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No. 21-55869

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BACKCOUNTRY AGAINST DUMPS, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS, et al.,

Defendants-Appellees,

and

TERRA-GEN DEVELOPMENT COMPANY, LLC and CAMPO BAND OF DIEGUENO MISSION INDIANS

Intervenor-Defendants-Appellees.

ON APPEAL FROM THE SOUTHERN DISTRICT OF CALIFORNIA

No. 3:20-cv-02343 JLS (DEB)

APPELLANTS' SUPPLEMENTAL BRIEF RE *KLAMATH IRRIGATION DISTRICT v. U.S. BUREAU OF RECLAMATION*

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INTRODUCTION

Pursuant to this Court's Order filed September 8, 2022 directing the parties to file supplemental briefs addressing the relevance of *Klamath Irrigation District. v. U.S. Bureau of Reclamation* ("*Klamath Irrigation*"), No. 20-36009 (filed September 8, 2022), Plaintiffs and Appellants Backcountry Against Dumps, et al. (collectively, "Backcountry"), respectfully submit their supplemental brief.

Klamath Irrigation's recitation of the law governing motions to dismiss by absent parties under Federal Rule of Civil Procedure ("Rule") 19(a)(1)(B)(i) is certainly germane. However, the specific facts that led that Court to find that the two absent tribes were both necessary and indispensable parties are not present in the case at bar. Whereas the absent tribes' long-standing water rights were directly threatened by the lawsuits filed and relief requested by the plaintiff irrigation districts in *Klamath Irrigation*, here Backcountry does not challenge the Campo Band of Diegueno Mission Indians' ("Band's") wind energy Lease with Terra-Gen Development Company, LLC ("Terra-Gen"). Indeed, that Lease is not even in the record. II-ER-95. Nor does Backcountry seek any remedy against the Band. Instead, Backcountry's claim and requested relief seek only to remedy procedural deficiencies in defendant and appellee Bureau of Indian Affairs ("BIA's") separate, and subsequent, approval of that Lease through the tightly focused lens of the Administrative Procedure Act, 5 U.S.C. section 706(2)(A)-(D).

Equally important, unlike *Klamath Irrigation*, where the sole defendant, the Bureau of Reclamation ("Reclamation"), did not share, and thus could not adequately defend, the Tribes' interests, here there is a second defendant, Terra-Gen, that *does* share, and can adequately defend, the Band's interests in the Lease.

In sum, *Klamath Irrigation* is distinguishable because the plaintiffs there sought the water needed by the absent Tribes, and Reclamation did not share the Tribes' water rights interests. Therefore *Klamath Irrigation* has little relevance.

ARGUMENT

I. *KLAMATH IRRIGATION'S* RECITATION OF THE LAW GOVERNING REVIEW OF AN ABSENT PARTY'S MOTION TO DISMISS UNDER RULE 19 IS GERMANE

Klamath Irrigation's recitation of the law governing review of an absent party's motion to dismiss under Rule 19(a)(1)(B)(i) is instructive and helpful.

A. *Klamath Irrigation* Explains this Court's Standard of Review

Klamath Irrigation explains that this Court "review[s] any legal questions underlying [the district court's] decision de novo," including "both the proper interpretation of a federal statute . . . and issues of tribal sovereign immunity." *Id.*, slip op. at 17. So too here, this Court reviews de novo the following legal questions posed by Backcountry's appeal: (1) Does Backcountry's Complaint seek any remedy against the Band? (2) Does Backcountry's Complaint seek any remedy against the Band's entry into its wind energy Lease with Terra-Gen? (3) Does the Band have any defense – other than sovereign immunity – to Backcountry's action against BIA's approval that BIA and Terra-Gen do not *also* have? (4) Do the pleadings filed by BIA and Terra-Gen show they are unable or unwilling to defend BIA's approval of the Lease? (5) Does Backcountry have any other remedy for BIA's alleged violations of law if this lawsuit is dismissed?

The answer to each of these questions is "no:" (1) Backcountry's Complaint does not seek any remedy against the Band. Tribe-SER-127-128 (Prayer). (2) Backcountry's Complaint does not challenge the Band's entry into its Lease with Terra-Gen. Tribe-SER-67-128 (Complaint). (3) The Band has no

unique defenses; indeed, Terra-Gen joined the Band's Motion to Dismiss. II-ER194-204. (4) Terra-Gen's and BIA's pleadings show they are willing and able to defend BIA's lease approval. II-ER-161-193 (BIA); ER-194-204 (Terra-Gen). (5) Backcountry has no remedy but this action. Tribe-SER-67-128 (Complaint).

Klamath Irrigation explains this Court reviews the District Court's rulings on questions of fact for "abuse of discretion." *Id.* at 17. Therefore, this Court reviews for abuse of discretion the following factual question posed by Backcountry's appeal: (1) Did the Band enter into its Lease with Terra-Gen in 2019, and begin receiving benefits thereunder, before and independent of BIA's approval of the Lease in 2020? The answer is "yes." Tribe-SER-10.

B. *Klamath Irrigation* Explains the Test for "Required Party"

Klamath Irrigation explains the test for "required party" under Rule 19:

> We engage in a three-part inquiry. We first examine whether the absent party must be joined under Rule 19(a). We next determine whether joinder of that party is feasible. Finally, if joinder is infeasible, we must 'determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.' Fed. R. Civ. P. 19(b).

Id. at 17. The Court discussed each of these inquiries. As to the first, it quoted Rule 19(a)(1), which states that a party is "required" if

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

Id. at 17-18. Applying this test, the Court found that the Hoopa Valley and Klamath Tribes "have 'federally reserved fishing rights'" and "if the [plaintiff Irrigation] Districts are successful in their suit, the Tribes' water rights could be

impaired, so the Tribes are required parties under [Rule] 19(a)(1)(B)(i)." *Id*. 18-19.

As discussed in Section II below, this finding in *Klamath Irrigation* has little relevance here. Backcountry seeks no remedy against the Band or its wind energy Lease with Terra-Gen, as its Complaint only challenges BIA's subsequent and separate approval of that Lease. BIA's approval of the Lease was not required by Terra-Gen and the Band as a condition for their Lease to be effective. The remedy Backcountry seeks is an order vacating BIA's approval of the Lease – not invalidation of the Lease itself – until BIA complies with NEPA and other laws.

C. *Klamath Irrigation* Explains the Adequate Representation Test

Klamath Irrigation explains the Tribes were not required parties if their interests were adequately represented by Reclamation, as contended by the plaintiff irrigation districts. *Id*. at 19-21. The Court stated:

> "Whether an existing party may adequately represent an absent required party's interests depends on three factors: (1) 'whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments;' (2) 'whether the party is capable of and willing to make such arguments;' and (3) 'whether the absent party would offer any necessary element to the proceedings that the present parties would neglect.'"

Id. at 19, *quoting Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs*. ("*Dine Citizens*"), 932 F.3d 843, 852 (9th Cir. 2019), *cert. denied*, 141 S.Ct. 161 (2020), in turn *quoting Alto v. Black*, 738 F.3d 1111, 1127-28 (9th Cir. 2013).

These three tests are applicable here. As discussed below, the answer to each of these questions shows that the Band is not an indispensable party whose absence requires dismissal of this action because: (1) the interests of both the BIA and Terra-Gen are such that they already have made, and will continue to make, all of the Band's arguments against invalidation of BIA's approval of the Lease (save only sovereign immunity); (2) BIA and Terra-Gen have already shown that they

are capable of and willing to make such arguments; and (3) the Band offers no "necessary element" to these proceedings that the present parties would neglect.

In sum, *Klamath Irrigation* posits the questions this Court must ask in deciding this appeal. The answers to those questions, however, show that the Band is not an indispensable party such that in its absence, Backcountry's action must be dismissed. Accordingly, the Judgment below should be reversed.

II. *KLAMATH IRRIGATION* IS DISTINGUISHABLE ON ITS FACTS BECAUSE THE ABSENT TRIBES' WATER RIGHTS WERE DIRECTLY THREATENED

Klamath Irrigation is distinguishable on its facts. In that case the absent Tribes had demonstrably protectable interests of the most fundamental character – water and dependent fishing rights held from "time immemorial" that were vital to the Tribes' economic, social and cultural survival and well being. *Id*. at 9-11. The plaintiff irrigation districts sought to impair the Tribes' instream water and fishing rights by securing "declaratory and injunctive relief against Reclamation'[s]" operation of the Klamath Project in order "to enjoin Reclamation from using water from UKL [Upper Klamath Lake] for instream purposes" including supporting the Tribes' long-standing use of these waters for instream uses such as fishing. *Id*. at 15. "Although the [Irrigation] Districts' claims [were] framed as procedural challenges, their underlying challenge is to Reclamation's authority and obligations to provide water instream to comply with the ESA [Endangered Species Act], an obligation that is *co-extensive with the Tribes' treaty water and fishing rights*." *Id.* at 16 (emphasis added).

Put simply, the irrigation districts sought to divert water for irrigation that the Tribes needed to remain in the Upper Klamath Lake and its associated natural watercourses so they could continue to use their reserved water rights for fishing,

hunting and related traditional tribal uses. *Id*. at 15-16 and 18-19. In short, the irrigation districts were trying to *take* water that *belonged* to the Tribes since "time immemorial." *Id*. at 10. The irrigation districts' direct attack on the Tribes' ancient and fundamental rights to continue to use the Upper Klamath Lake and its associated inflow and outflow posed a direct, existential conflict of the most fundamental kind with the Tribes' core entitlement to the "'continuation of [their] traditional hunting and fishing lifestyle.'" *Id* at 10, *quoting United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983).

No such conflict exists here. As discussed in the following Section, Backcountry challenges BIA's approval of the Lease, not the lawfulness of the Lease itself. The Lease is not even in the record of this case. The Lease existed in 2019 before BIA's approval in 2020, and will continue to exist whether or not BIA's approval is vacated to assure BIA's compliance with procedural laws.

III. HERE, BY CONTRAST, BACKCOUNTRY CHALLENGES BIA'S APPROVAL ONLY, AND HAS NEVER SOUGHT TO SET ASIDE THE BAND'S LEASE WITH TERRA-GEN

The District Court based its ruling on the mistaken premise that Backcountry's lawsuit challenges the Band's wind energy Lease with Terra-Gen. It stated, "Plaintiffs *are* challenging the Tribe's extant Lease with Terra-Gen. . . ." I-ER-18 (original emphasis). The Lease is not even in the record before this Court, as the Band and Terra-Gen refused to disclose its terms to Backcountry. *E.g.*, ER II-ER-95. Taking its cue from them, and confirming its view that its approval did not purport to determine the Lease's validity or lawfulness, BIA did not attach it to any of its approval documents, its Final Environmental Impact Statement, or any other document in the administrative record underlying its approval.

The lawfulness of the Lease has never been challenged in this proceeding. Nor has the lawfulness of any of its terms, all of which remain shielded from public view. As noted, the Tribe and Terra-Gen have refused to disclose the Lease to Backcountry, claiming its terms and its validity are not at issue in this litigation. II-ER-95. They argue the Band's interests under the Lease might be harmed by this litigation, but have refused to disclose the Lease to Backcountry, impeding Backcountry's ability to refute their claims. They cannot have it both ways.

This lawsuit is limited to judicial review of BIA's approval of the Lease under the APA. Tribe-SER-67-128 (Amended Complaint). It does not challenge the Band's Lease with Terra-Gen, a private contract over which Backcountry has never sought judicial review. *Id*. The relief sought is limited to vacation of BIA's approvals and an injunction against their implementation to remedy BIA's violations of NEPA, the MBTA and the BGEPA. Tribe-SER-127-128 (Prayer). No relief is sought against either the Tribe or Terra-Gen, let alone their Lease. *Id*.

In summary, the facts here could not be more distinct from those in *Klamath Irrigation*. There, the plaintiffs sought to divert for consumptive use water that had belonged to the absent Tribes since "time immemorial." *Id*. at 10. The plaintiffs' lawsuits sought to wrest control of that water from the Tribes by overturning BIA's decisions that respected and maintained the Tribes' traditional instream use of that water. *Id.* at 18-19. Here, by contrast, Backcountry never challenged the Band's wind energy Lease. The District Court's statement that "Plaintiffs *are* challenging the Tribe's extant Lease with Terra-Gen" (I-ER-18, original emphasis) is simply incorrect. The Lease antedates BIA's approvals; the Tribe's receipt of benefits under the Lease, such as the scholarship program started

in 2019, commenced *before* BIA's approval of the Lease in April 2020. Tribe-SER-10. Because this case does not challenge the Lease, it should proceed.

IV. BIA AND TERRA-GEN CAN ADEQUATELY REPRESENT THE BAND'S INTERESTS IN DEFENDING THE LAWFULNESS OF BIA'S APPROVAL OF THE BAND'S LEASE

Klamath Irrigation is also distinguishable because the facts leading to its ruling that the absent Tribes' interests could not be adequately represented by the existing parties are not present here. *Id.* at 19-22. There, the Court found that Reclamation's interest "in defending its Amended Proposed Action pursuant to the ESA and APA" was different from the "Tribes'primary interest . . . in ensuring the continued fulfillment of their reserved water and fishing rights." *Id*. at 21.

Here, by contrast, there is a *second* defendant – Terra-Gen – that not only shares the Band's interest in defending BIA's approval of that Lease, but *also* shares the Band's interest in *fully implementing the Lease* and securing all its economic benefits. II-ER194-204 (Terra-Gen's joinder in Band's motion to dismiss). This point is critical. There is no interest of the Band this litigation might threaten other than those arising from the Lease.

Of course, as shown Backcountry does not challenge that Lease. At most, Backcountry's success in vacating BIA's approval of the Lease would only impact implementation of the Lease by its two contracting parties – Terra-Gen and the Band. Those two defendants share the *same* interest in defending and implementing that Lease.

In ruling to the contrary, the District Court mistakenly conflated the Band's interest in defending and implementing the validity of the Lease – an interest that Terra-Gen shares – with its separate interest in maintaining its sovereignty – an interest that this litigation does *not* challenge. 1-ER-19 ("a decision in Plaintiffs'

favor . . . would also impair the Tribe's sovereign interests"). Nothing in Backcountry's Complaint or its arguments has ever questioned or challenged the Band's sovereignty. The relevant inquiry is whether an existing party can adequately defend each interest of the absent party that is *challenged by the suit*.

The Band's interest in implementation of its Lease with Terra-Gen is coterminous with Terra-Gen's interest in assuring the Lease is implemented. The District Court's overbroad ruling to the contrary elevates the interest of absent tribes in maintaining their sovereignty into a universal jurisdictional veto even where the lawsuit does not challenge their sovereignty, rendering Rule 19's adequacy of representation test meaningless. It contravenes Rule 19's express rule that adequacy of representation against the claims raised by an existing party defeats an absent party's motion to dismiss. As *Klamath Irrigation* explained:

> "Whether an existing party may adequately represent an absent required party's interests depends on three factors: (1) 'whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments;' (2) 'whether the party is capable of and willing to make such arguments;' and (3) 'whether the absent party would offer any necessary element to the proceedings that the present parties would neglect.'"

Id. at 19, *quoting Dine Citizens*, 932 F.3d at 852. Applying these three factors confirms the District Court erred, as each factor shows the Band's interests are adequately represented here. Regarding the first, the vigorous opposition to date from BIA and Terra-Gen shows they are already making "all the absent party's arguments." As to the second, their determined opposition likewise demonstrates that they are "capable of and willing to make such arguments." And regarding the third, no defendant has shown that "the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Id.*

The similarity of interests shared by Terra-Gen and the Band here is similar to the identify of interests that animated the ruling in *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998), where this Court

> "held that the [federal] government was an adequate representative of a tribe in a suit brought to stall the government from utilizing a newly built dam pending further environmental study. 150 F.3d at 1154-55. [This court] concluded that the government and the tribe shared the same interest in 'ensuring that the [dam was] available for use as soon as possible.'"

Klamath Irrigation at 21. So too here, Terra-Gen and the Band "share[] the same interest" in implementation of the Lease fully and promptly to "ensur[e] that the [wind energy project is] available for use as soon as possible." *Id*.

Because Terra-Gen adequately represents the interests of the Band in fully implementing the Lease, the District Court's contrary ruling is error.

CONCLUSION

The unique facts that led the Court to find that the two tribes absent in *Klamath Irrigation* were both necessary and indispensable parties are not present in this case. Whereas the absent tribes' long-standing and essential water rights were directly threatened by the plaintiff Irrigation Districts' lawsuits and requested relief in *Klamath Irrigation*, here Backcountry does not challenge the Band's Lease. Even if it did, Terra-Gen's interest in vigorously defending that Lease assures it will adequately represent the Band's interests in this case.

Accordingly, the Judgment below should be reversed.

Dated: September 23, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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