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' OPENING BRIEF

DATED: April 1, 2021

s/ Richard S. Deitchman
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

DATED: April 1, 2021

s/ Nathan J. Ratliff
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

DATED: April 1, 2021

s/ Reagan L.B. Desmond
REAGAN L.B. DESMOND, ESQ. (OSB #045129)
CLYDE SNOW & SESSIONS, P.C.
1018 SW Century Drive, Suite 203
Bend, OR 97702
Telephone: (801) 322-2516
Facsimile: (801) 521-6280
rlbd@clydesnow.com
Attorneys for Plaintiff-Appellant Klamath Drainage District

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the nongovernmental corporate parties state as follows:

Klamath Basin Water Users Protective Association, which does business as Klamath Water Users Association, has no parent corporation or any publicly held corporation owning 10 percent or more of its stock.

Date: April 1, 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 Plaintiff-Appellant Klamath Water Users Association

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Court Rules

I. INTRODUCTION

Appellants Shasta View Irrigation District, Tulelake Irrigation District, Klamath Water Users Association, Ben DuVal, Rob Unruh, Van Brimmer Ditch Company, and Klamath Drainage District (Klamath Irrigators) sought review by the federal district court of the United States Bureau of Reclamation's (Reclamation) administrative determination that injured Klamath Irrigators. Klamath Irrigators filed suit against Reclamation seeking a remand of the determination and declaratory relief, pursuant to the Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (June 11, 1946), codified in scattered sections as 5 U.S.C. §§ 551-706. The APA provides an avenue for relief against the United States but does not provide a cause of action or authorize relief against non-federal actors. *Id.*, §§ 702, 706, *see id.* § 701(b) (defining "agency"). The district court held that three non-federal Indian tribes (collectively, "the Tribes") were required parties that could not be joined to Klamath Irrigators' APA action, and that the suit must be dismissed because it could not proceed without the non-federal entities who declined to waive their sovereign immunity and be joined.

Klamath Irrigators allege that Reclamation's *ultra vires* determinations in adopting certain operating procedures for the Klamath Project for 2019-2024 (herein, the "Action") will curtail the water deliveries available for irrigation, have injured and will injure Klamath Irrigators and their communities by depriving them

of water to which they are lawfully entitled, and will force the irrigation district Klamath Irrigators to fail in meeting their own contractual water delivery obligations. Applying Federal Rule of Civil Procedure 19, the district court closed the courthouse to Klamath Irrigators by reasoning that Reclamation, a federal agency charged by law as the tribal trustee, would not adequately represent the interests of the Tribes. On this basis, the district court incorrectly held that the tribal entities were required parties to Klamath Irrigators' APA suit.

Further, in considering whether or not in "equity and good conscience" that case may proceed without intervenors, the district court sanctioned a novel "one-way street" for tribal entities in the Klamath Basin: (1) tribal entities (and other parties) may challenge Reclamation's determinations concerning operation of the Klamath Project by filing suits against Reclamation that seek relief detrimental to Klamath Irrigators' interests, including judgments that adversely affect irrigation water supply; but (2) absent reversal by this Court, Klamath Irrigators will have no recourse when they are adversely affected by unlawful government action that is detrimental to Klamath Irrigators' irrigation water supply unless all Klamath Basin tribes agree to join in the suit.

The district court's decision was contrary to law. Klamath Irrigators seek relief only against Reclamation. Further, Reclamation is the absent Tribes' trustee, and waivers of sovereign immunity of the United States include its actions as

trustee. The principles of equity that govern the Rule 19 indispensability analysis condemn this kind of "one-way street," particularly where this case causes no prejudice to the non-federal entities. The district court's decision must be reversed because Rule 19 cannot be used to slam the courthouse door shut to some entities, like Klamath Irrigators, while remaining open only to tribal plaintiffs.

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 and 16 U.S.C. § 1540(g). The clerk entered final judgment on September 25, 2020. SVID_ER-005. Klamath Irrigators timely filed a notice of appeal on November 23, 2020. SVID_ER-029. Under Federal Rule of Appellate Procedure 4(a)(1)(B)(ii)-(iii) this Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

III. ISSUE PRESENTED FOR REVIEW

Klamath Irrigators are Oregon and California farmers, ranchers, irrigation districts, and similar entities who hold beneficial interests in Klamath Project water rights to irrigate their land. Reclamation is a federal agency under the United States Department of the Interior, which oversees water resource management, specifically as it applies to the Klamath Project, a single purpose irrigation project developed under the authority of the federal Reclamation Act of 1902, Pub. L. No. 58-66, 32 Stat. 388, codified as 43 U.S.C. §§ 371-600e (June 17, 1902)

(Reclamation Act). In their complaint below, Klamath Irrigators allege that Reclamation, in adopting certain operating procedures for the Klamath Project for 2019-2024 has acted in excess of its statutory authority, and contrary to both federal law (the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, codified as amended as 16 U.S.C. §§ 1531-1544 (ESA), and the Reclamation Act), and the determinations made in Oregon's Klamath Basin Adjudication (under section 8 of the Reclamation Act, which governs the appropriation and distribution of water by the United States).

The question presented is: Whether the Klamath Irrigators' APA challenge to a Reclamation determination that harmed Klamath Irrigators due to its negative effects on irrigation water supply, and that sought prospective relief, was improperly dismissed under Federal Rule of Civil Procedure 19 for inability to join three distinct sovereign Indian tribes, parties against whom the Klamath Irrigators have no claims for relief, and where the United States acted as trustee for such Tribes, and where each tribe enjoys and exercises the right to sue the same federal agency to the detriment of the Klamath Irrigators?

IV. RELEVANT STATUTES

Relevant statutes are reproduced in the Addendum to this brief.

V. STATEMENT OF THE CASE

A. Statement of Facts and Procedural History

The Klamath Project (Project) was authorized in 1905 under the Reclamation Act. SVID_ER-012. The Project straddles the Oregon-California border, covering territory in Oregon's Klamath County and California's Siskiyou and Modoc Counties and providing irrigation service to approximately 200,000 acres of land through a complex system of drains, pumping plants, canals, laterals, tunnels, and drains. SVID_ER-013. The authorized purpose of the Project is exclusively the irrigation/reclamation purpose of the Reclamation Act. SVID_ER-013. The Project uses two primary water sources: the waters of the Upper Klamath Lake and the Klamath River, and the waters of the Lost River Basin, which include Clear Lake, the Lost River, and Tule Lake. SVID_ER-009. The Reclamation Act requires Reclamation to comply with state law in the "control, appropriation, use, or distribution of water" unless those laws conflict with "specific," "clear," or "explicit" congressional directives "authorizing the project in question." *See California v. United States*, 438 U.S. 645, 665, 668, 674 (1978) ("Congress in the 1902 Act intended to follow state law as to appropriation of water and condemnation of water rights.").

Klamath Irrigators are special districts (*e.g.*, irrigation and drainage districts) that divert and deliver Klamath water for beneficial irrigation use pursuant to

contracts with the United States, an association formed by those public agencies, and individual farmers who depend on water rights and the districts for delivery of water to irrigate their land. SVID_ER-186–89. Under contracts with the United States, the special district Klamath Irrigators were required to pay allocated costs of construction of Project facilities, and they have continuing obligations to reimburse Reclamation for costs of operation and maintenance of facilities that Reclamation still operates. SVID_ER-193–94. Individual Klamath Irrigators themselves constructed and operated significant works that divert and convey water made available due to the Project or its storage facilities. SVID_ER-185.

This case arose based on a determination by Reclamation related to compliance with section 7 of the ESA. Section 7(a)(2) of the ESA provides that each federal agency shall: "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). Procedurally, the action agency must consult with, and obtain the biological opinion (BiOp) of, the applicable listing agency with respect to whether a proposed action is likely to cause jeopardy or adverse modification of critical habitat. *Id.* § 1536(b)(3). To that end, the action agency prepares a biological assessment (BA) describing the proposed action and species likely to be affected.

Id. § 1536(c). If the consulting agency in its BiOp finds that jeopardy or adverse modification is likely, it must also specify any reasonable and prudent alternatives (RPAs) that it determines would be in compliance with section 7(a)(2). *Id.* § 1536(b)(3)(A).

Following this process, on December 21, 2018, Reclamation transmitted to the United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) a document titled, "The Effects of the Proposed Action to Operate the Klamath Project from April 1, 2019 through March 31, 2029 on Federally-Listed Threatened and Endangered Species" (Original BA). SVID_ER-198.

On February 15, 2019, Reclamation amended its proposed action, in the 2018 Biological Assessment Modified Part 4 (BA Amendment). SVID_ER-198. Together, the Original BA and BA Amendment are referred to as the "Proposed Action." The Proposed Action states as follows:

> The [Proposed Action] for 2019 to 2024 consists of three major elements to meet authorized Project purposes, satisfy contractual obligations, and address protections for listed species and certainty for Project irrigators:
> 1. Store waters of the Upper Klamath Lake and Lost River.
> 2. Operate the Project, or direct the operation of Project facilities, for the delivery of water for irrigation purposes or NWR needs, or releases for flood control purposes, subject to water availability; while maintaining conditions in UKL and the Klamath River that meet the legal requirements under section 7 of the ESA.
> 3. Perform Operations and Maintenance necessary to maintain Project facilities.

SVID_ER-198–99.

On March 5, 2019, Reclamation issued a draft Environmental Assessment titled, "Implementation of Klamath Project Operating Procedures 2019-2024," and allowed two weeks for public comment. SVID_ER-199. On March 29, 2019, NMFS issued its "Endangered Species Act Section 7(a)(2) Biological Opinion, and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response for Klamath Project Operations from April 1, 2019 through March 31, 2024" (NMFS BiOp). SVID_ER-199–200. Also, on March 29, 2019, USFWS issued its "Biological Opinion on the Effects of Proposed Klamath Project Operations from April 1, 2019, through March 31, 2024, on the Lost River Sucker and the Shortnose Sucker" (USFWS BiOp). SVID_ER-200.

On April 1, 2019, Reclamation adopted and approved the Proposed Action as the Action. SVID_ER-200. By its approval of the Action, Reclamation determined it would limit Project water diversions and deliveries based on section 7(a)(2) of the ESA and/or otherwise not make water available to the Klamath Irrigators and their patrons. The limitations also include a cap on the Project's water allocation as well as provisions to require a significantly diminished Project water supply. *Id.*

Klamath Irrigators filed this litigation to obtain review of this administrative determination because it will injure Klamath Irrigators and their communities.

SVID_ER-206. Klamath Irrigators have a statutory right to judicial review under the APA. 5 U.S.C. § 702. In the APA, Congress waived the sovereign immunity of the United States, including Reclamation – the decision-maker that Klamath Irrigators contend has acted outside its authority. Specifically, Klamath Irrigators allege that Reclamation, in adopting the Action, has acted in excess of its statutory authority, and contrary to applicable law. SVID_ER-196. Klamath Irrigators allege that Reclamation's Action will curtail the water deliveries available for irrigation by depriving them of water to which they are lawfully entitled and force the Klamath Irrigators to fail to meet their own water delivery obligations to their patrons, including the individual landowner Klamath Irrigators. SVID_ER-186–90.

Reclamation answered Klamath Irrigators' First Amended Complaint, defending its Action and praying that the district court dismiss the complaint and enter judgment for the United States. SVID_ER-249.

Subsequently, the Tribes sought and were granted intervention for the sole purpose of moving to dismiss on the basis of Federal Rule of Civil Procedure 19. SVID_ER-218. The Magistrate Judge granted the Tribes' motions to intervene, docketing their motions to dismiss. SVID_ER-224.

Klamath Irrigators subsequently filed a Second Amended Complaint for Remand and Declaratory Relief by which Klamath Irrigators sought judicial

review of agency action under the APA. SVID_ER-184. The Second Amended Complaint alleges that Reclamation's administration decisions to approve, adopt, and implement its Action is contrary to law, including that Reclamation's Action is in excess of the agency's lawful authority under section 7(a)(2) of the ESA, and that the Action deviates from the state law requirements imposed on Reclamation by the Reclamation Act.

Klamath Irrigators' Second Amended Complaint seeks prospective declaratory relief and a remand of Reclamation's determination consistent with the following principles: (i) the contracts between Reclamation and the contractor Klamath Irrigators do not confer power or authority upon Reclamation to curtail or limit Klamath Irrigators' use of water in order to benefit listed species or otherwise provide water for instream purposes (SVID_ER-207)[1]; (ii) Reclamation's actions in adopting and implementing the Action violate section 8 of the Reclamation Act (SVID_ER-208); (iii) Reclamation must maintain, operate, and direct operations of

[1] In recent litigation concerning Central Valley Project 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. United States Army Corps of Eng'rs*, 947 F.3d 635, 641 (10th Cir. 2020) (Tenth Circuit decision 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]").

the Project and Project-related facilities in accordance with the requirements of section 8 of the Reclamation Act (SVID_ER-207); (iv) Reclamation's authorization of the Action for ESA-listed species are not activities authorized by any applicable law (SVID_ER-211); and (v) the maximum annual diversion cap of 350,000 acre-feet for the Project as set forth in Reclamation's Action is not authorized or required by law (SVID_ER-211).

The Tribes filed motions to dismiss directed at the Second Amended Complaint. SVID_ER-127, 142. In general, the Tribes argued that they are necessary parties because the relief sought by Klamath Irrigators would "impair or impede, as a practical matter, [the Tribes'] reserved fishing rights and senior reserved water rights" in the Klamath Basin, and that they cannot be joined without their consent due to their sovereign immunity. SVID_ER-136, 166.

The United States did not join in the Tribes' motions to dismiss but filed a response to the Tribes' motions to dismiss stating that *Diṅe-Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019) (*Diṅe-Citizens*) is "controlling authority in this case" and "therefore supports the granting of the Motions to Dismiss." SVID_ER-125. The United States, however, noted that "Federal Defendants disagree with the ruling in *Diṅe-Citizens* and reserve the right to assert in future proceedings that the United States is generally

the only required and indispensable defendant in APA litigation challenging federal agency action." SVID_ER-126.

The Magistrate Judge issued findings and recommendation in support of the motions to dismiss, and over Klamath Irrigators' objections, the district court adopted the Magistrate Judge's findings and recommendation, and granted the Tribes' motions to dismiss the case in its entirety. SVID_ER-006–07, 028. The Klamath Irrigators timely appealed. SVID_ER-029.

B. Federal Rule of Civil Procedure 19

Rule 19 of the Federal Rules of Civil Procedure imposes a "three step inquiry": (1) "Is the absent party necessary (i.e., required to be joined if feasible) under Rule 19(a)?"; (2) "If so, is it feasible to order that the absent party be joined?"; and (3) "If joinder is not feasible, can the case proceed without the absent party, or is the absent party indispensable such that the action must be dismissed?" *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012); *see also* Fed. R. Civ. P. 19.

A person or entity is a "required party" if: either "in that [party]'s absence, the court cannot accord complete relief among existing parties"; or if "that [party] claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party]'s absence may . . . as a practical matter impair or impede the [party]'s ability to protect the interest" or "leave an existing party

subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." *Dińe-Citizens*, 932 F.3d at 851 (quoting Fed. R. Civ. P. 19(a)(1)).

If the party is "required" but cannot be joined, the court must next determine whether the party is "indispensable"; that is, "whether in equity and good conscience the action should proceed among the existing parties or be dismissed." *Dińe-Citizens*, 932 F.3d at 851 (quoting Fed. R. Civ. P. 19(b)). "The inquiry is a practical one and fact specific and is designed to avoid the harsh results of rigid application." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (*Makah*).

VI. SUMMARY OF ARGUMENT

The APA authorizes persons suffering legal wrongs to obtain review of the actions of federal defendants and authorizes relief only against federal entities. The district court erred in dismissing, on the basis of Rule 19 and tribal sovereign immunity, Klamath Irrigators' APA action against Reclamation for violation of federal law, including Klamath Irrigators' claims that Reclamation acted outside the scope of its lawful discretion under section 7(a)(2) of the ESA and contrary to controlling state law applicable to Reclamation by the Reclamation Act.

The Tribes do not have a legally protected interest in Klamath Irrigators' litigation that seeks to require that Reclamation's administrative determinations not

exceed its legal authority. Reclamation adequately represents the Tribes in the federal decision-making at issue in this litigation. In addition, a ruling in Klamath Irrigators' favor will not result in inconsistent obligations for Reclamation because this litigation merely seeks compliance with the law. The Tribes are not required parties under Rule 19(a) of the Federal Rules of Civil Procedure.

Second, even if the Tribes were required parties, dismissal would not be warranted because the case in equity and good conscience must proceed in the absence of the Tribes. 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 district court's ruling sanctions a "one-way street" whereby tribes can sue Reclamation for compliance with law, but no other entities may do so. It is contrary to equity, the very purposes of the APA, and fundamental principles of law to hold that Klamath Irrigators have no recourse when they are injured by unlawful government action, unless three sovereign tribes agree to join in the suit. Klamath Irrigators' APA suit should not be dismissed.

VII. STANDARD OF REVIEW

This Court reviews a district court's ruling on a Rule 19 motion "for abuse of discretion" and "review[s] the legal conclusions underlying that determination de novo." *Alto v. Black*, 738 F.3d 1111, 1125 (9th Cir. 2013) (*Alto*).

The questions of whether a person has an interest relating to an action and whether any such interest is adequately represented by existing parties are legal questions that are reviewed *de novo*. *See Prete v. Bradbury*, 438 F.3d 949, 953 (9th Cir. 2006) ("This court reviews *de novo* a district court's ruling on a motion to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2)." (citation omitted)). In this review, "a court 'by definition abuses its discretion when it makes an error of law.' " *Philippines v. Pimentel*, 553 U.S. 851, 864 (2008) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

"On review of an order dismissing an action under Rule 12(b)(7), [this Court accepts] as true the allegations in Plaintiff's complaint and draw all reasonable inferences in Plaintiff's favor." *Paiute-Shoshone Indians of the Bishop Cmty. v. City of L.A.*, 637 F.3d 993, 996, n.1 (9th Cir. 2011) (citation omitted).

VIII. ARGUMENT

A. The Tribes Are Not Required Parties to this Case

1. The Federal Decision-Maker is the Only Required Party in an APA Case, Subject Only to the Limited Holding in *Diné-Citizens* in this Circuit

Klamath Irrigators filed this action pursuant to the APA against a federal agency and officials (Reclamation) to compel compliance with federal laws that govern the actions of federal agencies only. The Supreme Court has explained that the APA "creates a 'basic presumption of judicial review [for] one "suffering legal

wrong because of agency action." ' " *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (*Weyerhaeuser*) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). When no such review is available – and thus "no consequence[s]" result from violations – "legal lapses and violations occur" more often. *Weyerhaeuser*, 139 S. Ct. at 370 (quoting *Mach Mining LLC v. EEOC*, 575 U.S. 480, 489 (2015) (*Mach Mining*)). Where, as here, no statute precludes review, the Supreme Court has "long applied a strong presumption favoring judicial review of administrative action." *Id.* (quoting *Mach Mining*, 575 U.S. at 486). The legal obligations at issue in this case are compliance with Reclamation's authorized discretion under section 7(a)(2) of the ESA and the mandates of state water law required by section 8 of the Reclamation Act. Those legal obligations apply only to federal entities. Because the cause of action authorizes relief only against federal entities, the federal decision-makers (i.e., Reclamation and its officers) are the only necessary or indispensable parties under Federal Rule of Civil Procedure 19.

Federal courts of appeal, including this Court, have consistently held that in an APA suit seeking to enforce federal laws applicable only to federal entities and seeking relief only from federal entities, the responsible federal entities are the only necessary and indispensable parties under Federal Rule of Civil Procedure 19 – even when the challenged agency action implicates, or has the potential to

implicate, the sovereign or financial interests of an Indian tribe. *See Sw. Ctr. for Biological Diversity v. Babbitt,* 150 F.3d 1152, 1154 (9th Cir. 1998) (*Sw. Ctr.*); *Thomas v. United States,* 189 F.3d 662 (7th Cir. 1999)*; Kansas v. United States,* 249 F.3d 1213, (10th Cir. 2001); *Sac & Fox Nation v. Norton,* 240 F.3d 1250 (10th Cir. 2001); *Manygoats v. Kleppe,* 558 F.2d 556 (10th Cir. 1977) (*Manygoats*); *Ramah Navajo Sch. Bd., Inc. v. Babbitt,* 87 F.3d 1338 (D.C. Cir. 1996).

This Court's recent limited holding in *Diṅe-Citizens,* which is a departure from the general rule, does not support the district court's dismissal of Klamath Irrigators' APA claims. In *Diṅe-Citizens*, plaintiff conservation groups took direct aim at an absent tribe's own business interests by challenging the federal agencies' "opinions and approvals that authorized the continued operations" at a mine owned by the absent tribal corporation (Navajo Transitional Energy Company ("NTEC")) and a power plant in which NTEC had a direct, and substantial, financial interest. *See Diṅe-Citizens*, 932 F.3d at 848-50. This Court undertook a Federal Rule of Civil Procedure 19 analysis, finding that the litigation regarding the mine owned by a tribal corporation could not proceed in the absence of the tribal interest, which could not be joined due to sovereign immunity. *Id.*

Here, the district court erroneously held that the Tribes' claimed interests in federally reserved water and fishing rights are not adequately represented by Reclamation, as its trustee, such that the case must be dismissed because the Tribes

cannot be joined. SVID_ER-022. In so holding, the district court ignored several critical facts that distinguish this Court's ruling in *Diṅe-Citizens*.

Klamath Irrigators' claims here are not directed at the Tribes and do not challenge *any* tribal businesses, contracts, leases, permits, or any other activity in which the Tribes have an interest as a proprietary matter. *Diṅe Citizens* involved extending lease renewals and other federal permitting for an existing mine. *Diṅe-Citizens*, 932 F.3d at 847. Here, the activity is about Reclamation's water project operations. SVID_ER-202–206. Nor do Klamath Irrigators challenge or seek to limit any federal reserved rights that the United States owns in trust for the Tribes. In *Diṅe-Citizens*, plaintiffs sought to roll back permitting for an existing mine, which permitting NTEC (an entity owned by the Navajo Nation) had already relied upon and made investments of $115 million. *Diṅe-Citizens*, 932 F.3d at 850. In this case, Klamath Irrigators seek declaratory relief aimed solely at Reclamation and remand to ensure Reclamation acts within its lawful discretion and complies with the law on a prospective basis. SVID_ER-204–207. As a result, Reclamation, the federal decision-maker, is the only required party in this APA case, and the district court improperly relied on *Diṅe-Citizens* and unique factual circumstances relating to tribal business interests in the subject matter of the litigation, in concluding otherwise.

2. Whatever Interests the Tribes have in Klamath Irrigators' Claims Will be Adequately Represented by Their Trustee, Reclamation

The district court incorrectly determined that the Tribes' interests in the subject matter of this litigation will not be adequately represented by Reclamation. SVID_ER-047. In its ruling, the district court found that only the Tribes "can adequately present and defend their distinct interest in the affected fish and water resources, and their interest in sovereign immunity." SVID_ER-022.

The district court failed to recognize the United States, in making determinations under the ESA, also acts as trustee. Klamath Irrigators' APA claims challenge an administrative determination issued by Reclamation, and the claims are solely directed at Reclamation, which, like the Tribes, has an interest in defeating the claims. The Tribes are not required parties because Reclamation can (and must) adequately represent their interests in this case.

a. The District Court Failed to Acknowledge the Very High Bar for Overcoming the Presumption of Adequate Representation

"As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit." *Diné-Citizens*, 932 F.3d at 852 (quotations and citation omitted). There are three general factors relevant to this inquiry: (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.* While application of these factors alone shows that Reclamation adequately represents any interests the Tribes may have in this suit, there are several presumptions that also inform the analysis. The district court failed to acknowledge these presumptions.

First, "[w]here an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (*Arakaki*). Second, this presumption is heightened further here because Klamath Irrigators' suit is against the government. "[A] presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee." *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), abrogated on other grounds by *Wilderness Soc'y v. United States Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (citation omitted); *accord Arakaki*, 324 F.3d at 1086 ("In the absence of a '*very compelling showing to the contrary*,' it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." (citation omitted) (emphasis added)).

The government is "charged by law" with representing the Tribes' interests. " 'The federal government, including [Reclamation], has a trust responsibility to the Tribe[],' as trustee, which 'obligates [Reclamation] to protect the Tribe['s] interests in this matter.' " *Alto*, 738 F.3d at 1128 (citation omitted) (second alteration in original); *United States v. Mason*, 412 U.S. 391, 398 (1973) ("The United States serves in a fiduciary capacity with respect to [Native Americans]," and "as such, it is duty bound to exercise great care in administering its trust."); *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995) ("We have noted, with great frequency, that the federal government is the trustee of the Indian tribes' rights, including fishing rights."). Because of this trust responsibility, it is presumed that "[t]he United States can adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the tribe." *Washington v. Daley*, 173 F.3d 1158, 1167 (1999) (*Washington*) (citation omitted); *accord Makah*, 910 F.2d at 558.

b. Reclamation Will Adequately Represent Tribal Interests

Reclamation can and will adequately represent the Tribes' interests, if any, in this suit. "As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from suit where its interest will be adequately represented by existing parties to the suit." *Washington*, 173 F.3d at 1167. 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." *Id.* at 1167-68 (quoting *Sw. Ctr*, 150 F.3d at 1154); *accord Alto*, 738 F.3d at 1128; *Conn. ex rel. Blumenthal v. Babbitt*, 899 F. Supp. 80, 83 (D. Conn. 1995). The mere "possibility of conflict" between the tribe and the United States is insufficient to render the tribe a required party. *Washington*, 173 F.3d at 1168; *Sw. Ctr.*, 150 F.3d at 1154; *Alto*, 738 F.3d at 1128 (possible future conflict insufficient to show federal defendants could not adequately represent tribe where federal defendants were defending federal decision that the tribe supported). Moreover, as this Court has repeatedly held, "the absent tribes 'have an equal interest in an administrative process that is lawful.' " *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962, 977 (9th Cir. 2008) (*Cachil*) (quoting *Makah*, 910 F.2d at 557); *cf. Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960) ("[T]he general acts of Congress apply to Indians as well as to all others . . . .").

Reclamation and the Tribes undoubtedly have the same "ultimate objective[s]" to both defeat Klamath Irrigators' suit and ensure that Reclamation fulfills its obligations that are of interest to the Tribes. *Cf. United States v. White Mountain Apache Tribe*, 784 F.2d 920 (9th Cir. 1986) (*U.S. v. White Mountain*) ("It is also clear that the federal government, as trustee for the tribes, is under an affirmative obligation to assert water claims on its beneficiaries' behalf."). It is the

United States that actually holds water rights for tribal purposes in trust, and that has been confirmed in the ongoing Klamath Basin Adjudication in Oregon. *See* SVID_ER-092. The district court did not identify any specific conflict between the Tribes and Reclamation arising in the context of Klamath Irrigators' claims in this case, let alone the necessary "compelling showing," to overcome the multiple layers of presumptions of adequate representation.

The McCarran Amendment (also known as the McCarran Water Rights Suit Act), 43 U.S.C. § 666, as codified, waives federal sovereign immunity for state general stream adjudications, and that waiver extends to federal water rights reserved on behalf of Native American tribes. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 811-12 (1976). The government's waiver of sovereign immunity in the McCarran Amendment extends to the federally reserved rights of Native American tribes. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (*Arizona*); *White Mountain Apache Tribe v. Hodel*, 784 F.2d 924 (9th Cir. 1986) (*White Mountain v. Hodel*). The presumption of adequate representation is heightened even further here because the Tribes' asserted interests relate to their claims of *reserved* fishing rights and water rights. The government's unity of interest with the Tribes on such reserved rights is so complete that the government's waiver of sovereign immunity in the McCarran Amendment extends to the federal government acting as trustee for federal reserved rights of Native

American tribes. *See, e.g.*, *Arizona*, 463 U.S. at 545; *White Mountain v. Hodel*, 784 F.2d at 924.

The district court summarily concluded that Reclamation will not "undoubtedly" make all of the Tribes' arguments because the Tribes have an interest "in how this proceeding would affect, as a practical matter, their federal reserved fishing and water rights, which are central to its culture, subsistence, and very existence." SVID_ER-022. But Reclamation acts as trustee for the Tribes in performing statutory obligations, which does not create a recognized conflict. As stated by the Supreme Court:

> [I]t may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well. In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The 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) (applying this principle in the context of res judicata to hold the tribe was bound by the government's actions on its behalf).

There is no indication that Reclamation is not "willing to make" all *necessary* arguments to preserve and protect the interests in issue. The district court suggests that only the Tribes can represent "their interest in sovereign immunity" and therefore a conflict arises such that there is inadequacy of representation. SVID_ER-022. But no party, not Klamath Irrigators and not the United States, disputes the Tribes' sovereign immunity. Moreover, this Court reversed, for abuse of discretion, a dismissal based on the district court's ruling that the United States could not adequately represent a tribe "because the government did not support the [tribe's] motion to dismiss the suit under Rule 19." *Sw. Ctr.*, 150 F.3d at 1154. This Court reasoned:

> The district court's approach is circular: a non-party is "necessary" even though its interests are adequately represented on the underlying merits by an existing party, simply because that existing party has correctly concluded that it is an adequate representative of the non-party, and therefore opposes the non-party's preliminary motion to dismiss. The district court's approach would preclude the United States from opposing frivolous motions to dismiss out of fear that its opposition would render it an inadequate representative. The district court's approach would also create a serious risk that non-parties clothed with sovereign immunity, such as the Community, whose interests in the underlying merits are adequately represented could defeat meritorious suits simply because the existing parties representing their interest opposed their motion to dismiss . . . . [T]he government's decision not to support the Community's motion to dismiss does not support a finding that the Community is a necessary party.

Id. Differences over "litigation tactics" are not enough to defeat the presumption of adequate representation. *See Mich. Gambling Opposition v. Norton*,

No. CV 05-01181 (JGP), 2005 U.S. Dist. LEXIS 56445, at *6 (D.D.C. Sept. 1, 2005) (citation and quotations omitted).

The claims in this litigation will require Reclamation to defend its decisions that are reviewed under the APA. *See* SVID_ER-197. If this action is permitted to proceed, the inquiry will focus on the record and the challenged Action and, in particular, on whether Reclamation did or did not have legal authority to make the administrative determination under review. The substantive defense of Reclamation's compliance with federal law must rise or fall on the basis its proffered justifications. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); *see also Nat. Res. Def. Council, Inc. v. Tenn. Valley Auth.*, 340 F. Supp. 400, 408 (S.D.N.Y. 1971) (holding that participation by coal producers in NEPA action would not "elucidate the issue in the case," i.e., "whether [the agency] followed the dictates of NEPA," because "[t]hey would have to take positions about [agency] procedures and [agency] estimates of environmental harms, topics on which they have no special knowledge"), rev'd on other grounds, 459 F.2d 255 (2d Cir. 1972).

This case does not involve an inter-tribal conflict, or an allocation of tribal resources that could create a conflict in the United States' ability to represent all of the Tribes' interests. *See Washington*, 173 F.3d at 1168 (stating, "[a] conflict would arise only in regard to the level of allocations, which are not at issue here,"

and thus tribes failed to "demonstrate how such a conflict might actually arise in the context of this case"). The Tribes can also protect their interests by participating as *amicus curiae* without waiving their tribal sovereign immunity.

Further, because this case arises under the APA, review will be limited to the administrative record. *See Wildearth Guardians v. United States Fish & Wildlife Serv.*, No. CV 16-65-M-DWM, 2018 U.S. Dist. LEXIS 28833, at *11-12 (D. Mont. Feb. 22, 2018). Thus, the Tribes "could not offer new evidence in the judicial proceeding that would materially affect the outcome of the case." *Id.* (quoting *Alto,* 738 F.3d at 1128). The Tribes have failed to make the "very compelling showing" necessary to overcome the presumption that Reclamation can adequately represent tribal interests in this case. *Arakaki*, 324 F.3d at 1086. Because the Tribes will be adequately represented by Reclamation as it relates to the subject of Klamath Irrigators' suit, and their rights would not be impaired by proceeding in their absence, they are not "required parties" under Rule 19(a)(1)(B).

This case is distinct from the circumstances in *Diṅe-Citizens* because the federal defendants there "did not share" the same commercial interest in the "outcome" of the approvals for the mine and power plant as NTEC. *Diṅe-Citizens*, 932 F.3d at 855. NTEC, the tribal party in *Diṅe-Citizens*, was a business enterprise to which the United States has no obligations as trustee and the case involved lease renewals for an ongoing mining operation, owned by NTEC, a separate entity.

There was also significant economic reliance on the existing mine, including investment of funds by NTEC once it received agency approvals. *Id.* at 853, 855. By contrast, here, Reclamation's interests and the Tribes' interests are "one and the same." *Id.* All federally reserved water and fishing rights are held in trust for the Tribes by the United States, and unlike *Diṅe-Citizens,* monetary investment to improve fisheries by the Tribes in this case does not rise or fall on Klamath Irrigators' APA claims. This Court should review the facts in the light most favorable to the Klamath Irrigators, and there is no indication Reclamation has or would neglect to fully protect any reserved rights or the species of fish in which the Tribes claim a protectable interest.[2]

3. This Litigation is About Reclamation's Compliance with the Law and Will Not Expose Reclamation to Inconsistent Obligations

The district court incorrectly found that a ruling in Klamath Irrigators' favor in this litigation may expose "Reclamation . . . to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations—namely, the obligation to fulfill [Appellants]' state law water rights on the one hand, and the obligation to

[2] *See Washington,* 173 F.3d at 1168 (holding the government's trust obligations to the tribes allowed the government to represent the tribes' interests where (a) the government and the tribes "agree that the [t]ribes have a treaty right to whiting [fish] in the area [at issue] . . . and that the [t]ribes are co-managers with the federal government of the resources in those regions," and (b) "there is no clear potential for inconsistency between the [government's] obligations to the [t]ribes and its obligations to protect the fishery resource").

release water instream to fulfill the Tribes' treaty water rights on the other." SVID_ER-021. But Klamath Irrigators' claims plainly do not seek to prevent Reclamation from *lawfully* using water for any purpose. The crux of Klamath Irrigators' APA claims includes that Reclamation's Action exceeds the bounds of its lawful discretion under section 7(a)(2) of the ESA. The scope and quantity of tribal water rights and/or claims in the Klamath Basin has yet to be finally determined. SVID_ER-090–91. The Tribes may assert their water rights in other litigation, for example in the ongoing Klamath Basin Adjudication in Oregon, but this litigation relates to Reclamation's lawful scope of discretion under the law and is not a determination of water rights or claims of any non-party to the litigation, including the Tribes.

As this Court held in *Diné-Citizens*, in determining a factor that weighed against dismissal, a judgment rendered in the Tribes' absence "would be adequate and would not create conflicting obligations, because it is the Federal Defendants' duty, not [the Tribes'], to comply with" the statutes at issue. *Diné-Citizens*, 932 F.3d at 858. In this case, it is Klamath Irrigators' claim that Reclamation must comply with its lawful scope of discretion under the ESA and the Reclamation Act and limit its actions to those within its authority. SVID_ER-202, 207. Certainly, the Tribes cannot create inconsistent obligations by insisting that Reclamation must act unlawfully. *See, e.g.*, *Cachil*, 547 F.3d at 977; *Makah*, 910 F.2d at 559.

Reclamation's trust obligations are not an unlimited deferral to any and all tribal claims. There is no independent general trust duty, and consequently there is no prejudice to the Tribes by requiring Reclamation to comply with generally applicable statutes and, specifically, its authorizing statute. "The government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (*Jicarilla*). And there is neither statutory authority nor any independent trust power that authorizes the United States to quantify and administer water rights. *See Morongo Band of Mission Indians v. FAA*, 161 F.3d 569,574 (9th Cir. 1998) (*Morongo*); *Pac. Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation*, Civ. No. C 02-2006-SBA, 2005 U.S. Dist. LEXIS 36035, at *41 (N.D. Cal. Mar. 7, 2005) (*PCFFA*). In this case, Reclamation is required by law to comply with the Reclamation Act, and in so complying with federal law, Reclamation does not prejudice the Tribes or any other non-party to this case.

Klamath Irrigators' APA claims are limited to seeking a judgment that will require Reclamation to comply with federal law, thus there can be no inconsistent obligations created by this litigation. As a practical matter, if Klamath Irrigators prevail on the merits to establish the bounds of Reclamation's discretion and authority in its supervision of the Klamath Project, the judgment will not have a

retroactive effect or deprive the Tribes of water or fishing rights they currently enjoy. The Tribes' ability to obtain adjudication and enforcement of water rights will be the same after this case as it was before this case. For example, in California's Central Valley Project (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 impact tribal water rights or their priority, to the extent they exist.

B. Even if the Tribes Were Required Parties, the Harsh Result of Dismissal Was Not Warranted

Assuming *arguendo* that the Tribes were required parties and that Reclamation does not adequately represent the Tribes in its role as tribal trustee, all of the equitable considerations of Rule 19(b) dictate that the suit continue, and the district court therefore abused its discretion in dismissing the action.

1. Allowing the Tribes to Use Sovereign Immunity as a Sword to Set Up a "One-Way Street" is Inconsistent with Equity and Good Conscience

By finding that Klamath Irrigators' APA claims requesting that Reclamation follow the law cannot proceed in the absence of the Tribes, the district court provided the Tribes with veto power over this and all future litigation by non-tribal

entities against Reclamation in the Klamath Basin. The district court's decision permits the Tribes to use their sovereign immunity as a sword to set up a "one-way street" dynamic. On this "one-way street," any tribe in the Klamath Basin could halt challenges to federal action that negatively affects the water supplies of any other persons who use and depend on that water, like Klamath Irrigators. The district court's decision ultimately closes the federal judiciary to some parties, while remaining open for the Tribes.

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 to challenge the same administrative determinations by Reclamation fails the "equity and good conscience" test. As one court observed, which refused to allow an absent tribe who was "clear[ly]" a required party to use sovereign immunity "to its advantage":

> By this logic, virtually all public and private activity on Indian lands would be immune from any oversight under the government's environmental laws. This is neither the intent nor the import of Indian sovereign immunity.

Diné-Citizens Against Ruining Our Env't v. United States Office of Surface Mining Reclamation & Enf't, Civil Action No. 12-CV-1275-AP, 2013 U.S. Dist. LEXIS 1401, at *6 (D. Colo. Jan. 4, 2013) (*Diné-Citizens II)*.

After all, tribal "immunity is a shield . . . not a sword." *Gingras v. Think Fin.*, 922 F.3d 112, 128 (2d Cir. 2019). As another court held:

> Sovereign immunity is meant to be raised as a shield by the tribe, not wielded as a sword by the State. An absentee's sovereign immunity need not trump all countervailing considerations to require automatic dismissal.
>
> Instead, courts must carefully consider the circumstances of each case in balancing prejudice to the absentee's interests against the plaintiff's interest in adjudicating the dispute. The circumstances presented by this case raise constitutional questions about government conduct and implicate the absentee's contractual interests. Where no other forum is available to the plaintiff, the balance tips in favor of allowing this suit to proceed without the tribes. This conclusion does not minimize the importance of tribal sovereign immunity but, rather, recognizes that dismissal would have the effect of immunizing *the State*, not the tribes, from judicial review.

Auto. United Trades Org. v. State, 285 P.3d 52, 60 (Wash. 2012) (emphasis in original).

Tribes in the Klamath Basin have never hesitated to intervene as *parties* for purposes of defending governmental action that they believe to be protective of their interests in fish and water. *See, e.g.*, *San Luis & Delta-Mendota Water Auth. v. Haugurd*, 848 F.3d 1216 (9th Cir. 2017) (Hoopa Valley Tribe and Yurok Tribe intervened in water contractors' challenge to flow augmentation releases on a tributary river of the Klamath River); *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001) (Klamath Tribes and the Yurok Tribe intervened in Klamath Project irrigators' challenge to Reclamation's 2001 Annual Operations Plan for the Klamath Project); *TPC, Ltd. Liab. Co. v. Or. Water Res. Dep't*, 308 Or. App. 177 (2020) (Klamath Tribes intervened in irrigators' state court challenge to water

rights regulation by the Oregon Water Resources Department). Quite simply, the Tribes have asked the federal courts to provide them a new, and always-successful, litigation tactic to prevent any other party from taking action to protect the Tribes' interests.

The decision below grants this request, insulates federal government actions from judicial review by all but the Tribes, and deprives Klamath Irrigators of their statutory rights to access the courts to seek redress for Reclamation's Action.

2. The Rule 19(b) Factors Further Show that the Tribes Are Not Indispensable

Courts traditionally consider four nonexclusive factors under Rule 19(b): (1) the extent to which a judgment rendered in the Tribes' absence might prejudice the Tribes or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by "shaping the relief" or "other measures"; (3) whether judgment rendered in the Tribes' absence would be adequate; and (4) whether Plaintiffs would have an adequate remedy if the action were dismissed for non-joinder. Fed. R. Civ. P. 19(b). These factors, which *must be weighed* by the Court, favor allowing this case to proceed without the Tribes. *Id.* (emphasis added); *see also, e.g.*, *Makah*, 910 F.2d at 559-60 (weighing factors even where tribes had sovereign immunity); *Manygoats*, 558 F.2d at 558.

First, contrary to the district court's conclusion, there is no prejudice to the Tribes or Reclamation from allowing this case to go forward without the Tribes.

There is no risk of inconsistent obligations, and Klamath Irrigators seek to ensure that Reclamation complies with *all* of its lawful obligations, as stated above, and the Tribes cannot credibly claim to be prejudiced by a lawful administrative process. *Makah*, 910 F.2d at 559. 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*, 558 F.2d at 558-59. Reclamation's tribal trust obligations also demand that it represent the Tribes' interests, which further "lessen[s]" any possible "prejudice." *Makah*, 910 F.2d at 560.

Further, Reclamation's trust obligations are not an unlimited deferral to any and all tribal claims. There is no independent general trust duty, and consequently there is no prejudice to the Tribes by requiring Reclamation to comply with generally applicable statutes and, specifically, its authorizing statute. "The government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Jicarilla*, 564 U.S. at 177. And there is neither statutory authority nor any independent trust power that authorizes the United States to quantify and administer water rights. *See Morongo*, 161 F.3d at 574; *PCFFA*, 2005 U.S. Dist. LEXIS 36035, at *41.

Second, the relief Klamath Irrigators seek could be further shaped to lessen any prejudice. The district court summarily determined that "there is no way this

prejudice can be lessened because this case involves conflicts and mutually exclusive interests in finite natural resources." SVID_ER-116. This statement has no factual support that the parties' interests are mutually exclusive. The district court's broad conclusion that many parties are interested in Klamath Basin water does not address the specific issues of Klamath Irrigators' claims. Even if there is any prejudice to the Tribes, which there is not, the APA-based relief sought by Klamath Irrigators does not preclude any assertion of tribal water rights.

Third, a judgment rendered in the Tribes' absence would plainly be adequate, and thus this factor strongly weighs against dismissal. As explained above, the outcome of this litigation, if it is to proceed, will not result in any inconsistent obligations for Reclamation because this action is not directed at the Tribes' actions or any tribal water rights. As a practical matter, if Klamath Irrigators are successful in the merits of this litigation, the Tribes still retain their senior priority for water rights claims and various legal recourse to protect senior diversions, to the extent such rights are valid. A judgment against Reclamation would be both adequate and complete.

The fourth factor weighs strongly against dismissal. There is no alternative forum by which Klamath Irrigators can obtain the relief they seek here against Reclamation: declaratory relief requiring Reclamation to comply with the law in approving and implementing operating procedures for the Klamath Project. While

the district court suggests that Klamath Irrigators could bring a takings case in the Federal Court of Claims to recover damages for the loss of water, and a takings claim *might* provide compensation, a takings case cannot possibly provide the relief requested here. The relief requested here is a remand of an unlawful administrative determination and a declaration concerning Reclamation's obligations. A takings case with a possible remedy of money damages would not cure Reclamation's unlawful actions. SVID_ER-116. Further, if Klamath Irrigators have no APA remedy, they would have to bring successive takings cases, on an annual basis, at tremendous cost. This result also again creates a one-way street effect; tribes can actively sue the United States to contest Klamath Basin operations, but tribal sovereignty precludes any forum for Klamath Irrigators to challenge the federal operations.

Moreover, it is a foundational principle of takings law that an unauthorized government taking creates two violations of a property-owner's rights. In *Del-Rio Drilling Programs v. United States*, 146 F.3d 1358 (Fed. Cir. 1998) (*Del-Rio*), the Federal Circuit explained:

> [I]f the government has taken property and has done so in a legally improper manner, it has committed two violations of the property-owner's rights. The two separate wrongs give rise to two separate causes of action, and the property-owner may elect to sue for just compensation or to seek relief for the legal improprieties committed in the course of the taking. *See First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 319-22, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987); *Great Falls Mfg. Co.*, 112 U.S. at 656 ("if, for

> the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it . . . there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation").

Id. at 1363-64.

In summary, Klamath Irrigators have no alternative forum to this Court for the claims and relief sought in this APA litigation.

The district court further provides a cursory overview of prior litigation in the Klamath Basin that it asserts upholds the senior priority of undetermined, unquantified, or presently unenforceable water rights held by the Tribes. The district court's discussion of the prior litigation is inapplicable to the present case: Klamath Irrigators seek compliance with federal law, and do not seek adjudication of all the water rights in California and Oregon in the Klamath Basin. Notwithstanding the lack of relevance, the district court's discussion of the prior litigation relies entirely on *dicta* from various opinions of this Court and others. For example, the district court cites to *Klamath Water Users Ass'n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000) (*Patterson*) for the proposition that tribal rights "take precedence over any alleged rights of the irrigators." SVID_ER-025. Any such reference in *Patterson* to relative priority of rights as between Klamath Irrigators and the Tribes amounts to *dicta* and must be disregarded. The actual legal issue in *Patterson* was whether irrigation interests are intended third party

beneficiaries of a contract between a private utility and the federal government. *Patterson,* 204 F.3d at 1210-14. In background, the Ninth Circuit accepted several general assertions in *Patterson,* regarding tribes in the Klamath Basin, and also repeated *dicta* in other cases, including *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001), which was cited by the district court as well. SVID_ER-025. The same incorrect *dicta* was further repeated recently by the Federal Circuit in *Baley v. United States,* 942 F.3d 1312 (Fed. Cir. 2019) (*Baley*). To the extent *Baley* is construed to hold that there is an independent obligation or authority to allocate water for trust purposes, it is inconsistent with holdings of the Supreme Court, the Ninth Circuit, and a ruling of the Northern District of California that concerned the Klamath Basin. *See Jicarilla*, 564 U.S. at 177 ("The government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."); *see also Morongo*, 161 F.3d at 574 (agency must exercise trust responsibility within the context of its authorizing statute); *PCFFA*, 2005 U.S. Dist. LEXIS 36035, at *41 (trust responsibility to Yurok Tribe is discharged by compliance with generally applicable statutes and regulations). The district court's discussion of prior Klamath Basin litigation ignores a consideration of equity: the district court concludes that the courthouse may be closed to Klamath Irrigators, but not to Tribes, in part based on the fact that Klamath Irrigators and related entities have brought prior litigation relating to distinct

issues, in various forums. The district court's reliance on past but unrelated Klamath Basin litigation, underscores that dismissal is not warranted.

Therefore, "equity and good conscience" weighs against dismissal. While the Tribes generally enjoy sovereign immunity from suit, they are not using it here for its intended purpose as a shield from unlawful state intrusions; they are using it as a sword to ensure they alone can affect Klamath Basin operations. The Tribes seek to wield sovereign immunity entirely to prevent Klamath Irrigators from exercising their statutory rights to access the courts to stop unlawful governmental action. The district court abused its discretion in finding that Klamath Irrigators' APA clams cannot proceed in the Tribes' absence.

///

///

///

///

///

///

///

///

///

///

IX. CONCLUSION

Congressional directive and multiple decisions of this Court mandate that federal courtroom doors remain open to parties seeking relief against federal agencies for actions in excess of their authority. Neither sovereign immunity nor Rule 19 should operate to slam the courthouse doors to such suits. Because the district court's decision contravened these controlling authorities, it should be reversed.

DATED: April 1, 2021

s/ Richard S. Deitchman

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
Email: rdeitchman@somachlaw.com
Email: psimmons@somachlaw.com
Attorneys for Plaintiffs-Appellants Shasta View Irrigation District, Tulelake Irrigation District, Klamath Water Users Association, Ben DuVal, and Rob Unruh

PARKS & RATLIFF, P.C.

DATED: April 1, 2021

s/ Nathan J. Ratliff

Nathan J. Ratliff, Esq. (OSB #034269)
620 Main Street
Klamath Falls, OR 97601
Telephone: (541) 882-6331
Facsimile: (541) 883-1501
Email: nathan@parksandratliff.com
Attorneys for Plaintiff-Appellant Van Brimmer Ditch Company

CLYDE SNOW & SESSIONS, P.C.

DATED: April 1, 2021

s/ Reagan L.B. Desmond
Reagan L.B. Desmond, Esq. (OSB #045129)
1018 SW Century Drive, Suite 203
Bend, OR 97702
Telephone: (801) 322-2516
Facsimile: (801) 521-6280
Email: rlbd@clydesnow.com
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 9,332 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: April 1, 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

ADDENDUM TO PLAINTIFFS-APPELLANTS' OPENING BRIEF

ADDENDUM INDEX

TAB A
FEDERAL STATUTES

5 U.S.C. § 701

§ 701 – Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; [1] and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 702

§ 702 – Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

5 U.S.C. § 706

§ 706 – Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

16 U.S.C. § 1536

(a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") 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 which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) OPINION OF SECRETARY

(1)

(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)

(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2), the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) BIOLOGICAL ASSESSMENT

(1) To facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) LIMITATION ON COMMITMENT OF RESOURCES

After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) ENDANGERED SPECIES COMMITTEE

(1) There is established a committee to be known as the Endangered Species

Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)

(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5.

(5)

(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of

such agency to the Committee to assist it in carrying out its duties under this section.

(7)

(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C. 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) PROMULGATION OF REGULATIONS; FORM AND CONTENTS OF EXEMPTION APPLICATION

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) APPLICATION FOR EXEMPTION; REPORT TO COMMITTEE

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary

for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)

(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

(B) deny the application for exemption because the Federal agency

concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) GRANT OF EXEMPTION

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5.

(2)

(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) REVIEW BY SECRETARY OF STATE; VIOLATION OF INTERNATIONAL TREATY OR OTHER INTERNATIONAL OBLIGATION OF UNITED STATES

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) EXEMPTION FOR NATIONAL SECURITY REASONS

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) EXEMPTION DECISION NOT CONSIDERED MAJOR FEDERAL ACTION; ENVIRONMENTAL IMPACT STATEMENT

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]: Provided, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) COMMITTEE ORDER GRANTING EXEMPTION; COST OF MITIGATION AND ENHANCEMENT MEASURES; REPORT BY APPLICANT TO COUNCIL ON ENVIRONMENTAL QUALITY

(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by

this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) NOTICE REQUIREMENT FOR CITIZEN SUITS NOT APPLICABLE

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) JUDICIAL REVIEW

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) EXEMPTION AS PROVIDING EXCEPTION ON TAKING OF ENDANGERED SPECIES

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned.

(p) EXEMPTIONS IN PRESIDENTIALLY DECLARED DISASTER AREAS

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a

natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

(Pub. L. 93–205, § 7, Dec. 28, 1973, 87 Stat. 892; Pub. L. 95–632, § 3, Nov. 10, 1978, 92 Stat. 3752; Pub. L. 96-159, § 4, Dec. 28, 1979, 93 Stat. 1226; Pub. L. 97-304, §§ 4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417, 1426; Pub. L. 99-659, title IV, § 411(b), (c), Nov. 14, 1986, 100 Stat. 3741, 3742; Pub. L. 100-707, title I, § 109(g), Nov. 23, 1988, 102 Stat. 4709.)

43 U.S.C. § 383

§ 383 – Vested rights and State laws unaffected

Nothing in this Act shall be construed as affecting or intended to affect or to 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, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

(June 17, 1902, ch. 1093, § 8, 32 Stat. 390.)

43 U.S.C. § 666

§ 666 - Suits for adjudication of water rights

(a) JOINDER OF UNITED STATES AS DEFENDANT; COSTS
Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) SERVICE OF SUMMONS
Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) JOINDER IN SUITS INVOLVING USE OF INTERSTATE STREAMS BY STATE
Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

(July 10, 1952, ch. 651, title II, § 208(a)–(c), 66 Stat. 560.)

TAB B
FEDERAL COURT RULES

Federal Rules of Civil Procedure

Rule 19 – Required Joinder of Parties

(a) **Persons Required to Be Joined if Feasible**.
- (1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
  - (A) in that person's absence, the court cannot accord complete relief among existing parties; or
  - (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's 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.
- (2) *Joinder by Court Order.* If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.
- (3) *Venue.* If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) **When Joinder Is Not Feasible**. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
- (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
- (2) the extent to which any prejudice could be lessened or avoided by:
  - (A) protective provisions in the judgment;
  - (B) shaping the relief; or
  - (C) other measures;
- (3) whether a judgment rendered in the person's absence would be adequate; and
- (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2021, I electronically filed the foregoing **PLAINTIFFS-APPELLANTS' OPENING BRIEF** and **ADDENDUM TO PLAINTIFFS-APPELLANTS' OPENING 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: April 1, 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