Nos. 20-36009, 20-36020 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KLAMATH IRRIGATION DISTRICT,
Plaintiff-Appellant,

and

SHASTA VIEW IRRIGATION DISTRICT, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF RECLAMATION, et al.,
Defendants-Appellees,

and

HOOPA VALLEY TRIBE; THE KLAMATH TRIBES,
Intervenor Defendants-Appellees.

Appeal from the United States District Court for the District of Oregon
Nos. 1:19-cv-00451, 1:19-cv-00531 (Hon. Michael J. McShane)

FEDERAL APPELLEES' ANSWERING BRIEF

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INTRODUCTION

Two years ago—over the federal government's objection—this Court held in *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 161 (2020), that a challenge to final agency action was properly dismissed under Federal Rule of Civil Procedure 19 where an absent tribe had a legally protected interest in the subject of the challenge and could not be joined due to sovereign immunity, notwithstanding that dismissal in those circumstances "arguably produce[s] an anomalous result in that no one, except a Tribe, could seek review" of agency action affecting that tribe's existing rights. *Id.* at 860-61 (internal quotation marks omitted).

The plaintiffs in the present case are irrigation districts that receive water from the Klamath Project, a federal irrigation project. The Bureau of Reclamation ("Reclamation") has adopted operating procedures for the Project that restrict the diversion of water for irrigation to maintain specified lake levels and instream flows to avoid jeopardy to fish species protected under the Endangered Species Act ("ESA"). As this Court and other courts have recognized, Reclamation's decision to maintain such minimum lake levels and stream flows under the ESA also partially safeguards federal reserved water rights held by certain Indian tribes to water levels capable of supporting their federal reserved fishing rights. The irrigation districts nevertheless seek declaratory relief that Reclamation lacks

authority to operate the Project in this way. Because granting that relief would imperil tribal water rights, and because the affected tribes have not consented to the consolidated actions, the district court followed *Diné Citizens* and granted motions to dismiss filed by two intervenor tribes, the Klamath Tribes of Oregon and the Hoopa Valley Tribe of California. Although Reclamation did not join the motions and does not concede that *Diné Citizens* was correctly decided, affirmance appears to be compelled by circuit precedent unless this Court revisits that precedent en banc.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because the claims pleaded by the two sets of plaintiffs, Klamath Irrigation District and Shasta View Irrigation District, *et al.*,[1] arise under a federal statute, namely, the Administrative Procedure Act ('APA"), 5 U.S.C. § 706. KID_ER-14. The district court's judgment was final because it resolved all claims against all defendants. KID_ER-3-5. This Court accordingly has jurisdiction under 28 U.S.C. § 1291.

[1] This brief will refer to the entire second set of plaintiffs, collectively, as "Shasta View Irrigation District."

The district court entered judgment on September 25, 2020. KID_ER-3.[2] Plaintiff Klamath Irrigation District filed a notice of appeal on November 19, 2020, or 55 days later. KID_ER-168-69. Plaintiff Shasta View Irrigation District filed a notice of appeal on November 23, 2020, or 59 days later. SVID_ER-29-32. Both appeals are timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUE

Whether the district court erred in dismissing the irrigation districts' challenges to federal agency action for failure to join a required and indispensable party under Federal Rule of Civil Procedure 19.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are reproduced in the Addendum to Shasta View Irrigation District's opening brief.

STATEMENT OF THE CASE

A. Reclamation's operation of the Klamath Project

The Klamath River Basin stretches from southern Oregon to northern California. KID_ER-7. From time immemorial, the basin and its resources, including Upper Klamath Lake, have been used by the Klamath Tribes "for subsistence, cultural, ceremonial, religious, and commercial purposes." KID_ER-8.

[2] Although the text of the final judgment lists *August* 25, 2020, as the date of the order, both the ECF header of that judgment and the header and text of the accompanying order show that it was filed on *September* 25, 2020. KID_ER-3-5.

Similarly, the Hoopa Valley and Yurok Tribes have from time immemorial relied on water and fish in the Klamath River, which flows from Upper Klamath Lake and ultimately through what are now the Hoopa and Yurok reservations in northern California. KID_ER-7-9.[3]

Upper Klamath Lake is a natural lake located in the Klamath River Basin. The lake is now a central feature of the Klamath Project, a federal reclamation project constructed by Reclamation under the Reclamation Act of 1902. KID_ER-7. A full account of the intricacies of the Project—and Reclamation's "nearly impossible" task in balancing the competing interests in the basin—are beyond the scope of this appeal. *Id.* For purposes of this case, the following overview of Reclamation's obligations suffices.

First, the Project holds water rights for irrigation purposes under state law, and Reclamation exercises those water rights consistent with federal reclamation law and contracts executed under it. To briefly summarize, the Reclamation Act, Pub. L. No. 57-161, 32 Stat. 388 (codified as amended at 43 U.S.C. § 371 *et seq.*), authorized and directed Interior to comply with state law regarding the appropriation of water for irrigation, except where state law conflicts with superseding federal law. 43 U.S.C. § 383. Oregon and California follow the "prior

[3] Although the Yurok Tribe is not a participant in this case, its rights are similarly situated to the Hoopa Valley Tribe, as discussed below. *See* pp. 8-9, *infra*.

appropriation" doctrine, which recognizes the superior right of the first person in time to divert and put water to a beneficial use. *Baley v. United States*, 942 F.3d 1312, 1320 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 133, (2020), (citing *Arizona v. California*, 298 U.S. 558, 565-66 (1936)). Accordingly, at the time it initiated the Project, the United States followed state law and administrative procedures to claim the right to use all waters in the basin that were not already appropriated. *Id.* The United States then entered into contracts with individual irrigators and irrigation districts representing them, under which the United States agreed to supply water from the Project to the irrigators. *Id.* at 1320-21. The United States "holds the water right that it appropriated" under state law "for the use and benefit of the landowners," who subsequently put that water to beneficial use. *Id.* at 1321 (quoting *Klamath Irrigation District v. United States*, 227 P.3d 1145, 1163-64 (Oregon 2010)).

Second, Reclamation must operate the Project consistent with the requirements of the ESA, 16 U.S.C. § 1531 *et seq.*, which—among other obligations—requires federal agencies to consult with specified federal fish and wildlife agencies to ensure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence" of any species listed for protection under the Act "or result in the destruction or adverse modification of" the species' critical habitat. *Id.* § 1536(a)(2). As relevant to this

case, two species of sucker fish that are endemic to Upper Klamath Lake and its tributaries are listed as "endangered" under the ESA, 53 Fed. Reg. 27,130 (July 18, 1988), and the Southern Oregon/Northern California Coast coho salmon, which spawns in the Klamath River downstream of the Project, is listed as "threatened." 62 Fed. Reg. 24,588 (May 6, 1997). Since the early 2000s, Reclamation has consulted with those relevant agencies regarding the impacts of Project operations on these listed fish. In the present case, the result of that consultation was a set of operating conditions that, when followed, ensure that Reclamation's operation of the Project will avoid jeopardy to listed species or adverse modification of their critical habitat. *See* KID_ER-14-15. These conditions, which Reclamation incorporated into its operations plan, include maintaining minimum lake levels in Upper Klamath Lake (to benefit listed sucker fish) and minimum stream flows in the Klamath River downstream from the lake (to benefit listed salmon). *See id.*

Third, Reclamation must operate the Project consistent with the federal reserved rights of affected Indian tribes. By way of background, under federal law, the establishment of a federal reservation implicitly reserves sufficient water to accomplish the purposes of the reservation. *Winters v. United States*, 207 U.S. 564, 576 (1908); *see also Cappaert v. United States*, 426 U.S. 128, 139 (1976); *Arizona v. California*, 373 U.S. 546, 598-600 (1963). Here, reservations for the Klamath, Hoopa Valley, and Yurok Tribes—along with federal reserved rights to fish and

associated rights to enough water to support the right to fish—were established decades before construction of the Project and thus predate Project rights. *See Baley*, 942 F.3d at 1321-23.

Turning first to the Klamath Tribes, in an 1864 treaty with the United States, the Klamath Tribes ceded their interest in millions of acres of land in exchange for a much smaller reservation adjacent to Upper Klamath Lake, and "the exclusive right of taking fish in the streams and lakes, included in said reservation." Treaty Between the United States and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, art. 1, 16 Stat. 707 (Oct. 14, 1864); *see also* KID_ER-8. At that time, the now-endangered sucker fish were a major food source for the Klamath Indians. *See Baley*, 942 F.3d at 1322-24, 1328, 1336-37; 53 Fed. Reg. at 27,130. Although Congress has since disestablished the Klamath Reservation, that act did not abrogate the Klamath Tribes' treaty fishing rights and associated water rights. *United States v. Adair*, 723 F.2d 1394, 1411-12 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

In the Klamath Basin Adjudication, a general adjudication of water rights in the Klamath Basin in Oregon that is presently ongoing in Oregon state court, the United States and Klamath Tribes claimed, *inter alia*, federal reserved water rights for the Tribes in Upper Klamath Lake, in the form of minimum lake levels necessary to support sucker fish and other resident fish species. *See* Corrected

Partial Order of Determination, *Klamath Basin General Stream Adjudication* 1 (Feb. 28, 2014).[4] Those rights were provisionally determined in the administrative phase of the adjudication and are currently enforceable under Oregon state law. *See id.* 4-7; KID_ER-12; *see also* Or. Rev. Stat. §§ 539.130(4), 539.170 (administratively determined rights are enforceable pending judicial review). Although the United States and Klamath Tribes stipulated and agreed not to assert those rights against the Project water rights during the pendency of the adjudication (now in its judicial review phase), that stipulation terminates upon the completion of the adjudication. *See* Dist. Ct. 1:19-cv-00451, ECF No. 84 at 5.

With regard to the Hoopa Valley and Yurok Tribes, reservation lands were set aside in a series of executive orders issued in 1855, 1876, and 1891. *Baley*, 942 F.3d at 1323; *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995). In 1988, Congress passed the Hoopa-Yurok Settlement Act, which partitioned the reserved lands between the Hoopa Valley and Yurok Tribes. *Parravano*, 70 F.3d at 542. Historically, and for generations since the establishment of these reservations, the Hoopa Valley and Yurok Tribes have depended on salmon and other fish species found in the Klamath and Trinity Rivers "for their nourishment and economic livelihood." *Id.* Indeed, one of the United States' purposes in selecting these

[4] *Available at* https://www.oregon.gov/OWRD/programs/WaterRights/-Adjudications/KlamathAdj/KBA_ACFFOD_04938.pdf.

riverine lands to set aside for the Tribes was to secure a salmon fishery for the Tribes, to preserve the Tribes' traditional fishing rights. *See id.* at 545-46; *see also Baley*, 942 F.3d at 1323.

Although the federal reserved water rights of the Hoopa Valley and Yurok Tribes have not been fully determined in a water-rights adjudication or congressional settlement, those rights have been recognized by the courts. Specifically, in 2001, Project irrigators brought a takings claim against the United States, alleging that the curtailment of Project water deliveries for ESA purposes constituted a taking of water rights. *Baley*, 942 F.3d at 1316. In defense of that claim, the United States asserted that waters released to avoid jeopardy to listed salmon were also consistent with the federal reserved water rights of the Tribes. *See id.* at 1334. The Federal Circuit agreed, confirming that the reserved water rights exist and are at least as great as necessary to avoid jeopardy to the listed salmon species. *Id.* at 1335-37. This Court has similarly recognized the need to operate the Project consistent with both the ESA and senior tribal water rights. *See Klamath Water Users Ass'n v. Patterson*, 204 F.3d 1206, 1213-14 (9th Cir. 1999), *cert. denied*, 531 U.S. 812 (2000).

B. This court's recent precedent regarding dismissal for failure to join a required and indispensable party

As stated above, this appeal ultimately turns on this Court's recent precedent regarding Federal Rule of Civil Procedure 19. Rule 19 provides that a nonparty to a lawsuit is "required to be joined if feasible" when one of two criteria is met:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

When joinder of a required nonparty is not feasible—as, for example, when the nonparty is protected from suit by sovereign immunity—"the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed," *i.e.*, whether the nonparty is "indispensable" to the action. Fed. R. Civ. P. 19(b). In making the indispensability determination, courts consider four factors:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Id.

Two years ago, in *Diné Citizens*, this Court addressed how Rule 19 applies when an absent tribe, which cannot be joined without consent, has a legally protected interest that would be impaired by a successful APA lawsuit to set aside federal agency action. At issue in *Diné Citizens* was a lawsuit brought by groups concerned about the environmental and public health consequences of a coal mine located on tribal land within the Navajo Reservation and owned by an arm of the Navajo Nation. 932 F.3d at 847-48. The groups specifically challenged the federal agencies' approval of a lease between the tribe and its operating partner, granting of certain rights of way, and issuance of a mining permit, claiming that the agencies had failed to adequately perform analyses required by the National Environmental Policy Act and ESA. *Id.* at 849-50. The absent tribal entity intervened for the limited purpose of filing a motion to dismiss, arguing that it was

a required party under Rule 19(a) that could not be joined because it was shielded by tribal sovereign immunity, and that equity and good conscience demanded that the lawsuit be dismissed in its absence. *Id.* at 850.

The United States opposed dismissal of the claims, notwithstanding that it would benefit from dismissal as the named defendant in the case, urging that the federal government is the only required and indispensable defendant in an APA challenge to a federal agency's compliance with federal statutes through a final agency action. *Id.* This Court disagreed. Specifically, this Court held that the absent tribal entity was a required party to the litigation under Rule 19(a), notwithstanding that plaintiffs' challenge was solely to the federal agencies' compliance with federal statutes, because a judgment for the plaintiffs would impair the tribal entity's interest in the existing lease, rights-of-way, and permit. *Id.* at 852-53. In other words, "the litigation could affect already-negotiated lease agreements and expected jobs and revenue"—interests that the tribal entity already possessed, not merely interests that the tribal entity could one day seek to obtain. *Id.* at 853.

The Court also rejected the United States' argument that the absent tribal entity need not be joined because the federal government could adequately represent its interest in seeing the federal agency action upheld, noting that while the federal defendants "have an interest in defending their own analyses," they "do

not share an interest in the *outcome* of the approvals—the continued operation of" the tribe's mine and associated power plant. *Id.* at 855. The Court also noted that the Navajo Nation's interest in being able to operate a mine and power plant to support its population was not merely pecuniary but "sovereign" in nature. *Id.*

After concluding that the absent tribal entity could not be joined without consent, the Court turned to Rule 19(b)'s indispensability analysis and concluded that the district court did not err in dismissing the lawsuit. *Id.* at 857-58. In so doing, the Court acknowledged that two of Rule 19(b)'s four listed factors arguably weighed against dismissal—including the fact that the plaintiff groups "would have no alternate forum in which to sue Federal defendants for their alleged procedural violations" if the case were dismissed. *Id.* at 858. Nevertheless, the Court concluded that "[e]ven assuming that no alternate remedy exists," dismissal would be proper because "the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Id.*; *see also Deschutes River Alliance v. Portland General Elec. Co.*, Nos. 18-35867, 18-35932, 18-35933, __ F.3d. __, 2021 WL 2559477, at *7-8 (9th Cir. June 23, 2021) (citing *Diné Citizens* to dismiss ESA challenge to private-tribal hydroelectric project where action would implicate tribes' protected interests).

Finally, the Court declined to apply the "public rights" exception to traditional joinder rules to allow the lawsuit to go forward. *Diné Citizens*, 932 F.3d

at 858-61. It recognized that, in doing so, it was deviating from the law of the Tenth Circuit, which has refused to dismiss challenges in comparable circumstances to avoid producing the "anomalous result" that "[n]o one, except [a] Tribe, could seek review of . . . significant federal action relating to leases or agreements for development of natural resources on [that tribe's] lands," unless the tribe voluntarily waives its sovereign immunity. *Id.* at 860-61 (quoting *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977)). The Court nevertheless declared that anomaly a problem "for Congress to address, should it see fit." *Id.*

C. The present lawsuit

The plaintiffs in this lawsuit, Klamath Irrigation District and Shasta View Irrigation District, each sued the federal government under the APA, challenging the 2019-2024 operations plan for the Project, along with certain ESA analyses supporting that plan. KID_ER-14. In their operative complaints, the irrigation districts asked the district court both to set Reclamation's operations plan aside as unlawful *and* to enter a declaratory judgment setting forth certain restrictions on Reclamation's management of the Project.

Turning to each complaint separately, Klamath Irrigation District sought a judgment declaring that the operations plan violates state law—and thereby the provision of the Reclamation Act directing the United States to comply with state law where not inconsistent with federal law—because no "water right or other

authority under state or federal law" allows Reclamation to "interfer[e] with the vested water rights of [Klamath Irrigation District], its landowners, and other water right holders" or to "cap[]" the amount of water the district receives. KID_ER-113-14. The district likewise sought a declaration that Reclamation violated both the Reclamation Act and the Fifth Amendment's right to due process by depriving the district of its "property interest in the beneficial use of water . . . without first purchasing or condemning" those rights via judicial process. KID_ER-114-15.

Shasta View Irrigation District, for its part, claimed that "[n]either" the ESA "nor any other authority or obligation that may be asserted by Defendants, confers legal power or authorities on Defendants to curtail diversion and use of water by" the irrigation district. SVID_ER-202. The district also, like its co-plaintiff, claimed that Reclamation was violating state law and thus the Reclamation Act by using water from the Project to maintain in-stream flows for fish "without a water right or other authority," and sought a declaration that such use of water by Reclamation is not "authorized by any applicable law." SVID_ER-207, 210; *see also* SVID_ER-211 (seeking a declaration that capping water delivery to the irrigation district "is not authorized or required by Oregon law, the Reclamation Act, or" the ESA). The district additionally pleaded two claims asserting that particular aspects of Reclamation's ESA analysis were arbitrary and capricious. SVID_ER-211-16.

After the irrigation districts initiated their lawsuits, the Klamath and Hoopa Valley Tribes intervened for the limited purpose of filing motions to dismiss, arguing that because the irrigation districts' requested relief would impair the Tribes' federal reserved rights to sufficient lake levels and instream flows, the Tribes are required and indispensable parties under Rule 19 that cannot be joined due to sovereign immunity. *See* KID_ER-6. The irrigation districts opposed the motions to dismiss.

Although Reclamation had not itself moved to dismiss the claims against it on Rule 19 grounds, it concluded, upon review of the motions and this Court's decision in *Diné Citizens*, that dismissal was consistent with circuit law. Reclamation accordingly filed a short response to the motions indicating that under *Diné Citizens*, "the Tribes' sovereign interests in their treaty fishing and federal reserved water rights could be impaired by this litigation, and the Tribes appear to satisfy the other criteria for granting dismissal under Rule 19 under the Ninth Circuit's reasoning in that opinion." SVID_ER-125-26. Reclamation's response thus stated that, while the federal government continues to "disagree with" *Diné Citizens* and "reserve the right to assert in future proceedings that the United States is generally the only required and indispensable defendant in APA litigation," it "d[id] not dispute that the Motions to Dismiss should be granted under the current state of the law in the Ninth Circuit." SVID_ER-126.

The magistrate judge recommended in favor of dismissal, agreeing that granting the irrigation districts' requested relief could impair the absent Tribes' legally protected interests and that dismissal was warranted under *Diné Citizens*. KID_ER-13-26. Over the irrigation districts' objections, the district court adopted the magistrate's findings and recommendation in full and dismissed both complaints. KID_ER-4-5. These consolidated appeals followed.

SUMMARY OF ARGUMENT

Under this Court's precedent, dismissal of an APA challenge to final agency action is proper where granting the requested relief would impair an absent tribe's existing legally protected interest. This Court has applied that rule even where dismissal would deprive the plaintiff of any alternate forum for raising an APA challenge. And it has endorsed that rule even while acknowledging that the effect of the rule may be—in the words of Shasta View Irrigation District's opening brief—to create a "one-way street" in which the public may not obtain judicial review of certain categories of federal government action, absent a tribe's voluntary consent to suit.

The United States argued against application of such a rule in *Diné Citizens*, and it continues to disagree with that rule. But that disagreement does not change that *Diné Citizens* is the law of this circuit. Under that controlling precedent, the district court correctly dismissed the irrigation districts' lawsuits. Thus, unless this

Court revisits *Diné Citizens* or chooses to confine that case strictly to the facts presented, affirmance is warranted.

STANDARD OF REVIEW

This Court reviews a district court's decision to dismiss for failure to join a required party for abuse of discretion but reviews its underlying legal conclusions *de novo*. *Diné Citizens*, 932 F.3d at 851.

ARGUMENT

The district court appropriately dismissed in light of controlling circuit precedent.

As discussed above, *Diné Citizens* concerned an APA lawsuit challenging the lawfulness of *federal* action. Nonetheless, even in that context, this Court held that an absent tribal entity was a required party under Rule 19(a) because a judgment declaring the challenged federal approvals unlawful would impair the absent tribe's sovereign interest in those approvals. *Id.* at 852-53. The Court considered and rejected the view that the United States could adequately represent the absent tribes' interest, holding instead that, to be an adequate representative, the federal government must share an interest not only in seeing the challenged agency action upheld, but also in the ultimate "outcome" or consequence of upholding that action. *Id.* at 855. The Court further held that dismissal was proper in the tribal entity's absence, notwithstanding that dismissal would deprive APA

plaintiffs of a forum for challenging federal action. *Id.* at 858; *cf. Deschutes River Alliance*, 2021 WL 2559477, at *7-8.

Here, as in *Diné Citizens*, plaintiff irrigation districts challenge the lawfulness of federal agency action under the APA. And while the challenged agency action in this case is not, as in *Diné Citizens*, the federal approval of a lease or permit to which the absent Klamath and Hoopa Valley Tribes are parties, a judgment granting the relief requested by the irrigation districts could call into question the scope or existence of the Tribes' legal rights.

To briefly elaborate, the irrigation districts ask the court to hold—and enter declaratory judgment memorializing—that Reclamation is acting unlawfully because no "water right or other authority under state or federal law" allows Reclamation to withhold water or curtail water deliveries to the districts in order to maintain sufficient water levels for ESA-listed fish. KID_ER-113-14; *see also* SVID_ER-202 (alleging that no "other authority or obligation that may be asserted by Defendants, confers legal power or authorities on Defendants to curtail diversion"); SVID_ER-210 (alleging that Reclamation's actions are not "authorized by any applicable law"). Reclamation adopted its challenged operation plan in accordance with its responsibilities under the ESA, as discussed above. The requirements of the ESA apply without regard to the federal reserved rights of the intervenor Tribes. But as courts have recognized, the actions mandated by the ESA

for the protection of listed fish in the Klamath Basin are consistent with and can partially fulfill the senior federal reserved rights of the Klamath, Hoopa Valley, and Yurok Tribes. *Baley*, 942 F.3d at 1336-37; *see also Patterson*, 204 F.3d at 1213-14; KID_ER-17 (collecting cases). In seeking declarations that no authority permits the curtailment of Project water rights for purposes of retaining lake levels and stream flows for fish, the irrigation districts apparently seek relief that would preclude Reclamation from recognizing the senior tribal water rights and from operating the Project consistent with those rights. Because the lawsuits thus seek relief that would imperil tribal water rights, *Diné Citizens* controls.

Klamath Irrigation District argues that Rule 19 (and thus *Diné Citizens*) is inapplicable to this case—or, more precisely, that the Klamath and Hoopa Valley Tribes cannot assert tribal sovereign immunity as a barrier to joinder—because the McCarran Amendment, 43 U.S.C. § 666(a), effectively waives tribal sovereign immunity in the context of water adjudications. KID Op. Br. 22-49. This is incorrect.[5] True, the McCarran Amendment waives federal sovereign immunity

[5] Reclamation's response to the Tribes' motion to dismiss did not address the McCarran Amendment arguments presented in Klamath Irrigation District's opposition to that motion, which was filed simultaneous with Reclamation's response. And Reclamation, as neither the movant nor a party against whom dismissal was sought, did not file a response to the irrigation districts' objections to the special master's recommendation. Nevertheless, because Klamath Irrigation District now asks this Court to make circuit-level precedent broadly construing the McCarran Amendment's waiver of the United States' sovereign immunity, Reclamation offers this rebuttal to aid the Court's analysis.

and grants consent to the joinder of the United States in suits "for the adjudication of rights to the use of water of a river system or other source," 43 U.S.C. § 666(a), and the Supreme Court has held that this waiver applies to federal reserved water rights for tribes. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 809-13 (1976). Accordingly, tribal sovereign immunity is no barrier to the determination of federal reserved water rights in McCarran Amendment adjudications. But the district court correctly determined that the present case "is clearly not a McCarran Amendment case." KID_ER-21.

The McCarran Amendment applies to the comprehensive adjudication of all water rights among all claimants to a specified water source, *see generally Dugan v. Rank*, 372 U.S. 609, 617-18 (1963); *United States v. Oregon*, 44 F.3d 758, 763-70 (9th Cir. 1994), and to suits "for the administration of" rights already declared in a prior comprehensive adjudication. 43 U.S.C. § 666(a). Here, there is a comprehensive adjudication of water rights in the Klamath River Basin in Oregon—the Klamath Basin Adjudication. *Oregon*, 44 F.3d at 762-70. But that adjudication is still ongoing, as stated above. And the present suit is not one to "administer" rights that were provisionally determined in the administrative phase of that adjudication, notwithstanding that administratively determined rights are enforceable pending judicial review. *See* Or. Rev. Stat. §§ 539.130(4), 539.170. Instead, the irrigation districts challenge Reclamation's determinations under the

ESA and its authority to release water from Upper Klamath Lake consistent with the downstream water rights of the Hoopa Valley and Yurok Tribes. The rights of the California Tribes were not subject to adjudication in Oregon's Klamath Basin Adjudication. *Baley*, 942 F.3d at 1341. Any effort by the irrigation district to assert interests against the California Tribes is thus not the administration of rights determined as between parties to the Oregon adjudication.

For these reasons, this is not a McCarran Amendment case. Instead, like the underlying lawsuit in *Diné Citizens*, it is an APA challenge to federal agency action—as the irrigation districts' own complaints reflect. *See* KID_ER-97 (asserting that jurisdiction arises under 5 U.S.C. §§ 701-06 and 28 U.S.C. §§ 1331, 2201-02); SVID_ER-185 (same). *Diné Citizens* therefore controls.

To be clear, the federal government continues to have concerns about the constriction of the APA cause of action under *Diné Citizens*. As the United States argued to this Court in that case, holding that non-federal entities are necessary for an APA action to proceed undermines Congress' decision to waive the United States' sovereign immunity for suits brought under the APA and could "sound[] the death knell for any judicial review of executive decisionmaking." Brief of United States, Ninth Cir. No. 17-17320 at 10, 17 (quoting *Conner v. Burford*, 848 F.2d 1441, 1460 (9th Cir. 1988)); *see also Manygoats*, 558 F.2d at 559. This Court heard the United States' concern, acknowledged the problem, but nevertheless

decided that it did not change the Court's analysis. *See Diné Citizens*, 932 F.3d at 860-61. That conclusion is the law of this circuit, unless the Court revisits or narrows *Diné Citizens*. Until such time, dismissal appears to be the appropriate outcome here.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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9th Cir. Case Number(s) 20-36009, 20-36020

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[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
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[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Rachel Heron

Date July 1, 2021