

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 CO., LLC and CAMPO BAND OF DIEGUENO
MISSION INDIANS,
Intervenor Defendants-Appellees.

Appeal from the United States District Court for the Southern District of California
No. 2:20-cv-2343 (Hon. Janis Sammartino)

FEDERAL APPELLEES' SUPPLEMENTAL BRIEF

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INTRODUCTION

On September 8, 2022, this Court ordered the parties to file supplemental briefs addressing the relevance of the Court's recent decision in *Klamath Irrigation District et al. v. U.S. Bureau of Reclamation et al.* (9th Cir. No. 20-36009) (*Klamath Irrigation District*) to this appeal.

As explained further below, the *Klamath Irrigation District* decision faithfully follows this Court's decision in *Diné Citizens Against Ruining our Environment v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019) (*Diné Citizens*). As *Klamath Irrigation District* merely restates and applies this Court's existing Rule 19 law, the United States adheres to its prior position that affirmance is compelled by circuit precedent.

THE COURT'S *KLAMATH IRRIGATION DISTRICT* DECISION

Klamath Irrigation District involved a dispute between irrigators, farmers, and other water users (collectively, the irrigators) and the United States Bureau of Reclamation (Reclamation) concerning Reclamation's operation of the Klamath Project, a federal irrigation project in the Klamath Basin. The irrigators challenged Reclamation's operations plan for the Klamath Project, which proposed to maintain water in the Klamath Basin at levels needed to comply with Endangered Species Act obligations regarding certain listed fish species that are of importance to the absent Klamath, Hoopa Valley, and Yurok Tribes. Slip Opn. 14. The irrigators claimed

that, by retaining water for Endangered Species Act obligations and thereby limiting the amount of water available to irrigators, Reclamation was in violation of federal law and infringing on their water rights. *Id.* 15-16.

The Klamath and Hoopa Valley Tribes intervened as of right and then moved to dismiss the action on the ground that they were required parties that could not be joined due to sovereign immunity. *Id.* 15. The district court, applying the Ninth Circuit’s decision in *Diné Citizens*, agreed that the Tribes were required parties, that the Tribes could not be joined due to sovereign immunity, and that the suit could not, in equity and good conscience, proceed. *See id.* 16. It therefore dismissed the action, and the irrigators appealed.

This Court agreed that dismissal was proper, relying heavily on *Diné Citizens*. It first considered whether the absent Tribes were required parties under Federal Rule of Civil Procedure 19(a). Applying *Diné Citizens*, the Court determined that the tribes had a legally protected interest in the suit in the form of their federally reserved fishing rights, which afforded the Tribes a right to water at least “coextensive with Reclamation’s obligations to provide water for instream purposes under the [Endangered Species Act].” *Id.* 18–19. It reasoned, over argument from the irrigators to the contrary, that those interests were not adequately protected by

the United States.¹ Citing *Diné Citizens*, the Court explained that the United States’ interests in complying with its legal obligations and the Tribes’ interest in their treaty-protected rights were “overlapping, [but] not so aligned as to make Reclamation an adequate representative of the Tribes.” *Id.* at 21. The Court reiterated *Diné Citizens*’ conclusion that sharing an interest in the outcome of a particular case is not a sufficient unity of interests for Rule 19(a) purposes. *Id.* at 22.

Turning next to sovereign immunity, the Court held that the tribes could not be joined without their consent, rejecting one irrigation district’s argument that the McCarran Amendment’s waiver of the United States’ sovereign immunity for actions to adjudicate and administer water rights applied and would waive the tribes’ immunity. *Id.* at 23–25.

Finally, the Court again applied circuit precedent to conclude that equity and good conscience required dismissal in the tribes’ absence under Rule 19(b). *Id.* at 25–28. Citing *Deschutes River Alliance v. Portland General Electric Company*, 1

¹ On appeal, the federal government took the same position it presses in this case—that is, that dismissal due to inability to join the tribes was compelled by circuit precedent, specifically *Diné Citizens*. Nonetheless, as in this case, the government continued to note its disagreement with that precedent in light of the Solicitor General-authorized views that the federal government can, in most circumstances, adequately represent an absent tribe and that the U.S. is therefore generally the only required and indispensable defendant in an APA challenge to federal agency action.

F.4th 1153 (9th Cir. 2021), the Court recognized the “wall of circuit authority” that suggested dismissal was the appropriate course of action. Slip Opn. at 26. The Court opined that there was potential prejudice to the tribes in the event of an unfavorable ruling and remarked that the district court was unable to shape relief to lessen that prejudice. In particular, the Court observed, “[i]n cases involving competing claims to finite natural resources, courts have found there is no way to shape relief to avoid prejudice.” *Id.* at 28 (citing *Skokomish Indian Tribe v. Goldmark*, 994 F.Supp.2d 1168, 1187–88 (W.D. Wash. 2014) and *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990)). The Court affirmed the district court’s dismissal without considering any countervailing considerations in favor of proceeding in the Tribes’ absence.

ARGUMENT

***Klamath Irrigation District* confirms that affirmance is compelled by circuit precedent.**

Klamath Irrigation District is further evidence that the *Diné Citizens* decision controls this case. As the United States noted in its brief, this case is indistinguishable from *Diné Citizens*. In all respects material to the Rule 19 analysis, it is also indistinguishable from *Klamath Irrigation District*. Accordingly, the Court is obliged to reach the same conclusion about the application of Rule 19 in this context: the absent Campo Band of Diegueno Mission Indians is a required party

that cannot be joined due to sovereign immunity, and the suit, in equity and good conscience, must be dismissed.

With regard to Rule 19(a), *Klamath Irrigation District* accepted *Diné Citizens*' key holdings, both of which apply equally here.

First, the Court reiterated that a tribe's sovereign interest in controlling its own resources is a sufficient interest for Rule 19(a) purposes. As stated in the federal government's brief, in this suit, the absent Tribe has a sovereign interest in developing the wind resources on its reservation. Fed. Resp. Br. 24-25.

Second, *Klamath Irrigation District* also reemphasized the point, first made in *Diné Citizens*, that a shared interest in the outcome of a particular suit is not itself sufficient to demonstrate that the United States is an adequate representative of an absent tribe under Rule 19(a). Slip Opn. 22. Applying *Diné Citizens* and *Klamath Irrigation District*, the Tribe's and the United States' interests in this suit are sufficiently distinct under this Court's precedent to deem the United States an inadequate representative under Rule 19(a). Under this Court's precedent, therefore, the Tribe is a required party that cannot be joined due to sovereign immunity.²

² Unlike in *Klamath Irrigation District*, no party to this suit disputes that sovereign immunity precludes the Tribe from being joined here without its consent. The sole basis for the plaintiffs' contrary argument in *Klamath Irrigation District* was the McCarran Amendment's limited waiver of sovereign immunity for actions adjudicating and administering water rights, which plainly has no application here.

Similarly, *Klamath Irrigation District*'s discussion of the Rule 19(b) factors follows *Diné Citizens* closely, and is also relevant to this action. The same "wall of circuit authority" counseling in favor of dismissal where the absent party is a tribe, cited by *Klamath Irrigation District* case (and *Diné Citizens*), is relevant here, where the absent party is a tribe. Slip Opn. at 26. Additionally, as in *Klamath Irrigation District* (and *Diné Citizens*), the dispute in this case concerns the use of finite natural resources. Finally, the *Klamath Irrigation District* opinion's failure to discuss any countervailing Rule 19(b) factors also suggests that the fact that the plaintiffs here will not have an alternative forum in the event of dismissal is not dispositive.

In sum, the *Klamath Irrigation District* decision is further evidence that *Diné Citizens* controls this case and that affirmance is compelled by circuit precedent.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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September 22, 2022
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