

**Nos. 20-36009 and 20-36020 (Consolidated)**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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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 and THE KLAMATH TRIBES,

*Intervenor-Defendants - Appellees*

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Appeal from the United States District Court for the District of Oregon, Medford  
Division; Case Nos. 1:19-cv-00451-CL and 1:19-cv-00531-CL

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**ANSWERING BRIEF OF HOOPA VALLEY TRIBE**

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### Statement of the Case

The Hoopa Valley Tribe (“Hoopa”) is located on the Hoopa Valley Reservation in northern California, which the United States set aside as a permanent homeland for Hoopa in 1864. *Mattz v. Arnett*, 412 U.S. 481, 490, fn. 9 (1973); *Short v. United States*, 202 Ct. Cl. 870, 875-980 (1973) (discussing Reservation history). The Klamath River and its largest tributary, the Trinity River, flow through the Reservation. Since time immemorial, Hoopa and its members have relied on the water and fish resources of the Klamath and Trinity Rivers. *Parravano v. Babbitt*, 70 F.3d 539, 542-546 (9<sup>th</sup> Cir. 1995). Traditional salmon fishing is one of the “Indian purposes” for which the Reservation was created. *Id.* at 546. Hoopa holds federal reserved fishing rights, which may be exercised on its Reservation, and federal reserved water rights to support its fishery. *Id.* at 544-546; *Baley v. United States*, 942 F.3d 1312, 1323, 1337 (Fed. Cir. 2019).

The Klamath Irrigation Project (“Project”) is located upstream of Hoopa’s Reservation and provides water diversions for agricultural irrigation in southern Oregon and northern California. The United States Bureau of Reclamation (“Reclamation”) owns and controls operations of the Project, including Link River Dam, the federal facility which regulates flow releases from Upper Klamath Lake (“UKL”) into the Klamath River. *Klamath Water Users Association v. Patterson*,

204 F.3d 1206, 1213 (9<sup>th</sup> Cir. 2000). Reclamation's Project operations substantially dictate the amount of flow that will be released into the Klamath River downstream for the benefit of fish and water resources and Hoopa's reserved rights. *Pacific Coast Federation of Fishermens' Associations (PCFFA) v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1232 (N.D. Cal. 2001).

Fish species listed under the Endangered Species Act (ESA) reside in the Klamath River downstream of the Project as well as in UKL. Reclamation is bound by the ESA to operate the Project in a manner that will avoid jeopardy to listed species. 16 U.S.C. §1536(a)(2); *Patterson*, 204 F.3d at 1213. Under governing Biological Opinions (BiOp) jointly issued by the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service pursuant to the ESA, Reclamation is required to leave sufficient water in UKL to protect endangered sucker fish and to also release sufficient flow into the Klamath River to protect threatened SONCC coho salmon. *Hoopa Valley Tribe v. NMFS*, 230 F. Supp. 3d 1106 (N.D. Cal. 2017). Hoopa's federal reserved water right is, at minimum, equal to the amount of water necessary to satisfy Reclamation's obligation to avoid jeopardy to salmon in the Klamath River. *Baley*, 942 F.3d at 1337. Thus, Reclamation's compliance with its ESA obligations simultaneously protects and implements, in part, Hoopa's reserved fishing and water rights. *Id.*

In 2014 and 2015, with Reclamation operating under terms of a 2013 BiOp, 81% (in 2014) and 91% (in 2015) of sampled salmon were found as infected with *C. shasta* disease in reaches of the Klamath River upstream of the Hoopa Reservation. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1112. NMFS considers fish disease, resulting from the artificial upstream flow regime, as the most serious threat to salmon in the Klamath River. *Id.* at 1129. In 2016, Hoopa sued and obtained an injunction (in 2017) pursuant to the ESA, which required Reclamation to re-initiate consultation with NMFS for the purpose of preparing a new BiOp and which required, pending completion of consultation, increased flows in the Klamath River to protect fish from impacts associated with Reclamation's Project operations. *Id.* at 1112, 1141-47. In 2019, following the re-initiated consultation, NMFS issued a new BiOp to govern Project operations and Reclamation released an updated Project operations plan designed to conform with its obligations under the BiOp. SVID\_ER-198-200. The flow releases prescribed by the BiOp and contained in Reclamation's operations plan are the minimum necessary to avoid jeopardy to ESA-listed species in the Klamath River.

Although Appellants have not sued NMFS and have made no legal challenge to the governing BiOp issued by NMFS in 2019, Appellants challenge in this litigation Reclamation's 2019 Project operations plan which allocates specific amounts of instream flow to the Klamath River in conformance with that BiOp.

KID\_ER-094-095; SVID\_ER-198-201. Such instream flows are required by the ESA (through the BiOp) to protect listed salmon in the Klamath River and simultaneously implement, in part, Hoopa's senior reserved rights.

In their Second Amended Complaints, Appellants claim that Reclamation's release of water through Link River Dam for downstream instream purposes (i.e., ESA compliance and partial implementation of Hoopa's senior water rights) unlawfully impacts Appellants' junior water rights that exist under Oregon state law. In its Second Amended Complaint, Klamath Irrigation District ("KID") asked the District Court to declare Reclamation's release of water for instream purposes (ESA and tribal rights) unlawful. KID\_ER-094-095, 111-112. KID sought a declaration that Reclamation may not limit water deliveries to Appellants for the purpose of providing downstream flow releases for fish. *Id.* KID also argued that it must be compensated for the alleged deprivation of its junior rights. KID\_ER-100, 106, 112.

The SVID Appellants sought declaratory relief to prevent curtailment of their water rights for any reason, including but not limited to ESA compliance or senior tribal water rights. SVID\_ER-202. SVID claims that Reclamation regulates the Project for "environmental objectives" which limits water deliveries to Appellants. SVID\_ER-200-201. SVID claims that Reclamation acts *ultra vires* by curtailing deliveries of water to Appellants when such curtailment occurs under the

ESA. SVID\_ER-206. SVID seeks a declaration that Reclamation's collection, retention, and use of stored water for ESA-listed species in the Klamath River is unlawful. SVID\_ER-210. SVID seeks a declaration that Reclamation may not cap Appellants' use of water for ESA compliance. SVID\_ER-211. SVID further sought an order remanding to Reclamation with direction to comply with the declaratory orders that it seeks. SVID\_ER-217.

Appellants' lawsuits seek relief designed to prohibit Reclamation from releasing any water from UKL or through Link River Dam for instream fish purposes into the Klamath River – at least not before Appellants' junior rights are fully satisfied. Compliance with such an order, if obtained, would require Reclamation to violate the ESA and would also unlawfully prevent implementation of even the bare minimum quantity of Hoopa's reserved rights, effectively subordinating (as a practical matter) Hoopa's senior water rights to Appellants' junior rights upstream. Such an order, depriving flow to the Klamath River for the basic survival of fish relied upon by Hoopa people, would be devastating to Hoopa, its people, and its rights.

Expressly reserving its sovereign immunity from suit, Hoopa filed a motion to intervene as of right for the express and limited purpose of filing a motion to dismiss. SVID\_ER-218. Appellants opposed Hoopa's request to intervene. SVID\_ER-267. The magistrate judge found that Hoopa met all elements for

intervention as of right. SVID\_ER-218-224. Appellants have not appealed the order granting Hoopa intervention as of right even though the analysis under FRCP 24(a) substantially mirrors the required party analysis under FRCP 19. KID\_ER-167; SVID\_ER-031.

Following the intervention order, Hoopa moved to dismiss under FRCP 19 on grounds that it is a required party who cannot be joined. SVID\_ER-142-183. The magistrate determined that Hoopa was a required party, that Hoopa could not be joined due to its sovereign immunity, and that the case should not proceed in Hoopa's absence. SVID\_ER-008-028. The District Court adopted the magistrate's report in full, without any modification, and this appeal followed. SVID\_ER-006. This Court should affirm the District Court.

### **Summary of Argument**

The District Court properly ruled that Hoopa is a required party to this litigation that cannot be joined due to its sovereign immunity and that, in equity and good conscience, the litigation may not proceed in Hoopa's absence.

Due to its federal reserved fishing and water rights, Hoopa has a clear interest in the subject matter of this litigation, in which Appellants seek relief that would restrict flows in the Klamath River that are necessary for fish life. Although Hoopa's federal reserved water rights are legally senior in priority, the Appellants' litigation seeks to subordinate, as a practical matter, Hoopa's senior rights by

requiring Reclamation to satisfy all of Appellants' junior rights first, regardless of impacts to the fish and water resources of the Klamath River downstream. Such a suit plainly threatens to impair Hoopa interests. The District Court correctly found that Appellants' claims and their requested relief threaten to directly impair Hoopa's interests in its senior federal reserved rights and in the fish and water resources of the Klamath River relied upon by Hoopa people. Hoopa is a required party under FRCP 19(a)(1).

The federal defendants are not an adequate representative of Hoopa's interests here due to the pervasive conflicts of interest that exist regarding federal water management in the Klamath Basin. The federal defendants do not share the same interest as Hoopa in defeating this litigation. The federal defendants have repeatedly taken positions adverse to Hoopa (and in favor of Appellants) regarding water management decisions on the Klamath River. The federal defendants have conflicting duties to Hoopa and the upstream Klamath Tribes, as well as to Appellants. Given the directly competing interests, the federal defendants cannot adequately represent Hoopa's interests in this suit.

The District Court correctly ruled that Hoopa, a federally recognized Indian tribe, cannot be joined to this litigation due to its sovereign immunity. KID's argument (not made by other Appellants) that the McCarran Amendment waived Hoopa's sovereign immunity from KID's suit is meritless. The McCarran

Amendment is narrowly limited in application to comprehensive intrastate water adjudications. As the District Court properly ruled, “this is clearly not a McCarran Amendment case.” KID\_ER-019. This case involves a private suit pursuant to the Administrative Procedure Act in which Appellants seek to restrain the federal government from releasing water through a federal facility that is required to implement a federal agency’s ESA obligations and senior federal tribal reserved water rights, which have not been subject to adjudication, in a different, downstream, state. The McCarran Amendment is plainly inapplicable but, even if it was applicable, it does not waive Hoopa’s sovereign immunity from KID’s suit, which falls outside the context of a comprehensive water rights adjudication.

There is a wall of Ninth Circuit authority favoring dismissal of cases in which a required party cannot be joined due to tribal sovereign immunity. *Dine-Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843, 857 (9<sup>th</sup> Cir. 2019). Dismissal of this suit on grounds of tribal sovereign immunity, in conjunction with the other factors in FRCP 19(b), is well supported. This Court has repeatedly dismissed actions that threaten to impair tribal interests in their absence. *Id.*

In determining that this litigation could not proceed in Hoopa’s absence, the District Court properly accounted for tribal sovereign immunity while also faithfully addressing other relevant factors under FRCP 19(b). The District Court



properly found that Hoopa would suffer significant prejudice if this case proceeds in its absence and that there is no way to lessen that prejudice given the directly competing claims to waters of the Klamath River at issue here. The District Court also correctly found that Appellants have alternative forums to press their claims, including the Court of Federal Claims. Over the past twenty years, Appellants have repeatedly participated in litigation and asserted their claims to waters of the Klamath River. Courts have repeatedly recognized that Appellants' rights are junior to Hoopa's federal reserved rights and that the federal government has an affirmative legal duty to release flows through Link River Dam to satisfy ESA obligations and to implement tribal water rights. Appellants are currently pressing related claims in no less than four separate judicial forums. Their assertion that the courthouse doors are closed to them is absurd.

This Court should affirm the District Court. Hoopa is a required party. It has sovereign immunity and thus cannot be joined. This action, in equity and good conscience, cannot proceed in Hoopa's absence.

### **Argument**

#### **I. The District Court Correctly Ruled That Hoopa Is A Required Party.**

Hoopa is a required party under Rule 19(a)(1)(B)(i) because Hoopa "claims an interest relating to the subject of the action and is so situated that disposing of the action in [Hoopa's] absence may . . . as a practical matter impair or impede

[Hoopa's] ability to protect the interest.” The Rule 19(a) inquiry is practical and fact specific. *Dine Citizens*, 932 F.3d at 851.

Appellants seek to prohibit Reclamation from releasing water from UKL or letting water pass Link River Dam into the Klamath River for instream fish flows. Appellants seek to prevent instream flows in the Klamath River that are necessary to implement Hoopa's on-reservation fishing rights and senior water rights reserved to Hoopa by federal law. Appellants seek to preclude Reclamation from limiting agricultural water diversions regardless of impacts to fish species in the Klamath River or senior tribal rights. Appellants' claims and requested relief, if granted, would imperil fish life in the Klamath River and threaten to negate Hoopa's federal reserved rights to fish and water in the Klamath River. Plainly, Hoopa is a required party under Rule 19.

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

A party is required to be joined under Rule 19 if it claims a legally protected interest in the subject matter of the lawsuit and is so situated that the litigation as a practical matter would impair or impede their ability to protect it. *Dine Citizens*, 932 F.3d at 851; *Shermoen v. United States*, 982 F.2d 1312, 1317 (9<sup>th</sup> Cir. 1992). The finding that a party is required is predicated only on that party having a claim to an interest. *Shermoen*, 982 F.2d at 1317. The person need not have a vested interest to be required under Rule 19(a). *Clinton v. Babbitt*, 180 F.3d 1081 (9<sup>th</sup> Cir.

1999). “Just adjudication of claims requires that courts protect a party’s right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party. *Shermoen*, 982 F.2d at 1317. “That the Tribes could litigate the issue [in the future] free of the constraints of res judicata and collateral estoppel does not by itself excuse their absence as necessary parties. Otherwise Rule 19(a) would become a nullity . . . .” *Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9<sup>th</sup> Cir. 2002).

Hoopa Indians possessed fishing and hunting rights long before contact with white settlers and their salmon fishery was “not much less necessary to [their existence] than the atmosphere they breathed.” *Parravano*, 70 F.3d at 542, *quoting Blake v. Arnett*, 663 F.2d 906, 909 (9<sup>th</sup> Cir. 1981). Hoopa has federal reserved rights to take fish from the Klamath and Trinity Rivers within its Reservation. *Parravano*, 70 F.3d at 542-46 (recognizing Hoopa’s reserved fishing rights); *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9<sup>th</sup> Cir. 1986) (acknowledging Indians’ right to take fish from the Klamath River for ceremonial, subsistence, and commercial purposes).

In 1993, the Interior Solicitor published an opinion reaffirming Hoopa reserved fishing rights. Solicitor Opinion M-36979 (October 4, 1993). HVT\_ER-023. Solicitor Leshy examined the “history of the reservations, the Indians’ dependence on the Klamath and Trinity River fisheries, the United States’

awareness of that dependence, and the federal intent to create the reservations in order to protect the Indians' ability to maintain a way of life, which included reliance on the fisheries." HVT\_ER-025. Solicitor Leshy found "it is now well-established that the Yurok and Hoopa Valley Indians have federal reserved fishing rights, created in the nineteenth century when the lands they occupied were set aside as Indian Reservations." HVT\_ER-036-037. "Hoopa Indians had a 'vital and unifying dependence on anadromous fish'". HVT\_ER-044. "[T]he Government intended to reserve for the [Hoopa] a fishing right which includes a right to harvest a sufficient share of the resource to sustain a moderate standard of living." HVT\_ER-043; *Parravano*, 70 F.3d at 542-46 (citing Solicitor opinion M-36979 with approval).

Creation of an Indian reservation by the United States includes an implied reservation of water to fulfill the purposes for which the reservation was created. *Arizona v. California*, 373 U.S. 546, 599-601 (1963) ("United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created"); *Winters v. United States*, 207 U.S. 564, 576-77 (1908) (United States implicitly reserved water for Indian reservation, which was entitled to protection from upstream junior diversions); *Baley*, 942 F.3d at 1337 (affirming that, at bare minimum, Hoopa has water right in Klamath River at least equal to what is needed to satisfy Reclamation's ESA obligations to protect SONCC coho

from jeopardy); *Navajo Nation v. United States Department of the Interior*, \_\_\_ F.3d \_\_\_, 2021 U.S. App. LEXIS 12630 (9<sup>th</sup> Cir., April 28, 2021) (affirming that federal government implicitly reserved water necessary to accomplish purposes of Navajo Reservation as permanent homeland); *United States v. Adair*, 723 F.2d 1394, 1408-11 (9<sup>th</sup> Cir. 1983), cert. denied, 467 U.S. 1252 (1984) (reservation for Klamath Tribes included water to maintain tribal fishing rights).

Traditional salmon fishing is one purpose for which the United States established the Reservation at its location where Hoopa could take and sustain itself on fish from the Klamath and Trinity Rivers. *Parravano*, 70 F.3d at 546 (finding salmon fishing one purpose for which Reservation was created); *Eberhardt*, 789 F.2d at 1359-60 (same); Solicitor's Opinion M-36979. Hoopa's federal reserved water right for fishery purposes includes that amount of instream flow necessary to maintain the salmon fishery at harvestable quantities sufficient to fulfill the "moderate living" standard of Hoopa's federal reserved fishing rights. *Baley*, 942 F.3d at 1335-37; *Adair*, 723 F.2d at 1414-15 (holding Klamath Tribes "entitled to a reservation of water, with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights"); *Confederated Tribes v. Walton*, 647 F.2d 42 (9<sup>th</sup> Cir. 1981), cert. denied, 454 U.S. 1092 (1981) (holding that fishing was one purpose for creation of Colville Reservation and "the Colvilles have a reserved right to the quantity of water necessary to maintain the

Omak Lake Fishery”); *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9<sup>th</sup> Cir. 1985); *United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982) (fishing was one purpose for creating Spokane Indian Reservation and “the Tribe has a reserved right to sufficient water to preserve fishing in Chamokane Creek”); *Greely v. Confed. Salish & Kootenai Tribes*, 712 P.2d 754, 764-66 (Mont. 1985) (tribal reserved water rights may include water for fisheries).

The full scope of Hoopa’s water right in the Klamath River is not judicially quantified. In November 2019, the Federal Circuit Court of Appeals affirmed that Hoopa has a water right in the Klamath River that is not less than the amount of flow necessary to protect Klamath River salmon from jeopardy under the ESA. *Baley*, 942 F.3d at 1337. “At the bare minimum, [Hoopa’s] rights entitle them to the government’s compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy.” *Id.*

The analysis and result in *Baley* are not unique. Hoopa’s reserved fishing and water rights in the Klamath River and their seniority over Appellants’ rights are confirmed in the Ninth Circuit. *Parravano*, 70 F.3d at 544-546 (recognizing Hoopa reserved fishing rights); *Patterson*, 204 F.3d at 1214 (Reclamation “has a responsibility to divert the water and resources needed to fulfill the [Hoopa] Tribes’ rights, rights that take precedence over any alleged rights of the Irrigators”); *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1141-42 (injunction requiring

Reclamation to deliver additional water to Klamath River “would also help protect the [Hoopa] Tribes’ fishing rights, which must be accorded precedence over irrigation rights”); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197, 1211 (D. Or. 2001) (denying Klamath irrigators request to enjoin Reclamation’s 2001 operations plan to release flow for protection of salmon and senior tribal rights). Reclamation’s Regional Solicitor previously opined that Hoopa’s fishery-related water right includes “the right to certain conditions of water quality and flow to support all life stages of fish.” HVT\_ER-078.

To qualify as a required party under Rule 19, Hoopa need not have a fully adjudicated right. Hoopa need only “*claim* [] an interest relating to the subject of the action.” FRCP 19(a)(1)(B)(i). Hoopa plainly satisfies that standard as it introduced court decisions, federal solicitors’ opinions, and declarations that affirm Hoopa’s fishing rights and senior water rights in the Klamath River to support its fishery pursuant to federal law. HVT\_ER-003-083. Water necessary to support Hoopa’s fishing rights and senior water rights in the Klamath River must pass through Link River Dam, a component of the federal Klamath Project that retains water in UKL that would otherwise flow into the Klamath River. *Kandra*, 145 F.Supp.2d at 1196-97; *Baley*, 942 F.3d at 1341. Water necessary to protect SONCC coho, listed as threatened under the ESA, and non-listed Chinook must pass through Link River Dam. *Id.*; *PCFFA v. U.S. Bureau of Reclamation*, 138 F.

Supp. 2d 1228 (N.D. Cal. 2001) (enjoining Reclamation from making irrigation deliveries to Plaintiffs if Klamath River flows fell below protected levels). Hoopa fishing and water rights depend on Reclamation's continued release of water through Link River Dam, which Appellants seek to prevent. Hoopa has a direct interest in the subject of this action.

B. The District Court Correctly Found That Hoopa's Interests Would Be Directly Impaired or Impeded as A Practical Matter by Appellants' Litigation.

Appellants claim Reclamation's releases of water for downstream instream purposes (ESA compliance and fulfillment of Hoopa's reserved rights) are unlawful due to alleged impact to the Appellants' junior water rights. Appellants seek declaratory and other relief to prohibit Reclamation from releasing water from UKL or through Link River Dam into the Klamath River for instream purposes, such as protection of fish (whether ESA-listed or not) or fulfillment of Hoopa's federal reserved rights. Appellants seek to prohibit Reclamation from limiting water deliveries to Appellants regardless of impact to Klamath River fish and water resources and Hoopa's senior rights.

The impacts that such a ruling would have on Hoopa are obvious. Hoopa has senior rights to water necessary to support its federal reserved fishing rights. Appellants ask the Court to declare it unlawful for Reclamation to release any water out of UKL for downstream fish flows unless and until Appellants' water



rights are first satisfied in full. The relief Appellants seek would, as a practical matter, subordinate Hoopa senior rights to Appellants who are legally junior.

There is typically not enough water to satisfy all of Appellants' full contract water entitlement and flows for ESA-compliance – let alone the full quantity of Hoopa downstream water rights. HVT\_ER-015-016. Fish populations are directly impacted and have significantly diminished due to water withdrawals from Project operations. HVT\_ER-010-017. SONCC coho are threatened with extinction. HVT\_ER-014. Klamath Chinook are increasingly imperiled. HVT\_ER-013-014. Given the current perilous condition of salmon in the Klamath River and the species' reliance on flow out of Link River Dam to provide habitat in the Klamath River, it is possible that granting Appellants' requested relief would lead to the extermination of salmon in the Klamath River, both coho and Chinook. HVT\_ER-015. This would be an ecological disaster and would deprive Hoopa of sustenance they have relied upon for centuries. HVT\_ER-010-017. It would negate the principal basis for locating the Hoopa Reservation along the Klamath River. HVT\_ER-004-008. Due to the impacts that Appellants' suit could have on Hoopa's federal reserved rights, Hoopa is a required party. *Dine Citizens*, 932 F.3d at 852 (party has legally protected interest at stake “where the effect of a plaintiff's successful suit would be to impair a right already granted”).

This case addresses, as a practical matter, Appellants' claims to the finite resource of waters of the Klamath River, which compete with and are mutually exclusive to Hoopa's senior rights. Appellants do not ask the Court to quantify Hoopa's water rights or adjudicate the relative entitlements amongst the respective interstate water claimants. Yet Appellants seek an order that would, without any interstate adjudication or quantification of respective rights, declare unlawful the release of water from Link River Dam into the Klamath River that is required for instream fish flows. Appellants seek to require Reclamation to fully satisfy Appellants' junior water rights regardless of impact to Hoopa or the Klamath River resources downstream. Such an order would directly contravene Hoopa's legally protected senior rights. It would also produce an ecological catastrophe through the potential extermination of fish life in the Klamath River.

In *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9<sup>th</sup> Cir. 1990), the Ninth Circuit found that absent tribes were required parties to a suit challenging and seeking reallocation of ocean fishing harvest quotas. "The absent tribes had an interest in the suit because any share that goes to the [plaintiff] Makah must come from other tribes." *Verity*, 910 F.2d at 559. "Claims for allocation of a limited resource do not present a situation in which multiple parties share compatible interests, but rather are more analogous to a request by a beneficiary to allocate a common fund." *Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168,

1187-88 (W.D. Wash. 2014). Where granting one share of a resource would come out of the share of the absent party, “such circumstances ‘present a textbook example . . . where one party may be severely prejudiced by a decision in his absence.’” *Id.* at 1188; *Hood ex rel. Mississippi v. City of Memphis*, 533 F. Supp. 2d 646 (N.D. Miss. 2008) (Tennessee was necessary party to Mississippi’s suit to enjoin Memphis from pumping groundwater claimed by Mississippi; the Court could not grant relief without Tennessee in suit because the states’ respective rights in aquifer were not determined).

Hoopa’s federal reserved water rights are senior in priority to Appellants’ junior rights. *Baley*, 942 F.3d at 1335-1341. Prior appropriation principles require fulfillment of Hoopa’s rights prior to any of Appellants’ rights. *Id.* But the relief sought by Appellants here would turn those principles on their head – requiring Appellants’ junior rights to be satisfied before any water could be released for Hoopa’s downstream senior rights or for ESA compliance. The law does not support Appellants’ claims.<sup>1</sup> But due to the significant prejudice that this case

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<sup>1</sup> Appellants have been wholly unsuccessful making similar claims. *Baley*, 134 Fed. Cl. at 679-80 (Reclamation’s withholding of water from plaintiffs to satisfy ESA and tribal trust obligations was not improper taking of plaintiffs’ water rights), *aff’d*, 942 F.3d at 1335-1341 (Appellants’ water rights are subordinate to Hoopa federal reserved water rights); *Patterson*, 204 F.3d at 1214 (Reclamation must release water from Link River Dam to fulfill downstream Tribes’ rights “that take precedence over any alleged rights of the Irrigators”); *Kandra*, 145 F. Supp. 2d at 1204-06 (denying irrigators’ request to enjoin Reclamation’s 2001 operations

would have on Hoopa's interests if successful, the District Court properly ruled that it could not proceed to adjudicate Appellants' claims in Hoopa's absence.

Hoopa also has a specific interest in ensuring that Reclamation continues to release water out of UKL as necessary to protect threatened SONCC coho, a tribal trust species, from jeopardy in compliance with the ESA. The ESA prohibits any operation of the Project or water deliveries to Plaintiffs that could jeopardize listed species. 16 U.S.C. §1536(a)(2). In 2017, Hoopa obtained injunctive relief against Reclamation that led to preparation of a new BiOp to govern Project operations in compliance with the ESA. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1141-46. That new BiOp, published in 2019, led to Reclamation's approval of the Klamath Project Operating Procedures challenged by Plaintiffs here. SVID\_ER-199-200. The 2019 BiOp requires Reclamation to set aside water and make specific releases into the Klamath River for protection of SONCC coho. *Id.*; *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1141-46. Now here, in separate litigation in Hoopa's absence, Plaintiffs argue that such releases are unlawful. Appellants' claims, if successful, would directly impair Hoopa's interests in protection of tribal trust species in the Klamath River and the benefits of its prior litigation. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897-98 (9<sup>th</sup> Cir. 2011) (intervenors had

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plan, finding "Reclamation . . . has a responsibility to divert the water and resources needed to fulfill the Tribes' rights").

protectable interest in federal administrative order that arose from prior litigation prosecuted by intervenors). The District Court properly found Hoopa is a required party pursuant to Rule 19.

Other than for its “due process” claim, KID does not challenge the District Court’s findings regarding Hoopa’s affected interests and the potential impairment to Hoopa’s interests resulting from Appellants’ suits. The District Court properly found that Hoopa is a required party to KID’s “due process” claim, which like its other claims, would require a determination that KID is entitled to receive water in priority to Hoopa – which is exactly opposite of what the law requires. As KID acknowledges in its brief, KID’s “due process” claim is really an argument that KID wants to be paid in advance for any water released downstream in fulfillment of Hoopa’s senior rights. This issue was already decided against KID in *Baley*. In *Baley*, the Federal Circuit affirmed that the irrigator plaintiffs (which originally included KID) were not entitled to any compensation resulting from the federal government’s release of water necessary to fulfill Hoopa’s senior rights. *Baley*, 942 F.3d at 1341-42. Reclamation is not using water for its “own” purposes as KID claims or unlawfully taking water that belongs to KID; rather, Reclamation is allowing water to flow past Link River Dam in fulfillment of Hoopa’s rights which are senior in priority to KID. As the *Baley* court found, given the relative priority between Hoopa (senior) and KID (junior), the release of water downstream did not

constitute an unlawful taking of irrigators' rights. *See also Navajo Nation*, 2021 U.S. App. LEXIS 12630, at \*34 (federal government has affirmative duty to protect tribal reserved water rights).

KID's "due process" claim is simply a repackaged argument that it is entitled to compensation when water is released in fulfillment of Hoopa's senior rights. An order mandating Reclamation to compensate KID or to condemn water rights prior to implementing Hoopa water rights through release of water that is critically necessary for maintenance of fish life in the Klamath River would plainly impair Hoopa rights. In addition to effectively subordinating Hoopa rights to KID, there is no guarantee that KID or its members would sell their water or sell at a reasonable price. As with KID's other claims, its "due process" claim directly threatens to impair Hoopa interests and it, like the other claims, was properly dismissed.

SVID's brief also ignores the relevant questions under Rule 19 and instead argues that the federal government is the only required party in litigation brought under the APA. But *Dine Citizens* forecloses this argument, as that case also presented claims challenging federal agency action through the APA.<sup>2</sup> As the

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<sup>2</sup> In *Dine Citizens*, the United States appeared as *amicus curiae* to argue that it is the only required defendant in a challenge to federal agency action. SVID\_ER-125; *see also Brief of the United States as Amicus Curiae in Support of Reversal*, Case No. 17-17320, Doc ID # 10768135 (2/16/2018). This Court did not accept

District Court properly did here, the Court in *Dine Citizens* faithfully analyzed, as a practical matter, whether the litigation would impair interests of a sovereign Indian tribe who could not be joined. *Dine Citizens*, 932 F.3d at 851-53; 857-58. As here, the situation in *Dine Citizens* involved a suit against a federal agency with a trust obligation to the affected tribal government. Hoopa's interests are arguably far weightier than the economic interests at issue in *Dine Citizens*. Hoopa stands to have its fishing and water rights – a foundation of Hoopa's subsistence, culture, and economy – negated, possibly forever. The considerations that favored dismissal in *Dine Citizens* apply here and favor dismissal with even greater force.

C. The Bureau of Reclamation is Not an Adequate Representative of Hoopa Interests in This Case.

The burden of making a showing of inadequate representation is minimal.

*Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538, n. 10 (1972). Despite

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the United States' argument and instead applied the Rule 19 factors in finding that the Navajo government enterprise was required and that the case could not proceed in its absence. The *Dine Citizens* plaintiffs petitioned the Supreme Court for writ of certiorari, presenting the sole question: "Whether Federal Rule of Civil Procedure 19 requires dismissal of an Administrative Procedure Act action challenging a federal agency's compliance with statutory requirements governing federal agency decisions, for failure to join a non-federal entity that would benefit from the challenged agency action and cannot be joined without consent." USSC Case No. 19-1166, Petition for Writ of Certiorari (3/24/20). The Supreme Court denied the petition. *Dine Citizens Against Ruining Our Environment v. BIA*, 2020 U.S. LEXIS 3508 (U.S., June 29, 2020). Here, the federal defendants expressly acknowledged that, in *Dine Citizens*, the Ninth Circuit rejected "the government's position that the United States is generally the only required and indispensable defendant in such APA challenges to federal agency action." SVID\_ER-125.

multiple opportunities before the District Court, the Bureau of Reclamation did not disclose any intent whatsoever to represent Hoopa's interest in this litigation. In response to Hoopa's motion to intervene, in which Hoopa expressly argued that Reclamation was not an adequate representative of its interests here, Reclamation "took no position." HVT\_ER-145. Likewise, responding to Hoopa's motion to dismiss, Reclamation did not dispute Hoopa's claims regarding inadequate representation. SVID\_ER-120-126. Instead, Reclamation argued that Hoopa appeared to satisfy the criteria for dismissal under Rule 19. SVID\_ER-125-126. The specific lengthy history of conflict in the Klamath Basin and Reclamation's multiple competing obligations in that conflict, including obligations to multiple competing tribal interests, leaves no question that Reclamation is not an adequate representative of Hoopa interests here.

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

Appellants contend Reclamation will adequately represent Hoopa's interests in this case because Reclamation (as a federal agency) has a general trust obligation to Hoopa and because Reclamation allegedly shares the same general interest in defeating Appellants' case. That Hoopa and Reclamation may share the same goal in defeating Appellants' suit does not establish that Reclamation is an adequate representative of Hoopa's interests here for Rule 19 purposes. *Dine*



*Citizens*, 932 F.3d at 855-56. In *Dine Citizens*, plaintiffs sued the Interior Department pursuant to NEPA, the ESA, and APA challenging administrative approvals of coal mining activities on Navajo lands. A Navajo entity intervened to file a motion to dismiss under Rule 19, as Hoopa did here. As with Hoopa, Interior has a trust obligation to Navajo. *Navajo Nation*, 2021 U.S. App. LEXIS 12630, \*31-36 (discussing trust duty to protect Navajo water rights); *United States v. Navajo Nation*, 537 U.S. 488, 495 (2003). Although Interior also shared an interest in defending the federal decisions in *Dine Citizens*, the Ninth Circuit found that Federal Defendants’ “overriding interest . . . must be in complying with environmental laws such as NEPA and the ESA. This interest differs in a meaningful sense from [Navajo’s] sovereign interest in ensuring that the Mine and Power Plant continue to operate and provide profits to the Navajo Nation.” *Dine Citizens*, 932 F.3d at 855.

As in *Dine Citizens*, while Reclamation may share an interest in defending its approvals and analyses here pursuant to applicable federal laws, Reclamation does not share Hoopa’s interest in the *outcome* of those approvals – the continued release of water necessary to protect fish and water resources in the Klamath River that are relied upon by Hoopa people and that support Hoopa’s reserved rights. *Id.* Neither Reclamation nor any Federal Defendant will suffer, directly or indirectly, the consequences that Hoopa will suffer if Appellants prevail and obtain their

requested relief. Hoopa has a sovereign interest in ensuring protection of Klamath River fish and water resources that are necessary for the subsistence and economy of Hoopa people now and in the future. HVT\_ER-004-008. While Reclamation may have a general interest in defending its agency action and authority, Hoopa “has an interest in its own survival, an interest which it is entitled to protect on its own.” *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F. Supp. 791, 797 (D. D.C. 1990). *See also Murphy Co. v. Trump*, 2017 U.S. Dist. LEXIS 35959 (D. Or., March 14, 2017) (declining to find that federal government adequately represented proposed intervenor that had narrower interests than the United States).

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

The Klamath Operating Procedures that Appellants challenge here arise from litigation brought by Hoopa against Reclamation that ultimately resulted in injunctive relief requiring preparation of a new BiOp to govern Reclamation’s Project operations as well as additional flow releases from Link River Dam for protection of ESA-listed species in the Klamath River. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1111-12; 1141-46. Reclamation vigorously defended against Hoopa in that litigation. *Id.* at 1111-46. Reclamation was aligned closely with Appellants (who intervened in support of Reclamation) throughout that litigation and significantly resisted (ultimately unsuccessfully) Hoopa’s requests for a new BiOp

and for additional flow through Link River Dam for fish in the Klamath River. *Id.*; *see also Hoopa Valley Tribe v. NMFS*, 2018 U.S. Dist. LEXIS 73641 (N.D. Cal., April 30, 2018), at \*21-29 (rejecting Reclamation's proposal to deliver 252,000 acre-feet of water to Klamath irrigators during 2018 season instead of implementing injunction measures obtained by Hoopa to protect SONCC coho in Klamath River). This Court has found federal agencies to be inadequate representatives of a party's interests in cases challenging administrative actions that arose from prior litigation brought against the federal agency by that same party. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 - 98 (9<sup>th</sup> Cir. 2011); *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9<sup>th</sup> Cir. 1980); *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1398 (9<sup>th</sup> Cir. 1995).

The *Hoopa Valley Tribe* litigation is just one of many examples where Reclamation's management of the Klamath Project has been challenged by Klamath Basin tribes, including Hoopa, due to Reclamation's failure to provide adequate water to fish resources affected by Reclamation's water deliveries to Appellants and Klamath Project operations. *See, e.g., Klamath Tribes v. U.S. Bureau of Reclamation*, Case No. 21-cv-556 (D. Or.) (seeking injunction to maintain water in UKL to protect ESA-listed tribal trust resources); *Yurok Tribe v. U.S. Bureau of Reclamation*, Case No. 19-cv-4405-WHO (N.D. Cal., May 29, 2020) (seeking injunction to protect SONCC coho from irreparable harm resulting

from Reclamation's 2019 operations plan); *Klamath Tribes v. U.S. Bureau of Reclamation*, Case No. 18-cv-3078-WHO (N.D. Cal.) (seeking injunction to maintain water in UKL to protect ESA-listed tribal trust resources); *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1106-46 (obtaining injunction against Reclamation requiring additional downstream flow released from UKL to protect ESA-listed tribal trust resource); *PCFFA/Yurok Tribe v. U.S. Bureau of Reclamation*, 2005 U.S. Dist. LEXIS 36035 (N.D. Cal., March 8, 2005) (lawsuit alleging that Reclamation violated federal reserved fishing right of Yurok Tribe by failing to release adequate flow into Klamath River from UKL); *PCFFA*, 426 F.3d at 1082-94 (tribes intervened in support of challenge to Reclamation's project operations in 2002). Reclamation has often aligned itself with Appellants in defending against water releases for fish. *Id.* Given this history, Hoopa was rightfully concerned that Reclamation could be a reluctant defender of its approvals in this litigation. *Citizens for Balanced Use*, 647 F.3d at 897-98. *White v. Univ. of Cal.*, 765 F.3d 1010, 1027 (9<sup>th</sup> Cir. 2014) (State University not adequate representative for absent tribal interests where their respective interests may "not necessarily remain aligned"); *Pac. NW Generating Coop v. Brown*, 822 F. Supp. 1479, 1511 (D. Or. 1993) (finding past litigation history relevant to adequate representation inquiry).

3. Reclamation Would Not Undoubtedly Make All of Hoopa's Arguments; Nor Was Reclamation Capable and Willing to Make Such Arguments.

Nothing in the record indicated that Reclamation would “undoubtedly make all of [Hoopa’s] arguments” or that it “is capable and willing to make such arguments.” *Citizens for Balanced Use*, 647 F.3d at 898. Reclamation’s answers do not assert Hoopa’s rights or interests as a possible defense. SVID\_ER-225-249. Reclamation never challenged Hoopa’s express contentions that Reclamation would inadequately represent its interests here. *Id.* Along with its general national interests, Reclamation has conflicting obligations to Hoopa, the upstream Klamath Tribes, and Appellants. Hoopa, in contrast, has one interest: protecting and preserving Klamath River fish and water resources and its reserved fishing and water rights.

Appellants argue that Reclamation’s decision to not move for dismissal under Rule 19 or other grounds in this case is irrelevant. In *Friends of Amador County v. Salazar*, 554 Fed. Appx. 562, 564 (9<sup>th</sup> Cir. 2014), this Court found the United States was an inadequate representative for the interested Tribe and affirmed dismissal under Rule 19 after finding that the federal government’s failure to move for dismissal under Rule 19 and failure to take any position on the Tribe’s Rule 19 motion did “indicate divergent interests between the Tribe and the government.” *Id.* at 564. There, the federal representative’s conduct “caused the district court to suspect that the government favored judicial resolution of the lawsuit as opposed to early dismissal, and would seek to avoid taking positions

contrary to its national Indian policy.” *Id.* Here, Reclamation similarly declined to file a Rule 19 motion not based on the specific facts or issues in this case, but to maintain consistency with litigation positions of the United States nationally.

HVT\_ER-019-020.

Appellants rely on *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9<sup>th</sup> Cir. 1998). *Babbitt* is distinguishable because Hoopa introduced undisputed evidence showing that the reason why Reclamation failed to present its Rule 19 motion was not based on any finding that Reclamation would adequately represent Hoopa or that Hoopa’s Rule 19 motion lacked merit. *Id.*; HVT\_ER-019-020. Rather, Reclamation declined to file a Rule 19 motion to maintain consistency with arguments made in pending litigation nationally – a general interest that diverges with Hoopa’s specific interest here. HVT\_ER-019-020. In *Babbitt*, other than the federal decision not to file a Rule 19 motion, there was no divergence of interest of any kind between the Tribe and the government and the Ninth Circuit found it “clear that the government would adequately represent [the Tribe’s] interest in that case.” *Babbitt*, 150 F.3d at 1154. Here, Reclamation’s decision not to file a Rule 19 motion based on broader national interests wholly unrelated to Hoopa is, among other reasons, further evidence of Reclamation’s inability to adequately represent Hoopa. *Friends of Amador County*, 554 Fed. Appx. at 564.

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

In cases evaluating whether an Indian tribe is a required party in litigation involving a federal agency, this Court applies the normal test under Rule 19 that evaluates, for purposes of the adequate representation inquiry: (1) whether the interest of a present party is such that it will undoubtedly make all of the absent party's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the absent party would offer any necessary elements to the proceeding that other parties would neglect. *Dine Citizens*, 932 F.3d at 852; *Babbitt*, 150 F.3d at 1154; *Shermoen*, 982 F.2d at 1318.

Under Rule 19, the fact that Reclamation has a general trust relationship to Hoopa does not answer whether Reclamation can adequately represent Hoopa's interests in the context of this specific litigation. *Id*; *Wild Fish Conservancy v. Irving*, 2015 U.S. Dist. LEXIS 179960 (E.D. Wash., Feb. 26, 2015) (Reclamation not adequate representative of Indian tribes in suit that threatened the tribes' interests in treaty fishing rights, due to federal agencies broader interests). The Ninth Circuit has repeatedly held that the federal government is not an adequate representative of an Indian tribe for purposes of Rule 19 where the United States has potentially conflicting interests. *Hull*, 305 F.3d at 1023, n. 5; *Confed. Tribes of*

*the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9<sup>th</sup> Cir. 1981); *Shermoen*, 982 F.2d at 1318; *Verity*, 910 F.2d at 560.

Appellants cite *Washington v. Daley*, 173 F.3d 1158 (9<sup>th</sup> Cir. 1999) to support their adequate representation argument, but in *Daley* the Court found the interests of the United States and affected tribes to be completely aligned. *Id.* at 1167-68. That is not the situation here, where Reclamation's conflicting broader national interests, its competing duties to the upstream Klamath Tribes and to Appellants, and its documented history of failing to protect Hoopa's rights from Project impacts preclude an adequate representation finding. HVT\_ER-008; HVT\_ER-016. This direct evidence of multiple sources of conflict precludes any conclusion that Reclamation adequately represents Hoopa's interests. *NRDC v. Kempthorne*, 539 F. Supp. 2d 1155, 1187-88 (E.D. Cal. 2008) (Interior not adequate representative of absent water contractors due to conflicting interests).

In support of their argument that Hoopa is not required, Appellants also cite to *Nevada v. United States*, 463 U.S. 110 (1983); *Arizona v. California*, 460 U.S. 605 (1983), and *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921 (9<sup>th</sup> Cir. 1986). Those cases do not support Appellants' argument. Each of these cases involved situations in which the United States had affirmatively filed claims for water rights on behalf of Indian tribes in the context of comprehensive water rights adjudications. In each of those cases, the Courts confirmed that the United States



was authorized by Congress in the narrow context of water rights adjudications to assert claims on behalf of Indian tribes as well as on behalf of other federal interests, including reclamation projects. *Nevada*, 463 U.S. at 113, 116; *Arizona*, 460 U.S. at 608-609; *Hodel*, 784 F.2d at 922. In *Nevada* and *Arizona*, the Supreme Court rejected subsequent efforts to re-open long settled water decrees based on new arguments that the United States had previously inadequately represented the tribes' interests in part due to their allegedly conflicting interests. *Nevada*, 463 U.S. at 143-45 (holding that Tribe was bound by United States' prior affirmative representation of its interests in the water rights adjudication and that principles of res judicata barred re-opening the decree, which had been relied upon by parties to the decree and their successors for over fifty years); *Arizona*, 460 U.S. at 620-28 (declining to re-open water rights decree based on principles of finality and finding that Indian tribes were bound by United States' prior affirmative representation of their interests in water rights adjudication). In *Hodel*, the Ninth Circuit rejected the Tribe's argument that the United States lacked authority to pursue the Tribe's water rights claims in a state court adjudication. *Hodel*, 784 F.2d at 924.

These distinguishable cases confirm that the United States has authority to present water rights claims on behalf of Indian tribes in a water rights adjudication and that Indian tribes may be subsequently bound by the United States' affirmative representation in that context. This is mandated by direct Congressional policy, as

expressed in the McCarran Amendment, which expressly provides state courts with jurisdiction to join the United States (on its own behalf and on behalf of Indian tribes) in state court water right adjudications. 43 U.S.C. § 666. The McCarran Amendment allows state courts to conduct comprehensive water rights adjudications that finally determine the rights of all claimants, including the United States and Indian tribes, within the court’s jurisdiction. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The Supreme Court has recognized that “water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute.” *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983). The holdings of the cases relied on by Appellants are limited to the unique context of claims affirmatively filed by the United States on behalf of Indian tribes in water rights adjudications, which the case presently before this Court is not. KID\_ER-019 (ruling that “this is clearly not a McCarran Amendment case”). *See also infra*.

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

This case does not present a mere abstract possibility of conflict; it presents an actual conflict of interest arising out of the actual relationships and documented conduct, past and present, of the parties at issue. *Klamath Water Users Protective Ass’n v. United States Dep’t of the Interior*, 188 F.3d 1034, 1038 (9<sup>th</sup> Cir. 1999) (finding that, despite general trust relationship, “a clear and present conflict” and

an “adversary relationship” existed between Interior and the Klamath Basin tribes regarding Project operations planning). *See* HVT\_ER-007-008 (describing Reclamation’s conflicts regarding the Klamath Project and Hoopa rights); HVT\_ER-016 (describing Reclamation’s reliance on “competing duties and obligations to other interests, such as duties to the Plaintiff irrigators or duties to other affected Indian tribes, as a basis to curtail or attempt to limit flows in the Klamath River downstream of the Project”). In past litigation, Reclamation has acted adversely to Hoopa in favor of Appellants’ interests. HVT\_ER-008.

A finding that the United States is not an adequate representative of an Indian tribe under Rule 19 is appropriate where two or more tribes have potentially conflicting interests in the case. *Verity*, 910 F.2d at 560 (suit against agency could not proceed in absence of tribes with potential conflicting claims in fishery); *see also Manybeads v. United States*, 209 F.3d 1164, 1166-67 (9<sup>th</sup> Cir. 2000); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9<sup>th</sup> Cir. 1994); *Pit River Home and Agricultural Coop. Ass’n v. United States*, 30 F.3d 1088 (9<sup>th</sup> Cir. 1994); *Lujan*, 928 F.2d at 1496; *Shermoen*, 982 F.3d at 1318. Each of these cases involved situations, like here, where the United States is sued as a defendant and the question for Rule 19 purposes is whether the United States can adequately represent absent tribes with potentially conflicting interests. *Verity*, 910 F.2d at 560; *Lujan*, 928 F.2d at 1500; *Shermoen*, 982 F.2d at 1318.

Here, Reclamation owes competing trust obligations to both Hoopa and the Klamath Tribes. *Navajo Nation*, 2021 U.S. App. LEXIS 12630, at \*31-36 (federal government has affirmative trust duty to protect tribal water rights). Although both Hoopa and the Klamath Tribes share an interest in defeating Appellants' suit, the Klamath Tribes have an interest in preserving lake levels in UKL that differs from Hoopa's interest in releasing water from UKL for instream flows. *Klamath Water Users Protective Ass'n*, 188 F.3d at 1039, fn. 1.<sup>3</sup> This conflict inherently exists due to the respective tribes' geographic locations in the Klamath Basin and the specific needs of the trust species that each tribe relies upon. *Id.* It also exists due to Reclamation's pattern and practice of failing to provide adequate water for both trust species (in UKL and in the Klamath River), while instead delivering water to Appellants. The relief requested in Appellants' suit would exacerbate this conflict by precluding Reclamation from using water in UKL to fulfill its ESA obligations and forcing Reclamation to allocate an even more limited water supply between Appellants and the respective tribal interests.

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<sup>3</sup> This conflict is exemplified by the Klamath Tribes' recent attempt to enjoin flow releases from UKL despite the harm that such an injunction would have caused SONCC coho and Hoopa's interests downstream. *Klamath Tribes v. U.S. Bureau of Reclamation*, Case No. 21-cv-556 (D. Or.), Dkt. # 2 (seeking TRO that would have reduced ESA minimum flows in Klamath River). On May 6, 2021, Judge McShane denied the Klamath Tribes' motion. *Id.*, Dkt. #53.

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

D. The District Court Was Alternatively Correct That Proceeding with This Litigation in Hoopa's Absence Could Result in Conflicting Obligations.

The District Court correctly ruled, in the alternative, that Hoopa is required under Rule 19(a)(1)(B)(ii) because adjudication in Hoopa's absence would put Reclamation at a substantial risk of double, multiple, or otherwise inconsistent obligations. KID\_ER-017. SVID argues that it merely wants to ensure compliance with (its incorrect view of) the law. SVID argues that Reclamation could only have one governing legal obligation if SVID prevails. But in its suit,

SVID alleges that Reclamation must implement the irrigators' state law water rights in advance of any federal obligations downstream. SVID's argument simply assumes that its view of the law is correct and that Reclamation is acting unlawfully by complying with the ESA and implementing Hoopa's senior reserved rights. SVID's view of the law is directly inconsistent with every judicial opinion that has evaluated Reclamation's Project operations to date. *See, e.g., supra* fn. 1.

SVID asserts that this litigation will not affect, as a legal matter, the existence of Hoopa's senior federal reserved water rights. But if Appellants prevail and obtain the relief they seek, Reclamation would be subject to an order in this litigation requiring it to implement and fulfill Appellants' rights first – even though Hoopa's senior reserved water rights would remain in effect and in legal priority. There is not typically enough water to satisfy both claims. Thus, should Appellants prevail, Reclamation would have directly and mutually conflicting obligations. Reclamation would also remain subject to the ESA and risk Section 9 take liability for failing to provide sufficient flow downstream for the protection of SONCC coho. The District Court's determination that Hoopa is required is correct.

II. The McCarran Amendment Has No Application in This Case Involving Unadjudicated Interstate Waters.

KID incorrectly contends that this action is a proceeding for the administration of water rights pursuant to the McCarran Amendment. As the District Court properly found, “this is clearly not a McCarran Amendment case.”

KID\_ER-019.<sup>4</sup> KID’s lengthy discussion of the McCarran Amendment’s history and its general purpose to allow comprehensive adjudication of water rights (including federal and tribal) within a state’s jurisdiction is wholly misplaced. Here, Appellants seek to restrain the federal government from releasing water through a federal facility that is required to implement a federal agency’s ESA obligations and senior federal tribal reserved water rights, which have not been subject to adjudication, in a different, downstream, state. The McCarran Amendment is narrowly limited in application to comprehensive intrastate water adjudications, and it has no application here.

The Klamath River is an interstate river, flowing in Oregon and California. Oregon’s Klamath Basin Adjudication (“KBA”), which remains pending in Oregon state court is not and cannot be an adjudication of all rights in the entirety of the Klamath River – rather, it is only an adjudication of those rights within Oregon. *United States v. District Court for Eagle County*, 401 U.S. 520, 523 (1971) (McCarran Amendment only addresses adjudications of rights in river system “within the particular State’s jurisdiction”). The McCarran Amendment does not confer jurisdiction on a state (i.e., an upstream state) to adjudicate (or administer) portions of an interstate river located within a different state (i.e., a downstream state). *Eagle County*, 401 U.S. at 523. “This result is entirely logical,

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<sup>4</sup> SVID does not argue that this proceeding arises under the McCarran Amendment.

because a state court would not have jurisdiction over out-of-state water claimants.” Thomas H. Pacheco, *How Big is Big – The Scope of Water Rights Suits Under the McCarran Amendment*, 15 Ecology L.Q. 627, 652 (1988). Neither Hoopa, nor the United States on Hoopa’s behalf, were required to submit claims in the KBA regarding Hoopa’s reserved water rights in California. *Baley*, 942 F.3d at 1341 (“[Hoopa’s] lack of participation in the [KBA] did not preclude their entitlement to water that flows in the Klamath River below the Iron Gate Dam in California”).

Hoopa’s federal reserved water right is non-consumptive and entitles the Tribe to maintenance of an instream flow of water in the Klamath River necessary to maintain and protect its on-reservation fishing rights in California. *Baley*, 942 F.3d at 1321-22, 1339; *Adair*, 723 F.3d at 1410-11; *Walton* 647 F.2d at 48. Though the full scope of Hoopa’s right is unquantified, Hoopa rights are entitled to protection from impairment. *Winters*, 207 U.S. at 576-77 (protecting unquantified tribal rights against upstream irrigators); *Joint Board of Control v. United States*, 832 F.2d 1127, 1131-32 (9<sup>th</sup> Cir. 1987), cert. denied 486 U.S. 1007 (1988) (BIA had authority and duty to implement minimum stream flows for Indian fishery before providing water to irrigators, despite lack of quantification of Indian rights); *Baley*, 942 F.3d at 1341 (Hoopa water rights need not be quantified to be protected).



Due to the lack of substantial tributary contribution between Iron Gate Dam and the Reservation, the Tribe's federal reserved water right for maintenance of its on-reservation fishery requires federally managed releases through upstream Link River and Iron Gate Dams that block and regulate the flow of the river. *PCFFA*, 426 F.3d at 1085 (“The flows past the Iron Gate dam into the Klamath River determine to a great extent the quantity of water available in the river”).<sup>5</sup> Here, Appellants seek to prevent flows that are necessary to implement the bare minimum quantity of Hoopa's rights – those necessary to satisfy federal ESA obligations and to prevent risk of extinction to Klamath River salmon.

Though located in California, the Tribe's senior downstream rights retain their priority over and are enforceable against the junior rights of Appellants in Oregon. *Winters*, 207 U.S. at 576-77; *Bean v. Morris*, 221 U.S. 485 (1911) (affirming decree enforcing senior priority of private rights holder in downstream state against interference by junior private rights holder in upstream state); *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922) (prior appropriation principles apply in disputes involving interstate streams). That Appellants have had their junior rights adjudicated in Oregon does not entitle them to relief that would bar

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<sup>5</sup> Iron Gate Dam is the furthest dam downstream on the Klamath River and the point at which ESA compliance is measured for purposes of providing minimum flows for SONCC coho. Link River Dam is upstream and regulates releases out of UKL, which flow downstream through Iron Gate Dam and the Klamath River.

flow from reaching California downstream to implement Hoopa's senior rights under federal law. The McCarran Amendment is wholly inapplicable to this dispute involving interstate waters.

KID's McCarran Amendment argument is also incorrect because the McCarran Amendment's reference to administration of water rights only applies to water rights that have been adjudicated, which Hoopa's have not. *South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9<sup>th</sup> Cir. 1985). There can be no suit for the administration of water rights where there has been no prior adjudication of the relative general stream water rights at issue. *Id.* The ACFOD, which arises out of the Oregon KBA, is inapplicable to Hoopa and does not adjudicate Hoopa rights. *Eagle County*, 401 U.S. at 523 (McCarran Amendment does not give state court jurisdiction over out-of-state claims); *Baley*, 942 F.3d at 1341 (Hoopa was not required to submit claims in the KBA). Since the McCarran Amendment does not apply to interstate adjudications of water rights, it also cannot extend to interstate "administration" of water rights. *Id.*

Nor does the McCarran Amendment authorize individual suits by water claimants against the United States or Indian tribes. While the McCarran Amendment authorizes a specific limited waiver of the United States' sovereign immunity to implement a policy of allowing comprehensive adjudications and administration of water rights within a state's jurisdiction – it does not provide any

waivers of immunity outside of those narrow comprehensive adjudication contexts. *Dugan v. Rank*, 372 U.S. 609 (1963). The McCarran Amendment provides no waiver of immunity for private suits between the United States and particular claimants. *Id.*; *Metropolitan Water District v. United States*, 830 F.2d 139, 144 (9<sup>th</sup> Cir. 1987).

Nor does the McCarran Amendment waive the sovereign immunity of Indian tribes as parties to litigation. *San Carlos Apache Tribe*, 463 U.S. at 567, n. 17; *Wagoner County Rural Water Distr. No. 2 v. United States*, 2008 U.S. Dist. LEXIS 14397 (N.D. Okla. 2008) (ruling, in suit seeking declaration of rights to water held in reservoir, that the McCarran Amendment does not waive sovereign immunity of Indian tribes as parties to litigation). While the McCarran Amendment permits, as this Court affirmed in *United States v. Oregon* and *White Mountain Apache Tribe*, adjudication of intrastate federal reserved rights, including tribal rights, within a state's jurisdiction in the limited context of a comprehensive state water rights adjudication, the McCarran Amendment does not provide any waiver of tribal sovereign immunity that would allow an individual litigant like KID to sue or join Hoopa directly as a party in private litigation. *Id.*

Both *United States v. Oregon* and *White Mountain Apache* addressed the authority of states to adjudicate tribal rights in the context of comprehensive state water rights adjudications. Neither of those cases, nor any other authority, supports

KID's contention that the McCarran Amendment waives tribal sovereign immunity to subject Indian tribes to private suits like KID brings here. Congressional waivers of tribal sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The McCarran Amendment does not mention Indian tribes at all and there is clearly no express waiver that would permit KID to join Hoopa as a party here. The District Court correctly found that the McCarran Amendment does not apply and does not waive Hoopa's sovereign immunity.

KID's assertion that this case is subject to the McCarran Amendment is belied by the fact that KID did not file its current requests for relief in the KBA, which remains pending in Oregon state court. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976) (McCarran Amendment favors dismissal of federal action in deference to ongoing state proceedings). The Oregon state court presumably stands ready to administer rights within its jurisdiction. But KID likely well understands that the Oregon state court has no jurisdiction to adjudicate or administer Hoopa's water rights in California. The pendency of a water rights adjudication in Oregon, to which Hoopa is not a party nor required to be a party, does not provide any support for KID's claim that the McCarran Amendment waives Hoopa's sovereign immunity in this litigation, which threatens to impair, as a practical matter, Hoopa's federal reserved rights in California.

The District Court’s conclusion that this proceeding, in which Appellants challenge the lawfulness of federal agency action under the APA, is not subject to the McCarran Amendment is plainly correct.

III. This Court Should Affirm the District Court’s Determination that, In Equity and Good Conscience, Appellants’ Suits Could Not Proceed in Hoopa’s Absence.

To prevail in their arguments under Rule 19(b), Appellants must show that the District Court abused its discretion in finding that their suits could not proceed in equity and good conscience. *Dine Citizens*, 932 F.3d at 851. The District Court reasonably applied Rule 19(b) and properly accounted for tribal sovereign immunity in concluding that the cases could not proceed in Hoopa’s absence.

A. Tribal Sovereign Immunity Strongly Favors Dismissal Under Rule 19(b).

In *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), the Supreme Court gave sovereign immunity of an absent party near-dispositive effect in the context of a Rule 19 motion to dismiss. “A case may not proceed when a required-entity sovereign is not amenable to suit . . . . Where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.” *Id.* at 867. That statement applies here, supporting dismissal.

This Court has repeatedly stated (both before and after *Pimentel*) that there is “very little need” for balancing under Rule 19(b) in cases where an absent Indian tribe is required. Sovereign immunity itself may be viewed as the compelling

factor in favor of dismissal. *Dine Citizens*, 932 F.3d at 857. Although this Court will still engage in the traditional four-factor analysis under Rule 19(b), as the District Court properly did here, “there is a ‘wall of circuit authority’ in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity – ‘virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.’” *Id.* at 857, quoting *White*, 765 F.3d at 1028. In *Dine Citizens*, this Court said: “we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.” *Id.* at 858.<sup>6</sup>

SVID argues that it is unfair that Hoopa (and other Klamath Basin tribes) can file suits challenging Project operations while Appellants’ suits here are subject to dismissal due to sovereign immunity. The Ninth Circuit rejected a similar argument in *Dine Citizens*, noting that sovereign immunity may lead to situations where legal recourse is precluded in cases affecting tribal rights. *Dine Citizens*, 932 F.3d at 861. SVID’s argument is also misplaced for other reasons. First, there is no case brought by Indian tribes or others regarding Project

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<sup>6</sup> See also *Deschutes River Alliance v. Portland General Electric Co.*, \_\_\_ F.3d \_\_\_, 2021 U.S. App. LEXIS 18693, at \*23 (9<sup>th</sup> Cir., June 23, 2021) (“Equity and good conscience thus do not permit [the] suit to proceed when the action involves protected interests of the Tribe that could be impaired in its absence.”)

operations in which participation of Klamath irrigators has been denied. As the District Court correctly noted: “It is clear that the irrigators of the Klamath Basin have had many chances in federal court to challenge the priority of their water rights, and they have generally been unsuccessful each time.” KID\_ER-021. “The irrigators have not been denied intervention in any of the litigation brought by other parties, and there is no evidence that they would be denied intervention in the future.” KID\_ER-022. Klamath Water Users Association (KWUA), a Plaintiff-Appellant here, is currently an intervenor in pending litigation regarding Project operations. *Yurok Tribe v. Bureau of Reclamation*, No. 19-cv-4405, ECF #924 (N.D. Cal., May 29, 2020) and they have recently filed motions in that proceeding that address some of the issues in which they sought to address in this litigation.<sup>7</sup> KID is participating as an amicus in that same litigation. *Id.* In *Hoopa Valley Tribe*, KWUA also intervened to oppose Hoopa’s request to nominally increase flows to protect threatened coho. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1114, 1141-42. In litigation recently filed by the Klamath Tribes regarding Project operations, KWUA intervened and argued (citing the very decision that it is appealing here) that the Klamath Tribes’ suit should be dismissed for failure to join

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<sup>7</sup> *Defendant-Intervenor KWUA’s Motion to Lift Stay*, Case No. 19-cv-4405 (N.D. Cal.), Dkt. No. 928 (04/19/21); *Defendant-Intervenor KWUA’s Motion for Summary Judgment on Plaintiffs’ Fifth and Sixth ESA Claims*, Case No. 19-cv-4405 (N.D. Cal.), Dkt. No. 928-1 (04/19/21).

Hoopa, a required party.<sup>8</sup> Appellants' rights to participate, defend, and make claims in relevant Project litigation is unimpaired.<sup>9</sup>

Nor does Hoopa argue that every lawsuit brought by Appellants relating to Reclamation's Project operations must be dismissed in Hoopa's absence.

*Patterson, Kandra, Baley* (and *Bennett v. Spear*, 520 U.S. 154 (1997)) were adjudicated without arguments raised under Rule 19. Other ongoing cases brought by Appellants, with differing scopes, are proceeding ahead. *See supra*, fn. 7-9.

Here, however, Appellants seek relief that directly threatens to not just affect, but to destroy, Hoopa's interests as a practical matter. Although Appellants' legal rights are junior to Hoopa, and although the ESA clearly governs Reclamation's

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<sup>8</sup> *Defendant-Intervenor KWUA's Opposition to Klamath Tribes' Motion for Temporary Restraining Order and Motion for Preliminary Injunction*, Case No. 21-cv-556 (D. Or.), Dkt. #35 (4/23/21).

<sup>9</sup> KID filed suits in Oregon state court and obtained an order requiring the Oregon Water Resources Department to investigate Reclamation's water use. KID\_ER-022. KID also recently moved for injunctive relief in the KBA regarding Reclamation's Project operations. *Klamath Irrigation District v. U.S. Bureau of Reclamation*, Case No. 21-cv-504 (D. Or.). Both KID and KWUA intervened in recent litigation filed by the Klamath Tribes, in which Appellants made arguments similar to those made here. The litigation before this Court is just one of many legal challenges that Klamath irrigators have brought or intervened in over the past twenty years – all of which have ultimately affirmed that Appellants' state law water rights are inferior and must yield to senior federal reserved water rights and Reclamation's federal obligations under the ESA. *Supra* fn. 1. Appellants are currently pressing their previously-rejected positions in no less than four judicial forums. Given their two-decade campaign of unsuccessful litigation, which continues in multiple forums now, Appellants' suggestion that the courthouse doors are closed to them is absurd.



operation of Link River Dam and mandates release of flow to protect ESA-listed species in the Klamath River, Appellants seek relief that would mandate full deliveries to Appellants regardless of impact to ESA-listed species or tribal rights in the Klamath. Given the extreme nature of the claims and relief sought by Appellants here, the District Court properly dismissed on Rule 19 grounds.

SVID argues that allowing dismissal on sovereign immunity grounds here is a “misuse” of sovereign immunity and would improperly insulate federal government action from judicial review by anyone except Indian tribes. This Court directly addressed this argument in *Dine Citizens* and rejected it. 932 F.3d at 861. There is nothing unusual or improper, or in SVID’s words “novel,” about a sovereign using its immunity to prevent a case from proceeding in its absence. Courts regularly dismiss cases under Rule 19 based on the immunity of federal, state, tribal, and foreign governments. *See e.g., Pimentel*, 553 U.S. 851 (2008) (case dismissed due to absent foreign sovereign; dismissal of claims is contemplated under sovereign immunity doctrine); *Delano Farms Co. v. Cal. Table Grape Comm’n*, 623 F. Supp. 2d 1144 (E.D. Cal. 2009) (dismissing action seeking declaratory relief because United States was required party that could not be joined due to sovereign immunity); *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995) (dismissing action brought by Indian tribe because Kansas was required party that could not be joined due to state sovereign

immunity); *Friant Water Authority v. Jewell*, 23 F. Supp. 3d 1130, 1147-50 (E.D. Cal. 2014) (finding California indispensable in suit brought by irrigation district); *White*, 765 F.3d at 1028 (9<sup>th</sup> Cir. 2014) (dismissing action for failure to join Indian tribe that could not be joined due to sovereign immunity; citing “wall of Circuit authority” favoring dismissal). The fact that a sovereign party may be able to sue, while simultaneously not being amenable to suit, is inherent in sovereign immunity. Where a required party has immunity, there is little need for balancing in the Rule 19(b) inquiry, as immunity is the compelling factor. *Id.* at 1028. Appellants’ contention that dismissal is disfavored is not correct where an immune sovereign is required. *Id.* Nor is it unusual for an immune sovereign to intervene for the sole purpose of dismissing the action under Rule 19. That is what occurred in *Dine Citizens*, 932 F.3d at 850.

B. Hoopa Would Suffer Significant Prejudice If This Litigation Proceeds in Its Absence.

The District Court correctly found that an order declaring it unlawful for Reclamation to release water from Link River Dam for instream fish flows, which both KID and SVID seek, would clearly prejudice Hoopa. Likewise, an order requiring Reclamation to make full water deliveries to Appellants regardless of impacts to ESA-listed species in the Klamath River or to senior downstream tribal rights, which both KID and SVID seek, would prejudice Hoopa. Both Appellants seek relief intended to require Reclamation to fully satisfy Appellants’ junior water

rights each year before releasing any water into the Klamath River for ESA compliance or senior tribal rights. Given the imperiled status of Klamath River salmon species, the limited annual water supply in the Klamath Basin, and the dependence that salmon species have on releases from Link River Dam, the relief Appellants request could result in extermination of anadromous salmon in the Klamath River. HVT\_ER-015. Appellants' suits directly threaten Hoopa's federal reserved fishing and water rights and the ability of Hoopa people to exercise those rights for subsistence, let alone a moderate living. *Id.*

Here on appeal, SVID suggests that Hoopa will suffer no prejudice because its' suit does "not call for any action by or against the Tribe[s]." SVID Brief, at 35. SVID ignores that its suit seeks to prevent releases of flow that are necessary to preserve, protect, and implement Hoopa's federal reserved rights. KID argues that Hoopa will not be prejudiced because KID merely wants Reclamation to "acquire" water that is released downstream. That is, KID argues that it just wants to be paid for water that is released downstream in fulfillment of Hoopa's senior rights. KID's argument ignores its own complaint and disregards the applicable law and established precedence of water rights in the Klamath River. In its Second Amended Complaint, KID argues that it is unlawful for Reclamation to release water for instream purposes "without a water right or other lawful authority". KID\_ER-094-095. KID ignores that the releases that it challenges implement

Hoopa's own senior water rights (not Reclamation's rights) and that Hoopa's senior water rights (and the ESA) provide lawful authority for Reclamation to release water into the Klamath River downstream. KID also argues that Reclamation is "unlawfully capping the amount of water that Plaintiff and its landowners are entitled to receive". KID\_ER-094-095. KID asserts it is entitled to receive its water in full before water is released downstream for ESA or tribal purposes. Such a result would clearly prejudice Hoopa.

Appellants argue that they are simply seeking to ensure Reclamation complies with (Appellants' view of) the law. But Reclamation, as numerous courts have already confirmed, is acting lawfully by conforming Project operations to satisfy ESA obligations and to implement tribal reserved rights. While Hoopa has little doubt that Appellants would again fail on the merits, that is not the relevant inquiry for Rule 19 purposes. The question is whether the suit threatens to impair Hoopa's legally protected interest (assuming Appellants ultimately prevail). *Dine Citizens*, 932 F.3d at 860. There is no question that the relief sought by Appellants, which would effectively require fulfillment of all of Appellants' junior state law water rights in advance of Reclamation's federal law obligations, would significantly prejudice Hoopa.

KID argues that Hoopa would not suffer harm if Reclamation acquires water from KID by purchase or condemnation before releasing it downstream to fulfill

Hoopa rights. The Federal Circuit’s *Baley* decision confirms that KID has the law backwards. In *Baley*, the Court confirmed (as the Ninth Circuit did in *Patterson*) that Hoopa’s rights are senior and that Reclamation need not pay anything to release water through Link River Dam to fulfill Hoopa’s senior rights, which take precedence over the junior rights of the irrigators. *Baley*, 932 F.3d at 1341-42. Nor does KID explain what would happen to Hoopa and its rights if KID (or other irrigators) prevail in this litigation but then refuse to sell water to Reclamation, or if Reclamation declines to initiate condemnation proceedings. It is this current litigation, in which Appellants are attempting to directly alter the established and governing order of precedence of rights on the Klamath River by declaring Reclamation’s implementation of the ESA and tribal reserved rights unlawful, that threatens Hoopa interests. KID’s effort to characterize its litigation as harmless to Hoopa interests ignores the text of its own pleadings, the governing law, and the practical realities of water availability and management on the Klamath River. The District Court properly rejected KID’s arguments and properly dismissed the suits.

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

“If the claims of a party and absentee are mutually exclusive, prejudice from non-joinder is virtually inescapable.” Moore’s Fed. Prac. [3d. ed.] § 19.05[2][d]. The nature of Appellants’ claims and requested relief forecloses any possibility to shape relief to avoid prejudice to Hoopa. Appellants seek an order

that would require Reclamation to honor Appellants' junior water rights in full prior to releasing any water for instream fish flows in the Klamath River downstream. Such an order is directly incompatible with Reclamation's federal law obligations to provide water for fish under the ESA and its trust obligations to protect and fulfill Hoopa's senior federal reserved rights.

Appellants' claims to the finite water resources of the Klamath River are mutually exclusive to those of Hoopa and other absent tribes. In cases involving competing claims to finite natural resources, courts have found no way to shape relief to avoid prejudice. *Goldmark*, 994 F. Supp. 2d at 1190-91 (no way to eliminate prejudice to absent tribes where tribal claimant sought exclusive authority to manage and harvest 100% of treaty resources to the exclusion of other tribes); *Verity*, 910 F.2d at 560 (no way to shape remedy where only "adequate" remedy would be at expense of absent tribes). When the parties' interests are in a specified percentage of the pie, and the combined claims exceed 100% of the pie, the court cannot afford one relief without affecting the rights of the others. *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986). Here, there is "not enough pie to satisfy all." *Id.*; *Verity*, 910 F.2d at 560.

Given the respective needs of Appellant irrigators and fish downstream, Appellants and Hoopa (and others) often compete for the same scarce water resources of the Klamath River at the same times of year. HVT\_ER-015-016.

This is especially true in dry years. *Id.*; *Baley*, 942 F.3d at 1325 (Reclamation’s implementation of ESA obligations in 2001 left no water available for Klamath irrigators); *Kandra*, 145 F. Supp. 2d at 1197-99 (noting competing water demands in Klamath Basin). Flows necessary to limit disease impacts in Spring and early Summer directly compete with Plaintiffs’ irrigation needs during that same time. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1146 (entering injunction to make additional flow available from April 1 through June 15 to mitigate disease impacts). Water demands of Appellants and Hoopa (and the Klamath Tribes upstream) often collectively exceed 100% of available water in the Klamath River. *Baley*, 942 F.3d at 1325; *Kandra*, 145 F. Supp. 2d at 1197-99.<sup>10</sup> There is insufficient water to satisfy Appellants’ claims while adequately protecting ESA-listed species and Hoopa’s senior reserved rights downstream. HVT\_ER-015-016.

Appellants seek relief that would effectively result in their rights superseding Reclamation’s obligations to provide flows for fish pursuant to the ESA and its tribal trust responsibilities. Even though Appellants’ rights are junior

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<sup>10</sup> In the 2021 water year, due in part to continued drought, Reclamation is not fully satisfying its dual ESA obligations to maintain lake levels in UKL while releasing adequate water for SONCC coho downstream. *Klamath Tribes v. U.S. Bureau of Reclamation*, Case No. 21-cv-556 (D. Or.), Dkt. #1 (documenting insufficient water supply to fully satisfy needs of ESA-listed species in Klamath Basin). If the relief Appellants seek had been in effect in 2021, the Klamath River could have been deprived of all flow below Iron Gate Dam during the irrigation season, when juvenile salmon migrate to the ocean. Such a result would have been catastrophic for the species and for Hoopa.

to Hoopa under governing principles of prior appropriation and federal reserved rights, Appellants' requested relief would require that their rights be satisfied in full prior to Hoopa. Hoopa has a legally protected right to sufficient water to implement and preserve its federal reserved fishing rights. Any relief that could, as a practical matter, impair or impede its federal reserved fishing or senior water rights would significantly prejudice Hoopa. HVT\_ER-004-017. The prejudice cannot be minimized given the limited water resources in the Klamath and the directly competing nature of Appellants' and Hoopa's claims.

KID argued to the District Court that there are "countless ways in which this court may shape the relief to avoid any prejudice to Intervenor" (Dkt. #81, p. 38), but failed to identify even one. KID's position is that KID should receive all its water first (despite having rights that are junior in priority to Hoopa) or be paid before any water is released for instream flows. KID's arguments fail to recognize that Hoopa holds senior rights which are entitled to fulfillment prior to Appellants receiving any water under their junior rights. Just as Appellants were not entitled to compensation in *Baley* when Reclamation released water to meet its ESA obligations and fulfill, in part, downstream senior tribal rights, Reclamation need not purchase, lease, or otherwise compensate Appellants for water released through Link River Dam to satisfy ESA obligations or to implement senior downstream tribal water rights.



2. Relief Would Not Be Adequate.

KID argues that judgment rendered in Hoopa's absence would be adequate, because, in its view, it merely seeks an order requiring Reclamation to purchase or condemn KID's water rights before releasing water downstream. This argument is again inconsistent with KID's own complaint, which affirmatively challenges Reclamation's legal authority to make the instream flow releases. KID ignores that Hoopa's rights are senior to KID and that an order mandating that Reclamation pay a third-party before implementing Hoopa's own senior rights would obviously prejudice Hoopa. The relief Appellants seek would cause, at minimum, confusion and uncertainty and would force Reclamation to choose between honoring this Court's order or its continuing obligations under the ESA and to release water necessary to implement Hoopa's senior rights.

3. Appellants Have Alternative Forums.

Neither Appellant seriously disputes the availability of alternative forums. Nor could they, given that Appellants are currently litigating related claims regarding Reclamation's Project operations in four separate judicial forums. In addition to the KBA which remains pending, KID is pursuing other litigation regarding Reclamation's Project operations in Oregon state court and Oregon federal court, while KWUA is litigating related federal claims in the Northern

District of California. *See supra* fn. 7-9. Appellants have alternative forums to seek relief, which they are taking full advantage of.

Appellants also may seek compensation in the Court of Federal Claims (CFC) if they are correct that their legal rights are being taken by Reclamation improperly. The primary thrust of KID's objections to this Court is that KID seeks to be compensated for any deprivation of its property rights. But that is exactly what the CFC is for. That the *Baley* plaintiffs, which initially included KID, ultimately lost their takings claim due to the seniority of Hoopa reserved water rights does not negate the availability of that forum; rather, it simply shows that Appellants' view of the applicable law is wrong. The District Court found that Appellants have presented numerous monetary solutions that would satisfy their interests and that the availability of a legal forum to pursue monetary damages favors dismissal here. KID\_ER-019. SVID objects that pursuing monetary claims would be burdensome but otherwise concedes that such claims are available.

### **Conclusion**

This Court should affirm the District Court and its dismissal of this litigation in its entirety.

Respectfully submitted,

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*/s/ Thane D. Somerville*

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### Certificate of Service

I certify that on July 1, 2021, an electronic copy of the foregoing brief and the Hoopa Valley Tribe's Supplemental Excerpts of Record were filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system and that service on all counsel of record occurred through the appellate CM/ECF system.

Dated July 1, 2021

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### **Certificate of Compliance**

I certify that this brief complies with the type-volume limitation of Ninth Circuit Rule 32-1 because this brief contains 13,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

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