No. 22-1116

In the Supreme Court of the United States

KLAMATH IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES BUREAU OF RECLAMATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Klamath Tribes and the Hoopa Valley Tribe (Tribes) have federally reserved water and fishing rights in Upper Klamath Lake and the Klamath River. Those vested property rights stem from the Tribes' use of those resources since time immemorial. Because those rights depend, in part, on the preservation and restoration of species protected by the Endangered Species Act (ESA), the federal government partially fulfills its obligations to the Tribes by complying with the ESA. But the Tribes and the federal government have at times disagreed over whether the government is living up to its obligations under the ESA, leading to ongoing litigation between the Tribes and the government.

Here, the Klamath Irrigation District (KID) sued the U.S. Bureau of Reclamation, claiming Reclamation's decision to comply with the ESA (and thus partially fulfill its obligations to the Tribes) was unlawful. The Tribes successfully intervened solely to assert their sovereign immunity and move to dismiss for failure to join a required party under Federal Rule of Civil Procedure 19. The Tribes argued that they were required parties and the litigation could not proceed without them because, among other things, the government could not represent their interests given their ongoing litigation with the government about its ESA obligations. The district court and court of appeals agreed. The splitless question presented is:

Whether the court of appeals abused its discretion in applying the factbound Rule 19 analysis to conclude that the Tribes were required parties and that the lawsuit could not proceed in equity and good conscience in their absence.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

RULES

INTRODUCTION

This case doesn't warrant review. The court of appeals reached the correct result; the petition presents no circuit split or important issue; the Court denied review of the question presented three years ago; and the case is a poor vehicle anyway.

The petition arises from the dismissal of Klamath Irrigation District's (KID) Administrative Procedure Act (APA) suit for failure to join The Klamath Tribes and the Hoopa Valley Tribe (Tribes) as necessary parties under Federal Rule of Civil Procedure 19. After KID sued, the Tribes intervened solely to assert that they have sovereign immunity and the suit cannot proceed without them because it threatens their treaty-based and federally reserved water and fishing rights in Upper Klamath Lake and the Klamath River. The district court and Ninth Circuit agreed. And there is no dispute at this stage that the Tribes have sovereign immunity; that the McCarran Amendment does not waive the Tribes' immunity to KID's suit; and that the Tribes have federally protected water and fishing rights.

Instead, KID asks the Court to take the unprecedented step of announcing a per se Rule 19 test in which no party other than the federal government can be a necessary party in an APA suit. That request contravenes this Court's approach and uniform circuit caselaw. But even if it didn't, further review makes no sense. Indeed, the Court denied cert on the same question just three years ago in *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 161 (2020) (No. 19-1166).

Struggling to distinguish its case from *Diné Citizens*, KID claims its petition is of "vital importance," Pet. 2, because the court of appeals' decision "severely undermine[s]" "[t]he point of the McCarran Amendment" and "endangers" the country's water-rights scheme, Pet. 19-20. But KID has not challenged the Ninth Circuit's holding that *this case does not implicate the McCarran Amendment*. Pet. 13 n.6, 30. The case doesn't present any of the concerns KID claims.

Moreover, KID's underlying claims are meritless; the theory KID relies on has been rejected—including at the United States' urging—by multiple federal courts, including the Ninth Circuit. *See infra* pp. 28-31. The question presented is thus entirely academic. In short, KID claims that the U.S. Bureau of Reclamation (Reclamation) is acting unlawfully by complying with the Endangered Species Act (ESA). In KID's view, an ongoing water adjudication in Oregon requires Reclamation to deliver water to irrigators, even if doing so would violate the ESA or other federal laws. That view of federalism, that state law supersedes conflicting federal law, is backwards. Put simply, KID's underlying claims are not even colorable. That fact alone is fatal to the petition. As the D.C. Circuit has made clear, courts can skip the Rule 19 analysis when they can resolve the merits in the absent sovereign's favor, because there is "little practical difference between a Rule 19 dismissal" and such a merits ruling. *West Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059, 1071 (D.C. Cir. 2023).

The Court should deny the petition.

STATEMENT

KID challenges a fact-intensive application of the flexible Rule 19 standard to an unusual set of facts

and an unusual confluence of disparate areas of law. Although the petition complains of the decision's effect on the McCarran Amendment, KID does not challenge the court of appeals' holding that this case does not in fact implicate the McCarran Amendment. Pet. 13 n.6, 30. Nor does KID explain how it can overcome binding, uniform circuit caselaw holding that the ESA takes precedence over state law and thus foreclosing its underlying claims on the merits.

A. Legal background

1. Rule 19 provides that a "required party" "must be joined" in an action if "that person claims an interest relating to the subject of the action" and that person's absence will "as a practical matter impair or impede the person's ability to protect that interest." Fed. R. Civ. P. 19(a)(1). If a required party cannot be joined, "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or be dismissed." Fed. R. Civ. P. 19(b). To assess whether a case should be dismissed, the court considers the prejudice to the absent party, among other factors. *Id.*

2. The ESA commands that "all Federal departments and agencies shall seek to conserve endangered species and threatened species." 16 U.S.C. § 1531(c)(1). Each agency must ensure that "any action" it takes "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." *Id.* § 1536(a)(2). If an agency determines that a proposed action could adversely affect a listed species, "it must engage in formal consultation" with the appropriate federal agency—the U.S. Fish and Wildlife Service (USFWS)

or the National Marine Fisheries Service (NMFS and, collectively, the Services)—which then "must provide the agency with a written statement," called a Biological Opinion, "explaining how the proposed action will affect the species or its habitat." *Bennett v. Spear*, 520 U.S. 154, 158 (1997) (citing 16 U.S.C. § 1536(b)(3)(A)). When the appropriate Service concludes that the proposed action could "jeopardize the continued existence" of a listed species "or result in the destruction or adverse modification of [critical habitat]," 16 U.S.C. § 1536(a)(2), the Biological Opinion must describe any "reasonable and prudent alternatives" the agency could take to avoid those consequences, *id.* § 1536(b)(3)(A). As the Court has explained, Biological Opinions have "virtually determinative effect[s]" over agency action. *Bennett*, 520 U.S. at 170.

3. Two federal water-related statutes are also relevant.

a. The Reclamation Act, 43 U.S.C. §§ 371 *et seq.*, authorizes the U.S. Bureau of Reclamation to carry out water-management projects. Pet. App. 11. Congress provided that "[n]othing in [the Reclamation] Act" itself shall "interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." 43 U.S.C. § 383. But the Reclamation Act does not purport to limit the applicability of any other federal law—including the ESA. *See California v. United States*, 438 U.S. 645, 671-72 & n.25 (1978). Indeed, the Ninth Circuit and other courts have uniformly held that the ESA's requirements, when applicable, "override the [state-law] water rights" of water users in the Klamath Basin. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999), *cert. denied*, 531

U.S. 812 (2000); *accord Baley v. United States*, 942 F.3d 1312, 1337 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 133 (2020); *Yurok Tribe v. U.S. Bureau of Reclamation*, No. 19-cv-04405, 2023 WL 1785278, at *19 (N.D. Cal. Feb. 6, 2023), *appeals pending*, Nos. 23-15499 & 23-15521 (9th Cir.).

b. The McCarran Amendment waives the United States' sovereign immunity in "any suit (1) for the adjudication of rights to use the water of a river system" or "(2) for the administration of such rights." 43 U.S.C. § 666(a). That waiver "reach[es] federal water rights reserved on behalf of Indians." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 811 (1976). But the waiver doesn't extend to tribes *as parties* to suits. *See Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 566 n.17 (1983).

B. Factual background

1. The Klamath Water Basin encompasses about 12,000 square miles of southern Oregon and northern California. Pet. App. 8. The Klamath Basin includes Upper Klamath Lake in southern Oregon and the Klamath River, which flows from below Upper Klamath Lake, into California. *Id.*

The waters of the Klamath Basin are critical habitats for several ESA-listed species of fish. *Id.* Upper Klamath Lake is the largest remaining contiguous habitat for two endangered species of sucker fish, and a threatened species of coho salmon relies on minimum stream flows in the Klamath River downstream from Upper Klamath Lake. Pet. App. 8, 13. Drought conditions in the Klamath Basin pose a significant existential threat to these species. Pet. App. 8-9.

2. The Tribes have federally reserved fishing rights in the Klamath Basin, which come with correlative water rights.

In an 1864 treaty that established a reservation adjacent to Upper Klamath Lake, the United States promised that the Klamath Tribes would retain "the exclusive right of taking fish" in the waters of the reservation. Pet. App. 9-10 (citation omitted). The Ninth Circuit has held that that treaty promise comes with water rights—specifically, "the right to prevent other appropriators from depleting the streams [*sic*] waters below a protected level," to ensure the Klamath Tribes' fishing rights remain protected. *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983), *cert. denied sub nom. Oregon v. United States*, 467 U.S. 1252 (1984).

The Hoopa Valley Tribe has a reservation along the Klamath River in northern California. Pet App. 11. "Federal and California state courts have recognized" the right of the Hoopa Valley Tribe "to take fish from the Klamath River for ceremonial, subsistence, and commercial purposes was reserved when the Hoopa Valley reservation was created." *Baley*, 942 F.3d at 1323. Those "federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights." *Parravano v. Babbitt*, 70 F.3d 539, 547 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996). The Hoopa Valley Tribe's fishing rights are further protected by an express statutory trust mandate, requiring the federal government to restore and maintain those rights in certain waters within the Klamath Basin. *See* Central Valley Project Improvement Act, Pub. L. No. 102-575, § 3406(b)(23), 106 Stat. 4706, 4720-21 (1992).

These rights are critical to the Tribes. Indeed, throughout the Tribes' histories, their fishing practices have been "not much less necessary to [their existence] than the atmosphere they breathed." *Parravano*, 70 F.3d at 542 (alteration in original; citation omitted). And because these rights depend on having sufficient populations of ESA-listed fish, courts have held that, "[a]t the bare minimum, the Tribes' rights entitle them to the government's compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy." *Baley*, 942 F.3d at 1337; *see* Pet. App. 19.

3. Since 1905, Reclamation has controlled the Klamath River Basin Reclamation Project (Klamath Project), including a dam that regulates waterflow from Upper Klamath Lake. Irrigators and farmers (including KID) have contracts with Reclamation for Klamath Project water. Pet. App. 12. Reclamation considers those contracts "subject to the availability of water": water may be unavailable "due to a drought" or the need "to satisfy prior existing rights" or to comply "with other federal laws such as the [ESA]." *Id.* (citation omitted). And, because Reclamation's operation of the Klamath Project adversely affects sucker fish in Upper Klamath Lake (under the jurisdiction of USFWS) and coho salmon in the Klamath River (under the jurisdiction of NMFS), Reclamation must consult with both Services regarding Project operations. Reclamation has also made clear, as relevant here, that the "[P]roject's 1905 water rights are junior to the reserved water rights of the [T]ribes." Pet. App. 13 (first alteration in original; citation omitted).

Oregon commenced the Klamath Basin Adjudication in 1975. *Id.* Under Oregon law, parties in a stream adjudication submit claims for initial review

by a state water agency, and a state court reviews and finalizes the agency's determination. Or. Rev. Stat. §§ 539.021, 539.130. In the Klamath Basin Adjudication, claims were submitted between 1990 and 2001, and the state agency issued its determinations in 2014. Pet. App. 14. Those determinations are under review in state court but are in effect in the meantime. *Id.*

4. As explained below, this petition arises from KID's challenge to Reclamation's decision to operate the Klamath Project consistent with the 2019 Biological Opinions, in which the Services recommended using water in Upper Klamath Lake to protect the critical habitats of several ESA-listed fish. Those Biological Opinions were the result of a 2017 preliminary injunction, obtained by the Hoopa Valley Tribe, ordering Reclamation to reinitiate consultation with the Services regarding the Klamath Project's effect on threatened salmon in the Klamath River. *Hoopa Valley Tribe v. National Marine Fisheries Serv.*, 230 F. Supp. 3d 1106, 1112, 1146 (N.D. Cal. 2017). The 2019 Biological Opinions recommended using water in Upper Klamath Lake for "instream purposes"—that is, maintaining water levels and flow rates in Upper Klamath Lake and the Klamath River to protect endangered and threatened fish. Pet. App. 15. By complying with its ESA obligations, Reclamation partially fulfilled its trust responsibility to the Tribes given the Tribes' senior water rights, thereby partially protecting the underlying tribal resources, and necessarily reduced the amount of water available to junior rights holders, including KID. *Id.*

C. Procedural background

1. In 2019, KID sued Reclamation in federal district court seeking declaratory relief under the APA. Pet. 11; *see* Pet. App. 86-115 (operative complaint). KID alleges that Reclamation violated water users' state-adjudicated property rights by following the directive in the 2019 Biological Opinions to use Upper Klamath Lake water for instream purposes to comply with Reclamation's obligations under the ESA. Pet. 11, Pet. App. 115. KID argues that Reclamation must operate the Klamath Project in strict accordance with state law, regardless of any obligations imposed by federal law. Pet. 4. That theory relies on the provision of the Reclamation Act that states that "[n]othing in this Act shall … in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." *Id.* (quoting 43 U.S.C. § 383). Thus, KID contends that, if the government cannot satisfy its obligations under the ESA or fulfill the Tribes' senior water rights without diminishing deliveries to KID, it must secure additional water rights "by purchase or by condemnation under judicial process." Pet. 10 (quoting 43 U.S.C. § 421).

The Tribes successfully intervened solely to move to dismiss for failure to join a required party under Rule 19. Pet. App. 16-17. The Tribes argued that their sovereign immunity prevented their joinder in a suit challenging their vested property rights. Pet. App. 17. The district court agreed and granted the motion to dismiss. Pet. App. 40-66, 35-37.

2. The Ninth Circuit affirmed in a factbound decision. Pet. App. 1-34. The court reasoned that, given the circumstances, including the Tribes' preexisting

federally reserved water rights and the ongoing conflict between the Tribes and the government in other litigation relating to the operation of the Klamath Project, the Tribes were necessary parties, Pet. App. 18-24; sovereign immunity prevented their joinder, Pet. App. 24-27; and the suit could not proceed in equity and good conscience without them, Pet. App. 27-30.

a. The court of appeals first held that the Tribes were required parties under Rule 19(a), reasoning that the Tribes had a legally protected interest in their federally reserved water and fishing rights, Pet. App. 19 (citing *Adair*, 723 F.2d at 1411), and that Reclamation could not adequately represent the Tribes' interests, Pet. App. 20. The court emphasized that there was an actual conflict of interest between the government and the Tribes, because those parties "are in active litigation over the degree to which Reclamation is willing to protect the Tribes' interests in several species of fish." Pet. App. 23.

The court next rejected KID's argument that the McCarran Amendment waived the Tribes' sovereign immunity. The court held that this case did not implicate the McCarran Amendment's waiver of sovereign immunity, because this lawsuit was for neither the "adjudication" nor "administration" of water rights. Pet. App. 24-27.

Finally, pointing to a "wall of circuit authority," the court held that the lawsuit could not proceed in equity and good conscience without the Tribes, under Rule 19(b), due in significant part to the prejudice the Tribes would suffer as absent sovereigns and the court's inability to lessen that prejudice. Pet. App. 27-30 (quoting *Deschutes River Alliance v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021)).

b. Judge Bumatay concurred to express a narrower view of why this case doesn't implicate the McCarran Amendment. Pet. App. 30-34. In Judge Bumatay's view, this case could not implicate the McCarran Amendment "because of the presence of the Hoopa Valley Tribe"—a California-based tribe whose rights could not have been adjudicated in the Oregon-based Klamath Basin Adjudication. Pet. App. 33. Thus, KID's attempts to vindicate its rights from the Oregon adjudication would not "adjudicat[e]" or "administ[er]" the Hoopa Valley Tribe's rights to the Klamath River—the prerequisite for bringing the case within the scope of the McCarran Amendment. 43 U.S.C. § 666(a).

c. The court denied panel rehearing and rehearing *en banc*. Pet. App. 68.

REASONS FOR DENYING THE PETITION

The Court should deny the petition because the court of appeals' decision was correct, the petition presents no certworthy issues, and this case is a poor vehicle anyway.

1. The court of appeals' decision was correct, and the petition seeks only factbound error correction. The Ninth Circuit applied the flexible Rule 19 standard to the unique facts of this case and correctly affirmed the dismissal of KID's suit for failure to join the Tribes under Rule 19. Contrary to KID's argument, the court did not hold that a tribe is always a required party in an APA suit. Rather, the court correctly held that the United States could not adequately represent the Tribes' interests given other ongoing litigation between the government and the Tribes over Reclamation's compliance with the ESA and the Tribes' water rights. There is nothing remarkable,

much less certworthy, about that conclusion. And the Ninth Circuit has consistently applied the fact-intensive Rule 19 standard in other cases, sometimes finding that the action must be dismissed and other times that it should be allowed to proceed.

2. The petition presents no certworthy issues. KID claims that the court of appeals' decision will "undermine[]" the nation's water-law regime and the McCarran Amendment. Pet. 2. But the court of appeals held that this case doesn't even implicate the McCarran Amendment, and KID does not challenge that holding. Pet. 13 n.6, 30. Instead, KID objects only to the court's application of the flexible Rule 19 standard to the facts of this case. The Court declined to take up the same issue three years ago in *Diné Citizens*, and this case doesn't call for a different result.

3. This case is a poor vehicle for addressing the application of the Rule 19 standard in APA suits. KID's substantive claims are meritless. Indeed, multiple federal courts have directly rejected KID's merits arguments. KID's repeated losses on the merits belie its assertion that this particular Rule 19 dismissal prevents it from pursuing its claims. This case is also unusual in that, as noted, the United States and the Tribes are in separate active litigation over the subject matter of this lawsuit, underscoring that the United States cannot adequately represent the Tribes' interests in this case.

I. The court of appeals' decision is correct.

The court of appeals correctly affirmed the dismissal of this suit for failure to join the Tribes under Rule 19. The court applied the flexible Rule 19 standard to the unique facts of this case and found that, given the Tribes' preexisting treaty and federally reserved

water rights and the actual conflict between the Tribes and the United States regarding the government's obligations under the ESA, the government could not adequately represent the Tribes' interests. That decision follows this Court's instruction that the "the determination whether to proceed [under Rule 19] will turn upon factors that are case specific," *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 862-63 (2008). Accordingly, the Ninth Circuit, like other courts of appeals, has consistently rejected any per se approach in Rule 19 cases.

A. The court of appeals correctly decided that this lawsuit could not move forward without the Tribes.

Following the three-part analysis required by Rule 19, *see* Pet. App. 18, the Ninth Circuit held that this suit could not proceed without the Tribes. The court was right at each step.

1. The Ninth Circuit correctly held that the Tribes were required parties under Rule 19(a) because they (a) have "a legally protected interest in the suit" and (b) the United States cannot adequately represent their interests. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (emphasis omitted); Pet. App. 18-24.

a. The court of appeals correctly determined the Tribes have a legally protected interest that this litigation threatens. Pet. App. 19-20. The court explained that, although an "absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedure," that party could have a legally protected interest "where the effect of a plaintiff's successful suit would be to impair a right *already granted*." Pet. App. 19

(emphasis added; quoting *Diné Citizens*, 932 F.3d at 852). And, here, the Tribes possess preexisting federal reserved fishing and water rights, which KID's lawsuit sought to impair. *Id.* (citing *Parravano*, 70 F.3d at 541; *Adair*, 723 F.2d at 1411).

It is beyond dispute that the Tribes have a strong interest in their fishing and water rights. *See Parravano*, 70 F.3d at 541-42; *Adair*, 723 F.2d at 1411; *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981). Indeed, KID does not contest that the Tribes have an interest "in the water" at issue. Pet. 31. Rather, KID claims that the Tribes have no interest in "the method by which Reclamation acquires it." *Id.* KID argues that Oregon law trumps the federal government's obligations under the ESA and its duties to the Tribes and that, if Reclamation wants to honor those obligations, it can fulfill them by purchasing water rights or through judicial condemnation. *Id.* That argument fails on the merits, *see infra* pp. 28-29, but it has no bearing on the Rule 19 analysis. As the court explained, this lawsuit seeks to "alter Reclamation's ability" to fulfill "the Tribes' long-established reserved water rights." Pet. App. 20. If KID prevailed, there is no guarantee that the United States would or could fulfill its obligations to the Tribes. Thus, "as a practical matter," the suit would "impair or impede the [Tribes'] ability to protect [that] interest." Fed. R. Civ. P. 19(a)(1)(B)(i).

b. The court of appeals also correctly concluded that the United States could not represent the Tribes' interests. To reach that conclusion, the court examined the same factors that it has long applied in APA Rule 19 cases. Pet. App. 20 (citing *Alto v. Black*, 738 F.3d 1111, 1127-28 (9th Cir. 2013) (United States could represent tribal interests) and *Diné Citizens*,

932 F.3d at 852 (United States could not represent tribal interests)); *see infra* pp. 18-21. That decision was correct.

The court correctly determined that the Tribes' and the government's interests "differ[ed] in a meaningful sense." Pet. App. 22 (citation omitted). As multiple federal courts have held, the Tribes' water rights are "*at a minimum* coextensive with Reclamation's obligations to provide water for instream purposes under the ESA." Pet App. 19 (emphasis added; citation omitted); *see Baley*, 942 F.3d at 1337. Thus, it does not follow that Reclamation fully protects the Tribes' water and fishing rights simply by doing "the bare minimum." *Baley*, 942 F.3d at 1337. Indeed, "[w]hile Reclamation has an interest in defending its interpretation of its obligations under the ESA … it does not share the same interest in the water that is at issue here." Pet. App. 23. Put simply, the court of appeals correctly recognized that the Tribes' and government's interest did not align, creating a potential conflict.

And that potential for conflict is more than hypothetical. As the court observed, the Tribes and the government are actively litigating "the degree to which Reclamation is willing to protect the Tribes' interests in several species of fish." Pet. App. 23; *see also Hoopa Valley Tribe*, 230 F. Supp. 3d at 1112-13; *Klamath Tribes v. U.S. Bureau of Reclamation*, 537 F. Supp. 3d 1183, 1184 (D. Or. 2021); *Klamath Tribes v. U.S. Bureau of Reclamation*, No. 22-00680 (D. Or.). In fact, that "active litigation," Pet. App. 23, produced a court order requiring Reclamation to reinitiate consultation under the ESA, which led to the 2019 Biological Opinions. *See supra* p. 8; *Hoopa Valley Tribe*, 230 F.

Supp. 3d at 1146. And those Biological Opinions, in turn, gave rise to *this* litigation. Pet. App. 15-16.

Even KID concedes that "a conflict of interest with the government" could be sufficient to make a tribe a required party under Rule 19. Pet. 27. But KID fails to explain why there is no conflict here, given the active litigation between the Tribes and the government on the substance of this lawsuit—let alone why the Ninth Circuit's decision that there is a conflict merits this Court's review.

2. Although the Tribes are required parties under Rule 19(a), joinder is impossible here because of their sovereign immunity, as the court of appeals correctly held. The court correctly rejected KID's argument that the McCarran Amendment waived the Tribes' sovereign immunity—a determination that KID has expressly declined to challenge. Pet. 13 n.6, 30; *see infra* pp. 21-22.

Under the McCarran Amendment, the United States has waived its own sovereign immunity only in suits "for the adjudication of [water] rights" or "for the administration of such rights." Pet. App. 25 (quoting 43 U.S.C. § 666(a)). The court agreed with the government that this APA challenge did not involve an "adjudication of [water] rights" or an "administration of such rights," and thus was outside the scope of the McCarran Amendment. Pet. App. 25-27; CA9 U.S. Br. 20-22. Among other reasons, this case could not have involved an adjudication or administration of the rights of the Hoopa Valley Tribe—because they are a California tribe with water rights within California, and an Oregon-based stream adjudication did not and could not reach the water rights of users in another state. Pet. App. 27; *United States v. District Court in*

& for the County of Eagle, 401 U.S. 520, 523 (1971). Thus, KID's attempt to protect its Oregon-based water rights could neither "adjudicat[e]" nor "administ[er]" the rights of the Hoopa Valley Tribe. 43 U.S.C. § 666(a).

3. Finally, the Ninth Circuit correctly held that this lawsuit could not proceed in equity and good conscience without the Tribes. Pet. App. 27-30. Of the four factors that Rule 19(b) advises courts to consider—(1) the "potential prejudice" to the absent party, (2) the "possibility to reduce prejudice," (3) the "adequacy of a judgment without the required party," and (4) the "adequacy of a remedy with dismissal," Pet. App. 27—all but the third factor weigh in favor of dismissal. As the court correctly noted, the possibility of prejudice to the Tribes is obvious, and that prejudice cannot be reduced (the first two factors), given that KID's lawsuit directly targets the Tribes' fishing and water rights. Pet. App. 29-30. And as to the fourth factor, KID cannot credibly claim it lacks an adequate remedy outside of this action, given the multiple other federal cases in which it has pursued these same arguments—and lost on the merits. *See infra* pp. 29-31.

KID argues (Pet. 34-35) that the court of appeals erred by following "a wall of circuit authority" giving significant weight to tribes' sovereign status in the Rule 19(b) analysis. Pet. App. 27-28 (quoting *Deschutes River Alliance*, 1 F.4th at 1163). But this Court's precedent requires that approach. Indeed, the Court has held that "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action *must be ordered* where there is a potential for injury to the interests of the absent sovereign." *Pimentel*, 553 U.S. at 867 (emphasis added). Because there was a potential for

injury to the sovereign Tribes, Rule 19(b) required dismissal, as the Ninth Circuit correctly concluded.

B. The Ninth Circuit appropriately rejects per se rules in Rule 19 cases.

KID claims that the Ninth Circuit has adopted a per se rule that "tribes will always be required parties" in APA suits. Pet. 14. That's wrong. The court of appeals' decision here and its caselaw more broadly reflect this Court's guidance that "the determination whether to proceed [under Rule 19] will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations." *Pimentel*, 553 U.S. at 862-63. The Ninth Circuit has explained that the Rule 19 analysis "is necessarily fact- and circumstance-specific." *Alto*, 738 F.3d at 1126. Its decision here illustrates that flexibility. For instance, the court explained that an absent tribe (or any litigant) will *generally* not be a required party in an APA lawsuit because "an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures"—the only issue at stake in many APA cases. Pet. App. 19 (quoting *Diné Citizens*, 932 F.3d at 852). But, the court continued, an absent party "*may* have a legally protected interest" in such a suit if that suit could impair a private right "already granted." *Id.* (emphasis added). Thus, contrary to KID's assertion, there is no categorical rule in the Ninth Circuit that tribes are always required parties under Rule 19. As discussed below, the caselaw also disproves KID's claim that its petition presents an important issue warranting this Court's review. *Infra* pp. 24-28.

1. In multiple APA cases, the Ninth Circuit, like other courts of appeals, *infra* pp. 24-28, has held that

tribes are not required parties under Rule 19 because their interests were sufficiently aligned with the government's. In *Alto*, for example, a former tribal member sued the Bureau of Indian Affairs (BIA), claiming that the BIA had unlawfully disenrolled him from the tribe at the tribe's urging. 738 F.3d at 1116-17. The court held that the tribe was not a required party because, even though the tribe had an interest in the litigation, that "interest [was] adequately represented by existing parties." *Id.* at 1127-28 (quoting *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999)). The court reasoned that the United States and the tribe shared the same interest in defending the disenrollment decision and that the tribe's constitution had expressly "delegated its authority over enrollment to the BIA." *Id.* at 1128-29.

In other APA cases where the Ninth Circuit has held that tribes were not required parties under Rule 19, the court has similarly focused on how closely the tribes' and the government's interests aligned and whether a conflict could arise. In *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153 (9th Cir. 1998), an environmental group alleged the government had failed to adequately consider an endangered species in adopting a plan to open a new water-storage facility that a tribe also had the right to use. The court held that the United States could adequately represent the tribe because the government and the tribe "share[d] a strong interest" in the outcome of the case—both wanted the storage facility "available for use as soon as possible"—and there was no "possibility of conflict arising." *Id.* at 1154. The interests were likewise aligned in *Washington v. Daley*, which involved a state's challenge to a Department of Commerce fishing regulation that protected tribal

fishing rights. 173 F.3d at 1161. The Ninth Circuit held that "the Secretary and the Tribes ha[d] virtually identical interests" and there was thus no "potential for inconsistency between the [government's] obligations to the Tribes and its obligations to protect the fishery resource." *Id.* at 1167-68.

2. The Ninth Circuit conducts the same fact-intensive Rule 19 analysis in cases, like this one, where it holds a tribe is a necessary party. *Diné Citizens*—the only other Ninth Circuit decision the petition cites where a suit was dismissed under Rule 19 for failure to join a necessary sovereign party—took just that approach. There, the Ninth Circuit held that a tribe was a necessary party to a lawsuit that environmental plaintiffs brought against the Department of the Interior, challenging the government's reauthorization of a mine on the Navajo Nation's reservation. *Diné Citizens*, 932 F.3d at 847-48. In that case (as here) the court cited *Alto* for its rule statement on whether an existing party will adequately represent an absent one—even though *Alto* had come out the other way. *Id.* at 852; Pet. App. 20. And the court expressly distinguished *Southwest Center for Biological Diversity* and *Alto*, noting the closeness of the government's and the Tribes' "shared interest[s]" in those cases. *Diné Citizens*, 932 F.3d at 854-55. On the other hand, in *Diné Citizens*, the relevant interests "differ[ed] in a meaningful sense." *Id.* at 855. The government's "overriding interest" was in complying with environmental laws, while the tribe's "sovereign interest" was in "ensuring that the Mine and Power Plant continue to operate and provide profits." *Id.*

The conflict of interests between the United States and the Tribes is even more obvious here. As the Ninth Circuit noted, "the Tribes are in active

litigation" with Reclamation over Reclamation's compliance with the ESA. Pet. App. 23; *see supra* pp. 15-16. It is not surprising that a court would find, in applying "a necessarily fact- and circumstance-specific" test, *Alto*, 738 F.3d at 1126, that a party actively litigating against a counterparty in one case cannot simultaneously represent that counterparty's interests in a related case. This Court need not review that commonsense conclusion.

II. The petition presents no certworthy issues.

KID claims the Court should grant review because, in its view, the Ninth Circuit's opinion will "severely undermin[e] the comprehensive, century-old regime Congress implemented to allocate water in the West." Pet. 3. But the court of appeals expressly held that this case does not involve an adjudication or administration of water rights, and KID does not challenge that holding. *See* Pet. 13 n.6, 30. Instead, KID objects to the Ninth Circuit's application of the flexible Rule 19 standard to the facts of this case. The Court denied cert on that factbound question three years ago in *Diné Citizens*, where the federal government declined to recommend review, and there is no reason this case warrants a different result.

A. Despite KID's repeated invocation of the Western water crisis, it does not seek review of the court of appeals' holding that this case doesn't implicate the McCarran Amendment.

1. KID claims that the question presented "is of vital importance," and warrants urgent review, because "the Ninth Circuit has gravely undermined the federal-state water rights framework." Pet. 2. KID says the court of appeals' decision gives tribes a "veto

power" that defeats "[t]he point of the McCarran Amendment" and "endangers" the country's water-rights scheme. Pet. 19-20.

The Ninth Circuit's Ruling does no such thing. As the government argued below, "this is not a McCarran Amendment case." CA9 U.S. Br. 20-22. The court agreed, Pet. App. 24-27, and KID has not challenged that determination, *see supra* pp. 21-22. Thus, contrary to KID's protestations, the Ninth Circuit's decision has not given tribes a "veto power," Pet. 2, in cases that involve an "adjudication" or "administration" of water rights, 43 U.S.C. § 666(a).

Remarkably, while arguing that the Ninth Circuit's decision "'sound[s] the death knell' for judicial review" in water-rights cases, Pet. 19, KID has declined to challenge the only portion of that ruling that implicates water-rights law or the McCarran Amendment, *see* Pet. 13 n.6. KID even goes so far as to call that holding "immaterial" to the petition. Pet. 30. Those concessions are fatal. Nothing in the Ninth Circuit's opinion limits the McCarran Amendment's waiver of sovereign immunity in *actual* McCarran Amendment cases, because the court held that this case doesn't implicate the McCarran Amendment. Nor could this Court's review bring additional federal cases within the scope of the McCarran Amendment, because KID doesn't seek review of that issue here. Pet. 13 n.6, 30.

2. Since it filed this petition, KID has also filed another petition, in *Klamath Irrigation District v. U.S. Bureau of Reclamation* (*Klamath II*), No. 23-216 (U.S.), that underscores that the Rule 19 issue is unrelated to KID's concerns about Western water rights. In *Klamath II*, KID sued Reclamation in Oregon state

court, bringing claims similar to the ones it brought here. Reclamation removed to federal court, the district court denied KID's remand motion, and the Ninth Circuit denied KID mandamus relief. As explained below (at 30-31), the *Klamath II* petition likewise doesn't warrant review, but KID tries to use it to make both cases appear more certworthy.

KID's *Klamath II* petition argues that the Ninth Circuit's mandamus ruling "enable[s] the federal government to remove the vast majority of [McCarran Amendment] *administration cases*," while the court's ruling in this case "allow[s] tribes to obtain dismissal once *those cases* reach federal court." *Klamath II* Pet. 27 (emphasis added). That's wrong. The Ninth Circuit's Rule 19 ruling here expressly turned on the court's antecedent holding that this is *not* a McCarran Amendment administration case. *Supra* pp. 16-17. Thus, KID's *Klamath II* petition makes clear that, at bottom, KID thinks its lawsuits are McCarran Amendment cases. But it has expressly *disclaimed* that argument. Pet. 13 n.6. (And in *Klamath II*, the court of appeals noted that the agency conducting the state court water adjudication dismissed the possibility that KID's claims were properly before the state court, saying that "the Klamath County Circuit Court's jurisdiction does not extend to those issues." *Klamath II* Pet. App. 14-15.) Instead, KID asks the Court to abandon the factbound Rule 19 standard—which applies across the board in all federal cases—to address purported legal errors that could arise only in cases that relate to water. The Court should decline that invitation.

B. There is no circuit split.

KID seeks review of the Ninth Circuit's factbound application of the well-worn Rule 19 standard. That request isn't certworthy. KID nonetheless attempts to manufacture a circuit split by suggesting "tension" between the Ninth Circuit's decision and decisions of other circuits. Pet. 25. KID relies on exactly the same courts of appeals decisions that the unsuccessful petitioner in *Diné Citizens* cited just three years ago. *Compare* Pet. 25-27, *with Diné Citizens* Pet. 17-22. There is no split, or even tension, in those decisions.

1. KID first claims (Pet. 25) a conflict between the Ninth Circuit's ruling here and the Seventh's Circuit's decision in *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999), *cert. denied*, 531 U.S. 811 (2000). In *Thomas*, the Seventh Circuit held that a tribe was not a required party in an APA challenge to the government's procedures for administering an election to amend the tribe's constitution. *Id.* at 667-68. But given the different tribal interests at issue, there is no legal inconsistency between *Thomas* and this case.

The Seventh Circuit's holding followed from the tribe's limited "interest in the legal structure" of those elections, which were "federal—not tribal—elections." *Id.* Although the tribe may have had an interest in the elections' *outcomes*, it did not have a substantial interest in the *procedures* by which they were administered—which were the target of the lawsuit. *Id.* at 667-68. And even if the tribe had an interest in the outcome of the elections, it did not have a right to any *particular* outcome. That reasoning presents no tension, much less conflict, with the Ninth Circuit's reasoning here. As the Ninth Circuit recognized, KID's suit seeks to "alter Reclamation's ability or

duty" to satisfy "the Tribes' long-established reserved water rights." Pet. App. 20. Thus, unlike in *Thomas*, the Tribes here have a legally protected right to a substantive outcome that is directly in the crosshairs of KID's lawsuit.

Other Seventh Circuit caselaw drives home the lack of conflict. Like the Ninth Circuit, the Seventh Circuit recognizes that Rule 19's "flexibility" "mandates a case-specific inquiry." *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 481 (7th Cir. 1996). That inquiry, the Seventh Circuit has said—citing favorably to the Ninth Circuit—is "practical," "fact specific," and "designed to avoid the harsh results of rigid application." *Id.* (quoting *Makah Indian Tribe*, 910 F.2d at 558). That flexibility, combined with the cases' different facts, explain the different outcomes in *Thomas* and this case.

2. KID next asserts (Pet. 26-27) a conflict with the Tenth Circuit, and points to *Sac & Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002). That's wrong, too. In *Sac & Fox Nation*, the Tenth Circuit held that the tribe was not a required party in a challenge to an agency decision to designate a federal property as "Indian lands" under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721, which would have allowed the tribe to operate a casino there. *Sac & Fox Nation*, 240 F.3d at 1256-58. For two reasons, that decision does not conflict with the Ninth Circuit's decision.

First, as in *Thomas*, the absent tribe in *Sac & Fox Nation* did not have a pre-existing right to any substantive outcome of the challenged agency action. Although the tribe had an "economic interest" in the agency's decision, it had no legal entitlement to

operate a casino. *Id.* at 1259. Again, this case is different. Independent of any agency action taken pursuant to the ESA, the Tribes here have legally protected water and treaty rights in Upper Klamath Lake and the Klamath River.

Second, *Sac & Fox Nation* cited favorably to the Ninth Circuit's opinion in *Daley* in concluding that "the [agency's] interest in defending [its] determinations is 'virtually identical' to the interests of the Wyandotte Tribe." *Id.* (citing *Daley*, 173 F.3d at 1167-68). The Tenth Circuit did not apply a different legal test than the Ninth Circuit or hold that a tribe is never a required party under Rule 19 in APA cases. Rather, that court examined how close the tribes' and the government's interests actually were—as the Ninth Circuit does, *see supra* pp. 18-21—and concluded they were "virtually identical."

The two Tenth Circuit cases that KID cites in a footnote (Pet. 27 n.11) reinforce that that court applies the same fact-specific approach as the Ninth Circuit in Rule 19 cases. In *Kansas v. United States*, 249 F.3d 1213, 1226-28 (10th Cir. 2001), which involved facts similar to those in *Sac & Fox Nation*, the Tenth Circuit found a tribe was not a required party under Rule 19(a). And the court reached the opposite conclusion in *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977). There, the plaintiffs challenged the adequacy of an agency's environmental impact statement. *Id.* at 557. The court held that the tribe *was* a required party under Rule 19(a) because "the duties and responsibilities of the [agency] may conflict with the interests of the Tribe." *Id.* at 558. To be sure, the court in *Manygoats* decided that the case could move forward in equity and good conscience, under Rule 19(b), because the lawsuit sought only a new environmental impact

statement, which would "not necessarily result in prejudice to the Tribe." *Id.* But that logic doesn't support the same outcome here. The relief KID seeks would directly impair the Tribes' long-held rights. Pet. App. 20, 29.

3. Finally, KID argues (Pet. 26) there's a split with the D.C. Circuit's decision in *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). That's incorrect as well.

In *Ramah*, the D.C. Circuit held that a tribe was not a required party in a lawsuit challenging the formula the government used to disburse funds associated with operating tribal programs. *Id.* at 1341, 1352. That approach aligns with the Ninth Circuit's Rule 19 decisions. As in the Ninth Circuit, *see supra* pp. 13-14, the D.C. Circuit's "Rule 19 analysis must begin with an assessment of whether the nonparty Tribes have a legally protected interest" in the outcome of the case, *Ramah*, 87 F.3d at 1351. And in *Ramah*, the court didn't need to go further. It held that the tribe didn't have a legal interest in the funds to begin with because they would provide only "negligible" benefits to the tribes. *Id.* at 1351. There's no dispute here, on the other hand, that the Tribes' have a substantial interest in the water and fish in the Klamath Basin. *See supra* p. 14.

Like its sister circuits, the D.C. Circuit has never held that a tribe cannot be a required party in an APA action. To the contrary, *Ramah* acknowledged—citing a Ninth Circuit decision—that the "United States cannot adequately represent interest[s] of nonparty Tribes where 'competing interests and divergent concerns of the tribes' might conflict with" those of the United States. 87 F.3d at 1352 (quoting *Shermoen v.*

United States, 982 F.2d 1312, 1318 (9th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993)). In short, the Rule 19 analysis in the D.C. Circuit, like in other courts, depends on the facts of each case.

III. This case is a poor vehicle

Splitlessness and lack of importance aside, this case is a poor vehicle for addressing the Rule 19 standard in APA lawsuits. KID's underlying claims fail on the merits because they rely on a backwards view of federalism in which state-adjudicated water rights trump federal law. Unsurprisingly, multiple federal courts have rejected KID's theory in recent years. For the same reason, KID's assertion that the Rule 19 dismissal has deprived it of a forum to bring its arguments rings hollow. What's more, active litigation between the Tribes and the United States demonstrates, even by the standard articulated by the government in its *Diné Citizens* brief before the Ninth Circuit (No. 17-17320, at 13), that this is an "unusual case[]" where the United States cannot represent the Tribes' interests.

A. KID's underlying claims fail on the merits.

1. Rule 19 aside, KID's claims would fail even if they proceeded in district court. KID claims that Reclamation acted unlawfully when it "fulfill[ed] its obligations under the ESA and to the Tribes" pursuant to the 2019 Biological Opinions and limited the amount of water available to other users. Pet. 10. KID contends that the rights it secured in the Klamath Basin Adjudication, conducted under Oregon law, supersede Reclamation's duty to follow the ESA and to honor the Tribes' senior water and treaty rights. *See supra* p. 9. That's completely backwards under the

Supremacy Clause. *See* U.S. Const. art. VI, cl. 2. In fact, the Ninth Circuit has already applied that fundamental rule to these exact facts. In a case involving the Klamath Basin, the Ninth Circuit held that "Reclamation has the authority to direct Dam operations to comply with the ESA," and accordingly, the ESA's requirements "override the water rights of the Irrigators." *Patterson*, 204 F.3d at 1213. KID's suit fails no matter how Rule 19 is resolved.

KID's only counterargument (Pet. 4) is that the Reclamation Act states that "[n]othing in this Act" will interfere with any state laws regarding water distribution. 43 U.S.C. § 383. KID argues that that provision requires Reclamation to give "deference" to and "comply with" state laws in operating the Klamath Project. Pet. 4. But even if nothing *in the Reclamation Act* supersedes Oregon law, Reclamation must comply with *all* federal laws—including the ESA. That's why the Ninth Circuit has already held that the ESA's requirements "override the water rights" of water users in the Klamath Basin. *Patterson*, 204 F.3d at 1213. That a state agency quantified those water rights in the Klamath Basin Adjudication does not change the fundamental relationship between state and federal law.

2. The weaknesses of KID's merits arguments are plain on their face. That's why federal courts have repeatedly rejected KID's theory.

Earlier this year, a district court in California squarely rejected KID's argument that the Klamath Basin Adjudication displaces the ESA in a case that began as a challenge to the very same water-management plan KID challenges here. *See Yurok Tribe*, 2023 WL 1785278, at *19. The court reached the

straightforward conclusion that Reclamation "must comply with the ESA in operating the Klamath Project," and that the ESA therefore preempts any Oregon law that impedes Reclamation's ability to do so. *Id.* That's because, as discussed, "the ESA's requirements 'override the water rights of the Irrigators.'" *Id.* at *15 (quoting *Patterson*, 204 F.3d at 1213). The court found that KID's arguments—the same merits arguments KID would make here—were "either straw man arguments or [arguments that] misconstrue the applicable law." *Id.* at *18.

Similarly, the Federal Circuit recently rejected a takings claim brought by water users in the Klamath Basin (including KID) arguing that Reclamation had acted unlawfully by limiting water delivery in accordance with the government's obligations to the Tribes and under the ESA. *See Baley*, 942 F.3d at 1337, *cert. denied*, 141 S. Ct. 133 (2020). The court held that "the Tribes had rights to an amount of water that was *at least* equal to what was needed to satisfy the Bureau of Reclamation's ESA obligations." *Id.* at 1337 (emphasis added). And the court specifically rejected the water users' argument—raised by KID in this case—that Oregon state law or the Klamath Basin Adjudication displaced the government's federal-law obligations to the Tribes, reasoning that "federal courts have consistently held that tribal water rights arising from federal reservations are federal water rights not governed by state law." *Id.* at 1340 (citing *Arizona v. California*, 373 U.S. 546, 597 (1963)).

Finally, following the district court's dismissal in this very case, KID "attempted to evade the force of that ruling by bringing essentially the same challenge" in the Oregon state court handling the Klamath Basin Adjudication. *Klamath Irrigation Dist. v. U.S.*

Bureau of Reclamation, No. 21-cv-504, 2022 WL 1210946, at *5 (D. Or. Apr. 25, 2022). The government removed to federal court, and after KID's motion to remand back to state court failed, it sought a writ of mandamus from the Ninth Circuit. Although, in denying mandamus relief, the Ninth Circuit did not reach the merits of KID's claim, it made clear the weakness of KID's position, noting that "Reclamation *must* comply with the ESA." *In re Klamath Irrigation Dist.*, 69 F.4th 934, 941-42 & n.4 (9th Cir. 2023) (citing *Baley*, 942 F.3d at 1323, 1340-41). The court observed that "KID seems to be seeking a new umpire because it has repeatedly struck out in multiple federal courts" in its challenges to "Reclamation's authority to release water to satisfy tribal rights and comply with the ESA." *Id.* at 940, 944 n.11.

That case has given rise to another cert petition in *Klamath II* (No. 23-216). That petition is uncertworthy for the same fundamental reason this one is: KID's merits claims cannot succeed. And that's to say nothing of the other glaring cert problems in *Klamath II*, including the conceded lack of split (*Klamath II* Pet. 29) and the mandamus posture.

3. Because KID's underlying arguments cannot succeed—and federal courts have uniformly rejected them—there is little point to further review. Explaining that "Rule 19 'calls for a pragmatic decision based on practical considerations,'" the D.C. Circuit recently skipped the Rule 19 analysis altogether and granted judgment on the merits in favor of the government (which was aligned with the tribe on the merits). *West Flagler Assocs.*, 71 F.4th at 1071 (citation omitted). The court reasoned that there was "little practical difference between a Rule 19 dismissal on the one hand, and a judgment [that protected the tribe's interests]

on the other." *Id.* The same practical considerations weigh strongly against review here.

B. KID has not been denied its day in court.

KID argues that the Ninth Circuit's decision "closes both the federal and state courthouse doors to water rights holders in the West." Pet. 22-23 (emphasis omitted). That contention is wrong on two levels. *First*, KID has "repeatedly struck out in multiple federal courts" pursuing these same arguments, *In re Klamath Irrigation Dist.*, 69 F.4th at 944 n.11, showing that it has not been denied its day in court. *See supra* pp. 29-31. Indeed, to underscore that KID has had ample opportunity to press its arguments, the Ninth Circuit is currently hearing KID's appeal (which is also likely to fail on the merits) from a district court's ruling that the ESA overrides conflicting Oregon water laws. *See Yurok Tribe v. Klamath Irrigation Dist.*, Nos. 23-15499 & 23-15521 (9th Cir.). And that case involves both Tribes here, as well as KID and Reclamation, proving that there's a forum for KID to raise its arguments free of the Rule 19 ruling it complains of here. *Yurok Tribe*, 2023 WL 1785278. *Second*, as noted, the Ninth Circuit did not say anything about the status of the courthouse doors in *actual* McCarran Amendment cases that adjudicate or administer water rights. *See supra* pp. 16-17. And KID does not challenge the Ninth Circuit's holding that this is not a McCarran Amendment case. *See supra* pp. 21-22. Whether the application of the Rule 19 standard could limit a party's right of review under the APA in *other* cases, that concern does not arise here. This case is thus a poor vehicle for the Court to announce a new Rule 19 standard.

C. The unique facts of this case also make it a poor vehicle.

The unusual facts of this case create additional vehicle problems. Given the "active litigation" between the Tribes and the government on the very subject matter underlying this lawsuit, the government cannot adequately represent the Tribes' interest. Pet. App. 23; *see Hoopa Valley Tribe*, 230 F. Supp. 3d at 1146; *supra* pp. 8, 15-16. Indeed, even under the United States' position before the Ninth Circuit in *Diné Citizens*, this case falls squarely within the set of "unusual cases in which the United States cannot adequately represent a tribe's interest" because of an "existing conflict of interest." *Diné Citizens* U.S. Br. 13. KID agrees that a conflict of interest could make the government an inadequate representative. Pet. 27. Thus, even if the Court adopted that high bar, this case would clear it.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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