between the date the Klamath Adjudication was commenced in 1975, and the date the ACFFOD was entered in 2014, neither the United States in its capacity as trustee nor the Hoopa Valley Tribe itself ever claimed such rights. Nor has the Hoopa Valley Tribe ever contested the water rights claims of KID—or any other person, for that matter—in the UKL Reservoir or the Klamath River, in the Klamath Adjudication. This is true notwithstanding the fact that:

> (1) The United States Supreme Court has held that in Oregon's adjudication process, "[a]ll claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding." *Pac. Live Stock*, 241 U.S. at 447–48.
>
> (2) The Ninth Circuit has held "that the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States [and tribes] to participate in when it passed the McCarran Amendment" and rejected the United States and Klamath Tribes' claims that they could not "be ***required*** to participate in a state adjudication in order to *preserve* water rights that accrued under federal law." *United*

> *States v. State of Or.*, 44 F.3d 758, 770 (9th Cir. 1994) (emphasis added).

Although the Hoopa Valley Tribe claims federal reserved water rights ***in California*** to protect its fishing rights in the Klamath and Trinity Rivers, those claims have ***never been adjudicated*** and, as explained above, do not grant the Hoopa Valley Tribe any water right in Upper Klamath Lake or the portion of the Klamath River encompassed within the scope of the Klamath Adjudication, as such rights are not reflected in the ACFFOD. Beyond this, however, the existence, quantity, volume, types of use, seasons of use, and sources of water associated the federal reserved water rights claims of the Hoopa Valley Tribe are entirely unknown by virtue of the fact that such claims have not been adjudicated. It is also entirely unknown whether, or to what extent, the Hoopa Valley Tribe's water rights would actually operate to curtail the water rights of KID or Reclamation once adjudicated, as the United States Supreme Court has never exercised its exclusive jurisdiction to equitably apportion the interstate waters of the Klamath River between Oregon and California,[4] and the tribes are generally only entitled to a portion of the water that is equitably allocated to a given state. *See*, *e.g.*, Tarlock, Law of Water Rights and Resources § 10:10 (2013 Thompson Reuters); *see also State of Arizona v. State of Calif.*, 376 U.S. 340 (1964), *amended sub nom. Arizona v. Calif.*, 383 U.S. 268 (1966), *also amended sub nom. Arizona v. Calif.*, 466

[4] While Oregon and California have entered into the Klamath Basin Compact (the "Compact"), the Compact does not provide for how water is to be equitably apportioned with respect to water rights vested prior to the date of the Compact (1957). *See* Klamath River Basin Compact, Pub. L. No. 85–222, 71 Stat. 497 (1957).

U.S. 144 (1984) ("all uses of mainstream water within a State are to be charged against that State's apportionment, which of course includes uses by the United States").

E. Reclamation's Operation of UKL Reservoir

Although Reclamation does not have a water right to use water for instream purposes has determined that it will use a *minimum* of 400,000 acre-feet of water in the UKL Reservoir each year for instream purposes to, *inter alia*, satisfy Intervenors' rights, despite the fact that it does not have a water right authorizing the use. *Rietmann Dec.,* Exhibit 4, at 55 ("Under the Proposed Action Alternative, the minimum EWA is 400,000") (Dkt. $46). Defendant has also purported to cap the maximum amount of water that Plaintiff and other irrigators within the Klamath Project are entitled to beneficially use under their water rights to 350,000 acre-feet. *Rietmann Dec.,* Exhibit 4, at 27 ("The maximum Project Supply under the Proposed Action Alternative is 350,000 AF) (Dkt. #46). Reclamation's use of water without going through the process of obtaining a water right necessitated filing of this action on April 10, 2019.

3. STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(7) allows for dismissal "for failure to join a party required by Rule 19." In turn, Rule 19 provides for dismissal of an action where there is a "required party" who cannot be joined and the case cannot "equity and good conscious" proceed in the "required party's absence."

Under Rule 19(a), a court determines whether a party is "required" by considering: (1) whether a party's absence will prevent it from according complete relief between the parties, (2) whether deciding the case in a party's absence will practically impair or impede the absent party's ability to protect their interests, and (3) whether deciding this case in Intervenors' absence will cause Reclamation to face a substantial risk of double, multiple, or otherwise inconsistent obligations. If a party is "required," the Court considers whether it is feasible to join the required party in the action. If it is not, the Court considers whether in equity and good conscious the case should be allowed to proceed in the required party's absence pursuant to Rule 19(b).

4. ARGUMENT AND AUTHORITIES

There are several underlying legal points that must be understood in order to properly analyze whether Intervenors are required to be joined in this action pursuant to FRCP Rule 19.

A. Collateral Estoppel Precludes Any Contention That Water Rights in UKL Reservoir or The Klamath River in Oregon Are Different or Other Than Those Recognized in The ACFFOD

Collateral estoppel bars Intervenors or the parties to this case from asserting there are any presently enforceable water rights in Oregon Klamath Basin that are different, or otherwise recognized in the ACFFOD. Collateral estoppel applies to decisions made by administrative agencies when the administrative agency (1) acts in a judicial capacity and (2) resolves disputed issues of fact properly before it, and (3) the parties had an adequate opportunity to litigate. *United States v. Utah Const. Co.*, 384 U.S. 394 (1966), *superseded*

on other grounds. The ACFFOD reflects a decision by an administrative agency that satisfies each and every one of these elements. *See,* ORS Chapter 539; *Rietmann Dec.,* Exhibit 1 (Dkt. No. 46-1); *United States v. State of Or.*, 44 F.3d 758, 764 (9th Cir. 1994) ("Oregon Water Resources Department accepts and objects claims, surveys the river, takes evidence, and holds hearings regarding contested claims"). The ACFFOD comprehensively determines *all* presently enforceable water rights in the UKL Reservoir or the Klamath River in Oregon. *Id.*

B. The Right To Store Water Does Not Include The Right To Use Stored Water

Under Oregon law, the right to store water is separate and distinct from the right to use water. To lawfully store water, it is necessary to obtain a "primary" storage right. To lawfully use stored water, it is necessary to obtain a "secondary" use right. The right to store water under the "primary" storage right "does not include the right to divert and use stored water, which must be the subject of the secondary permit." *Cookinham v. Lewis*, 58 Or 484, 492 (1911).

Secondary rights to use stored water are substantially different from other forms of water rights. "Once water from a natural source has been legally stored, use of the stored water is subject only to the terms of the secondary permit that grants the right to use of stored water." Op Atty Gen OP-6308 (1989); ORS 540.210(3) ("The distribution and division of water shall be made according to the relative and respective rights of the various users from the ditch or Reservoir.") (Emphasis added); OAR 690-250-0150(4) ("Use of legally stored water is governed by the water rights, if any, which call on that source of

water."). *Tudor v. Jaca*, 178 Or 126, 147–148 (1945) (impounded water may only be used to satisfy the secondary right). For such reason, "legally stored water is not subject to call by senior rights to natural flow, even if the stored water originated in that stream." Op Atty Gen OP-6308 (1989) (Emphasis added).

By contrast, primary storage water rights (entitling the owner to take water from a natural stream and store it) are in competition with other natural flow rights. This means that the senior most water right holder on a given natural stream is entitled to call a junior primary storage right holder in times of scarcity and prevent the holder of the junior storage right from taking more water from the stream and storing it. However, the senior most water right holder on a given natural stream is *not* entitled to curtail the owner of a junior secondary storage right and prevent the junior secondary storage right holder from using water already impounded in storage (or force the release of water that is already stored).

C. Pre-ACFFOD Cases Have Little Bearing Post-ACFFOD

Based on a line of cases decided or involving factual disputes that arose prior to the issuance of the ACFFOD in 2014, Intervenors contend that "courts have repeatedly recognized Hoopa's federal reserved water rights and the priority that Hoopa's rights have over Plaintiffs' rights." *Hoopa MTD,* at6 (ECF No. 70). The line of cases cited in support of this proposition includes: *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1209 (9th Cir. 1999) ("Reclamation…has a responsibility to divert the water and resources needed to fulfill the [t]ribes' rights, rights that take precedence over any alleged rights of the Irrigators"); *Kandra v. United States*, 145 F.Supp.2d 1192, 1195 (D. Or. 2001)

(Plaintiffs' contract rights to irrigation water are subservient to ESA and tribal trust requirements"); *Baley v. United States*, 942 F.3d 1312, 1339 (Fed. Cir. 2019)("Yurok and Hoopa Valley Tribes have an implied water right that includes the Klamath River and the flows therein as controlled by the Iron Gate Dam.[5]").

All of the foregoing cases were litigated based on the assumption that Reclamation owned all of the water rights associated with the Klamath Project and maintained absolute discretion to control the operation of the Link River Dam, which controls the release of water from UKL into the Klamath River. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999)("Because Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the [t]ribes' rights, rights that take precedence over any alleged rights of the [i]rrigators"); *Kandra v. United States*, 145 F.Supp.2d 1192, 1196 (D. Or. 2001) ("Reclamation must deliver water to Project irrigators in accordance with the rights held by the United States and the irrigators' individual repayment contracts"); *Klamath Irrigation Dist v. United States*, 348 Or. 15, 20 (2010) *answering* Certified Questions in *Baley*, 942 F.3d at 1317 ("[W]e assume that the United States holds legal title to the water.") It was similarly assumed, in each of the foregoing cases, that the Klamath Tribes held immemorial water rights in UKL Reservoir, which had priority over the water rights of KID and other irrigators within the Klamath Project.

[5] It is important to note that Link River Dam, not Iron Gate Dam, controls the release of water from UKL Reservoir. Iron Gate Dam is located in California below the Klamath Project.

Today, following issuance of the ACFFOD, none of the findings that formed the basis for foregoing pre-ACFFOD decisions are even arguably correct. In contrast to what was always assumed, the ACFFOD determined that KID and others own the water rights to the use of water in UKL Reservoir and the Klamath River, not Reclamation. As a result, Reclamation does not have discretion to operate Link River Dam however it pleases and must instead operate the dam in accordance with the ACFFOD. *Nat. Res. Def. Council v. Patterson*, 791 F.Supp. 1425, 1435 (E.D. Cal. 1992) ("Section 8 incorporates state statutes which affect both dam operation and water impoundment or distribution and statutes which solely affect water impoundment or distribution.") And contrary to what was always assumed in the pre-ACFFOD cases, the Klamath Tribes' water rights in the UKL Reservoir do not curtail the water rights of KID .*Rietmann Dec.,* Exhibit 3, at 10 (Dkt. #46). Also, now that the ACFFOD sets forth enforceable water rights, it is contrary to Oregon water law for Reclamation to use water without a water right or in contravention of another person's water rights. And under the ACFFOD, Reclamation does not have any right to store or use water from Upper Klamath Lake for instream purposes.

In short, all of the *pre*-ACFFOD decisions are predicated upon the assumption (or reality at the time) that Reclamation had complete discretion over how water in UKL Reservoir was utilized and that irrigators within the Klamath merely had a contractual right to water. Today, as a result of the ACFFOD, Reclamation no longer has the authority it was assumed to have in the foregoing line of pre-ACFFOD. Consequently, Reclamation cannot meet its legal obligations by just holding water in UKL Reservoir and releasing in

whatever manner is necessary to fulfill its ESA and tribal trust obligations, as it did prior to the issuance of the ACFFOD. Instead, it must provide water for instream water flows using one or more of the several procedures available under law.

D. There Are Many Processes Through Which Reclamation May Lawfully Use Water In UKL Reservoir For Instream Purposes

i. Reclamation May Lawfully Use Water Through an Instream Lease

Specifically, Oregon law allows Reclamation to lease the water rights that Plaintiff and other water rights holders have in UKL Reservoir for instream purposes. Sections 1 and 2, Chapter 445, Oregon Laws 2015. This statute was enacted in specific response to the issuance of the ACFFOD in 2014 and is codified as a note immediately below ORS 539.170. Rietmann Dec March 6, Exhibit 1. The statute applies specifically to "determined claims," which are defined to mean "a water right in the Upper Klamath Basin determined and established in an order of determination certified by the Water Resources Director under ORS 539.130." Pursuant to this statute, a determined claim "may be leased for a term as provided under ORS 537.348." In turn, ORS 537.348(2) provides that "any person who has an existing water right may lease all or a portion of the existing water right for use as an in-stream water right for a specified period without the loss of the original priority date. During the term of the lease, the use of the water as an in-stream right may be considered a beneficial use." This statute, which was enacted in direct response to the issuance of the ACFFOD, provides a clear cut mechanism through which Reclamation may lease the water rights that KID and other water rights holders in UKL Reservoir and *lawfully* obtain the

rights to use water for compliance with its ESA and tribal trust obligations without violating the Reclamation Act of 1902 or Plaintiff's right to procedural due process under the Fifth Amendment.

ii. Reclamation May Lawfully Use Water Through a Limited License

ORS 537.143 and OAR 690-340-0030 set forth a process through which Reclamation may obtain a limited license to use water for instream purposes. Notably, in 2014 and 2015, immediately following the issuance of the ACFFOD, Reclamation actually did obtain limited licenses authorizing it to use "275,872 acre-feet" of water "currently stored in UKL" (that KID and others held the water rights to) "for augmenting flows in the Link River, Lake Ewauna, and the Klamath River in support of instream resources." *Rietmann* Dec.,Exhibit 8 (Dkt. #46).

iii. Reclamation May Lawfully Use Water Through a Stay of the ACFFOD Pursuant to ORS 539.180

ORS 539.180 sets forth a process through which Reclamation may stay the ACFFOD "in whole or in part…by filing a bond…in the circuit court where the determination is proceeding in such amount as the judge may prescribe, conditioned that the party will pay all damages that may accrue by reason of the determination not being enforced." Once a stay of the ACFFOD is obtained in this matter, Reclamation could freely use the water in UKL Reservoir for meeting its ESA and tribal trust obligations, just as it did prior to the issuance of the ACFFOD. While this procedure may result in higher costs, the federal government has sufficient funds to file such bond or letter of credit. In addition,

it would be entirely consistent with the policy underlying the ESA, which is "to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978); Rietmann Dec. March 6, Exhibit 2.

iv. Reclamation May Lawfully Use Water Through Condemnation Under Judicial Process

Condemning the water rights of KID or others "under judicial process" is another available procedure through which Reclamation may obtain the water it needs to fulfill its ESA and tribal trust obligations. Section 7 of the Reclamation Act of 1902, 43 U.S.C. § 421 provides that "when it becomes necessary to acquire any rights or property, the Sectary on the Interior is authorized to acquire the same for the United States by purchase or condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose…" Reclamation knows how to condemn water rights under judicial process. *See e.g., United States v. 71.22 Acres of Land, More or Less Situated in Utah Cty., State of Utah*, 665 F.Supp. 885, 887 (D. Utah 1987).

v. Voluntarily Purchasing Rights

In accordance with Section 7 of the Reclamation Act, it would also be possible for Reclamation to obtain the instream water it needs to satisfy its ESA and tribal obligations by purchasing water rights in UKL Reservoir, or other available sources, and converting the acquired water rights to instream use in accordance with state law.

E. Relationship Between Hoopa Valley Tribe's Un-adjudicated Federal Reserved Water Right Claims In California And The Adjudicated Oregon Water Rights Set Forth In The ACFFOD

The Hoopa Valley Tribe has *unadjudicated* federal reserved water rights claims in California to protect its fishing rights in the Klamath and Trinity Rivers. The only thing known for certain regarding these unadjudicated claims is that they necessarily *do not* grant the Hoopa Valley Tribe any water rights in Upper Klamath Lake or the portion of the Klamath River encompassed within the scope of the Klamath Adjudication as such rights are not reflected in the ACFFOD and the Hoopa Valley Tribe are collaterally estopped from asserting otherwise. Supra, at 16.

Beyond this, however, the existence, quantity, volume, types of use, seasons of use, and sources of water associated the federal reserved water rights claims of the Hoopa are entirely unknown by virtue of the fact that such claims have not been adjudicated. *Hoopa MTD,* at 20 (Dkt. #70).

Since there has not been any equitable apportionment between Oregon and California with respect to vested rights predating the Compact, the extent of which any federal water rights of the Hoopa Valley Tribe would be enforceable against water rights holders in Oregon remains unclear. Supra, 10-11.

It is also important to understand that even if the Hoopa Valley Tribes' federal reserved water rights claims were adjudicated and found to be enforceable against the water

rights of KID and Reclamation, the Hoopa Valley Tribe would have the right to prevent Reclamation from storing water in UKL Reservoir at certain times and might be able to similarly prevent KID from using water flow. However, it would not be entitled to the release of stored water that KID is entitled to under its secondary storage rights. *Supra*, Pg. 10-11.

Finally, even if the Hoopa Valley Tribes' federal reserved water rights claims were adjudicated and found to be enforceable against the water rights of KID and Reclamation, the extent to which any water rights owned by KID would be impacted is entirely unknown because there are so many other sources of water and junior water right holders whose rights would be curtailed before KID's. To provide some perspective, there are hundreds if not thousands of water rights between UKL Reservoir and the Hoopa Valley Tribe's reservation that are junior to those of Plaintiff's. In addition, the Hoopa Valley Tribes federal reserved water rights could be deemed to curtail water rights in Gerber Reservoir, Clear Lake Reservoir, Hyatt Lake, and Howard Prairie Reservoir. Therefore, it is entirely unknown whether or to what extent the Hoopa Valley Tribes' water rights would curtail the water rights of KID.

F. Intervenors Are Not Required Parties

i. The Court Can Afford Complete Relief Between The Parties

In assessing whether an absent party is a "required party" for purposes of FRCP 19(a)(1)(A), "the court must decide if *complete relief* is possible among those already parties to the suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

Intervenor Hoopa Valley Tribe asserts that "Plaintiffs cannot obtain complete relief in Hoopa's absence," but fails to explain why. *Hoopa MTD,* at 17.

Intervenors have not met their burden to show that deciding this case in Intervenors' voluntary absence will prevent the court form affording complete relief **"*between the parties*."** The only relief Plaintiff seeks is a declaration setting forth the rights of the parties vis-à-vis one another. Plaintiff is not seeking any declaration concerning the rights of Intervenors or other non-parties to the action. Although intervenors are interjecting their rights into this proceeding to try and prevent Plaintiff from obtaining a declaration of its own rights vis-à-vis Reclamation, Intervenors rights are not otherwise at issue.

ii. Declaring Rights Of Parties Will Not Impair Intervenors' Ability To Protect Their Interests.

Under FRCP 19(a)(1)(B)(i), an absent party is a "required party" if that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest.

In determining whether a party is "required" under this rule, the court first considers whether "the absent party has a *legally protected interest* in the suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). While the courts have made clear that the interest must be "legally protected," they "have developed few categorical rules informing this inquiry." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 970 (9th Cir. 2008). However, the courts have recognized that

the "interest must be more than a financial stake, and more than speculation about a future event." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (Emphasis added).

Intervenors urge the Court to find that KID's case is analogous to those cases finding that "[a]n interest in a fixed fund or limited resource that the court is asked to allocate" is legally protected." *See, Hoopa MTD,* at 21 (Docket No. 74). The fatal flaw with this argument is that the water rights KID, Reclamation, the Klamath Tribes, and the Hoopa Valley Tribe have in UKL Reservoir have already been allocated in the Klamath Adjudication and all parties concerned are collaterally estopped from asserting otherwise. While the federal reserved water rights claims that the Hoopa Valley Tribe have in California have not been adjudicated, the Hoopa Valley Tribe expressly concedes that "Plaintiffs do not ask this Court to quantify Hoopa's water rights or adjudicate the relative entitlements amongst the respective interstate water claimants." Hoopa MTD, at. 20 (Docket No. 70). Thus, by operation of law and Intervenors' own admission, this case is not akin to those cases involving a "limited resource that the court is asked to allocate" because KID is not asking the Court to allocate anything.

Rather, KID requests this Court to determine the rights of the parties and declare whether the particular process Reclamation is currently using to allocate water violates the ACFFOD, Reclamation Act, KID's contract with Reclamation, and KID's procedural due process rights guaranteed by the United States Constitution. Consequently, the line of cases applicable for determining whether Intervenors have a legally protected interest are those cases holding that "[a]n absent party has no legally protected interest at stake in a

suit to enforce compliance with administrative procedures." *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 852 (9th Cir. 2019).

Under this line of cases, the only situation in which an absent party has a legally protected interest in a procedural claims is "where the effect of a Plaintiff's successful suit would be to impair a right already granted." *Id.* Here, a declaration as to whether Reclamation is using water from UKL Reservoir through a procedure that complies with the ACFFOD, Reclamation Act of 1902, KID's contract with Reclamation, and the Fifth Amendment will not impair any right already granted to Intervenors. This is true for several reasons.

First, the water rights protecting the treaty rights of the Klamath Tribes are the water rights set forth in the ACFFOD. The ACFFOD provides that the water rights the Klamath Tribes hold in UKL Reservoir cannot be used to curtail KID's water rights. Thus, there is no declaration KID is requesting, or any relief the Court could lawfully grant concerning the water right of KID, which would impair the water rights of the Klamath Tribes in the UKL Reservoir to protect their treaty interests.

Second, the ACFFOD does not grant the Hoopa Valley Tribe any water right to use the waters of UKL Reservoir or the Klamath River in Oregon for instream flows. Nor does the ACFFOD grant the United States any right, as trustee for the Hoopa Valley Tribes, to use water in UKL Reservoir for instream purposes. The Hoopa Valley Tribe and United States are both collaterally estopped from asserting there are currently water rights in UKL Reservoir, or the Klamath River, different from those set forth in the ACFFOD.

Third, Hoopa Valley Tribe has an un-adjudicated federal reserved water right claim in the Klamath River below Iron Gate Dam in California to protect its treaty fishing rights. However, the Hoopa Valley Tribe concedes there has not been "any interstate adjudication or quantification" of their un-adjudicated federal reserved water rights in California. The Hoopa Valley Tribe also concedes KID is not asking the Court "to quantity Hoopa's water rights or adjudicate the relative entitlements amongst the respect interstate water claimants." Hoopa MTC, at 20 (Dkt. #70). There is also authority that federal reserved water rights must be satisfied out of "all uses of mainstream water within a state are to be charged against that State's apportionment, which of course includes uses by the United States." *State of Arizona v. State of California*, 376 U.S. 340 (1964), *amended sub nom. Arizona v. California*, 383 US 268 (1966), and *amended sub nom. Arizona v. California*, 466 US 144 (1984). Since the share of water to which Oregon and California are respectively entitled has not been determined through equitable apportionment between states, and Intervenors' admit as much, it cannot be said that the Hoopa Valley Tribe has "already been granted" any water right that may be exercised against the Oregon water rights that KID and Reclamation hold in UKL Reservoir, which are at issue in this case.

Fourth, KID's claims for declaratory relief concern the lawfulness of the process (or lack thereof) Reclamation is using to provide instream flows, and not any obligation Reclamation has to provide instream flows. KID has demonstrated there are at least five different ways for Reclamation to continue using water for instream purposes, exactly as it is today, if the declaratory relief KID requests is granted. In addition, KID is not seeking

any declaration that would change any legal obligation Reclamation owes to the tribes. Thus, there is no non-speculative basis for concluding the declaratory relief KID seeks would have any impact whatsoever on the Hoopa Valley Tribe.

Fifth, all of the impairments Intervenors are alleging amount to nothing more than sheer speculation. KID is not asking the Court to declare that the distribution of water from UKL Reservoir must be any different than it is today. Any change in how water is distributed following the issuance of the declaratory relief would be a function of an independent decision by Reclamation, not a necessary consequence of the decision from this Court. There is no evidence that Reclamation would make such a decision, and all available evidence is to the contrary. The record in this matter plainly shows Reclamation is so committed to providing water for instream flows that it is willing to violate the law in order to do so. And if the instream flows Reclamation is currently providing are legally required as Intervenors contend, it is extremely unlikely that Reclamation would now decide to violate those legal requirements based on a declaratory ruling that it must provide those flows in accordance with law. To the extent Intervenors are speculating that Reclamation will respond to a declaratory ruling from this Court by violating the law, the fact is that Reclamation could decide to violate the law at any time, irrespective of this litigation.

The decision that should guide the Court's ruling in this case is *Makah Indian Tribe v. Verity,* 910 F.2d 555 (9th Cir. 1990). There, Tribes who had treaty rights in Columbia River salmon brought an action seeking a higher ocean quota, as well as declaratory and

injunctive relief concerning the legality of the regulatory process that led to establishment of the quota. *Id.* The Court held that other tribes, absent from the case, were required parties with respect to those claims asking the Court to grant them a higher ocean quota. However, the Court concluded the absent tribes were not required parties with respect to the claims challenging the legality of the regulatory process that led to the establishment of the quota.

Here, KID is not asking the Court to issue a declaration that would require the current physical distribution of water from UKL Reservoir to change. Thus, the present case is analogous to *Makah* and the Court should find it controlling. Intervenors have no legally protected interest in any particular agency procedures. *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 469 (9th Cir. 1986). This is particularly true where, as here, the procedures are unlawful and Intervenors do not have any right to receive instream flows based on unlawful procedures. *See 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 Associations* v. *U.S. Bureau of Reclamation*, Civ. No. C 02-2006 SBA (N.D. Cal.) (trust responsibility to Yurok Tribe is discharged by compliance with generally applicable statutes and regulations).

///

///

iii. Proceeding In Intervenors' Absence Will Not *Cause* Reclamation To Face A Substantial Risk Of Double, Multiple, Or Otherwise Inconsistent Obligations.

Rule 19 makes the joinder of absent parties necessary if their absence will "leave any of the existing parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations...."

"Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order regarding the same incident." *Blumberg v. Gates*, 204 FRD 453, 455 (C.D. Cal. 2001). Intervenors contend this is the circumstance here because "if Plaintiff's prevail and obtain their requested relief, Reclamation would be between a similar rock and a hard place – faced with the choice of complying with this Court's order requiring, as a practical matter, full water deliveries to Plaintiffs or complying with its competing legal obligations to release water to fulfill the fishing and water rights of the absent Tribe(s) and its continuing obligations under the ESA." Hoopa MTD, at 30 (Dkt. #30).

Intervenors' argument mischaracterize KID's claims and present a false choice. As discussed above, there are multiple processes available through which Reclamation may satisfy its obligations to provide instream flows without violating the legal rights of Plaintiff. In fact, the very purpose of this action is to obtain declaratory relief that will have the effect of requiring Reclamation to satisfy all its obligations, as opposed to just some of them. The reason KID has filed this action is that Reclamation is already between a hard

place and instead of using the processes available for getting out of the jam lawfully, it is trying to get out from between the rock by violating the law rather than following it.

G. Proceeding In Intervenors Absence Will Not Impair Their Interests

Courts have held that a proposed intervenor's interests will not be impacted where there is a process by which the intervenor may still seek to vindicate its claims. *See California ex rel. Lockyer v. United States*, 450 F.3d 436, 443 (9th Cir. 2006) ("Even if this lawsuit would *affect* the proposed intervenors' interests, their interests might not be *impaired* if they have 'other means' to protect them."); *Newby v. Enron Corp.*, 443 F.3d 416, 422 (5th Cir. 2006) ("Intervention generally is not appropriate where the applicant can protect its interests and/or recover on its claim through some other means.") (quoting *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 526 (5th Cir. 1994)); *Alisal Water Corp.*, 370 F.3d at 921 (no impairment where proposed intervenor could submit claims through a claims process set up by a receiver).

The declaratory relief KID seeks against Reclamation concerning the processes through which the water rights set forth in the ACFFOD must be administered will not, and cannot, impair and legally protected interest of previously explained, and their interest are already adequately represented.

i. Whatever Interest the Intervenors Have is Adequately Represented by Reclamation, Which Acts as Trustee for the Tribes

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." *Washington v. Daley,* 173 F.3d 1158, 1167 (9th Cir.1999). A court considers "three factors in determining whether existing parties adequately represent the interests of the absent tribes: whether 'the interests of a present party to the suit are such that it will undoubtedly make all' of the absent party's arguments; whether the party is 'capable of and willing to make such arguments'; and whether the absent party would 'offer any necessary element to the proceedings' that the present parties would neglect." *Alto v. Black*, 738 F.3d 1111, 1127–28 (9th Cir. 2013)

According to the Intervenors, Reclamation here cannot adequately represented its interests for three reasons: (1) because Defendants will not make every argument the Tribes would make; (2) because Defendants have a conflict of interest in representing the Tribes' interests; and (3) because of the history of the conflicts between the Tribe and the U.S. Government. Hoopa MTD, at 22-25 (Docket No. 70). None of the proffered reasons shows Defendants will not adequately represent the Intervenors' interests.

The Court considers the following three factors recited by the Intervenors in determining whether representation is adequate: 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." *Dine Citizens,* 932 F.3d at 852 However, "[t]he most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties," and "[w]hen 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): *see also League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997). "If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation." *Arakaki*, 324 F.3d at 1086. This presumption increases when a party to the suit is a governmental agency and the proposed intervenor one of its constituents. *See Id.* ("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.") (quoting 7C Wright, Miller & Kane, § 1909, at 332.) "[M]ere [ ] differences in [litigation] strategy . . . are not enough to justify intervention as a matter of right." *Perry v. Prop. 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 402–03 (9th Cir. 2009)).

The Intervenors' representation that Reclamation is unwilling to make the Intervenors' argument that it is a necessary party and yet has sovereign immunity do not provide a basis to conclude that the Intervenors' interests are not represented. This is merely a litigation tactic. Additionally, In *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998), the Ninth Circuit found that the government could adequately represent the intervenor's interest in the adjudication of the underlying merits of the *Babbitt* suit, and the government's decision not to support the intervenor's motion to dismiss does not support a finding that the intervenor was a necessary party. There, the

district court did not question the ability or willingness of the United States to represent the intervenor adequately in the adjudication of the underlying merits of the suit, but concluded the government would not represent the intervenor adequately because the government did not support the intervenor's motion to dismiss the suit under Rule 19. *Id.* The Ninth Circuit found the district court's reasoning "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 also create a serious risk that non-parties clothed with sovereign immunity, such as the [intervenor], 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." *Id.*

Also, there is no conflict of interest between Reclamation and the Intervenors' interests in this case because no legal protected interest of the Intervenors is at issue and this case does not ask the Court to make any determination of how water in UKL Reservoir should be distributed. It asks this Court to determine whether the procedures Reclamation is using to provide instream flows comply with the law.

The federal government is charged with safeguarding and protecting reserved federal water rights that the United States holds on behalf of Native American Tribes. *See* 25 U.S.C. § 5108 (authorizing the Secretary of the Interior to acquire "water rights . . . for the purpose of providing land for Indians"). Numerous courts have commented on the

sometimes duplicative role of the federal government in relation to Native Americans, and yet still concluded no conflict of interest exists. *Nevada v. United States*, 463 U.S. 110, 128 (1983).

The interests of the Intervenors and the interests of the Defendants are, in this case, aligned. Both dispute the process through which Reclamation is instream flows violates the law and that instream flows to comply with both the ESA and its tribal trust duties. *Rietmann Dec.,* Exhibit 4, at 47 (Dkt. #46);

Intervenors rely on several cases for the proposition that a federal defendant is not an adequate representative when there are conflicts of interest. Hoopa MTC at26 (Dkt. #70) However, each of these cases involved inter-tribal litigation—i.e., conflicts *between different tribes* regarding their respective rights in a share resource. *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.") (Emphasis added); *Pit River Home & Ag. Coop. Ass'n v. United States*, 30 F.3d 1088, 1101 (9th Cir. 1994) (same); *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992) (same); *Confederated Tribes of the Chehalis Indian Res. v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1981) (same); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (holding United States could not represent absent tribes because tribal interests conflicted amongst themselves). These cases are all distinguishable because they reflect an understanding that the federal

government cannot adequately represent a disagreement between different tribes. However, the Supreme Court and the Ninth Circuit have both held that the federal government *does* adequately represent tribal interests in conflicts with other, non-tribal parties over water rights. *See Nevada*, 463 U.S. at 128; *Arizona*, 460 U.S. at 627; *White Mountain Apache Tribe*, 784 F.2d at 925.

The history of prior litigation between Reclamation and the Intervenors should not serve as a basis for concluding the representation is inadequate. Moreover, the cases the Tribe cites to concerning conflicting interests are distinguishable. In *White v. University of California*, the dispute was between a professor and the University of California about whether artifacts needed to be repatriated to a tribe. The court noted that while the University and the Tribe's interests were presently aligned, that could change. *See* 765 F.3d 1010, 1027 (9th Cir. 2014). However, the University had no duty to act as trustee for the Tribe, unlike Reclamation. Additionally, the statement the Tribe cites from *Pacific Northwest Generating Co-op v. Brown*, 822 F. Supp. 1479, 1511 (D. Or. 1993) is pure dicta, following the Court's statement that it "need not address the issue of whether the tribes are necessary parties. *Id.* at 1510.

H. Intervenors May Be Joined In This Action

Although Intervenors are not required parties and it is therefore unnecessary to join them in this action, Intervenors may be joined if the Court concludes otherwise because the McCarran Amendment waives the sovereign immunity of the Intervenors in suits, such

as this one, which are for the administration of adjudicated water rights. *See* 43 U.S.C. § 666(a); *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 569 (1983)

The full text of the McCarran Amendment reads:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. *Id.*

A case is one for the "administration" of water right within the meaning of 43 U.S.C. §666(a)(2) if there has first been a "prior adjudication of relative general stream water rights." *See South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985); *see also United States v. Hennen*, 300 F. Supp. 256, 263 (D. Nev. 1968) ("Once there has been such an adjudication and a decree entered, then one or more persons who hold adjudicated water rights can, within the framework of § 666(a)(2), commence among others such actions as described above, subjecting the United States, in a proper case, to the judgments, orders and decrees of the court having jurisdiction.").

Here, there has been a prior comprehensive and McCarran Amendment compliant general stream adjudication of all water rights in UKL Reservoir and the Klamath River in Oregon. *See Oregon*, 44 F.3d at 770 ("[W]e hold that the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment."). The water rights determined in the adjudication are set forth in the ACFFOD. KID is seeking declaratory relief regarding the

proper administration of the water rights of KID and Reclamation set forth in ACFFOD. Therefore the Intervenors may be joined in this action, if the Court is of the opinion it is necessary to do so.

The McCarran Amendment is a waiver of sovereign immunity statute, not a jurisdictional statute. *See In Re Green River Drainage Area*, 147 F. Supp. 127, 134 (D. Utah 1956) ("[T]his statute is one simply waiving the immunity of the United States from suit in the class of actions specified, and that, apart from this, it does not purport to be a grant of jurisdiction to any particular court or courts, state or federal.") Therefore, a suit for the administration of water rights may be brought in either state or federal court.

I. Equity And Good Conscious Dictate This Case Should Proceed In Intervenors Absence

Even if a party is "required" and cannot be joined, a case may proceed in the absent party's absence if it is possible to do so in "equity and good conscious." FRCP 19(b).

The relative rights of all persons in the waters of UKL Reservoir and the Klamath River in Oregon have been comprehensively determined in the Klamath Adjudication and are as set forth in the ACFFOD after a thirty-nine (39) year-long process. The doctrine of collateral estoppel bars anyone from asserting water rights in UKL Reservoir other than as stated in the ACFFOD.

The ACFFOD grants KID the right to use water stored in UKL Reservoir as well as live flow in both UKL Reservoir and the Klamath River. KID's "right to the use of water constitutes a vested property interest which cannot be divested without due process

of law." *Skinner v. Jordan Valley Irr. Dist.,* 137 Or. 480, 491 (1931). The ACFFOD does not grant Reclamation any right to use water in UKL Reservoir or the Klamath River for instream purposes. Meanwhile, federal law 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. *See, United States v. State of Cal., State Water Res. Control Bd.*, 694 F.2d 1171, 1175 (9th Cir. 1982).

There are multiple ways for Reclamation to lawfully comply with its obligations under the ESA to provide instream flows for protection fish. And there are also multiple ways for Reclamation to lawfully provide water to the Hoopa Valley Tribe in California. However, the federal reserved water right claims of the Hoopa Valley Tribe have not been adjudicated and the interstate waters of Oregon and California have not been equitably apportioned in a manner that would allow the Hoopa Valley Tribe's un-adjudicated federal reserved water right claims to be enforced in Oregon. And even if they were enforceable in Oregon, they would not be enforceable against KID's secondary water rights to the use of stored water in UKL Reservoir. Moreover, no court has ever held that the un-adjudicated federal reserved water right claims of the Hoopa may be independently exercised to curtail KID's adjudicated water rights set forth in the ACFFOD and KID has *never* had notice and opportunity to be meaningfully heard before an impartial decision maker on the issue.

In the face of all this, Reclamation is using more than 400,000 acre feet of water from UKL Reservoir that KID and others already hold adjudicated water rights under the ACFFOD for instream purposes without securing the lawful right to use that water in

accordance with the processes set forth in Oregon law that would protect KID's rights and depriving KID of its Fifth Amendment right to procedural due process. And now, Intervenors assert that KID and the farmers it serves should never be able to ask a court whether this process is lawful. In the meantime, the lives of thousands of real people hang in the balance. A more prejudicial circumstance could hardly be found.

Intervenors will suffer no prejudice if this case proceeds in their absence for the numerous reason recounted. Moreover, since it is solely declaratory relief KID is seeking, there are countless ways in which this court may shape the relief to avoid any prejudice to Intervenors.

As to the final element of whether dismissal would leave KID with an adequate forum, Intervenors admit that it would not. Hoopa MTD, at 34. (Dkt. 74)("There is likely no alternative forum in which Plaintiffs could obtain the relief they seek in Hoopa's absence…"). Although Intervenors then proceed feebly suggest that a takings suit in the Court of federal claims would amount to an adequate remedy. However, a takings suit for compensation would clearly not procedural due process interest KID is seeking to vindicate in this proceeding. *City of Riverside v. Rivera*, 477 U.S. 561, 562, 106 (1986)("Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.")

J. 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 WL 6141291, at *2 (E.D. Cal. Dec. 9, 2011) (quoting *Kickapoo Tribe of Indians of Kickapoo Reservation in Kan. v. Babbitt*, 43 F.3d 1491, 1500 (D.C.Cir.1995)); *accord Dine 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,* 2011 WL 6141291 at *2 (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.").

Intervenors assertion of this exception to the traditional joinder rules is inapplicable because "plaintiffs here are concerned with vindicating their own rights – not those of the public." Klamath Tribes MTD at13 (Docket No.35). But in point of fact, KID is a public entity holding property in trust for the constituent farmers it serves and is bringing this case on their behalf in a representative capacity. ORS 545.239. *Fort Vannoy Irr. Dist. v. Water Res. Comm'n*, 345 Or 56, 85 (2008). In addition, KID is bringing this action to vindicate the important constitutional right to due process under the Fifth Amendment and to curb an unlawful abuse of power by the federal government that has not only affected KID and its constituents, but also other water right owners and members of the public who do not own any water rights, but are economically suffering as a result of the government's

actions. *City of Riverside v. Rivera*, 477 U.S. 561, 562 (1986) ("A civil rights action for damages does not constitute merely a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that that cannot be valued solely in monetary terms"); *Dec. Gene Souza.* For reasons explained throughout this brief, KID's efforts to vindicate these important interests will not adversely impact any rights of the Intervenors, let alone "destroy" any such right as the Klamath Tribes contend. *See,* Klamath Tribes, MTD at 12 (Dkt.#75).

5. CONCLUSION

For the reasons herein stated, Intervenors' motions to dismiss should be denied and KID should be afforded the opportunity to be heard on its claims.

DATED March 6, 2020

Respectfully submitted,

RIETMANN LAW, PC

/s/ Nathan R. Rietmann

Nathan R. Rietmann, OSB #053630
Attorney at Law
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

WANGER JONES HELSLEY PC

/s/ John P. Kinsey

John P. Kinsey, CASB #215916
265 E. River Park Circle, Suite 310
Fresno, California 93720
(559) 233-4800
jkinsey@wjhattorneys.com

CERTIFICATE OF SERVICE

I hereby certify that this brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 10,862 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

On March 6, 2020, I filed a true and correct copy of the foregoing document as well as the supporting Declaration of Nathan R. Rietmann, and all exhibits to the above-referenced documents, with the Clerk of the Court for the United States District court – District of Oregon via the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

RIETMANN LAW, PC

/s/ Nathan R. Rietmann

Nathan R. Rietmann, OSB #053630
Attorney at Law
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com