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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHASTA VIEW IRRIGATION DISTRICT; *ET AL.,*

Plaintiffs-Appellants,

and

KLAMATH IRRIGATION DISTRICT,

Plaintiffs-Appellants

v.

UNITED STATES BUREAU OF RECLAMATION, *ET AL.,*

Defendants-Appellees

and

HOOPA VALLEY TRIBE; THE KLAMATH TRIBES,

Intervenor-Defendants-Appellees

On Appeal from the United States District Court for the District of Oregon,
Medford, Nos. 1:19-cv-00451 CL and 1:19-cv-00531-CL,
The Honorable Michael J. McShane

BRIEF OF THE KLAMATH TRIBES

JEREMIAH D. WEINER
SIMON W. GERTLER
Rosette, LLP
1415 L St. Suite 450
Sacramento, California 95814
Telephone: (916) 353-1084
Facsimile: (916) 353-1085
jweiner@rosettelaw.com

Attorneys for Intervenor-Defendants-Appellees The Klamath Tribes

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

The district court acted well within its discretion and consistent with applicable law when it made the multi-layered factual determination that intervenor tribes are necessary but indispensable and unjoinable parties to Appellants' claims pursuant to Fed. R. Civ. P. 19.

The Klamath Tribes ("Tribes") have significant protectable interests in the waters of Upper Klamath Lake ("UKL") and the Klamath Basin, and in their treaty-guaranteed species and resources that rely on those waters. SVID_ER-10, 15. *See also id*. at 221 ("It is undisputed that the Klamath Tribes have federally protected treaty rights to water and fishing, giving them an interest in the water contained in Upper Klamath Lake and water released for instream purposes"); *Baley v. United States*, 942 F.3d 1312 at 1328-29 (Fed. Cir. 2019). C'waam (Lost River sucker or *Deltistes luxatus*) and Koptu (shortnose sucker or *Chasmistes brevirostris*), in particular, are on the brink of extinction and will cross that threshold if Reclamation does not maintain sufficient water in UKL to meet their life cycle needs.

After conducting a practical inquiry into the potential effects on those protectable interests of the claims of Appellants Klamath Irrigation District ("KID") and Shasta View Irrigation District, et al. ("SVID") (collectively "Appellants"), as required by Fed. R. Civ. P. 19, the district court concluded that Appellants' claims should be dismissed in their entirety because the Tribes are necessary parties but are

not susceptible to joinder due to their sovereign immunity. SVID_ER-22-28. This is precisely the result required under the law, and nothing Appellants adduce in their briefs reveals an abuse of discretion in the district court's conclusions. This Court should affirm the judgment of the district court.

STATEMENT OF THE ISSUES

1. Whether the district court's finding that resolution of Appellants' claims could, as a practical matter, impair the Tribes' ability to protect their interests in their treaty protected fishing and water rights was within its discretion.

2. Whether the district court's finding that Reclamation does not adequately represent the Tribes' interests in their treaty protected fishing and water rights was within its discretion.

3. Whether the district court's finding that relief on Appellants' claims could leave Reclamation subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations was within its discretion.

4. Whether the district court correctly determined that the McCarran Amendment, 43 U.S.C. § 666, is inapplicable to this case because this case is not one for the administration of water rights as that phrase is used within that statute.

5. Whether the district court's finding that dismissal of the complaints comports with equity and good conscience was within its discretion.

STATEMENT OF THE CASE

A. The Tribe's Rights and Interests in the Klamath River

Since time immemorial, the Klamath Tribes and their members have used, and continue to use, the resources of the Klamath Basin in what are now the states of Oregon and California for subsistence, cultural, ceremonial, religious, and commercial purposes. Klamath Tribes' Supplemental Excerpts of Record (KT_SER) -004. C'waam and Koptu have played a particularly central role in the Tribes' cultural and spiritual practices, and they were once the Tribes' most important food-fish. *Id*.

In 1864, the United States and the Tribes entered into a treaty whereby the Tribes ceded their interests in millions of acres of land and retained a reservation of approximately 800,000 acres, along with "the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits." Treaty between the United States and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, October 14, 1864, 16 Stat. 707. The Ninth Circuit has recognized that the Tribes' treaty fishing rights include "the right to prevent other appropriators from depleting the streams waters below a protected level." *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983).

In 1975, the State of Oregon initiated the Klamath Basin Adjudication which addressed the Tribes' claims to rights in the waters of the Klamath Basin. *See* KID_ER-103-104. In February 2014, the Oregon Water Resources Department filed its Amended and Corrected Findings of Fact and Final Order of Determination

("ACFFOD") with the Klamath County Circuit Court setting forth the adjudicator's conclusions regarding the attributes of the Tribes' water rights. *Id*. at 105. Under Oregon law, the ACFFOD is in "full force and effect" unless and until its operation is stayed. ORS 539.130(4). Among other things, the ACFFOD recognizes the Tribes' instream rights to water in UKL to support their treaty rights to hunt, trap, gather and – as particularly relevant here – fish. *See* KID_ER-106.

B. Impacts of Reclamation's management of the Klamath Irrigation Project on C'waam and Koptu

UKL and its tributaries comprise the most important habitat for the C'waam and Koptu. UKL is especially critical to their conservation and recovery because it provides the few remaining members of both species with the most habitat. *See* KT_SER-027. It is also home to the last genetically intact reproducing population of Koptu in existence. *Id*. But UKL is also a primary source of water for the Klamath Irrigation Project (the "Project"), which Congress authorized pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, and constructed under the authority of the Reclamation Act of 1902, 43 U.S.C. §§ 372 et seq., in and around the Klamath Tribes' ancestral homelands and waters. *See* KT_SER-004.

Over the ensuing century, the Project's infrastructure and operations have modified the hydrology of UKL and the entire Klamath River Basin through the storage, diversion, and conveyance of water for agricultural, municipal, and hydroelectric purposes throughout what is now southern Oregon and northern

California. KT_SER-019-020; 023-024. These changes have had devastating impacts on many Klamath Basin species, including the C'waam and Koptu, which are now critically endangered. *Id*.

Reclamation controls the elevation of UKL through its oversight of the operation of the Link River Dam, located on the Lake's southern end. *Id.* at 022-023. However, Reclamation operates UKL at elevations significantly lower than occurred prior to construction of the Project, depriving C'waam and Koptu of habitat and exposing them to increased risk of predation and the effects of poor water quality. *See id.* at 027; 039-046.

Maintaining high UKL elevations during the spring months is critical because it allows for inundation of substrate for spawning for a critical portion of the C'waam population. *See* KT_SER-033-036. If the spawning grounds are dry or barely damp, spawning opportunities are reduced, which is something the species cannot afford given its low populations numbers and geriatric status. *Id*. In 2010, for instance, when the elevation of UKL was lower than 4,141.0 ft. during much of spawning season, U.S. Geological Service (USGS) monitoring showed that the amount of time spent at the spawning areas was at least 36% shorter for C'waam females and 20% shorter for males than in years when elevation levels were maintained above 4,142.0 ft. *Id*. And many fish simply skipped spawning that year altogether, with USGS data showing that 14% fewer C'waam females and 8% fewer males participated in

spawning in 2010 than during years when UKL was kept above 4,142.0 ft. during spawning season. *Id*.

Maintaining baseline UKL elevations through the spring and summer has other important biological benefits as well. Both UKL- and tributary-spawned C'waam and Koptu larvae are present in UKL from late March through mid-July, with peak abundance occurring from mid-May through mid-June. *Id*. at 037-038. Larvae require shallow, near-shore and marsh edge habitat with emergent vegetation for food and for protection from predators and lake turbulence and currents, which can transport larvae out of UKL to perish in Project canals and other unsuitable habitat, a process known as entrainment. *Id.*

During July, surviving C'waam and Koptu larvae transform into juveniles. *Id*. at 038-039. While juvenile C'waam and Koptu are less dependent on near-shore emergent vegetation habitat than larvae, they still rely on this habitat in addition to other near-shore areas, particularly those with rocky substrate. *Id*. Maintaining UKL at sufficient elevations to ensure access to all of these critical areas during the period from March to mid-July is therefore essential to the continued existence of the C'waam and Koptu.

Moreover, while adult C'waam and Koptu prefer to move to the northern end of UKL from June to September where there is more abundant food, fewer predators, and deeper water, they are often forced to migrate from this preferred habitat in July

and August to escape areas of extremely poor water quality. *Id*. at 041. Dramatic changes to the Klamath River Basin's hydrology and the rise of agricultural activity within the area since the Project's inception have caused UKL to change from eutrophic to hypereutrophic, that is, from a lake with high nutrient levels to one that is excessively rich in them. *Id*. at 032. This situation causes a number of water quality issues, which pose "the greatest threat to fish [in UKL] from July to mid-October, but especially late July and August." *Id*. at 045. C'waam and Koptu must have good access to water quality refuge habitat in Pelican Bay and other tributary inflow areas like the mouth of the Williamson and Wood rivers if poor water quality conditions occur, and UKL elevations must be sufficient to protect them from predation from pelicans and other birds while they shelter there. *See id.* at 025-026; 041.

To enter one of the most important summer water-quality refuges, Pelican Bay, however, C'waam and Koptu must pass through a relatively shallow portion of UKL. *Id.* at 044. If UKL is not maintained at a sufficient elevation–one that allows for a minimum depth of three feet at the entrance to Pelican Bay–C'waam and Koptu are at extreme risk from avian predation as they pass into this critical water-quality refuge. *Id.* at 041. Further, UKL elevations must be high enough to provide adequate amounts of sufficiently deep habitat to protect C'waam and Koptu from avian predation and disease associated with overcrowding while they shelter in Pelican Bay and other water quality refugia. *Id.* The inability to access critical water quality

refuges puts the fish at much greater risk for mass mortality events. *Id*. at 025 ("Although adult sucker are hardier than juveniles and larvae, they are still susceptible to poor water quality, which can be associated with die-offs[.]").

The record in the district court reflected that, as a result of Reclamation's failure to maintain adequate elevations in UKL in the past couple decades, the number of surviving C'waam and Koptu has dramatically decreased. *See id*. at 029 (between 2001 and 2015, the number of surviving C'waam decreased by 55-66% and surviving Koptu by 76-78% and the populations of both species have continued to decline since then). Compounding the decline in population is the fact that neither species has had a meaningful recruitment event—that is, new individuals joining the spawning population—since the 1990s. *Id*. As a result, most of the adult C'waam and Koptu are estimated to be nearly 30 years old, past the C'waam average life span of 20 years, nearing their maximum natural lifespan of 40 years, and more than double the average life span of Koptu. *Id*. The record further reflected that if the current adverse recruitment conditions persist, the C'waam would likely be extirpated from their most important habitat of UKL and its tributaries in less than a decade and the Koptu within as few as 2-3 years. *Id*. And both species are at continual risk that a catastrophic single-year die-off could drive them toward extirpation even sooner. *Id*.

Two years later, the situation has become even more dire. The past two years have been two of the driest on record with UKL elevations hovering below those recognized by the 2019 BiOp as necessary to ensure C'waam and Koptu survival. *See Klamath Tribes v. United States Bureau of Reclamation*, No. 1:21-CV-00556-CL, 2021 WL 1819695, at *3 (D. Or. May 6, 2021). In fact, this spring UKL elevations sunk below the 2010 UKL levels that resulted in a significant reduction in C'waam spawning success. *Id*. Any changes to Reclamation's management of UKL that make even less water available to satisfy the biological needs of these critically endangered species could be fatal to their continued existence on the face of this planet.

C. Conflict between the Tribes and Reclamation

The Tribes have been challenging Reclamation's failure to live up to its obligations under the Endangered Species Act, 16 U.S.C. §§ 1536, 1538 (ESA), to protect the C'waam and Koptu in its management of the Project for several years. In 2018, the Tribes brought suit against Reclamation's flawed implementation of the Joint Biological Opinion on the Effects of the Proposed Klamath Project Operations from May 31, 2013, through March 31, 2023, on Five Federally Listed Threatened and Endangered Species, which consistently favored the interests of the Project and its irrigators over the needs of the C'waam and Koptu, and thus the Tribes'. SVID_ER-132 (citing *Klamath Tribes v. Reclamation*, No. 18-CV-03078-WHO,

2018 WL 3570865 (N.D. Cal. July 25, 2018)). The Tribes also challenged Reclamation's management of the Project for its failure to protect the C'waam and Koptu, both under the 2019 BiOp and its predecessor. KT_SER-007-0015.

After the district court's decision in this matter, the Tribes again sued Reclamation for its more recent failure to adequately protect the C'waam and Koptu. *Klamath Tribes v. United States Bureau of Reclamation*, No. 1:21-CV-00556-CL, 2021 WL 1819695 (D. Or. May 6, 2021).

D. Appellants' Claims

Appellants seek remedies that would irreversibly and materially impair the Tribes' treaty-based rights in the waters and species of the Klamath Basin. Appellants' First Amended Complaints "sought an injunction to stop Reclamation from releasing water for instream purposes or even holding and using water for purposes of compliance with the ESA or other non-Project related purposes." SVID_ER-221. After the district court granted the Tribes' motion to intervene as of right, however, Appellants amended their complaints.

While Appellants no longer seek to enjoin "Reclamation from releasing water for instream purposes or holding and using water for purposes of compliance with the ESA," they now seek a judgment declaring such actions unlawful. *See* SVID_ER-208 ("Plaintiffs are entitled to a declaration that Defendants' actions, inactions, findings, and conclusions in adopting and implementing the Action violate

section 8 of the Reclamation Act"); *Id*. at 210 (seeking a declaration that "collection and retention and use of stored water for ESA-listed species, and use of stored water for ESA-listed species in the Klamath River, are not activities authorized by any applicable law"); *Id*. at 213 (seeking a declaration that "[t]he best available scientific and commercial data available does not support that increasing Upper Klamath Lake elevations is expected, directly or indirectly, to reduce appreciably either the survival or recovery of the shortnose sucker or Lost River sucker."); KID_ER-111 ("Reclamation's actions in adopting and implementing the Amended Proposed Action must be held unlawful"); *Id*. at 113 ("KID is entitled to a declaration that Defendant is violating Section 8 of the Federal Reclamation Act by unlawfully using water in UKL reservoir for instream purposes"); *Id*. at 114 ("KID is entitled to a declaratory judgment that Defendants are violating Section 8 of the Reclamation Act by unlawfully capping the amount of water KID, its landowners, and other water right holders are able to beneficially use under the ACFFOD and in accordance with Oregon law").

E. Procedural Background

The Tribes moved to intervene in this action pursuant to Fed. R. Civ. P. 24, without waiving their sovereign immunity, for the limited purpose of moving to dismiss the Appellants' complaints for their failure to join the Tribes. Magistrate Judge Clarke granted the Tribes' motion to intervene under a standard that is

identical to that for determining a necessary party pursuant to Fed. R. Civ. P. 19(a)(1)(B)(i). SVID_ER-219; *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 390 (2d Cir. 2006) ("These rules are intended to mirror each other." (citing 4 James Wm. Moore et al., *Moore's Federal Practice—Civil,* § 19.03(3)(f)(i) (3d ed. 2006) ("Indeed, the operative language of the two Rules is identical"))). Appellants do not appeal the district court's order on intervention.

Magistrate Judge Clarke subsequently issued Findings and Recommendations (F&R) granting the Tribes' motion to dismiss Appellants' complaints for failure to join the Tribes. SVID_ER-08. Over Appellants' objections, district court Judge McShane adopted Magistrate Judge Clarke's F&R and entered an order dismissing Appellants' complaints. Appellants appeal that order. SVID_ER-05.

SUMMARY OF THE ARGUMENT

Appellants challenge the district court's factual determinations that the Tribes are a necessary, unjoinable, and indispensable party. But Appellants fail to identify a single instance of abuse of discretion or legal error by the district court in making those determinations.

The district court correctly found that resolving Appellants' claims in their favor would impair the Tribes' ability to protect their treaty rights. While Appellants argue that their claims are "merely procedural," the district court rightly rejected those arguments because the proper inquiry is not whether the claims can be

construed as "procedural" in nature but rather whether resolution of the claims may, "as a practical matter, impair or impede" the Tribes' ability to protect their treaty rights.

Applying the proper legal standard, the district court also correctly found that Reclamation cannot adequately represent the Tribes' interests. A long-lived and very tangible conflict between Reclamation and the Tribes over the allocation of Klamath Basin water for protection of the Tribes' treaty resources squarely prevents Reclamation from adequately representing the Tribes. For similar reasons, Reclamation will not make the same arguments as the Tribes and the Tribes offer a necessary element to the analysis. And despite KID's labored efforts to argue otherwise, the McCarran Amendment does not factor into this analysis because it simply does not apply to this case.

The district court was also correct in finding that disposing of this action in the Tribes' absence would subject Reclamation to a substantial risk of incurring inconsistent obligations. This is because Appellants seek a declaration requiring Reclamation to give priority to Appellants' water rights over the Tribes' treaty rights. *See* SVID_ER-017-018. Such relief would create a direct conflict with Reclamation's well established trust responsibility to protect the Tribes' treaty resources.

The district court also properly concluded the Appellants' claims do not seek administration of a water rights decree under the terms of the McCarran Amendment such that the Tribes' sovereign immunity is waived. Appellants are not requesting the administration of any particular water rights determined in the ACFFOD (or otherwise), but rather seek to define the relationship between Reclamation's obligations under the ESA and the Reclamation Act in relation to certain rights set forth in the ACFFOD.

Finally, the district court correctly found that equity and good conscience require dismissal. The Tribes' sovereign immunity is the most compelling factor in the analysis, but–as the district court correctly concluded–all other factors weigh in favor of dismissal.

The district court properly exercised its discretion and reached the appropriate conclusion. This Court should affirm dismissal of Appellants' complaints.

STANDARD OF REVIEW

SVID correctly notes that the Ninth Circuit reviews a district court's decision to dismiss an action for failure to join a required party under Rule 19 for abuse of discretion, except for underlying legal conclusions, which it reviews de novo. *See Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 851 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 161, 207 L. Ed. 2d 1098 (2020). Erroneously, however, SVID goes on to state that the Ninth Circuit reviews the

determination in Rule 19(a), that a person is a required party, de novo. SVID Br. at 15 (citing *Prete v. Bradbury*, 438 F.3d 949, 953 (9th Cir. 2006)). *Prete v. Bradbury*, however, only addressed the standard of review of a district court's ruling on a motion to intervene as of right. 438 F.3d at 953. The Ninth Circuit is clear that it reviews a Rule 19 dismissal, including the factual determinations leading up to dismissal, for abuse of discretion. *See Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002) (outlining each step of the analysis under Rule 19 and reviewing "these determinations of the district court for an abuse of discretion.").

ARGUMENT

The district court properly concluded that the Tribes are necessary and unjoinable but indispensable parties to Appellants' claims under Fed. R. Civ. P. 19. Appellants' arguments to the contrary are unavailing.

I. The district court correctly found that resolving the Appellants' claims in their favor would impair the Tribes' ability to protect their treaty rights.

Appellants do not dispute that the Tribes' treaty rights to fish and water in the Klamath Basin are legally protected interests for purposes of Rule 19 analysis. *See* KID_ER-013. Nor do Appellants dispute that the Tribes' treaty-based interests are at a "minimum coextensive with Reclamation's obligations to provide water for

instream purposes under the ESA." KID_ER-013.[1] Yet Appellants seek a declaration that Reclamation lacks authority under the ESA to manage Project operations for the protection of the Tribes' treaty water and fishing rights. The district court was well within its discretion to conclude that, "for practical and logistical purposes," such relief "would have a significant detrimental impact on those rights." KID_ER-019.

The Tribes' treaty resources—the C'waam and Koptu—are on the brink of extinction. Water levels in UKL are a critical factor for C'waam and Koptu survival. As such, the ESA requires Reclamation to maintain a sufficient amount of water in UKL for species survival and recovery. Reclamation already struggles to comply with this requirement, and any change in Reclamation's current management regime that results in deliveries of more water to Appellants from UKL will have catastrophic effects on the C'waam and Koptu. Appellants are requesting relief from this Court that would force exactly this kind of change.

Appellants attempt to complicate the district court's straightforward analysis by characterizing their claims as "procedural" such that the Tribes can have no legally protectable interest in their resolution. The district court properly rejected

[1] The Tribes do not believe that Reclamation's current approach to ESA compliance is *sufficiently* protective of the C'waam or Koptu or adequate to fully discharge Reclamation's obligations under the ESA. *See Klamath Tribes v. United States Bureau of Reclamation*, No. 1:21-CV-00556-CL, 2021 WL 1819695 (D. Or. May 6., 2021). But Reclamation's current approach does afford the species at least *some* additional protection over Reclamation's prior management of the Project under the predecessor to the 2019 BiOp.

these arguments and nothing Appellants raise here reveals an abuse of discretion by the district court.

A. The district court properly found that SVID's claims do not merely seek compliance with administrative procedures.

SVID attempts to characterize their suit as one "merely to enforce compliance with administrative procedures," in which an absent party generally has no legally protected interest. *Dine Citizens*, 932 F.3d at 852. The district court rightly rejected this characterization. SVID_ER-016.

SVID directly challenges Reclamation's substantive legal authority to maintain water levels in UKL for C'waam and Koptu and to limit water deliveries to Appellants in order to meet ESA obligations and fulfill tribal rights. SVID alleges that Reclamation's decision to manage Project operations for ESA compliance during the term of the current BiOp is *ultra vires*–i.e., beyond its legal authority. SVID_ER-206 ¶ 76. They seek a declaration confirming their legal entitlement to full water deliveries each year irrespective of any impacts such deliveries might have on Reclamation's ability to meet its obligations under the ESA or related impacts to the Tribes' treaty rights. *Id*. at 206-7 ¶¶ 76-77; 210 ¶ 92; 211 ¶ 96. SVID does not merely challenge the pre-decisional administrative procedures used by Reclamation to develop its final decision. Rather, SVID challenges the substantive legality of Reclamation management of Project operations to provide water instream for ESA compliance and tribal rights. SVID seeks to have Reclamation's Project

management for ESA compliance and tribal rights declared unlawful and to remand the matter to Reclamation with a directive to make a new decision providing all the water Appellants claim they are entitled to under their contracts with the United States. SVID_ER-217. Such relief would not "merely enforce compliance with administrative procedures[,]" and Appellants' argument therefore fails.

Moreover, even if SVID's claims were solely procedural, the district court properly recognized that such a distinction is not dispositive. "Although an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, our case law makes clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted." *Dine Citizens*, 932 F.3d at 852.[2] As the district court recognized, Reclamation has administratively already "granted" the Tribes' right to the protection of its fishing and water rights by operating (or at least attempting to operate) the Project in compliance with the ESA for decades. SVID_ER-018. In fact, federal courts have long since "granted" this right by recognizing that Reclamation is required to do so.

[2] SVID argues this is a "departure" from the general rule. SVID Br. at 17. The only Ninth Circuit case SVID cites for the "general rule" is *Sw. Ctr. For Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998). That case is not on point, however, as it did not address the interest prong of the Rule 19 analysis but rather the adequate representation prong, which the Tribes address separately below (and which also does not support Appellants' arguments).

See e.g., *Klamath Water Users Association v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000), cert. denied, 531 U.S. 812 (2000) (Reclamation "has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators"); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197, 1211 (D. Or. 2001). To grant the relief SVID requests would impair that right. SVID_ER-018.

Finally, SVID attempts to distinguish the Tribes' interests here from the absent party's interests in *Dine Citizens* by asserting that the Appellants "do not challenge *any* tribal businesses, contracts, leases, permits, or any other activity in which the Tribes have an interest as a proprietary matter." SVID Br. at 18 (emphasis original). Appellants cite no authority that an absent tribe's interest needs to be proprietary. And there is none. Courts have recognized that the Tribes' interests in "fishing and water rights that derive from the [1864] Treaty" are legally protected interests for purposes of Rule 19. *Klamath Tribe Claims Comm. v. United States*, 97 Fed. Cl. 203, 212-213 (2011). As the district court properly recognized, the Tribes' treaty rights are at a "minimum coextensive with Reclamation's obligations to provide water for instream purposes under the ESA," SVID_ER-015. *See Baley*, 942 F.3d at 1337. Moreover, SVID cannot seriously dispute that the Tribes' treaty rights are proprietary. *See e.g.*, *Mitchel v. United States*, 34 U.S. 711, 749 (1835) (characterizing Indian treaty rights as "proprietary."). SVID's trivialization of the

existential importance to the Tribes of the continued existence of C'waam and Koptu, for which the Tribes rely in part on Reclamation's manner of compliance with the ESA, would be offensive if it were not so ridiculous. *See* KT_SER-004 (C'waam and Koptu "have played a central role in the Tribes' cultural and spiritual practices"); *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1983) (holding that one of the "very purposes" of the United States' treaty with the Tribes was "to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle").

There is no credible basis on which to suggest that the Tribes somehow have *less* of an interest in their treaty-protected fisheries than the tribe in *Dine Citizens* had in its mining operation. The district court properly rejected SVID's argument on this point.

B. The district court properly construed KID's claims and concluded that they threaten to impair the Tribes' ability to protect their interest.

KID asserts that the district court failed to acknowledge a subtle distinction between the rest of its – and all of SVID's – claims and its due process claim, and that that distinction is substantive enough to save that due process claim from dismissal. KID Br. at 49. KID's argument certainly supports dismissal of its other claims along with all of SVID's, but it fails to save the due process claim.

In that claim, KID asserts that the ACFFOD affords it "the exclusive right to beneficially use" water Reclamation impounds in UKL. KID_ER-115 ¶ 77. As such,

KID avers, Reclamation's use of water in UKL to protect the Tribes' treaty rights without leasing, purchasing, or condemning KID's rights deprives KID "of its property interests without due process of law." KID_ER-115-116. The district court did not gloss over the specifics of this claim, however. Rather, it precisely understood the nature of KID's request: "Plaintiffs seek a declaration that their adjudicated water rights under the 2014 Oregon ACFFOD, and the contract water rights between Reclamation and the Water Users, supersede Reclamation's water obligations under the ESA." KID_ER-018.

The district court also properly recognized that issuing such a declaration would directly impair the Tribes' ability to protect their treaty rights because Reclamation's current management of water in UKL is a significant component of its efforts to discharge its ESA obligations. And compliance with those obligations serves to provide minimum baseline protections for critical tribal treaty resources. *Id*. at 017 (citing *Baley*, 942 F.3d at 1337 ("Tribes' 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"); *Patterson*, 204 F.3d at 1214 (Reclamation "has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators")). The district court accurately understood that the declaratory relief to the contrary KID seeks "would be a radical and extreme shift" from existing

precedent and operations, KID_ER-18-19, and correctly concluded that a request for a declaration effectively mandating such a sea change would have a "significant detrimental impact" on the Tribes' rights. *Id*.

The district court's conclusion was sound. First, Appellants do not cite, because there is none, a due process claim exception to Rule 19. The inquiry does not turn on whether claims are generally characterized as "procedural" or substantive; rather, the question is whether the claims may "as a practical matter impair or impede" the Tribes' ability to protect their interests. Fed. R. Civ. P. 19(a)(1)(B)(i). This is so because, as courts have recognized in other contexts, "'there is no bright line distinguishing substance from procedure, [and] the meanings of these terms shade into one another by degrees and vary from context to context.'" *In re Cty. of Orange*, 784 F.3d 520, 527 (9th Cir. 2015) (quoting Larry Kramer, *Choice of Law in Complex Litigation,* 71 N.Y.U. L.Rev. 547, 569 (1996)).

In the context of this case, providing the relief KID requests for its due process claim may, as a practical matter, impair or impede the Tribes' ability to protect their treaty rights. Were the district court to rule in KID's favor on the merits and find Reclamation's current approach to ESA compliance to be illegal, Reclamation could well become even more constricted in its interpretation of its ESA duties than at present, perhaps in order to avoid additional costs that a victory here by the Appellants might otherwise entail. KID acknowledges this is a risk: "If Reclamation

did refuse to discharge whatever duties it owes the Tribes, the Tribes would then have their own cause of action against Reclamation." KID Br. at 60 (emphasis original). Given the extremely precarious condition of the C'waam and Koptu, *any* change to the status quo that risks leaving less water in UKL for the biological and life cycle needs of these species would directly impair the Tribes' interests. While Reclamation may have other mechanisms under the law to protect the Tribes' interests, eliminating the one that Reclamation presently employs, as a practical matter, would have an undeniable chilling effect on the Tribes' ability to protect their underlying interests.

KID again tries to escape this conclusion by positing that the Tribes can have no legal interest in maintaining the status quo because the status quo is unlawful. KID Br. at 56. But this begs the question. The lawfulness of the manner in which Reclamation currently approaches compliance with its ESA obligations is precisely the issue that KID's claims raise on their merits. KID cannot *presume* success on the merits to vitiate the Tribes' interest in this litigation. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, the Court does not "accept as true a legal conclusion couched as a factual allegation"). Allowing KID to do so would thwart the purpose of Rule 19. KID fails to identify an abuse of discretion by the district court.

II. The district court correctly found that Reclamation cannot adequately represent the Tribes' interests.

The Tribes and Reclamation agree that Reclamation cannot adequately represent the Tribes' interests in this matter. The district court was well within its discretion to agree with them.[3] The Ninth Circuit has recently held that the government cannot adequately represent a tribal entity when its interest in the litigation "differs in a meaningful sense" from that of the tribal entity. *Dine Citizens*, 932 F.3d at 855. The district court logically concluded that the Tribes' and Reclamation's interests here differ in a meaningful sense: "The Tribes are directly interested in how this proceeding would affect, as a practical matter, their federal reserved fishing and water rights, which are central to its culture, subsistence, and very existence. Reclamation has a different general interest in defending its decisions made pursuant to the ESA and APA." SVID_ER-022.

SVID attempts to distinguish *Dine Citizens* on grounds that the dispute there did not implicate the federal government's trust obligations as this case does. That is not true. Like the Tribes' treaty water and fishing rights, the United States holds the Navajo Nation's subsurface coal resources in trust for the Navajo Nation. See *United States v. Navajo Nation*, 537 U.S. 488, 495 (2003) ("large deposits of coal have been discovered on the Tribe's reservation lands, which are held for it in trust by the United States"); *United States v. Shoshone Tribe of Indians of Wind River*

[3] KID notes specifically that it does not dispute the legal standard that the district court applied—only its findings therefrom. KID Br. at 32 n. 4.

Rsrv. in Wyoming, 304 U.S. 111, 116 (1938) ("Minerals and standing timber are constituent elements of the land itself"). While the absent party in *Dine Citizens* was not the Navajo Nation itself, it was "wholly owned by the Navajo Nation," "created specifically so that the Navajo Nation could purchase the Mine," and its "profits go entirely to the Navajo Nation." 932 F.3d at 856. These differences would not result in any less of a presumption that the United States adequately represented the absent tribal entity's interests. Yet, in that case, this Court affirmed that the United States was an inadequate representative. It should do the same here.

A. The district court applied the proper presumption.

SVID complains that the district court "failed to acknowledge" certain presumptions that apply the adequacy of representation analysis. SVID Br. at 20. Not so. The F&R cited Magistrate Judge Clarke's Opinion and Order granting the Tribes' Motion for Intervention. SVID_ER-022. There, the Magistrate Judge directly stated the relevant presumption: "Notwithstanding this generally permissive rule, a rebuttable presumption of adequate representation arises where an existing party and the applicant for intervention 'share the same ultimate objective' or where 'the government is acting on behalf of a constituency that it represents.' Where a presumption of adequate representation arises, the applicant must make a 'compelling showing' to the contrary." SVID_ER-222 (internal citations and quotations omitted).

The district court properly concluded that the Tribes made the compelling showing necessary to overcome the presumption of adequate representation. *Id*.

B. Reclamation may not adequately represent the Tribes due to a conflict between them.

Categorically, the United States may not adequately represent an Indian tribe when there is "a conflict between the United States and the tribe." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). A conflict exists between the Tribes and Reclamation that makes Reclamation's representation of the Tribes' interests in this case inadequate.

The Tribes and Reclamation have previously been and are currently in active litigation with respect to the degree to which Reclamation is willing to protect the Tribes' interests in the C'waam and Koptu. In 2018, the Tribes brought suit against Reclamation for what the Tribes saw as Reclamation's flawed implementation of the Joint Biological Opinion on the Effects of the Proposed Klamath Project Operations from May 31, 2013, through March 31, 2023, on Five Federally Listed Threatened and Endangered Species, which consistently favored the interests of the Klamath Project and its irrigators over the needs of the C'waam and Koptu, and thus the Tribes'. SVID_ER-132 (citing *Klamath Tribes v. Reclamation*, No. 18-CV-03078-WHO, 2018 WL 3570865 (N.D. Cal. July 25, 2018)). The Tribes also challenged Reclamation's management of the Project for its failure to protect the C'waam and Koptu, both under the 2019 BiOp and its predecessor. KT_SER-005-0013.

After the district court's decision in this matter, the Tribes again sued Reclamation for its more recent failure to adequately protect the C'waam and Koptu. *Klamath Tribes v. United States Bureau of Reclamation*, No. 1:21-CV-00556-CL, 2021 WL 1819695 (D. Or. May 6, 2021).

Although Reclamation is being sued by irrigator interests in this case, it is reasonable to expect that conflict between Reclamation and the Tribes could continue or arise anew in the course of this litigation as Reclamation seeks to avoid liability to plaintiffs. *See White v. Univ. of Cal.*, 765 F.3d 1010, 1027 (9th Cir. 2014) ("[A]t present [the parties'] interests are aligned. There is some reason to believe that they will not necessarily remain aligned."); *Pacific Northwest Generating Co-op v. Brown*, 822 F. Supp. 1479, 1511 (D. Or. 1993) ("[P]arties that are in agreement now may be in bitter disagreement within a very short time frame [citing to history of litigation in which tribes and U.S. were on adverse sides of issue]"). Appellants allege that Reclamation has overarching contractual obligations to deliver water to plaintiffs, which, if true, would directly conflict with Reclamation's obligations to protect the Tribes' treaty-based rights. This creates a significant risk that Reclamation's representation of the Tribes' interests will be materially limited—not least if Reclamation is persuaded by plaintiffs' claim that interference with their contracts triggers a compensation requirement under the Fifth Amendment.

SVID's citation to *Nevada v. United States*, 463 U.S. 110 (1983) is inapposite. *Nevada* is about whether the US is conflicted, *ab initio*, in asserting tribal claims in a state court adjudication alongside those of other parties (such as a Reclamation project). *Id*. at 142. Contrary to SVID's suggestions, *see* SVID Br. at 24, it does not speak to the positional differences between the United States and the Tribes on the facts of this case, which is not an adjudication case but rather one that goes directly to the application of the ESA to Reclamation's decisions about how the finite waters of the Klamath Basin are to be allocated among multiple competing parties, to all of whom the United States owes various duties. And *Nevada* certainly cannot stand in meaningful counterpoint to the United States' own concession that it cannot adequately represent the Tribes' interests here.

C. Reclamation will not undoubtedly make the same arguments as the Tribes.

SVID complains that Reclamation's failure to support the Tribes' motion for dismissal does not support the district court's conclusion that Reclamation will not undoubtedly make the same arguments as the Tribes. SVID Br. at 25. But there are other arguments that Reclamation may not make.

Reclamation is unlikely to make all of the arguments the Tribes might in response to the Appellants' request that Reclamation purchase or condemn the water it uses that would otherwise go to the Appellants. The Tribes' interests in the C'waam and Koptu, and their other treaty-based rights, could potentially be better

protected if Reclamation simply condemned junior water rights, such as Appellants' (whether for ESA reasons or otherwise). The arguments the Tribes might make on that front (were the Tribes participating in this litigation on the merits), would very likely not be arguments that Reclamation would be willing to make given the financial liability to the United States. Reclamation has also at times taken the position, directly contrary to the Tribes' interests, that the ESA does not apply to certain of its contractual obligations on the Klamath River. *See* Reclamation's January 2021 Reassessment of U.S. Bureau of Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act.[4] Nor did Reclamation's answer to the SVID's complaint assert the Tribes' rights or interests, or its trust obligation to protect them. SVID_ER-225-249. The Tribes cannot rely on Reclamation to adequately make all of the Tribes' arguments.

For similar reasons, the Tribes offer a "necessary element to the proceedings that the present parties would neglect." *Dine Citizens*, 932 F.3d at 852. While SVID argues that the evidence for its APA claims will be limited to the administrative record, SVID Br. at 27, they ignore that their claims raise legal questions such as whether Reclamation must satisfy its ESA obligations and the Tribes' rights before allocating water to the Appellants—questions that the Tribes are uniquely positioned

[4] The Secretary of Interior has since withdrawn this opinion. https://www.usbr.gov/mp/kbao/docs/secInt-memo-ebSB46-00673-klamath-withdawal-2021-04-08-final.pdf.

to address. Further, by Appellants' logic, the government should always be deemed an adequate representative of absent parties in cases limited to the administrative record. That is simply not the case. *See Dine Citizens*, 932 F.3d at 852.

D. The McCarran Amendment does not apply.

Appellants also argue that the McCarran Amendment resolves the adequate representation question in their favor. As explained in Section IV, below, the McCarran Amendment does not apply to this dispute, and thus has no bearing on the (in)adequacy of the United States' representation of the Tribes in this matter.

III. The district court correctly found that disposing of the action in the Tribes' absence would subject Reclamation to a substantial risk of incurring inconsistent obligations.

The district court grounded its finding that the Tribes are necessary parties on a second and equally sound basis—that disposing of the action in the Tribes' absence would subject Reclamation to a substantial risk of incurring inconsistent obligations. SVID_ER-021. The district court identified two potentially conflicting sets of responsibilities: that which Reclamation has to Appellants to satisfy their state law-based water rights and that which it owes to the Tribes (and the lower river tribes) to satisfy their treaty rights. *Id*.

SVID asserts error in this finding on ground that there is "no independent general trust duty" that could create an inconsistent obligation on Reclamation to protect the Tribes' treaty rights. Yet this Court recently made clear that the United

States in fact has an independent trust "duty to protect and preserve" treaty water rights. *Navajo Nation v. U.S. Dep't of the Interior*, 996 F.3d 623, 641 (9th Cir. 2021). A judgment requiring Reclamation to satisfy Appellants' water rights would directly conflict Reclamation's existing obligation to satisfy the Tribes' treaty rights. KID contends that Reclamation can meet both obligations by condemning or leasing their water rights—but the need to do so would only arise as a result of Reclamation incurring the inconsistent obligations in the first place, which is precisely the risk Rule 19 aims to forestall. Appellants again fail to identify any abuse of discretion in the district court's finding.

IV. The district court correctly rejected the application of the McCarran Amendment to these facts.

As the district court correctly recognized, KID_ER-021, and as SVID also acknowledges, SVID Br. at 29, the instant action is not in fact a suit brought under the McCarran amendment. "The purpose of the McCarran Amendment is not to waive sovereign immunity whenever litigation may incidentally relate to water rights administered by the United States." *San Luis Obispo Coastkeeper v. U.S. Dep't of the Interior*, 394 F. Supp. 3d 984, 995 (N.D. Cal. 2019). Instead, that statute waives federal sovereign immunity for general stream adjudications or the administration, in a "proper case," of decrees resulting from a general stream adjudication. *S. Delta Water Agency v. U.S., Dep't of Interior, Bureau of Reclamation*, 767 F.2d 531, 541 (9th Cir. 1985). Plainly this is not a suit for the

comprehensive adjudication of water rights (there is, in fact, such an ongoing comprehensive adjudication: the Klamath Basin Adjudication ("KBA") which resulted in the issuance of the ACFFOD). SVID Br. at 29 ("this litigation relates to Reclamation's lawful scope of discretion under the law and is not a determination of water rights or claims"). Nor, contrary to KID's assertion, is this a suit for the administration of water rights under the second prong of the McCarran amendment.

KID is not requesting the administration of water rights determined in the ACFFOD (or otherwise) in relation to each other. Nor is it seeking to redefine, modify, or change its own water rights or any other water rights determined in what is currently the only McCarran-compliant adjudication in the Klamath Basin, namely the KBA. Rather, KID seeks to define the relationship between certain of its ACFFOD-determined rights in relation to Reclamation's obligations under the ESA and the Reclamation Act. That is not a suit for administration in the sense contemplated by the McCarran Amendment. *See S. Delta Water Agency* 767 F.2d at 541 .

KID attempts to avoid this conclusion by construing its claims as presenting a question of the administration in priority of its water rights alongside the Tribes' and Reclamation's. Yet as the district court correctly understood, this case does not implicate the *administration* of the Tribes' water rights, but rather the Tribes' ability to protect their interests in their "federal reserved fishing and water rights, which are

central to [their] culture, subsistence, and very existence." KID_ER-020. At core, the Tribes' interest in this action is grounded in their treaty-protected rights to harvestable populations of C'waam and Koptu, and to other critical treaty resources in the Klamath Basin, including SONCC coho. KID_ER-08. Both the Tribes' water rights and the ESA are among the tools the Tribes have and will continue to use to protect these treaty-based interests. But the rights adjudicated to the Tribes in the Klamath Basin Adjudication do not define the extent of the Tribes' treaty-based–and legally protectable–interests in the survival and eventual recovery of the C'waam and Koptu, and in other natural resources of the Klamath Basin. *See Klamath Tribe Claims Comm. v. United States*, 97 Fed. Cl. 203, 212-213 (2011).

KID's invocation of the stipulation into which the Tribes have entered regarding its water right to maintain specified elevations in UKL, KID Br. at 16, therefore does not change the analysis (though it does underscore why KID's argument about the McCarran amendment is wrong). That stipulation, which is temporary in duration, currently precludes the Tribes from placing a call to satisfy their UKL water right on water users with priority dates prior to August 9, 1908, a category of water users that includes Appellants. The Tribes have at all times complied with that stipulation, and KID makes no assertion to the contrary, meaning that there is no live conflict between KID's and the Tribes' *water rights* that might give rise to an administration dispute implicating McCarran. Importantly, however,

the stipulation itself recognizes the Tribes' continued right to benefit from the protections afforded to treaty-protected resources by laws of general applicability, including the ESA.[5] That is why Appellants' efforts to redefine Reclamation's obligations under the ESA, removing this "backstop" of protection preserved in the stipulation, so threatens the Tribes' ability to protect their interests.

Given that the McCarran Amendment does not apply to this proceeding, and that McCarran does not waive the immunity of any Indian tribe as a party to litigation, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566 , n. 17 (1983), KID's argument that this court should construe McCarran to waive the Tribes' sovereign immunity is spurious. The district court found correctly that Appellants' claims do not seek administration of water rights pursuant to the McCarran Amendment and that McCarran has no bearing on the Rule 19 analysis that the district court accurately conducted.

V. The district court correctly found that equity and good conscience require dismissal.

The determination under Rule 19(b)—"whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed"—lies within "the sound discretion of the trial judge." *Walsh v. Centeio*,

[5] *Id*.

692 F.2d 1239, 1243 (9th Cir. 1982). Appellants fail to identify an abuse of discretion by the district court on this question.

Just last week, this Court reaffirmed the nearly dispositive role of tribal sovereign immunity in the Rule 19(b) analysis:

> Joinder of the Tribe is infeasible because of its sovereign immunity. We must therefore determine under Rule 19(b) whether the case can proceed in the Tribe's absence. "The balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity." *Jamul Action Comm.*, 974 F.3d at 998; *see Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) ("If the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." (quotation marks and citation omitted)). "[T]here 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 alternative] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.' " *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs*., 932 F.3d 843, 857 (9th Cir. 2019) (alteration in original) (quoting *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014)).

Deschutes River Alliance v. Portland General Electric Co., ___ F.3d ___, 2021 WL 2559477 at *7. The district court would have been well within its discretion to end the equity and good conscience inquiry here and order dismissal. Nevertheless, the district court proceeded to analyze each of the four Rule 19(b) factors and separately

concluded that they also weighed in favor of dismissal.[6] It was again well within its sound discretion in doing so.

"Prejudice, the first factor in the Rule 19(b) analysis, 'largely duplicates the consideration that made a party necessary under Rule 19(a)[.]'" *Dine Citizens*, 932 F.3d at 857. Accordingly, the district court referenced its prior finding that "judgment in the Tribes' absence would significantly prejudice their interest in fulfillment and protection of their reserved fishing and water rights." SVID_ER-025. As explained above, the district court got the necessary party analysis right.

Implicitly recognizing that their claims invite Reclamation to breach its trust obligation to the Tribes, SVID contends that the Tribes' theoretical ability to file a breach of trust action against Reclamation for its management decisions inuring to the detriment of treaty protected resources means that the instant claims cannot prejudice the Tribes and thus do not support dismissal under Rule 19(b). SVID Br. at 35. Conversely, KID contends that the availability of such a cause of action for the Tribes mitigates any prejudice the Tribes might otherwise suffer from KID's requested relief. KID Br. at 61. Either way, Appellants are wrong. Resolution of the prejudice question requires a "practical examination of [the] circumstances," *Paiute-*

[6] Even had the court concluded the any one of the Rule 19(b) factors favored Appellants, dismissal would nonetheless have been appropriate. *See Dine Citizens*, 932 F.3d at 858 (affirming dismissal when three of four factors weighed in favor of dismissal).

Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles, 637 F.3d 993, 1000 (9th Cir. 2011), not an academic discussion about hypothetical causes of action. As a practical matter, Appellants' claims prejudice the Tribes' ability to protect their treaty rights. This is so since any diminishment of the water Reclamation keeps in UKL to meet C'waam and Koptu needs in satisfaction of its ESA obligations risks causing significant and irreparable consequences to the continued existence of these treaty-protected resources. No after-the-fact breach of trust claim can bring an extinct species back to life. The district court correctly concluded, as for the second factor, there is no way to lessen the prejudice to the Tribes. SVID_ER-025.

The district court also correctly concluded that, due to Reclamation's obligations to protect the Tribes' treaty rights, judgment in the Tribes' absence would not be adequate. *Id*. On appeal, Appellants fail to present any argument to gainsay the accuracy of this conclusion. Both instead try to construe their own claims modestly and ignore the interrelationship between their claims, Reclamation's ESA obligations, and the protection of the Tribes' treaty resources. *See* KID Br. at 61-63; SVID Br. at 46. Any judgment based on such cramped readings of the claims would plainly be inadequate.

Finally, the district court was right to conclude that Appellants have opportunities to seek alternate remedies in other forums, particularly in the Court of

Claims. Moreover, as the district court pointed out, Appellants have repeatedly, albeit unsuccessfully, brought multiple suits presenting issues similar to those they raise in this case. SVID_ER-25-26. There is no error or abuse of discretion here.

Frustrated by the necessary result of the Rule 19 analysis in this case, SVID complains that the Tribes are somehow abusing the doctrine of sovereign immunity to create an inequity whereby the Tribes can seek relief when Appellants cannot. These accusations are baseless. SVID cites *Auto. United Trades Org. v. State*, 175 Wash.2d 214, 233-34 (2012) for its sword and shield metaphor, but that case involved a state party asserting an absent tribe's immunity to seek dismissal of the case. Here, the Tribes raise *their own* immunity to shield *their own* interests from the direct threats posed by Appellants' claims. *Auto. United Trades Org.* recognized that when raised by a tribe, sovereign immunity is a "shield." *Id*. ("Sovereign immunity is meant to be raised as a shield by the tribe"). Additionally, as the district court noted, Appellants ignore that they have brought similar claims in this and other forums and the Tribes have not intervened in those cases to seek dismissal. SVID_ER-025-026. The Tribes do so here because these claims uniquely implicate the Tribes' interests and the Tribes cannot afford to have the case to proceed in their absence. This is a further basis to grant, not deny, the Tribes' motion to dismiss.

CONCLUSION

The district court acted well within the bounds of its sound discretion when it found that the Tribes were indispensable but unjoinable parties to Appellants' suits, and that equity and good conscience mandated the dismissal of Appellants complaints. It neither abused its discretion nor committed legal error in any portion of its analysis, and Appellants' arguments to the contrary are baseless. – The judgment of the district court should be affirmed.

Dated: July 1, 2021

Respectfully submitted,

ROSETTE, LLP

s/ Jeremiah D. Weiner

JEREMIAH D. WEINER
SIMON W. GERTLER
1415 L St. Suite 450
Sacramento, California 95814
Telephone: (916) 353-1084
Facsimile: (916) 353-1085
jweiner@rosettelaw.com
sgertler@rosettelaw.com
Attorneys for The Klamath Tribes

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that: This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,212 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word and Times New Roman 14-point font.

Dated: July 1, 2021

ROSETTE, LLP

s/ Jeremiah D. Weiner
Jeremiah D. Weiner
1415 L St. Suite 450
Sacramento, California 95814
Telephone: (916) 353-1084
Facsimile: (916) 353-1085
jweiner@rosettelaw.com
Attorney for
The Klamath Tribes

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: July 1, 2021

ROSETTE, LLP

s/ Jeremiah D. Weiner
Jeremiah D. Weiner
1415 L St. Suite 450
Sacramento, California 95814
Telephone: (916) 353-1084
Facsimile: (916) 353-1085
jweiner@rosettelaw.com
Attorney for
The Klamath Tribes