Case No. 20-36009

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KLAMATH IRRIGATION DISTRICT,

Plaintiff and Appellant,

v.

UNITED STATES BUREAU OF RECLAMATION, *et al.*

Defendants and Appellees,

HOOPA VALLEY TRIBE and KLAMATH TRIBES,

Intervenor-Defendants and Appellees.

On appeal from the U.S. District Court for the District of Oregon, Medford Division, Case No. 1:19-cv-00451-CL

Appellant's Reply Brief

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INTRODUCTION

Appellees' answering briefs spend remarkably little time responding to the arguments actually made by Klamath Irrigation District ("KID") in its opening brief. Instead, Appellees misstate KID's allegations and arguments and then respond to the strawman they have constructed. The Court should pay no heed to Appellees' characterizations: instead, the Court should look to what KID has actually pleaded and actually argued. Having done so, the Court will see why KID must be correct and this case must be reversed and remanded.

The first and most critical error committed by the District Court in this case was its conclusory decision that KID's complaint did not fall within the McCarran Amendment. The District Court provided neither explanation nor authority, but decided in entirely conclusory fashion it did not apply. This is fundamentally incorrect. KID seeks *only* to enforce the rights decided in the Klamath Basin Adjudication ("KBA") against another water-rights holder in Oregon, the Bureau of Reclamation. *Both* KID *and* Reclamation were adjudicated to hold certain water rights in Upper Klamath Lake ("UKL") during the KBA. Specifically, Reclamation has the right to store water for the beneficial use of Project irrigators, and—as a Project irrigator—KID has the right to use that stored water. Under Oregon law, the right to store water and the right to use water are separate rights.

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Nonetheless, Reclamation has persisted in using water KID owns the right to use, in direct violation of the KBA's Amended and Corrected Findings of Fact and Order of Determination (the "ACFFOD"). Under Oregon law, the ACFFOD is fully enforceable unless and until its enforcement is stayed by order of the Klamath County Circuit Court and the posting of a bond. It is undisputed no bond has been posted and no stay ordered.

Because this case falls squarely within the McCarran Amendment, case law makes clear why the Tribes either are not necessary parties, or may be joined as parties if necessary. The District Court's holding that the Tribes are necessary parties who cannot be joined directly subverts the clear Congressional intent behind the McCarran Amendment.

The McCarran Amendment embodies a Congressional choice to uphold the practice of Western states of consolidating adjudications of water rights into singular proceedings concerning *all* water rights in a particular water source. Because water in the West is scarce and there are many competing claims, every Western state has adopted a comprehensive and detailed process for these general stream adjudications. The federal government's participation in these state adjudications is essential because the federal government holds numerous federal reserved water rights in the American West. Absent the inclusion of these federal reserved rights, general stream adjudications would fundamentally fail: claimants with adjudicated

rights would not be able to treat those rights as settled, for fear of newly claimed reserved rights that were not part of the adjudication. The avoidance of this piecemeal litigation was paramount in Congress's decision to waive federal sovereign immunity to participate in these adjudications. This is why the Supreme Court has described it as a "virtually unique" federal statute.

Many of the federal reserved rights held in the West by the United States are held in trust for federally-recognized Native American tribes with whom the federal government made treaties. To ensure the existence of these federally-reserved tribal rights did not subvert the purpose of the McCarran Amendment, the Supreme Court held in several cases starting in the 1970s that tribal reserved water rights *are* subject to McCarran Amendment adjudications and that any sovereign immunity over them was waived by that statute. The Ninth Circuit has even explicitly considered this question in relation to the KBA, and held that tribal reserved water rights are subject to the KBA.

Assuming the McCarran Amendment waives sovereign immunity as to tribal water rights, but not to the tribes themselves as parties, this makes apparent why the Tribes are not necessary parties here. Were they necessary parties who could not be joined, water rights adjudication in the West would come to an abrupt halt. There could be no certainty that the water rights adjudicated in such a proceeding were *actually* enforceable, as it would be unknown what claims might be held by federal

tribes who declined to participate. And if an adjudication was completed, there could be no assurance that an absent Tribe would not interject into attempts to enforce those decisions and assert the existence of unadjudicated water rights, much as the Tribes are doing here.

Moreover, both the District Court's reasoning and the Tribe's arguments about why they are not adequately represented by the United States rely on jurisprudence about Rule 19 developed *outside* the context of the McCarran Amendment. This is a critical distinction. Rule 19 is a judicially-created rule, enacted by the Supreme Court in its administrative capacity. It cannot be interpreted to undermine the express intent of Congress. But this is exactly what the Ninth Circuit's traditional test under Rule 19 does when it leads to the conclusion that tribal water rights are not adequately represented by the trustee of those rights. This interpretation of Rule 19 wholly disrupts Congress's desire to respect state water adjudications and avoid piecemeal litigation. As such, the United States *must* be an adequate representative of the tribes in this McCarran Amendment proceeding.

Alternatively, it may be the McCarran Amendment waives sovereign immunity over the Tribes themselves as parties. Indeed, the sole authority suggesting otherwise is dicta in a single footnote in one Supreme Court case. What the Court *actually held* in that case was that tribal water rights were subject to adjudication in McCarran Amendment proceedings. Further, courts have routinely

suggested that, if tribes feel they are inadequately represented by the United States, their remedy is intervention. Courts would not suggest this if tribal sovereign immunity was retained in a meaningful way in McCarran Amendment proceedings. However, because it is well established tribal rights can and will be adjudicated whether the Tribes choose to join or not, it is appropriate to interpret the McCarran Amendment as a waiver of party immunity.

If the Court nevertheless finds both that the Tribes are necessary parties and cannot be joined due to sovereign immunity—and that this conclusion does not fundamentally undermine the McCarran Amendment—the Court should allow the matter to proceed in equity and good conscience without the Tribes. The same policy reasons underlying the McCarran Amendment dictate this outcome. Congress clearly expressed a desire to allow unified proceedings about water rights, including tribal rights. Actions to enforce those rights must be able to proceed in order to avoid rendering the adjudication process nugatory. Rights that cannot be enforced are no rights at all.

Lastly, the Court should pay no heed to Hoopa's misguided argument about "priority." Not only is this argument irrelevant to the current appeal, it is fundamentally incorrect. Holders of water rights in one state do not have higher or lower priority of water rights than water rights holders in another state. The rights are held pursuant to the laws of separate co-equal sovereigns and do not apply

extraterritorially. Interstate water rights disputes must be resolved by the States as sovereigns, either through compact or equitable apportionment. While prior appropriation principles are considered in equitable apportionment, they do not control. Concepts of priority have no place here.

ARGUMENT

A. This is a Proceeding for the Administration of Water Rights Found in the Klamath Basin Adjudication, which Squarely Falls Under the McCarran Amendment

None of the Appellees persuasively respond to KID's arguments about the District Court's incorrect determination of whether this is a McCarran Amendment proceeding. This is unsurprising: the District Court itself provided no explanation or authority for its conclusory statement that "this is clearly not a McCarran Amendment case." (ER-019.)

Each of the Appellees here argue that, because certain tribes may hold California water rights, this cannot be a McCarran Amendment case. (*See* Doc. No. 25 at 26–27; Doc. No. 26 at 46–53; Doc. No. 30 at 36–39.) This is nonsensical. The two concepts are simply unrelated. The California tribes may well hold water rights in California; however, that says nothing about whether *KID's* complaint—which was filed in Oregon against an Oregon water rights holder—falls under the McCarran Amendment. Because the McCarran Amendment applies to suits for the

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"administration" of water rights, the Court's inquiry should properly focus on what KID's complaint alleges.

The "administration" of water rights under 43 U.S.C. § 666(a)(2) occurs after there has been a "prior adjudication of relative general stream water rights." *See South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985). It is undisputed the KBA qualifies. *See United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994). Once those rights have been determined, they can be administered—i.e., enforced—in a separate action. *See United States v. Hennen*, 300 F. Supp. 256, 263 (D. Nev. 1968) ("Once there has been such an adjudication and a decree entered, then one or more persons who hold adjudicated water rights can, within the framework of § 666(a)(2), commence among others such actions as described above, subjecting the United States, in a proper case, to the judgments, orders and decrees of the court having jurisdiction.").

This is precisely what KID's complaint seeks: enforcement of rights determined in the KBA. KID's operative complaint—which was filed in Oregon—solely concerns Oregon water rights. It alleges KID's and Reclamation's water rights in Oregon have been determined, with Reclamation holding a right to store water in UKL, and KID and others having the right to use that water. (ER-106 at ¶ 43(a), (b).) The complaint alleges Reclamation is unlawfully seizing water in UKL without a water right and using it for instream purposes in order to meet other

obligations it has. (*See* ER-107 at ¶ 45; ER-108 at ¶ 46(a).) While these uses may be in California, the location is immaterial to KID's central complaint: Reclamation is using water it has no right to use, in violation of state law and the Reclamation Act.

The complaint alleges water rights in UKL were determined in the KBA, and under Oregon law, are fully enforceable during the judicial phase of the KBA. (*See* ER-106–07, at ¶¶ 43–44.) It alleges Reclamation has not sought to stay the ACFFOD. (ER-106 at ¶ 42.) It asks the Court to declare Reclamation's actions unlawful and administer the water rights found in the KBA. (ER-109 at ¶ 49.) These allegations are a suit to administer and enforce the water rights found in the KBA, which falls within the McCarran Amendment, 43 U.S.C. § 666(a)(2).

KID does not seek an interstate water rights adjudication, as Appellees suggest. Essentially, the Appellees argue a McCarran Amendment adjudication cannot determine extraterritorial water rights, i.e., an Oregon water rights adjudication cannot determine California water rights.

On this, KID agrees. The KBA does not and did not purport to comprehensively determine water rights in California. Water rights in different states are simply unrelated to each other: a water right in one state may not be called upon to satisfy a water right held in a different state, because the rights exist pursuant to different sets of laws enacted and administered by separate but co-equal

sovereigns. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) ("For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."); *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 F. 9, 26 (9th Cir. 1917) ("[I]t is not for individual users to raise a controversy about the use of such water in another state, out of the territorial jurisdiction of the court."); *El Paso County Water Imp. Dist. No. 1 v. City of El Paso*, 133 F.Supp. 894, 924 (1955) (noting "the impotency of the New Mexico appropriation in Texas"); *Finney County Water Users' Ass'n v. Graham Ditch Co.*, 1 F.2d 650, 651 (D. Colo. 1924) ("The Supreme Court has said that neither state can impose its policy upon the other, and, when the action of one state reaches through the agency of natural laws into the territory of another state, the question of the extent and limitations of the rights of the two states may be inquired into."); Erwin Chemerinsky, Federal Jurisdiction § 6.2.5 (3d ed. 1999) ("Obviously, in a conflict between two states, neither states' laws can be applied to resolve the dispute.").

Interstate water disputes are not uncommon. Such disputes are resolved through either equitable apportionment or interstate compact,[1] to which *only the*

[1] There is an interstate compact—the Klamath River Basin Compact (the "Compact")—between California and Oregon concerning the Klamath River. *See* ORS 542.620; Cal. Water Code § 5901. However, that Compact controls only how

states and not the individual water users are parties. *See South Carolina v. North Carolina*, 558 U.S. 256, 280 (2010) ("A State's citizens also need not be made parties to an equitable apportionment action because the Court's judgment in such an action does not determine the water rights of any individual citizen."). Once the waters of an interstate water source are equitably apportioned between the states, *then* state law divides whatever water that state is entitled to amongst its citizens. *See Nebraska v. Wyoming*, 325 U.S. 589, 627 (1945) ("The equitable share of a State may be determined in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the State."); *Hinderlider*, 304 U.S. at 106–08 (noting that once an equitable apportionment has occurred, "the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact"). In lieu of that equitable apportionment of water—either by litigation or compact—there simply is no restriction on the depletion of water in an interstate stream based on the extraterritorial application of state law.[2]

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water rights acquired *after* the 1950s will be prioritized. *See* Art. III, §§ A, B. Because both KID's and the Tribes' rights pre-date the Compact, it affords no assistance.

[2] The analysis does not change even if these California water rights are federally based. *United States v. U.S. Bd. of Water Comm'rs*, 893 F.3d 578, 595 (9th Cir. 2018) ("[T]here is no federal water law. Fundamental principles of federalism vest control of water rights in the states.") Tribal water rights must be

Just because interstate issues may be interjected by other parties does not somehow change *KID's complaint* into one seeking equitable apportionment. KID's complaint remains focused on Reclamation's unlawful seizure of water *in Oregon*. KID does not care *why* Reclamation is seizing the water KID holds the right to use. What matters is that Reclamation *is* seizing the water—in Oregon—without an Oregon water right, in contravention of the law. Because the suit seeks to administer those rights found in the KBA, it falls squarely within the McCarran Amendment.

The other arguments made by Appellees about this issue are similarly unpersuasive. Both the United States and the Klamath Tribes argue this is not a suit for the administration of water rights because "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." (Doc. No. 30 at 37; *see also* Doc. No. 25 at 26–27 [arguing KID "challenge[s] Reclamation's determinations under the ESA"].) Not so. KID agrees Reclamation may have *obligations* under

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satisfied by the State in which the reservation lies. Tarlock, *Interstate Allocation § 10:13*, Law of Water Rights and Resources, at 644, discussing *Arizona v. California*, 373 U.S. 546 (1963); *see also Arizona v. California*, 460 U.S. 605, 628 (1983) ("Our 1963 opinion bore this out: perfected rights for the use of federal establishments were charged against the state's apportionment."); *Arizona v. California*, 373 U.S. 546, 601 (1963) ("Finally, we note our agreement with the Master that all uses of mainstream water within a State are to be charged against that State's apportionment, which of course includes uses by the United States."). Therefore, if the waters of the Klamath River are someday equitably apportioned between Oregon and California, the water demands of the Hoopa Valley and Yurok Tribe will be satisfied from *California's* share of the water, not Oregon's.

various laws. Nowhere does KID's complaint seek to determine what those obligations are or contest that Reclamation has them. Obligations are, however, different than rights. Reclamation may not satisfy its legal obligations by using rights it does not own. This is precisely the type of action a suit to administer water rights addresses. *See Hennen*, 300 F. Supp. at 263.[3]

B. Appellees' Arguments about Adequacy of Representation Under Rule 19 are Inapposite, because They Do Not Concern the "Virtually Unique" Federal Policy Embodied in the McCarran Amendment

The Appellees each argue that, under Ninth Circuit jurisprudence, Reclamation is not an adequate representative of the Tribes, because it will not "undoubtedly make" each of the Tribes' arguments in litigating on their behalf. This fails to respond to KID's argument. KID does not disagree with what the Ninth Circuit Rule 19 standard is. Rather, KID argues this Court's interpretation of Rule 19—i.e., a judicial interpretation of an administratively-promulgated rule—must bend in the face of the clear congressional intent found in the McCarran Amendment.

[3] The Klamath Tribes' statement that "the rights adjudicated to the Tribes in the Klamath Basin Adjudication do not define the extent of the Tribes' treaty-based . . . interests" is truly mystifying. (Doc. No. 30 at 38.) That is *exactly* what the KBA does, at least in terms of water rights. *See Colorado River*, 424 U.S. at 809–10 ("Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions."); *San Carlos Apache*, 463 U.S. at 566 n.17; *United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994). Whether the Klamath Tribes' treaty grants them additional property rights *other than* water rights irrelevant to this litigation. But the KBA determined tribal water rights.

To hold otherwise would eviscerate the purpose of the McCarran Amendment, and place the judiciary above the legislature in terms of lawmaking.

1. Assuming the Tribes Cannot be Joined Due to Sovereign Immunity, This Court's Jurisprudence on Rule 19 Must Bend to Accommodate Congressional Direction

Because this is a suit for the administration of water rights under the McCarran Amendment, this Court must consider the overall goals of the McCarran Amendment, which embody Congressional will. The District Court found both that Reclamation could not adequately represent the Tribes' interests *and* that the Tribes could not be joined as parties due to sovereign immunity. (ER-020–22.) This dual holding fundamentally undermines the McCarran Amendment.

The purpose of the McCarran Amendment is to ensure *all* claims to water rights from a given water source are joined in comprehensive adjudications, to avoid piecemeal claims from water users leading to perpetual and unending litigation. Because of the central role states play in regulating water distribution, the McCarran Amendment waived the United States' sovereign immunity in relation to such comprehensive adjudications, to permit all claimants to be joined. *See United States v. District Court In and For Eagle County*, 401 U.S. 520, 525 (1971) (quoting Senator McCarran as saying the amendment was necessary "because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value").

"The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 n.22 (1983) (reaffirming that "the primary policy of the statute was the avoidance of piecemeal litigation"); *R.R. Street & Co. Inc. v. Transport Ins. Co.*, 656 F.3d 966, 978 (9th Cir. 2011) (recognizing the McCarran Amendment sought to "avoid[ ] piecemeal adjudication of water rights"). The Supreme Court has described the McCarran Amendment as "an all-inclusive statute concerning 'the adjudication of rights to the use of water of a river system' which in § 666(a)(1) has no exceptions and which, as we read it, includes appropriate rights, riparian rights, and *reserved rights*." *Eagle County*, 401 U.S. at 524 (emphasis added); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564 (1983) ("[T]he Amendment was designed to deal with a general problem arising out of the limitations that federal sovereign immunity placed on the ability of the States to adjudicate water rights."). The Congressional intent behind the McCarran Amendment is clear: all water rights claims to a given water source should be adjudicated in a single comprehensive proceeding.

The McCarran Amendment was also intended to include tribal water rights. "Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions." *Colorado River*, 424 U.S. at

810. The legislative history of the McCarran Amendment is replete with statements of the necessity of sweeping *all* potential claimants into these comprehensive proceedings. As the Senate report on the bill stated, "[i]t is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States . . . is permitted to claim immunity . . . such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users." *Colorado River*, 424 U.S. at 811 (quoting S.Rep.No.755, 82d Cong., 1st Sess., 4–5 (1951). Because of this desire to subject federal rights to state administration and permit comprehensive resolution of competing water claims, the McCarran Amendment is a "virtually unique" federal statute. *San Carlos Apache*, 463 U.S. at 571.

Assuming the McCarran Amendment waives sovereign immunity only over tribal water rights and not tribal parties, the Ninth Circuit's jurisprudence on Rule 19, which permits tribes to successfully argue they are not adequately represented by the federal government, eviscerates the McCarran Amendment. The McCarran Amendment was designed to permit comprehensive water rights proceedings, and undoubtedly includes tribal rights. If a tribe cannot be compelled to join such a suit, the federal government *must* be able to adequately represent it. To hold otherwise would permit exactly the sort of piecemeal litigation Congress enacted the McCarran Amendment to avoid: a situation where all water rights *except* tribal rights are

adjudicated; or where tribal rights have been adjudicated but cannot be enforced or administered, because the Tribe cannot be joined to the case and no other representative is adequate.

The Federal Rules of Civil Procedure are promulgated as an administrative function of the Supreme Court, pursuant to the Rules Enabling Act, codified at 28 U.S.C. § 2072. *See Doctor John's Inc. v. Village of Cahokia*, No. 3:18-cv-00171-JPG-RJD2019 WL 1574814, at *1 (S.D. Ill. April 11, 2019). The Rules Enabling Act specifically states the procedural rules promulgated by the Supreme Court "shall not abridge, enlarge or modify any substantive right." *See* 28 U.S.C. § 2072(b); *Willy v. Coastal Corp.*, 503 U.S. 131, 134 (1992). Neither the Supreme Court through its rulemaking functions nor the Ninth Circuit through its interpretations of those rules may subvert clearly expressed Congressional direction. Yet this is exactly what will happen if tribal rights are not permitted to be joined in an enforcement action under the McCarran Amendment. The McCarran Amendment will no longer be able to provide for the *comprehensive* adjudication and enforcement of water rights.

Despite the concerns expressed by the Tribes, there is simply no evidence the United States would shirk its duty as a trustee. Courts hearing water cases have routinely relied on the fact that the federal government is the legal owner of and the trustee for federally-recognized tribal water rights, and is obligated to defend them.

See, e.g., *San Carlos Apache*, 463 U.S. at 566 n.17; *Colorado River*, 424 U.S. at 812; *Washington v. EPA*, 752 F.2d 1465, 1470 n.4 (9th Cir. 1985); *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 323 (9th Cir. 1956); *United States v. Walker River Irr. Dist.*, 473 F.Supp.3d 1150, 1156 (D. Nev. 2020); *United States v. Fallbrook Public Util. Dist.*, No. 51cv1247-GPC-RBB, 2019 WL 2184819, at *3 (S.D. Cal. May 21, 2019). The Department of the Interior itself also consistently recognizes its trust obligations to protect tribal water rights. *See* Notice Regarding Upper Klamath Basin Comprehensive Agreement, 82 Fed. Reg. 61582, 61583 (Dec. 28, 2017); Truckee River Operating Agreement, 73 Fed. Reg. 74031, 74037 (Dec. 5, 2008); Colorado River Interim Surplus Guidelines, 66 Fed. Reg. 7772, 7776 (Jan. 25, 2001); Central Arizona Project Water Allocation and Water Service Contracting, 56 Fed. Reg. 28404, 28407 (June 20, 1991); Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990).

More importantly, there is no reason to believe the United States will not adequately defend tribal interests in *this* case. While the Tribes raise general concerns about prior antagonism in other cases, in this litigation, the Tribes and the United States are on the same side. Both the Tribes and the federal government seek to defeat KID's complaint. Whatever may have happened previously, the United States has now for years taken the position in the Klamath Basin that it may do

anything it deems necessary to ensure the downstream tribes receive adequate water flows, including unlawfully using water KID owns the water rights to. This hardly bespeaks an adversarial relationship between the federal government and the Tribes.

Again, the United States' inability to assert tribal sovereign immunity has no bearing here. The Tribes have no sovereign immunity interest that must be raised in this case. Congress clearly and unequivocally waived tribal sovereign immunity over water rights. *See San Carlos Apache*, 463 U.S. at 566 n.17 (noting "the McCarran Amendment . . . waive[d] sovereign immunity with regard to the Indian *rights* at issue in those proceedings"); *Colorado River*, 424 U.S. at 809–10; *United States v. Oregon*, 44 F.3d at 770; *White Mountain Apache Tribe*, 784 F.2d at 922. The Tribes inserted themselves into this lawsuit voluntarily to create procedural obstacles for KID and confusion for the courts, despite the fact that there is no sovereign immunity for their water rights in McCarran Amendment adjudications. Tribal sovereign immunity is irrelevant to this suit.

2. If This Court Finds that Reclamation Cannot Adequately Represent the Tribes, But They are Still Necessary Parties, the McCarran Amendment Must Be Interpreted to Waive Their Sovereign Immunity

Alternatively, this Court could uphold the purpose and intent of the McCarran Amendment by finding the McCarran Amendment waives tribal sovereign immunity and allows tribes to be joined as parties.

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The sole authority on which the District Court relied to find the Tribes could not be joined as parties was dicta. *San Carlos Apache* primarily concerned a question of whether the *Colorado River* doctrine should apply to federal court proceedings that were duplicative of state court water cases. 463 U.S. at 553–59. In so discussing these arguments, the Supreme Court included a footnote saying that, "although the McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications, it did (as we made quite clear in *Colorado River*) waive sovereign immunity with regard to the Indian *rights* at issue in those proceedings." *Id.* at 566 n.17 (emphasis added). Because the Court held that "concurrent federal proceedings are likely to be duplicative and wasteful," and *Colorado River* abstention was warranted, this footnote was not necessary to the holding. *San Carlos Apache*, 463 U.S. at 567. It is dicta.

This Court already indicated the McCarran Amendment waived tribal sovereign immunity insofar as water rights are concerned. In *United States v. Oregon*, 44 F.3d 758, the Klamath Tribes and the United States argued they were not required to participate in the KBA because their sovereign immunity was not waived by the McCarran Amendment. 44 F.3d at 763 ("Unless the McCarran Amendment waived the sovereign immunity of the federal government *and the Tribe*, neither may be required to participate in a state adjudication in order to preserve water rights that have accrued under federal law.") (emphasis added). This

Court *specifically* ruled sovereign immunity was waived. *See id.* at 763–70 (considering and rejecting numerous arguments claiming sovereign immunity was not waived by the McCarran Amendment). Ultimately, this Court held "that the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment." *Id.* at 770. This holding necessarily concluded the Klamath Tribe's sovereign immunity is waived.

Because of the clear purpose of the McCarran Amendment, both of the rulings made by the District Court cannot be simultaneously true: either the United States is an adequate representative for the Tribes and they are thus not necessary parties to this litigation, or the McCarran Amendment waives their sovereign immunity and they can be joined as parties. There simply is no way to hold otherwise and respect the Congressional policy embodied in the McCarran Amendment.

C. While Rule 19 Inquiries are Practically Based, The Law Informs the Analysis, and the Tribes have No Practical Interest in KID's Due Process Claim

Appellees spend significant effort misconstruing or misstating what KID alleges in its complaint, and KID's due process claim is a particularly adept example of this. Much of Appellees' concerns are predicated on an assertion that, if KID were successful in its complaint, water will simply stop flowing down the Klamath River. This is simply not true. Reclamation apparently has authority to acquire

water from KID, whether KID wants to sell it or not. *See* 43 U.S.C. § 421 ("Where, in carrying out the provisions of this Act, it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation under judicial process."); ER-099 at ¶ 15. There is no real risk the United States will simply stop fulfilling its obligations because it has to fulfill them *lawfully*.

This is why analysis of necessary party status proceeds on a claim-by-claim basis. In determining whether a party has an interest in a particular claim, the court looks to the practical consequences of the allegations made. *White v. Univ. of California*, 765 F.3d 1010, 1026 (9th Cir. 2014) (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)); *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). However, the interests are not unbounded. *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Comm. v. California*, 547 F.3d 962, 970 (9th Cir. 2008) (noting the interest must be more than a mere financial stake or speculation about a future event, but need not be property as defined in the due process clause).

The legal basis for a claim informs this practical inquiry. *See, e.g.*, *Cachil*, 547 F.3d at 971 (carefully considering the specific legal challenges brought to California Indian casino licensing compacts, and noting absent tribes lacked an interest in the litigation because of the specific nature of the claims advanced); *Union*

Pac. Railroad Co. v. Runyon, 320 F.R.D. 245, 251 (D. Or. 2017) (noting "the critical question is whether the Treaty Tribes' indisputable interest in their treaty-reserved fishing rights '*relates to the subject of the action*' under Rule 19") (emphasis added). This is why the Ninth Circuit requires this analysis to proceed on a claim-by-claim basis. *See Alto v. Black*, 738 F.3d 1111, 1129–31 (9th Cir. 2013); *Jamul Action Comm. v. Chaudhuri*, 200 F.Supp.3d 1042, 1051–52 (E.D. Cal. 2016).

Success on a procedural due process claims entitles the plaintiff to a *process*, not any specific outcome of that process. *See Michael H. v. Gerald D.*, 491 U.S. 110, 147 (1989) (Brennan, J., dissenting) ("The point of procedural due process is to give the litigant a fair chance at prevailing, not to ensure a particular substantive outcome."); *Jafarzadeh v. Nielsen*, 321 F.Supp.3d 19, 48 (D.D.C. 2018) (noting distinction between substantive and procedural due process as being "whether the Fifth Amendment guaranteed a particular outcome . . . rather than a procedure"); *Etherly v. Oregon*, No. CV 04–996–PA, 2005 WL 1839041, at *2 (D. Or. Aug. 3, 2005) ("As for procedural due process, the Fourteenth Amendment does not guarantee a particular outcome, only certain basic procedural rights."). All KID seeks access to in this claim is constitutionally adequate *process*, not any particular outcome.

This is not something in which the Tribes *can* have an interest. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) ("Generally, there is no

legally protected interest in particular agency *procedures*.") (emphasis added). The Tribes have no protectable interest in the *means* by which Reclamation acquires water. *Id.* at 559 ("We disagree, however, that the absent tribes are necessary to the Makah's procedural claims."). The Tribes' interests are in whether or not Reclamation provides them a certain amount of water. And while all of KID's claims are aimed at *the means* by which Reclamation acquires its water rights, this is particularly true of the procedural due process claim. There is no authority suggesting any third-party has a protectable interest in whether another party receives due process.

Additionally, the Hoopa Tribe attempts to characterize KID's due process claim strictly about financial compensation, and therefore appropriately brought in the Court of Federal Claims. (Doc. No. 26 at 29.) In order to bring a Takings claim in the Court of Federal Claims, one must admit the propriety of the governmental seizure. *See Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1331 (Fed. Cir. 2006) ("[A]n uncompensated taking and an unlawful government action constitute two separate wrongs that give rise to two separate causes of action."). In this complaint, KID asserts the Government's action was unlawful, and suit in the Court of Federal Claims would be improper.

The fact that KID is pursuing a procedural due process claim proves it is not concerned *solely* with financial compensation. Due process is about the *process*

involved in property seizures, not compensation for them. An orderly process for acquiring or condemning water provides KID an opportunity to consider specific requests from Reclamation; marshal its supply of water, coordinate voluntary forbearance or rationing; identify junior water rights holders; identify other sources of water; and contest certain specific water seizures as unnecessary, wasteful, arbitrary, or capricious.

Further, requiring Reclamation to proceed by judicial process ensures any disputes are heard before a neutral decisionmaker. This is a common remedy for a procedural due process violation. *See, e.g.*, *Walker v. City of Bradley*, 951 F.2d 182, 184 (9th Cir. 1991) (due process violated where city failed to provide an impartial decisionmaker at post-termination hearing for employee); *Fed. Energy Reg. Comm'n v. Barclays Bank PLC*, No. 2:13–cv–02093–TLN–DB, 2017 WL 4340258, at *11 (E.D. Cal. Sept. 29, 2017) (holding that a proceeding for a regulatory fine must be held before a neutral decisionmaker); *Monroe v. Smith*, No. CV 12–00757–PHX–SRB (SPL), 2012 WL 5381491, at *2 (D. Ariz. Sept. 24, 2012) (noting that the Supreme Court "implied that a fair hearing requires an impartial decisionmaker" in prison disciplinary hearings).

Reclamation is not a neutral decision-maker, and provides virtually no process to KID in electing to seize its water rights. The lack of process is the *sole* focus of KID's procedural due process claim, both legally and practically, and the

claim does not seek to compel Reclamation to make any particular *substantive* decision. As such, the Tribes simply have no interest in it, because it does not control who receives water, only how the water is obtained.

1. Hoopa's Argument About *Baley* is Incorrect and a Significant Misstatement of the Law

The Hoopa Valley Tribe argues that *Baley* precludes KID's due process claim. Not only is this wrong, it is a significant misstatement of the law. The Court in *Baley* expressly noted the suit *did not concern any rights at issue in the KBA*. *See Baley v. United States*, 942 F.3d 1312, 1327 (Fed. Cir. 2019), *cert. denied*, 141 S.Ct. 133 (2020) (noting the case did not involve any property interests "based on rights, titles, or interests that *are or may be subject to determination in the Adjudication*") (emphasis added). This case proceeds in a much different procedural and factual posture than *Baley*. At the time *Baley* was filed, the KBA had not yet been adjudicated, and there simply were no enforceable water rights in the Klamath Basin in Oregon. For that reason, the plaintiffs in *Baley* brought contract-based claims. *See Baley v. United States*, 134 Fed. Cl. 619, 653–59 (2017) (discussing the various contractual theories of property interests advanced in the case). In denying a motion to stay pending resolution of the KBA, the trial court in *Baley* held the plaintiffs "assert no property interest determinable in the Adjudication" and plaintiffs could therefore not bring "any claims or seek[ ] any relief in this case based on rights, titles,

or interests that are or may be subject to determination in the Adjudication." *Baley v. United States*, 134 Fed. Cl. 619, 650 (2017).

Now, the situation is very different. The KBA has been adjudicated, the ACFFOD has been issued, and it is binding and enforceable. KID does not assert contractual rights here, but rather seeks enforcement of the water rights adjudicated in its favor in the KBA. *Baley* is simply irrelevant to this case.

D. Even if the Court Finds the Tribes are Necessary Parties that Cannot be Joined Due to Sovereign Immunity, the Court Should, in Equity and Good Conscience, Allow the Case to Go Forward

The Tribes argue tribal sovereign immunity provides all the reason this Court needs to not allow this case to proceed forward without them, pointing to a "wall" of authority dictating that outcome. (*See* Doc. No. 26 at 54; Doc. No. 30 at 40.) However, neither Tribe responds to KID's central argument: *none* of this authority concerns the "virtually unique" McCarran Amendment, which specifically waives sovereign immunity over tribal water rights.

None of the cases cited by the District Court for this outcome concerned water rights at all. *See Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008) (sovereign immunity of the Philippines); *Dine Citizens Against Ruining Our Envt. v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019) (reissuance of mining permits to a Navajo company); *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014) (Native American Graves Protection and Repatriation Act); *Friends of Amador County v.*

Salazar, 554 Fed. App'x 562 (9th Cir. 2014) (tribal gaming compact); *Dawavendewa v. Salt River Project Ag. Imp. & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002) (hiring practices at Navajo Generating Station); *Am. Greyhound Racing v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (tribal gaming compact); *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992) (Hoopa-Yurok Settlement Act); *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245 (D. Or. 2017) (railroad expansion). None of the additional cases cited by either Tribe for this argument concerned the McCarran Amendment. *See Deschutes River Alliance v. Portland Gen. Elec. Co.*, 1 F.4th 1153 (9th Cir. 2021) (Clean Water Act); *Kickapoo Tribe of Indians of Kickapoo Reservation v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995) (tribal-state compacts under the Indian Gaming Regulatory Act); *Delano Farms Co. v. Cal. Table Grape Comm'n*, 623 F.Supp.2d 1144 (E.D. Cal. 2009) (patent licensing for grape varieties).

The sole case cited by the Tribes that involved actual water rights is *Friant Water Authority v. Jewell*, 23 F.Supp.3d 1130 (E.D. Cal. 2014). Again, that case did not involve the McCarran Amendment. Instead, it concerned mere *contractual* claims to water held by various contractors. The Court found it could not proceed in equity and good conscience because California's Department of Water Resources had sovereign immunity and would be directly prejudiced by any relief ordered. *See* 23 F.Supp.3d at 1147–51. However, the sovereign at issue—California—did not

hold federal water rights, and therefore the McCarran Amendment was irrelevant. *Friant Water Authority* is inapposite.

Cases falling under the McCarran Amendment are different than most cases involving tribal sovereign immunity, because the McCarran Amendment inarguably waives sovereign immunity over at least the rights themselves. *See San Carlos Apache*, 463 U.S. at 564; *Colorado River*, 424 U.S. at 810; *United States v. Oregon*, 44 F.3d at 770; *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 924 (9th Cir. 1986); *Blackfeet Indian Nation v. Hodel*, 634 F. Supp. 646, 646–47 (D. Mont. 1986). Because tribal water rights are subject to adjudication and enforcement in actions under the McCarran Amendment, these actions must be able to proceed even if the tribes will not or cannot be joined. Equity and good conscience, not to mention express Congressional direction, dictate this result.

The Tribes' remedy, if it has concerns about the adequacy of the federal government's representation, is to intervene. *See White Mountain Apache Tribe*, 784 F.2d at 924 ("If the Tribe is convinced, as it seems to be, that the United States cannot adequately represent the Tribe in W–1, *then the remedy is for the Tribe to intervene in that proceeding*.") (emphasis added); *Blackfeet Indian Nation*, 634 F. Supp. at 648. But the Tribes cannot be permitted to hold water rights adjudications or enforcement actions hostage by refusing to participate in them. The case must proceed, whether the Tribes wish to participate or not.

E. Hoopa's Argument that it Holds "Senior" Water Rights is Fundamentally Incorrect

Throughout the answering brief, Hoopa incorrectly states it holds "senior" water rights to KID. This issue is not directly relevant to the question of whether the District Court erred in determining that this case should be dismissed. There is no reason for the Ninth Circuit to determine the "priority" of water rights in Oregon and California in this case. However, because this issue is of great significance and how the Court discusses it could have a broad impact, KID must briefly reiterate why the Hoopa Valley Tribe is wrong.

As mentioned above, conflicts over interstate resources are a matter of resolution amongst the States and not between individual rights-holders in each state. *See, e.g.*, *Kansas v. Colorado*, 185 U.S. 125, 142–43 (1902) (noting Kansas sued as *parens patriae* on behalf of Kansas citizens in an interstate water dispute); *see also South Carolina v. North Carolina*, 558 U.S. 256, 264–65 (2010) (noting that individual citizens may only rarely intervene in lawsuits between states; "[r]espect for state sovereignty also calls for a high threshold to intervention by nonstate parties in a sovereign dispute"). This is because each State is a coequal sovereign within American federalism, and must be treated equally with other states. *See Kansas v. Colorado*, 206 U.S. 46, 98 (1907) (noting the Supreme Court's original jurisdiction is applied to disputes that, if the States were separate nations, "would be settled by treaty or by force"). Because of this, the division of water between states is governed

by the law of equitable apportionment. *See Colorado v. New Mexico*, 459 U.S. 176, 183 (1982).

Equitable apportionment is "the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream." *Id.* It is a "flexible doctrine which calls for 'the exercise of an informed judgment on a consideration of many factors' to secure a 'just and equitable' allocation." *Id.* (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)).

Where the two states in question both use the law of prior appropriation, "priority becomes the 'guiding principle' in an allocation between competing states." *Id.* at 183–84 (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)); *see also Wyoming v. Colorado*, 259 U.S. 419, 470 (1922). However, prior appropriation is just one consideration: "Rather, the just apportionment of interstate waters is a question of federal law that depends 'upon a consideration of the pertinent laws of the contending States and *all other relevant facts*.'" *Colorado v. New Mexico*, 459 U.S. at 184 (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 670–71 (1931)) (emphasis in original). Therefore, while rules of prior appropriation certainly *impact* the Court's determination of an equitable apportionment, they do not control it. *Id.* at 188 ("[T]he rule of priority is not the sole criterion. While the equities supporting the protection of established, senior uses are substantial, it is also appropriate to consider additional factors relevant to a just apportionment.").

The Supreme Court has reiterated this rule numerous times. *See Colorado v. New Mexico*, 467 U.S. 310, 327 (1984) ("New Mexico is not entitled to an undiminished flow simply because of its first use."); *Colorado v. New Mexico*, 459 U.S. 176, 191 (1982) ("Nor is New Mexico entitled to any particular priority of allocation or undiminished flow simply because of first use."); *Colorado v. Kansas*, 320 U.S. 383, 393 (1943) ("The lower state is not entitled to have the stream flow as it would in nature regardless of need or use."). In explaining the original 1922 holding in *Wyoming v. Colorado*, 259 U.S. 419 on which the Hoopa Valley Tribe relies, Special Master Littleworth explained: "The holding was that *the total share allocated to each state* was the true adjudication of 1922 . . . the individual rights served only as a basis for the overall apportionment of the stream between Colorado and Wyoming." *Kansas v. Colorado*, No. 105, 1997 WL 33796878, at *42 (1997). While historic use *informs* the equitable apportionment of interstate waters between the states, it does not control it.

Because concepts of priority and prior appropriation do not control how water is divided between states, they also do not control how water is divided between parties holding water rights in different states. To the extent the Hoopa Valley Tribe argues—or the *Baley* court held—that the California-based tribes hold a water right that is "senior" to *any* Oregon water rights holders, they are simply incorrect. Each holds rights based on the laws of different states, which have no extraterritorial

application. A prior appropriation may *inform* an equitable apportionment between the states, but it is not controlling. KID requests this Court bear this principle in mind and reject any attempts to invoke priority.

CONCLUSION

For the reasons discussed above, KID asks this Court to reverse and remand the District Court's order granting dismissal of the case. This case is a McCarran Amendment proceeding to enforce rights determined in the KBA against another water rights holder, Reclamation. The Tribes are not necessary parties, because the United States is the legal owner and trustee of their water rights. If the Court determines the Tribes are necessary parties, it should find the McCarran Amendment waives sovereign immunity to permit them to be joined. In the alternative, the Court should permit this matter to proceed in equity and good conscience, given the policy goals of the McCarran Amendment.

DATED: AUGUST 12, 2021. WANGER JONES HELSLEY PC

By: /s/ Christopher A. Lisieski
John Kinsey and Christopher A. Lisieski, Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, and does not exceed the extended word count permitted under Circuit Rule 32-2(b) for responding to multiple briefs. This brief uses a proportional typeface and 14-point font, and contains 7,887 words.

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By: /s/ Christopher A. Lisieski
John Kinsey and Christopher A. Lisieski, Attorneys for Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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v. UNITED STATES BUREAU OF RECLAMATION, et al.

United States Court of Appeals for the Ninth Circuit, Case Nos.:
20-36009; 20-36020

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

I am a citizen of the United States and employed in Fresno County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Wanger Jones Helsley PC, 265 E. River Park Circle, Suite 310, Fresno, CA 93720.

On August 12, 2021, I electronically filed **APPELLANT'S REPLY BRIEF** with the United States Court of Appeals for the Ninth Circuit, by using the Court's CM/ECF system.

X (BY CM/ECF) Upon the filing of the foregoing document with the Clerk of the Court using the CM/ECF system, a notification of such filing (NEF) will be transmitted to the following:

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I declare that I am employed in the office of a member of the bar of this court at whose direction this service was made. Executed on August 12, 2021, at Fresno, California.

Kimberley Dodd
Declarant

/s/ Kimberley Dodd
Signature