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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHASTA VIEW IRRIGATION DISTRICT; et al.,

Plaintiffs-Appellants,

and

KLAMATH IRRIGATION DISTRICT,

Plaintiff,

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
(Hon. Michael J. McShane)

PLAINTIFFS-APPELLANTS SHASTA VIEW IRRIGATION DISTRICT, ET AL.'S REPLY BRIEF

RICHARD S. DEITCHMAN, ESQ. (SBN 287535)
PAUL S. SIMMONS, ESQ. (SBN 127920)
SOMACH SIMMONS & DUNN, PC
A Professional Corporation
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: (916) 446-7979
Facsimile: (916) 446-8199
rdeitchman@somachlaw.com
psimmons@somachlaw.com

Attorneys for Plaintiffs-Appellants Shasta View Irrigation District, Tulelake Irrigation District, Klamath Water Users Association, Ben DuVal, and Rob Unruh

NATHAN J. RATLIFF, ESQ. (OSB #034269)
PARKS & RATLIFF, P.C.
620 Main Street
Klamath Falls, OR 97601
Telephone: (541) 882-6331
Facsimile: (541) 883-1501
nathan@parksandratliff.com

Attorneys for Plaintiff-Appellant Van Brimmer Ditch Company

REAGAN L.B. DESMOND, ESQ. (OSB #045129)
CLYDE SNOW & SESSIONS, P.C.
377 SW Century Drive
Suite 203, Mailbox #6
Bend, OR 97702
Telephone: (541) 797-0011
Facsimile: (801) 521-6280
rlbd@clydesnow.com

Attorneys for Plaintiff-Appellant Klamath Drainage District

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I. INTRODUCTION

The Administrative Procedure Act (APA), 5 U.S.C. § 702, creates a right to judicial review of a federal agency's administrative actions. Section 10 of the APA, 5 U.S.C. § 704, describes when that right may be exercised and what actions are reviewable. This action is standard APA litigation.[1] The APA entitles Klamath Irrigators (Appellants Shasta View Irrigation District, Tulelake Irrigation District, Klamath Water Users Association, Ben DuVal, Rob Unruh, Van Brimmer Ditch Company, and Klamath Drainage District) to court review of the actions of the United States Bureau of Reclamation (Reclamation) and authorizes relief only against federal entities. 5 U.S.C. § 701(b)(1). Because the legal obligations at issue in this case apply only to federal entities and because the APA authorizes relief only against federal entities, Reclamation is the only necessary or indispensable party under Federal Rule of Civil Procedure 19 (Rule 19).

Based on incorrect application of this Court's precedent and mistaken characterizations of the issues in the underlying case, the district court held that the Hoopa Valley Tribe (Hoopa) and the Klamath Tribes (collectively, "Tribes") are

[1] Klamath Irrigators' case was consolidated with *Klamath Irrigation District v. United States Bureau of Reclamation, et al.* (Case No. 20-36009). The issues set forth in Case No. 20-36009 overlap to some extent, but are not identical to those set forth in the Klamath Irrigators' litigation. Arguments raised in the appeal in one case may or may not be relevant to the other, consolidated appeal, and vice versa.

required parties to Klamath Irrigators' APA suit, and that the case may not proceed in their absence. The Tribes, in their responsive briefs in this Court, further distort the nature of Klamath Irrigators' claims, the specific legal issues raised, and the relief sought. The Tribes deflect attention from the legal issues by appeal to emotion, positing the potential for fish extinction events that are divorced from Klamath Irrigators' administrative law claims and the relevant question here, which is whether Klamath Irrigators have access to the district court.

This Court need only look to the actual claims and relief sought in the underlying litigation, namely a remand of the subject administrative action to Reclamation for modification in accordance with federal law, to remand to the district court to proceed to the merits. The Court should additionally reject the district court's blanket application to this case of *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019) (*Diné Citizens*), and re-open the Ninth Circuit to private litigants seeking redress for unlawful federal administrative action.

II. STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to Shasta View Irrigation District, et al.'s, opening brief.

III. SUMMARY OF ARGUMENT

In this APA action, Klamath Irrigators contend that Reclamation acted outside the scope of its lawful discretion under section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), and other federal law in adopting certain operating procedures for the Klamath Project for 2019-2024 (Reclamation's "Action"). Klamath Irrigators seek relief only against Reclamation in the form of a remand so that the agency can modify the operating procedures to conform with the requirements of federal law. A subsequent favorable outcome on the merits for the Klamath Irrigators would return the matter to the agency for a review of Klamath Project operations under federal law. The district court erred in dismissing the lawsuit on the basis of Rule 19 and sovereign immunity.

The Tribes do not have a legally protected interest in the actual subject matter of Klamath Irrigators' complaint. Klamath Irrigators' complaint does not implicate all water rights or claims in the Klamath Basin; rather, Klamath Irrigators seek federal agency compliance with federal law. Klamath Irrigators do not seek any relief against any entity other than Reclamation.

This Court's limited decision in *Diné Citizens* is not controlling. In *Diné Citizens*, the proprietary business interest of the absent tribal entity was directly at issue. That litigation attacked and sought to negate a lease that had already been approved. By contrast, in this case, the interest of the absent Tribes is attenuated,

and the relief sought is for a revised review by a federal agency—no sovereign's independent business or proprietary activity is at stake. *See* Federal Appellees' Answering Br. (U.S. Brief) at 12 ("[i]n other words, 'the litigation could affect already-negotiated lease agreements and expected jobs and revenue'—interests that the tribal entity already possessed, not merely interests that the tribal entity could one day seek to obtain" (quoting *Diné Citizens*, 932 F.3d at 853)). In this case, the United States, which will defend Reclamation's Action as lawful and within its authority, adequately represents the Tribes as trustee.

The district court further erred, and abused its discretion, in finding that the case could not proceed in the absence of the Tribes. The district court's decision closes this Court, the only available forum for the relief sought, to parties such as Klamath Irrigators who are adversely affected by unlawful government decisions. The United States is correct that the application of *Diné Citizen's* holding in this matter "create[s] a 'one-way street' in which the public may not obtain judicial review of certain categories of federal government action, absent a tribe's voluntary consent to suit." *See* U.S. Brief at 17. In fact, the district court's holding creates a one-way, twelve lane freeway: at least four tribes,[2] and any other party in

[2] Tribes in the Klamath Basin, including Hoopa and the Klamath Tribes, have pursued ESA litigation of their own. *See, e.g., Yurok Tribe, et al. v. U.S. Bureau of Reclamation, et al.*, 231 F. Supp. 3d 450 (N.D. Cal. 2017) (addressing claims of the Yurok Tribe and Hoopa that Reclamation failed to reinitiate formal consultation under the ESA); *Klamath Tribes v. U.S. Bureau of Reclamation, et al.*,

the world that can establish standing, can sue the United States to challenge government decisions that they claim result in too much water being available for irrigation, but irrigation parties cannot sue to challenge unlawful government decisions that deprive them of water unless multiple tribes waive sovereign immunity and agree to be joined. In other words, multiple tribes each have individual veto power over whether Klamath Irrigators may seek to protect themselves against unlawful government decisions. This result is contrary to the purpose of the APA, not in line with this Court's precedent, and creates a dangerous precedent of insulating federal agency decisions, even manifestly unlawful decisions, from review. The result is not simply unfair–it is unconscionable.

2018 U.S. Dist. LEXIS 124741 (N.D. Cal. 2018) (addressing venue and preliminary injunction issues in Klamath Tribes' litigation filed against Reclamation alleging ESA violations relating to operation of the Klamath Project). A third tribe, the Yurok Tribe challenged the very same decision at issue in this litigation in the Northern District of California. *See Yurok Tribe v. U.S. Bureau of Reclamation, et al.*, 2020 U.S. Dist. LEXIS 94484 (N.D. Cal. 2020) (addressing the Yurok Tribes' lawsuit challenging Reclamation's 2019-2024 Klamath Project Operations Plan). A fourth Klamath Basin tribe, the Karuk Tribe, has also pursued litigation under the ESA related to ESA-listed fish. *See Karuk Tribe of Cal. v. U.S. Forest Serv., et al.*, 681 F.3d 1006 (9th Cir. 2012) (addressing the Karuk Tribe's challenge to the United States Forest Service's approval of mining activities in a critical habitat for salmon for failure to consult with the wildlife agencies under the ESA).

IV. ARGUMENT IN REPLY

A. This Case Does Not Challenge any Determinations of Tribal Water Rights

Klamath Irrigators filed this litigation seeking review of Reclamation's administrative determinations (the "Action") that will injure Klamath Irrigators and their communities. SVID_ER-206. Congress has provided a statutory right to judicial review under the APA. 5 U.S.C. § 702. All of Klamath Irrigators' claims focus exclusively on Reclamation's administrative determinations to approve, adopt, and implement Reclamation's operating procedures for the Klamath Project. Those determinations were based on Reclamation's assessment of what it must do in order to comply with section 7(a)(2) of the ESA. *See* SVID_ER-095. Klamath Irrigators disagree. On each of their claims, Klamath Irrigators seek prospective declaratory relief and a remand of Reclamation's determinations. Klamath Irrigators assert:

- SVID_ER-207: "Plaintiffs are entitled to a declaration that the contracts between Reclamation and the Association's members do not confer power or authority upon Defendants to curtail or limit [Plaintiffs'] use of water in order to benefit listed species or otherwise provide water for instream purposes."
- SVID_ER-208: "Plaintiffs are entitled to a declaration that Defendants' actions . . . in adopting and implementing the Action violate section 8 of the Reclamation Act and/or that Defendants must maintain, operate, and direct operations of the Project and Project-related facilities in accordance with section 8 of the Reclamation Act."

- SVID_ER-210: "Plaintiffs are entitled to a declaration that Defendants must maintain, operate, and direct operations of the Project . . . in accordance with the requirements of the Reclamation Act, and that Defendants' authorization in the Action . . . for ESA-listed species . . . are not activities authorized by any applicable law."

- SVID_ER-211: "Plaintiffs are entitled to a declaration that the maximum diversion cap of 350,000 acre-feet is not authorized or required by Oregon law, the Reclamation Act, or section 7(a)(2) of the ESA."

The district court correctly noted that the issues presented do not require the court to resolve all competing water right claims in the Klamath Basin. SVID_ER-009. Notwithstanding that conclusion, the district court concluded that the existence of unquantified and/or unenforceable senior water rights held by the Tribes make their presence essential to the disposition of Klamath Irrigators' claims. This is incorrect. In this APA case, Klamath Irrigators do not seek determinations regarding the existence or quantity of tribal water rights; Reclamation made no such determinations in adopting the Action. Nor would the relief sought in this case in any way preclude the Tribes from properly asserting such rights.

Assuming *arguendo* that the Tribes' water rights somehow are directly or indirectly implicated by the Klamath Irrigators' Second Amended Complaint, neither Tribe has any right or presently enforceable, legally protectable interest that is superior to Klamath Irrigators' water rights in Upper Klamath Lake (UKL) or the Klamath River. As a consequence of a "no-call" stipulation in the ongoing

Klamath Basin Adjudication (KBA), the Klamath Tribes and the United States, the holder and defender of the Tribes' water rights, have no rights to lake levels in UKL as against junior water right holders having priority dates earlier than 1908 in priority. *See* SVID_ER-044. The Project water rights, held by Plaintiffs, all pre-date 1908. SVID_ER-045. Accordingly, the Klamath Tribes do not have a legally protectable interest relating to Klamath Irrigators' claims in this case, and the relief sought could not impair any relevant interest. Hoopa also cannot demonstrate a legally protectable interest related to Klamath Irrigators' claims. Neither Hoopa nor the United States as its trustee has ever sought a judicial or administrative determination of the existence, source, purpose, location, or quantity of any water rights, whether in federal court, in California, in the KBA, or elsewhere. Because Hoopa lacks any presently enforceable water right as against the Project, it cannot squash the relief sought by Klamath Irrigators, even if such relief were to implicate Hoopa's water right claims, which Klamath Irrigators submit that it will not. *See* SVID_ER-045.

B. The District Court Incorrectly Relied on Prior *Dicta* from Klamath Basin Litigation

The district court's cursory overview of prior litigation in the Klamath Basin is both inaccurate and not germane to the analysis of the potential tribal interest in Klamath Irrigators' current claims. This Court should avoid any use of *dicta* relating to the ESA or water rights priorities recited in *Klamath Water Users*

Association v. Patterson, 204 F.3d 1206, 1214 (9th Cir. 2000) (*Patterson*) (which was restated in the preliminary injunction decision in *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001) (*Kandra*)), or *Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019) (*Baley*).

Indeed, the Klamath Irrigators' complaint fundamentally asserts that the *dicta* and general characterizations from those prior cases plainly are not consistent with modern understandings of the ESA or other federal obligations. For example, as explained in Klamath Irrigators' opening brief, in recent litigation concerning Central Valley Project (CVP) contracts, the Eastern District of California found that "in order to trigger the requirement for re-consultation . . . in the context of an executed and otherwise valid contract, the action agency must have retained sufficient discretion in that contract to permit material revisions to it that might benefit the listed species in question." *NRDC v. Norton*, 236 F. Supp. 3d 1198, 1216-17 (E.D. Cal. 2017); *see also WildEarth Guardians v. U.S. Army Corps of Eng'rs*, 947 F.3d 635, 641 (10th Cir. 2020) (*WildEarth Guardians*) (holding that the U.S. Army Corps of Engineers "is only required to engage in consultations under § 7(a)(2) when it has discretion to pursue objectives under the [ESA]"). Klamath Irrigators seek remand of an administrative determination and declaratory relief aimed solely at Reclamation, and remand to ensure Reclamation acts within its lawful discretion and complies with the law. The basis for the requested relief

includes new applicable federal authorities, including *NRDC v. Norton* and *WildEarth Guardians*, cases that post-date the *dicta* in *Patterson and* restated in *the* Kandra preliminary injunction ruling and *Baley*. Further, in *Baley*, the plaintiff class conceded for purposes of that case that Reclamation's ESA-based action in 2001 was in fact authorized or required by the ESA. In the underlying action, Klamath Irrigators make no such concession; in fact, Klamath Irrigators assert that Reclamation's interpretation and determination of its legal obligations under the ESA was in error. On the merits, the district court will be required to determine whether that new case law applies in establishing Reclamation's lawful discretion and scope of the ESA consultation requirement.

C. *Diné Citizens* Does Not Control the Resolution of this Case

Diné Citizens is not controlling precedent in this case. In *Diné Citizens*, plaintiffs took direct aim at the absent tribe's independent business interests by challenging federal agencies' "opinions and approvals that authorized the continued operations" at a mine owned by the absent tribal corporation (NTEC) and a power plant in which the NTEC had a direct, and substantial, financial interest. *See Diné Citizens*, 932 F.3d at 848-50. The plaintiffs challenged the federal agencies' (i) approval of a lease between the tribe and its operating partner; (ii) granting of certain rights-of-way; and (iii) issuance of a mining permit, and sought injunctive relief, claiming that the agencies failed to adequately perform

analysis required by the National Environmental Policy Act and the ESA. *Id.* at 849-50. The *Diné Citizens* plaintiffs effectively sought to shut down the operation of the mine and power plant by filing suit eight months after the agencies provided the necessary permits and approvals for the power plant and mine, and after NTEC had "made a significant financial investment" therein. *Id*. at 849.

This Court held that the absent tribal entity was a required party to the litigation under Rule 19(a) because a judgment for the plaintiffs would impair the tribal entity's interest in the existing lease, rights-of-way, and permit. *Diné Citizens,* 932 F.3d at 852-53. A foundation of this Court's decision was that "the litigation could affect already-negotiated lease agreements and expected jobs and revenue"—business interests the tribal entity already possessed, not interests that the absent tribal entity could one day seek to obtain. *Id.* at 853. The Court further held that the United States could not adequately represent the absent tribal entity's business interest in the continued operation of the mine because the United States has an interest in "defending [its] own analyses" but not in the "outcome," which is the mine's continued operation. *Id.* at 855. In addition, this Court further analyzed the Rule 19(b) factors and found that the litigation could not proceed in the absence of the tribal entity, in part on the grounds that "the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs" in the context of the tribal entity's protected business interests in the continued

operation of the mine. *Id.* at 858. This Court likewise recently held that an ESA-based challenge to a private tribal hydroelectric project may be dismissed on sovereign immunity grounds because it would implicate the tribes' protected business interests in the operation of the electric project. *See Deschutes River All. v. Portland Gen. Elec. Co.*, Nos. 18-35867, 18-35932, 18-35933, 21 U.S. App. LEXIS 18693 (9th Cir. June 23, 2021).

No such facts, and no such practical consequences to tribal business and protected interests are present here. None of Klamath Irrigators' claims, on their face or in their practical effect, seek to invalidate or limit federally reserved fishing or water rights or claims, or are otherwise "aimed" at the Tribes' actions or interests. Furthermore, the Klamath Irrigators' successful prosecution of its claims to establish the bounds of Reclamation's discretion and authority in operating the Project would not have a retroactive effect or deprive the Tribes of water or fishing rights they currently enjoy. *See Diné Citizens*, 932 F.3d at 853 (tribes had protectable interest in the subject of the action because plaintiffs' challenge "does not relate only to the agencies' future administrative process, but instead may have retroactive effects on approvals already granted" because "[w]ithout the proper approvals, the [m]ine could not operate"). In *Diné Citizens*, this Court distinguished *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990) (*Makah*), in a manner that is instructive:

> In Makah, we likewise held that absent tribes lacked a legally protected interest in a suit brought by the Makah Indian Tribe challenging the Secretary of Commerce's ocean fishing allotment "[t]o the extent that the Makah [sought prospective injunctive] relief that would affect only the *future conduct* of the administrative process." We also held, however, that absent tribes *did* have a legally protected interest "to the extent the Makah [sought] a reallocation of [a particular prior year's] harvest or challenge[d] the Secretary's [prior] inter-tribal allocation decisions."

Id. at 852-53 (bracketed text in original) (quoting *Makah*, 910 F.2d at 559).

Here, any water already released by Reclamation under the adopted Action, quite literally, is already down the river. Klamath Irrigators do not seek to, and cannot, get it back. In fact, the adopted administrative determination has already injured Klamath Irrigators, who have experienced severe water shortage in 2020 and 2021 that would not have occurred if the challenged determination had not be been in effect. Klamath Irrigators' claims set forth in this litigation will not result in tribal "fishing and water rights . . . negated, possibly forever." Answering Br. of Hoopa at 23.

The Klamath Tribes invite this Court to broaden *Diné Citizens* by noting that there is "no authority that an absent tribe's interest needs to be proprietary" in order for a tribe to have the type of interest necessary to support dismissal under Rule 19. Br. of the Klamath Tribes at 19. However, the *Diné Citizens* court clearly stated it was required to make a factually intensive review, as "[t]he inquiry under Rule 19(a) 'is a practical one and fact specific' . . . and 'few categorial rules

inform[] this inquiry.' " *Diné Citizens*, 932 F.3d at 851 (citations omitted). This is unsurprising: *Diné Citizens* is an exception to the longstanding rule in this Court that the federal government is the only necessary party in an APA lawsuit. The absent tribal entity's interest in *Diné Citizens* was a business interest with a retroactive aim at approvals already issued for an ongoing mining operation. The district court in this case went too far by applying the *Diné Citizens* business-interest exception to Appellants' request for future agency administrative process and ignoring the existing precedent that absent tribal entities are not required parties to APA litigation.

Reclamation, the federal decision-maker, is the only required party in this case, and the district court improperly relied on the limited and unique factual circumstances in *Diné Citizens* relating to tribal business interests in concluding otherwise. The facts in this case align more closely with those in *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153 (9th Cir. 1998) (*Sw. Ctr.*), where plaintiffs challenged the Secretary of the Interior's plan to begin using a new water storage facility. In *Sw. Ctr.*, this Court found that the United States could adequately represent tribal interests with respect to the issues relating to the water storage facility and that the United States' failure to join a motion to dismiss on the grounds of sovereign immunity did not support a finding that the third-party interest is necessary. *Sw. Ctr.*, 150 F.3d at 1154.

The APA "creates a 'basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.' ' " *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (*Weyerhaeuser*) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). Blanket extension of the narrow ruling in *Diné Citizens* to other factual circumstances effectively closes the courthouse to non-tribal litigants and compromises the right to judicial review that the APA affords.

D. The United States Adequately Represents any Interests the Tribes May Have in the Federal Decisions at Issue

This Court has long held that "[t]he United States may adequately represent an Indian tribe unless there is a conflict between the United States and the tribe." *Makah*, 910 F.2d at 558; *accord Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999) (*Daley*) (due in part to its "trust responsibility to the Tribes," "[t]he United States can adequately represent an Indian tribe unless there exists a conflict between the United States and the tribe" (internal citations omitted); *Sw. Ctr.*, 150 F.3d at 1154. The rule rests on the United States' trust obligations to tribes. *Heckman v. United States*, 224 U.S. 413, 444-45 (1912) ("There can be no more complete representation than that on the part of the United States in acting on behalf of [tribes].").

Consistent with this principle, this Court previously held in *Daley* that, in an ESA suit, "Tribes are not necessary parties because there is no direct conflict

between the federal defendants and the Tribes." 173 F.3d at 1169. In *Daley*, a fishing group sued federal defendants under the ESA over regulations allocating a portion of a fishery to four tribes. *Id.* at 1164. The Court rejected Rule 19 arguments based on a mere "possibility of conflict" between the federal defendants' "obligations to the Tribes and [their] obligations to protect the fishery resource." *Id.* at 1168. Because the federal defendants and the tribes agreed about the litigated issues, the Court held that they had "virtually identical interests," precluding dismissal under Rule 19(b). *Id.* at 1168.

Reclamation can and will adequately represent any potential tribal interests in Klamath Irrigators' lawsuit. As this Court held in *Daley*, the "mere possibility of conflict" between the tribe and the United States is insufficient to render the tribe a required party. 173 F.3d at 1168. Like the district court, which did not identify any specific conflict between the Tribes and Reclamation arising from Klamath Irrigators' APA claims, the Tribes in their response briefs point, at best, to a "mere possibility of conflict" with the United States.

The Tribes' failure to identify a true conflict with the United States is the logical result from Klamath Irrigators' APA claims: Klamath Irrigators seek a remand to Reclamation for a new determination that is consistent with the requirements of current federal law. Klamath Irrigators seek the proper application of federal laws—laws of general application apply that equally to both the Klamath

Irrigators and the Tribes. Like the Klamath Irrigators, the Tribes share an interest in an administrative process that is lawful. *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962, 977 (9th Cir. 2008).

On one hand, the Tribes allege that Klamath Irrigators' claims will infringe on their federal reserved water rights or claims, yet on the other hand, the Tribes reject Klamath Irrigators' reliance on longstanding Supreme Court precedent establishing the federal government's unity of interest as tribal trustee in the area of federal reserved water rights. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). As explained by the Supreme Court, with respect to reserved water rights, "[t]he Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do." *Nevada v. United States*, 463 U.S. 110, 128 (1983). Klamath Irrigators' lawsuit does not ask the district court to deny the existence of fishing rights or whatever water rights the Tribes may hold, but even assuming *arguendo* that it does, Supreme Court case law establishes that the United States is an adequate representative as tribal trustee. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. at 545 (McCarran Act waiver of United States' sovereign immunity for water rights adjudication in state courts extends to United States acting as trustee of tribal water rights).

E. Even if the Tribes Were Required Parties, the Harsh Result of Dismissal is Unconscionable

Assuming *arguendo* that the Tribes were required parties, and that Reclamation does not adequately represent the Tribes, the district court abused its discretion in dismissing the action. All of the equitable considerations set forth in Rule 19(b) require that the suit continue. Certainly, there are several Ninth Circuit cases that dismiss claims under Rule 19(b) on the basis of the sovereign immunity of absent tribes. *White v. Univ. of Cal.*, 765 F.3d 1010, 1033 (9th Cir. 2014) ("[i]n each of these cases . . . the *absent tribe was a party or signatory to a contract sought to be enforced*") (Murgia, J., dissenting) (emphasis added). But, sovereign immunity alone is not decisive in the Rule 19(b) analysis. *See, e.g., Dawavendewa v. Salt River Project Agric. Improvement Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002) ("the Ninth Circuit has, nonetheless, consistently applied the four-part balancing test to determine whether Indian tribes are indispensable parties").

The Tribes argue that, if Klamath Irrigators get their day in court and prevail, "[i]t would . . . produce an ecological catastrophe through the potential extermination of fish life in the Klamath River." Answering Br. of Hoopa at 18. The Tribes' sensational arguments do not relate to whether this Court should allow the Klamath Irrigators to have a day in court. Nor do they reflect that the relief requested in the underlying action is no more than a remand to Reclamation to adopt a new action that complies with federal law.

Further, Klamath Irrigators do not, by this lawsuit, seek to alter priority administration of water rights. As explained in Klamath Irrigators' opening brief, the Tribes' ability to obtain adjudication and enforcement of water rights will be the same after this case as it was before this case. In California's CVP litigation, Reclamation has prevailed in arguments that Reclamation does not retain sufficient discretionary control to implement measures to benefit species under the ESA. *NRDC v. Norton*, 236 F. Supp. 3d at 1216-17. The decision has no impact on water rights priorities in a prior appropriation system. Likewise, if Klamath Irrigators prevail on the merits, the decision will not change or eliminate tribal water rights or claimed priorities.

As explained in Klamath Irrigators' opening brief, allowing tribal sovereign immunity to preclude Klamath Irrigators from enjoying a right of access to the courts to obtain judicial review of adverse administrative determinations, while allowing the Tribes, and all persons with standing, to challenge the same administrative determinations by Reclamation, fails the "equity and good conscience" test. Further, the district court's decision contradicts the clear congressional directive reflected in the APA that there is a right to judicial review to challenge unlawful federal agency action. In effect, the district court's decision means that private water users in the Klamath Basin must now obtain consent from all tribal entities in the Klamath Basin in order to even have the opportunity to seek

judicial review of federal agency action. Closing the courthouse to one class of water users in the Klamath Basin, while remaining open to others, fails the "equity and good conscience" test.

The district court undoubtedly accepted the use of immunity as a "sword" as opposed to a "shield." *Gingras v. Think Fin.*, 922 F.3d 112, 128 (2d Cir. 2019) (tribal "immunity is a shield . . . not a sword"). The Tribes, in the opposition briefs, envision prejudice to themselves as a result of Klamath Irrigators' claims. But there is no prejudice from the Tribes' absence because Klamath Irrigators' claims and requested declaratory relief do "not call for any action by or against the Tribe[s]." *Manygoats v. Kleppe*, 558 F.2d 556, 558-59 (10th Cir. 1977) (*Manygoats*).

The federal government's status as trustee also "lessen[s]" any possible "prejudice." *Makah*, 910 F.2d at 560. The Tribes retain their right to assert senior water right claims, and legal recourse in a court of their choosing, regardless of the outcome on the merits of this litigation. The only result of the district court's decision below is that Klamath Irrigators cannot file APA lawsuits to challenge unlawful government action. As the United States points out, the decision in *Diné Citizens* deviates from law of the Tenth Circuit in *Manygoats*, which instead avoided the " 'anomalous result' that '[n]o one, except [a] Tribe, could seek review of . . . significant federal action.' " U.S. Br. at 14. *Manygoats* correctly

distinguished an attack on a lease from a result that remanded a matter for additional agency consideration. "The only result will be a new EIS for consideration by the Secretary. The requested relief does not call for any action by or against the Tribe." *Manygoats*, 558 F.2d at 558-59.

While *Diné Citizens* cites *Manygoats* for support that the Tribe was necessary, the practical outcome from that case determined that the Tribe was not indispensable under Rule 19(b) factors—because the facts were different, and there was not an injunctive attack on a lease. "The controlling test of Rule 19(b) is whether in equity and good conscience the case can proceed in the absence of the Tribe." *Manygoats*, 558 F.2d at 559. The consequence of the district court's decision is that tribal entities may use sovereign immunity as a sword to entirely prevent private litigants from filing suits about Reclamation project operations, rather than the intended purpose of sovereign immunity to shield tribal sovereigns from unlawful state intrusions. This Court should correct the inequity created by the district court's decision and allow Klamath Irrigators' APA claims to proceed to the merits.

V. CONCLUSION

Neither sovereign immunity nor Rule 19 should close the courthouse to private litigants seeking relief from unlawful federal agency decision-making. This Court's limited decision in *Diné Citizens*, factually distinct from this case,

should not bar litigation on the merits of Klamath Irrigators' request. This Court should reverse the decision and judgment of the district court so that the underlying case can be adjudicated on the merits.

DATED: August 12, 2021 SOMACH SIMMONS & DUNN, PC

s/ Richard S. Deitchman
RICHARD S. DEITCHMAN, ESQ. (SBN 287535)

Attorneys for Plaintiffs-Appellants Shasta View Irrigation District, Tulelake Irrigation District, Klamath Water Users Association, Ben DuVal, and Rob Unruh

DATED: August 12, 2021 PARKS & RATLIFF, P.C.

s/ Nathan J. Ratliff
Nathan J. Ratliff, Esq. (OSB #034269)

Attorneys for Plaintiff-Appellant Van Brimmer Ditch Company

DATED: August 12, 2021 CLYDE SNOW & SESSIONS, P.C.

s/ Reagan L.B. Desmond
Reagan L.B. Desmond, Esq. (OSB #045129)

Attorneys for Plaintiff-Appellant Klamath Drainage District

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 4,901 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 2016 Times New Roman 14-point font.

Date: August 12, 2021

s/ Richard S. Deitchman

RICHARD S. DEITCHMAN, ESQ. (SBN 287535)
SOMACH SIMMONS & DUNN, PC
A Professional Corporation
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: (916) 446-7979
Facsimile: (916) 446-8199
rdeitchman@somachlaw.com
Attorneys for Plaintiffs-Appellants Shasta View Irrigation District, Tulelake Irrigation District, Klamath Water Users Association, Ben DuVal, and Rob Unruh

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2021, I electronically filed the foregoing **PLAINTIFFS-APPELLANTS SHASTA VIEW IRRIGATION DISTRICT, ET AL.'S REPLY BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Date: August 12, 2021

s/ Richard S. Deitchman

RICHARD S. DEITCHMAN, ESQ. (SBN 287535)
SOMACH SIMMONS & DUNN, PC
A Professional Corporation
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: (916) 446-7979
Facsimile: (916) 446-8199
rdeitchman@somachlaw.com
Attorneys for Plaintiffs-Appellants Shasta View Irrigation District, Tulelake Irrigation District, Klamath Water Users Association, Ben DuVal, and Rob Unruh