Case No. 20-36009

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KLAMATH IRRIGATION DISTRICT,

Plaintiff and Appellant,

v.

UNITED STATES BUREAU OF RECLAMATION, *et al.*

Defendants and Appellees,

HOOPA VALLEY TRIBE and KLAMATH TRIBES,

Intervenor-Defendants and Appellees.

On appeal from the U.S. District Court for the District of Oregon, Medford Division, Case No. 1:19-cv-00451-CL

Appellant's Opening Brief

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INTRODUCTION

This case concerns an issue of great importance to virtually every state in the Western U.S.: how a water rights holder may enforce its rights against other parties who are appropriating that right unlawfully. The District Court's holding below establishes that, for a significant number of water rights holders, they simply may not enforce those rights.

Klamath Irrigation District ("KID") brought suit against the Bureau of Reclamation ("Reclamation") in this case to seek to administer and enforce the rights established in the Klamath Adjudication. Certain Native American tribes were permitted to intervene in the case. They then moved to dismiss as necessary parties who could not be joined due to sovereign immunity. The District Court granted these motions and dismissed KID's case.

The import of the District Court's decision here is to create a full procedural bar preventing KID from *ever* enforcing its water rights against Reclamation, despite the fact that Reclamation participated in and is bound by the Klamath Adjudication. If the Tribes can forestall federal courts from reaching the merits of KID's claims, they possess veto power over any attempt by KID to enforce its rights.

This decision fundamentally subverts decades of water law and express Congressional commands found in Section 8 of the Reclamation Act and the

McCarran Amendment. Reclamation is required to abide by state law governing water rights in procuring water, and the United States has waived its sovereign immunity in comprehensive state water rights adjudications, such as the Klamath Adjudication, which established the rights KID now seeks to administer.

An unenforceable right, however, is no right at all. What the Tribes now seek to do is prevent KID from enforcing its rights against Reclamation, barring any hearing on the merits of its claims. This renders the rights KID established in the Klamath Adjudication nugatory and worthless. Moreover, it flouts Congressional intent: why would Congress compel the United States to participate in water rights adjudications that would, in many cases, never be enforceable against it anyway?

Critical for the court to bear in mind are the far-reaching implications of this holding. Tribal water rights are replete throughout the American west and vie with many other claims on a scarce and finite resource. If tribal water rights are permitted to veto suits against Reclamation through the mechanism sanctioned by the District Court in this case, Reclamation would essentially regain immunity whenever it chose to privilege tribal water rights over non-tribal water rights. Neither state nor federal law requires this, and the Supreme Court has repeatedly said that tribal water rights claims must be joined like any other to these comprehensive state adjudications.

This Court should reverse the District Court's dismissal of this case, and allow it to be considered on its merits.

JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

(1) Is this a proceeding for the administration of "rights to the use of water of a river system or other source" pursuant to the McCarran Amendment?

(2) Is Reclamation an adequate representative of the Tribes, showing the District Court erred in determining the Tribes are necessary parties?

(3) If Reclamation is not an adequate representative of the Tribes and they are necessary parties, does the McCarran Amendment waive tribal sovereign immunity?

(4) Did the District Court err by failing to separately analyze whether the Tribes are necessary parties to KID's procedural due process claim and summarily concluding that they were?

(5) If the Tribes are necessary parties, and tribal sovereign immunity is not waived by the McCarran Amendment, did the District Court err in determining the case should not proceed in equity and good conscience, in order to avoid negating the Congressional intent expressed in the McCarran Amendment?

STATEMENT OF PRIMARY AUTHORITY

43 U.S.C. § 666:

(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.

STATEMENT OF THE CASE

KID is a special district located in Oregon formed for the purpose of delivering irrigation water from the Klamath Project to its members. The Klamath Project incorporates a number of dams and irrigation works, and primarily stores water for irrigation purposes in Upper Klamath Lake ("UKL").

This case follows the completion of a long-pending water rights adjudication by the Oregon Water Resources Department ("OWRD") of all state and federal water rights in the Klamath River Basin (the "Klamath Adjudication"). (ER-101–02, at ¶¶ 33–36.) River basin adjudications in Oregon are conducted in two parts: an administrative phase conducted by OWRD, and a judicial phase conducted by the County Circuit Court. *See* ORS 539.021; ORS 539.130.

The Klamath Adjudication began in 1975. (ER-101 at ¶ 33.) On March 17, 2013, 38 years after commencing, OWRD issued its Findings of Fact and Order of Determination in the Klamath Adjudication. (ER-102–03 at ¶ 36.) In February 2014, OWRD submitted its Amended and Corrected Findings of Fact and Order of Determination ("ACFFOD") to the Klamath County Circuit Court, completing the administrative phase. (ER-103 at ¶ 39.)

While the judicial phase of the adjudication remains ongoing, Oregon statute directs that the ACFFOD is "in full force and effect from the date of its entry in the records of the department, unless and until its operation shall be stayed by a stay

bond." ORS 539.130(4); *see also,* ORS 539.170; ORS 539.180. No relevant stay bonds have been posted in the Klamath Adjudication, and no stay has been ordered. (ER-104 at ¶ 42.)

The ACFFOD fundamentally re-configured all parties' understanding of Oregon water rights in the Klamath Basin. (ER-104–05 at ¶ 43.) Prior to the issuance of the ACFFOD, KID, Reclamation, and all others assumed the water rights in the Klamath Project belonged to Reclamation, and KID and other irrigators held only contractual rights to use water. (*Id.*) The ACFFOD clarified that this was not the case: the *only* relevant water right Reclamation holds is the right to store up to a certain amount of water in UKL for the beneficial use of the irrigators. (*Id.*) In so far as is relevant here, it has no other water rights, including no right to use water for other purposes, such as releasing instream flows for either Endangered Species Act ("ESA") or satisfying tribal trust requirements. (*Id.*) Because the basis and measure of water rights in Oregon is beneficial use, Reclamation's right to store water is based on the irrigators' right to use this stored water for irrigation purposes. (*See* KBA_ACFFOD_07060, 07084[1] ["[T]he United States is the owner of a right to store water in Upper Klamath Lake *to benefit the separate irrigation rights* recognized for the Klamath Reclamation Project in this

[1] The full text of the ACFFOD can be found at https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx.

Partial Order of Determination."] [emphasis added].) Thus, following the issuance of the ACFFOD, Reclamation has no state or federal water right authorizing it to use stored water in UKL for instream purposes. (ER-104–05 at ¶ 43.)

Prior to the ACFFOD, it was also assumed the Klamath Tribes had time immemorial water rights in UKL that were capable of curtailing the 1905 water rights of Klamath Project irrigators (irrespective of whether those rights were owned by the irrigators or the United States). However, while the ACFFOD confirmed that Klamath Tribes have time immemorial water rights in UKL, it recognized the validity of an agreement between the Klamath Tribes, United States, KID and other Project irrigators, and the Oregon Water Resources Department. (ER-104 at ¶ 43.) This agreement, which is incorporated into the ACFFOD, prevents Klamath Tribes water rights from curtailing water rights prior to 1905. (*Id.*) Thus, following the ACFFOD, the time immemorial water rights of the Klamath Tribes cannot curtail the water rights of KID and other Project irrigators, as an array of federal cases had previously assumed.

The first re-examination of Klamath Project operations by Reclamation after the ACFFOD occurred in 2019. (ER-105–06 at ¶ 46.) Reclamation began consulting with both the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Services ("NMFS"; collectively, the "Services") in 2018 and issued a Biological Assessment on December 21, 2018, which was subsequently

amended on February 15, 2019 (the "Amended Proposed Action"). (*Id.*) On March 29, 2019, Reclamation adopted the Biological Opinions from both FWS and NMFS and committed to implementing its 2019 Operations Plan. (*Id.*)

In these documents, Reclamation confirmed it would not change its operations based on the water rights determinations in the ACFFOD. In particular, Reclamation indicated it would: (1) continue using stored water in UKL reservoir for instream purposes by releasing the water stored under its state storage right to satisfy the needs of Southern Oregon/Northern California Coast ("SONCC") coho salmon; and (2) limit the amount of water KID was able to deliver to itself, its landowners, and other water right holders in order to preserve UKL lake elevations to satisfy the needs of endangered suckers. (*Id.*) More importantly for this litigation, in making these decisions, Reclamation confirmed it would not purchase, lease, or condemn KID's water rights through judicial process, but would instead simply take the water. (*Id.*)

Reclamation undoubtedly has the authority to acquire KID's water rights, whether through purchase, lease, or judicial condemnation. *See* 43 U.S.C. § 421 ("Where, in carrying out the provisions of this Act, it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation under judicial process."). Reclamation has no authority, however, to simply seize the water

without acquiring the water rights. Instead, Reclamation is statutorily commanded to respect state law on water rights and the acquisition of those water rights. *See* 43 U.S.C. § 383 ("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.").

Because Reclamation was unilaterally seizing water without purchasing KID's water rights or condemning them under judicial process, KID brought suit against Reclamation for administration of the rights found in the ACFFOD. In particular, KID sought "declaratory relief setting forth the rights of the parties[ ] under the ACFFOD, the Reclamation Act and the Fifth Amendment to the United States Constitution." (*See* ER-114–15.)

Reclamation has not responded to the merits of KID's claims. Instead, two Native American tribes—the Hoopa Valley Tribe in California and the Klamath Tribes in Oregon (collectively, the "Tribes")—intervened for the sole purpose of moving to dismiss the case in its entirety for failing to join a necessary party, the Tribes, who could not be joined due to sovereign immunity.

Particularly, the Tribes were permitted to intervene as a matter of right on November 6, 2019. (ER-116–22.) The District Court concluded the Tribes had a

"significant protectable interest" because Reclamation owed the Tribes trust obligations related to water; incorrectly characterized KID's argument as seeking to stop the flow of water, which might impact the Tribes' rights; and concluded Reclamation could not adequately represent the Tribes. (*Id.*)

The Tribes subsequently moved to dismiss the action, asserting they were necessary parties who could not be joined because they had sovereign immunity. On May 15, 2020, the assigned magistrate judge issued findings and recommendations recommending the motions to dismiss be granted because the Tribes were necessary parties who could not be joined due to sovereign immunity. (ER-004–024.) In doing so, the court found that (1) Native American tribes could not be joined to a suit under the McCarran Amendment, even though their federal water rights could be adjudicated; and (2) this case did not fall under the McCarran Amendment. (*Id.*)

KID filed objections to these findings and recommendations on June 29, 2020. The District Court adopted the findings and recommendations in full on September 25, 2020. (ER-002–03.)[2] KID timely filed its notice of appeal on November 19, 2020.

///

[2] Because the District Court fully adopted the findings and recommendations, no distinction is hereafter made between these recommendations and the District Court's holding.

SUMMARY OF ARGUMENT

This case is undoubtedly a suit for the "administration" of water rights found in a general stream adjudication under the McCarran Amendment. This Court held more than two decades ago that the Klamath Adjudication in particular is a McCarran Amendment proceeding. This suit seeks only to enforce the rights determined in the Klamath Adjudication.

Since this case falls within the McCarran Amendment, the District Court's decision to dismiss this case must be wrong: either the Tribes are not necessary parties, because Reclamation is an adequate representative, or tribal sovereign immunity was waived by the McCarran Amendment. To hold otherwise would be to thwart the clear intention of the McCarran Amendment that *all* state and federal water rights on a particular water source be comprehensively determined and administered.

Even if the Court determines this is not a McCarran Amendment proceeding, the district court erred in finding the Tribes are necessary parties for *all* of KID's claims. In particular, the Tribes cannot conceivably be necessary parties to KID's procedural due process claim.

Finally, even if this Court agrees that the Tribes are necessary parties and cannot be joined due to sovereign immunity, this case should, in equity and good conscience, be permitted to proceed. To hold otherwise is to effectively deny

review of whether the United States is acting in accordance with the Reclamation Act by honoring the water rights found in the Klamath Adjudication.

ARGUMENT

A. The District Court Erroneously Concluded That This Suit Does Not Fall Under the McCarran Amendment

The District Court in this case improperly conflated the two different types of cases contemplated under the McCarran Amendment. It noted that the "Klamath Basin Adjudication was certainly a McCarran Amendment case," and then observed that KID had argued that this case was a "suit for the administration of rights to the use of water of the Klamath River system." (ER-019.) It then confusingly found, however, that "this is not a 'state general stream adjudication case,'" and therefore "this is clearly not a McCarran Amendment case." (*Id.*) This conclusion is wrong.

i. The McCarran Amendment, a "Virtually Unique" Federal Statute, was Enacted by Congress to Facilitate Comprehensive Adjudications of Water Rights in the States

As this Court is well aware, Western water law is a unique area of property law involving a complicated mix of both federal and state considerations. *See California v. United States*, 438 U.S. 645, 650 (1978) ("If the term 'cooperative federalism' had been in vogue in 1902, the Reclamation Act of that year would surely have qualified as a leading example of it."). The scarcity of water in many arid Western states and the many competing demands on that resource has led those states to adopt comprehensive schemes to resolve these claims over access to water. *See, e.g., Colorado River Water Conservation Dist. v. United States*,

424 U.S. 800, 804 (1976) ("*Colorado River*") (noting Western states had "established elaborate procedures for allocation of water and adjudication of conflicting claims to that resource"). Western water law generally follows the doctrine of prior appropriation. *See, e.g., Mineral County v. Walker River Irr. Dist.*, 900 F.3d 1027, 1029 n.2 (9th Cir. 2018) ("Under the doctrine of prior appropriation, '[t]he first appropriator of the water of a stream passing through the public lands . . . has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation.'") (quoting *Lobdell v. Simpson*, 2 Nev. 274, 277–78 (1866)).

Much of the water development in the West, including the Klamath Project, occurred pursuant to projects originally financed by Reclamation, and subsequently paid off by the farmers within the project. *California*, 438 U.S. at 650 ("In [the Reclamation Act of 1902], Congress set forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States."). In authorizing these projects, Congress commanded that Reclamation abide by state law regarding water rights unless expressly overcome by Congressional enactment. *Id.* at 675 (noting Section 8 of the Reclamation Act "does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the 'control,

appropriation, use, or distribution of water'"); *id.* at 678 ("While later Congresses have indeed issued new directives to the Secretary, they have consistently reaffirmed that the Secretary should follow state law in all respects not directly inconsistent with these directives."). Therefore, Section 8 of the Reclamation Act states that, "[n]othing 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." 43 U.S.C. § 383. It also commands the Secretary of the Interior to "proceed in conformity with such laws" when acting under the Reclamation Act. *Id.*

Consistent with this, Congress required Reclamation to acquire water rights in accordance with state law, either through direct applications for water rights under state law for appropriation of unappropriated water, or through purchase or condemnation of vested water rights under judicial process. *See* 43 U.S.C. § 421; *see also* ER-099 at ¶ 22. Therefore, water rights within a Reclamation Project, including any water rights held by Reclamation, are generally creatures of state law, not federal law. Consequently, ownership of water rights within a Reclamation project, and the existence and priority of such rights, is an issue of state law. *See* 43 U.S.C. § 383; *see also California*, 438 U.S. at 647, 666–76 (holding that California could impose conditions on the water rights granted to

Reclamation, and Reclamation was required to abide by those state law-based conditions).

Because of the central role states play in regulating water distribution, Congress passed the McCarran Amendment, which waived the United States' sovereign immunity in relation to comprehensive water rights adjudications. *See United States v. District Court In and For Eagle County*, 401 U.S. 520, 525 (1971) (quoting Senator McCarran as saying the amendment was necessary "because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value"). The Supreme Court has described the McCarran Amendment as "an all-inclusive statute concerning 'the adjudication of rights to the use of water of a river system' which in § 666(a)(1) has no exceptions and which, as we read it, includes appropriate rights, riparian rights, and reserved rights." *Eagle County*, 401 U.S. at 524; *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564 (1983) ("[T]he Amendment was designed to deal with a general problem arising out of the limitations that federal sovereign immunity placed on the ability of the States to adjudicate water rights.").

This also includes tribal water rights held in trust by the Government: "Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions." *Colorado River*, 424 U.S. at

810. The legislative history of the McCarran Amendment is replete with statements of the necessity to sweep *all* potential claimants into these comprehensive proceedings. As the Senate report on the bill stated, "[i]t is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts." *Colorado River*, 424 U.S. at 811 (quoting S.Rep.No.755, 82d Cong., 1st Sess., 4–5 (1951). Because of this desire to subject federal rights to state administration and permit unitary, comprehensive resolution of all competing water claims on a particular water source, the McCarran Amendment is a "virtually unique" federal statute. *San Carlos Apache*, 463 U.S. at 571.

ii. This Case is a Suit for the "Administration" of Water Rights Found in the Klamath Adjudication and Thus Falls Under the McCarran Amendment

The McCarran Amendment contemplates two separate kinds of cases falling under its ambit: (1) suits for "the adjudication of rights to the use of water of a river system or other source; and (2) suits for "the administration of such rights." 43 U.S.C. § 666(a)(1)–(2).

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Suits falling under subsection (a)(1) of the McCarran Amendment are the comprehensive water rights adjudications discussed above in such cases as *Eagle County*, *Colorado River*, and *San Carlos Apache*.

This case falls under subsection (a)(2), i.e., a suit for the "administration of such rights." A case is one for the "administration" of water rights within the meaning of 43 U.S.C. § 666(a)(2) if there has first been a "prior adjudication of relative general stream water rights." *See South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985); *see also Eagle County*, 401 U.S. at 524 ("'[T]he administration of such rights' in § 666(a)(2) must refer to the rights described in (1) for they are the only ones which in this context 'such' could mean."); *San Luis Obispo Coastkeeper v. Dep't of Interior*, 394 F.Supp.3d 984, 994 (N.D. Cal. 2019) ("[S]ubsection (a)(2) pertains to the administration of adjudicated rights under subsection (a)(1)."); *United States v. Hennen*, 300 F. Supp. 256, 263 (D. Nev. 1968) ("Once there has been such an adjudication and a decree entered, then one or more persons who hold adjudicated water rights can, within the framework of § 666(a)(2), commence among others such actions as described above, subjecting the United States, in a proper case, to the judgments, orders and decrees of the court having jurisdiction.").

It is undisputed that the Klamath Adjudication is the type of proceeding contemplated in § 666(a)(1) of the McCarran Amendment. This Court has

specifically said so. *See United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994) ("[W]e hold that the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment."); *see also* ER-019 ("The Oregon Klamath Basin Adjudication was certainly a McCarran Amendment case."). The Supreme Court has also noted that, in Oregon water rights adjudications such as the Klamath Adjudication, "[a]ll claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim." *Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 447–48 (1916).

Moreover, the rights determined by the OWRD in the Klamath Adjudication are fully enforceable, even while the judicial phase of the Adjudication is proceeding. ORS 539.170 ("While the hearing of the order of the Water Resources Director is pending in the circuit court, and until a certified copy of the judgment, order or decree of the court is transmitted to the director, the division of water from the stream involved in the appeal shall be made in accordance with the order of the director."). The Supreme Court has upheld this specific provision of Oregon law: "[W]e think it is within the power of the state to require that, pending the final adjudication, the water shall be distributed according to the board's order, unless a suitable bond be given to stay its operation." *Pac. Live Stock Co.*, 241 U.S. at 455.

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KID's Second Amended Complaint ("SAC") *expressly* seeks administration of the rights determined in the Klamath Adjudication. KID's entire complaint in this case is that the federal government possesses no rights to use stored water in UKL for instream purposes under the Klamath Adjudication, yet is nevertheless seizing and using stored water without *any* water rights authorizing the use. First, the SAC discusses how water rights adjudications are conducted in Oregon, and particularly, how the Klamath Adjudication was conducted, culminating in the ACFFOD. (*See* ER-101–03 at ¶¶ 30–36.) Then, the SAC alleges that certain actions of Reclamation evinced an intention not to abide by the ACFFOD. (ER-103–05 at ¶¶ 38–45.) The SAC identified specific actions taken by Reclamation showing it would continue to use stored water in UKL, contrary to the water rights determined in the ACFFOD. (ER-105–06 at ¶ 46.) The SAC *expressly* stated, "[t]his suit is necessary to administer the water rights to use the Klamath River system, as determined in the ACFFOD, because Defendants continue to flout the OWRD's decision as to what water rights Reclamation actually holds." (ER-107 at ¶ 49.)

It is clear that the District Court failed to comprehend the gravamen of KID's complaint, or understand the nature of a general stream adjudication under the McCarran Amendment, such as the Klamath Adjudication. The District Court failed to recognize that *all* pre-1909 state and federal water rights in the waters of

Oregon's Klamath Basin—including all tribal water rights—were encompassed within the ACFFOD, something this Court recognized in 1994. *See United States v. Oregon*, 44 F.3d at 770. The court below looked solely to federal court decisions that arose *before* the entry of the ACFFOD in describing the water rights of the Hoopa and Klamath Tribes. (ER-006–08.) It failed to understand that any and all water rights the Hoopa and Klamath Tribes have in Oregon[3] are necessarily set forth in the ACFFOD. *See Pac. Live Stock Co.*, 241 U.S. at 447–48 ("All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim."); *United States v. Oregon*, 44 F.3d at 770 (finding both federal and tribal rights were subject to the Klamath Adjudication).

The Hoopa Valley Tribe has no Oregon water rights under the ACFFOD, as neither it nor the United States on its behalf asserted any right to use the stored water in UKL. Meanwhile, the Klamath Tribe *does* have an Oregon water right under the ACFFOD, yet the District Court failed to recognize or describe the actual right that Tribe has, instead relying on older federal cases generically recognizing that the Klamath Tribe had a water right. Specifically, the Klamath Tribe has a right to particular lake elevations under the ACFFOD, but that right may not be

[3] This case does not address or concern whether the Hoopa Tribe might have federal reserved rights in *California*, or other California water rights. Obviously, a California water right cannot make a call on a water right in another state; the sole province for resolving such disputes is by interstate compact or an original action brought in the Supreme Court for equitable apportionment. This is not a case for equitable apportionment of the Klamath River between California and Oregon.

used to call upon KID's rights during the pendency of the judicial phase of the Klamath Adjudication. (*See* KBA_ACFFOD_04938–46.) In other words, the Klamath Tribe has a federal reserved water right in Oregon, recognized under Oregon law, as articulated in the ACFFOD. This Court directed the Klamath Tribe to submit its water rights claims to the Klamath Adjudication. It did so, and was awarded a water right in the process. The District Court's reliance on prior articulations of the Klamath Tribe's water right, which pre-date the ACFFOD, is unfounded.

The District Court's conclusion that this is "clearly not a McCarran Amendment case" is wrong. The SAC clearly falls under § 666(a)(2) as a suit for the administration of water rights found in a comprehensive state adjudication. The Klamath Adjudication was an adjudication under § 666(a)(1), and this suit seeks administration of those rights under § 666(a)(2).

B. In Order to Give Effect to the McCarran Amendment, Either Reclamation is an Adequate Representative of the Tribes and the Tribes are not Necessary Parties, or the Tribes Cannot Invoke Sovereign Immunity

The District Court in this case next found, under Rule 19 of the Federal Rules of Civil Procedure, that the Tribes could only be adequately represented by the United States if it met a three part test. The District Court required a showing that (1) "the interests of existing parties are such that they would undoubtedly make all of the non-party's arguments"; (2) "existing parties are capable of and

willing to make such argument"; and (3) "the non-party would offer no necessary element to the proceeding that existing parties would neglect." (ER-017.)[4] Because "Reclamation will not 'undoubtedly' make all of the Intervenors' arguments," the District Court concluded that "[o]nly the Intervenors can adequately present and defend their distinct interest in the affected fish and water resources, and their interest in sovereign immunity." (ER-018.) However, it then *also* found that the Tribes cannot be joined due to sovereign immunity. (ER-019–20.) This interpretation of Rule 19 cannot be correct if the Tribes cannot be joined as parties due to sovereign immunity.

Both of the District Court's findings cannot be true. Either the United States is an adequate representative of the Tribes, or the McCarran Amendment permits the Tribes to be joined as parties. To hold otherwise would eviscerate the clear intent of the McCarran Amendment.

The most accurate understanding of the law supports the conclusion that the United States is an adequate representative of the Tribes in a proceeding under the McCarran Amendment. Any contrary precedent interpreting Rule 19 must bend in the face of the clear Congressional intent to enable these comprehensive water

[4] KID does not dispute that this is a correct articulation of the Ninth Circuit's standard. *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992); *see also Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012); *Southwest Ctr. for Bio. Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001).

rights adjudications. In the alternative, KID argues that, if the Court believes the Tribes are necessary parties who cannot be adequately represented by the Government, the McCarran Amendment must be interpreted to waive sovereign immunity over the Tribes as parties.

i. In Order to Avoid Rendering the McCarran Amendment Meaningless, the United States Must be an Adequate Representative of the Tribes

Traditional canons of statutory interpretation counsel in favor of interpreting the law in a manner that gives effect to each part of the statute. *See, e.g.*, *Republic of Ecuador v. Mackay*, 742 F.3d 860, 864 (9th Cir. 2014) ("An interpretation that gives effect to every clause is generally preferable to one that does not."). Similarly, the statutes of the United States "should be construed so that effect is given to all [their] provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). The court "must presume that, '[a]bsent clear congressional intent to the contrary, . . . the legislature did not intend to pass vain or meaningless legislation." *Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructure Grp.*, 387 F.3d 1046, 1057 (9th Cir. 2004) (quoting *Coyne & Delany Co. v. Blue Cross & Blue Shield of Va., Inc.*, 102 F.3d 712, 715 (4th Cir. 1996)). In the same vein, it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *United States v. $133,420.00 in*

U.S. Currency, 672 F.3d 629, 643 (9th Cir. 2012) (quoting *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 691 (9th Cir. 2003)). Federal courts apply these canons of statutory interpretation to both statutory law and the Federal Rules of Civil Procedure. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 (9th Cir. 2017) ("We employ the 'traditional tools of statutory construction' to interpret the Federal Rules of Civil Procedure.").

The McCarran Amendment inarguably waives sovereign immunity over water rights held by both the United States and federally-recognized Indian tribes. *See Colorado River*, 424 U.S. at 809–10 ("Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions."); *see also San Carlos Apache*, 463 U.S. at 566 n.17 ("[A]ny judgment against the United States, as trustee for the Indians, would ordinarily be binding on the Indians."); *United States v. Oregon*, 44 F.3d at 770. As explained above, Congress recognized the importance of permitting all claims to varying water rights to be consolidated into one forum for adjudication, and while protecting these state processes in the McCarran Amendment, intended to include tribal water rights. *Colorado River*, 424 U.S. at 811 ("It was unmistakably the understanding of proponents and opponents of the legislation that it comprehended water rights reserved for Indians.").

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Assuming the McCarran Amendment does not waive sovereign immunity over Indian tribes as *parties* and only waives sovereign immunity over the Indian water *rights* at issue, the United States must be an adequate representative of the Tribes in water rights suits that fall under the McCarran Amendment. To interpret Rule 19 otherwise would render the sovereign immunity waiver of the McCarran Amendment null and void. If *only* the Tribes can adequately represent their water rights interests, *and* the Tribes cannot be forcibly joined to a suit due to sovereign immunity, then no state can conduct *comprehensive* water rights adjudications. Even if a state conducted such an adjudication, the Tribes would always be free to refuse to join and then assert they were not adequately represented in that suit, rendering the prior adjudication unenforceable as to them.

Ensuring these state water rights adjudications were all-encompassing and resolved all claims to rights in a particular body of water was the express purpose of the McCarran Amendment. Quoting from the Senate report on the Amendment, the Supreme Court observed:

> It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts.

Colorado River, 424 U.S. at 811.

If a Tribe cannot be joined as a party to a suit falling under the McCarran Amendment due to sovereign immunity, then the Government *must* be an adequate representative of their tribal water rights. Otherwise, there would be no mechanism to resolve what tribal water rights exist, and no mechanism by which to then administer those decisions. This result is obviously antithetical to the purposes of the McCarran Amendment, and the Supreme Court's holding in *Colorado River* and *San Carlos Apache*. Assuming the Tribes' sovereign immunity as parties is not waived by the McCarran Amendment, this Court's traditional interpretation of an "adequate representative" under Rule 19 as one who will "undoubtedly" make all the arguments of the intervenor must bend to avoid nullifying this "virtually unique federal statute." *San Carlos Apache*, 463 U.S. at 571. This Court should recognize McCarran Amendment suits as a particular exception to its traditional interpretation of Rule 19, and conclude the Government is an adequate representative of the tribes in such suits.

This outcome is required because federal courts cannot interpret the Federal Rules of Civil Procedure in a manner that fundamentally undermines the intent of Congress's statutory enactments. The Federal Rules of Civil Procedure are promulgated as an administrative function of the Supreme Court, pursuant to the Rules Enabling Act, codified at 28 U.S.C. § 2702. *See Doctor John's Inc. v. Village of Cahokia*, No. 3:18-cv-00171-JPG-RJD2019 WL 1574814, at *1 (S.D.

Ill. April 11, 2019) ("Article I, § 8, cl. 9 of the Constitution gives Congress the authority to establish the federal district courts; Congress then designated authority to the Supreme Court to create rules to govern those district courts pursuant to the Rules Enabling Act, 28 U.S.C. § 2072; and the Supreme Court then promulgated the Federal Rules of Civil Procedure."). The Rules Enabling Act specifically states that the procedural rules promulgated by the Supreme Court "shall not abridge, enlarge or modify any substantive right." *See* 28 U.S.C. § 2072(b); *Willy v. Coastal Corp.*, 503 U.S. 131, 134 (1992). In adopting procedural rules, federal courts are "not free to extend or restrict the jurisdiction conferred by a statute." *Willy*, 503 U.S. at 135. By the same token, federal courts may not restrict waivers of sovereign immunity, which is fundamentally related to jurisdiction, through their procedural rules. *See Powelson v. United States*, 150 F.3d 1103, 1104 (9th Cir. 1998) ("[S]overeign immunity is not merely a defense to an action against the United States, but a jurisdictional bar.") (quoting 16 James Wm. Moore et al., Moore's Federal Practice ¶ 105.21 (3d ed. 1998)); *Burns Ranches, Inc. v. U.S. Dep't of Interior*, 851 F.Supp.2d 1267, 1271–72 (D. Or. 2011); *Villegas v. United States*, 926 F.Supp.2d 1185, 1195 (E.D. Wash. 2013) ("[A]bsent an unequivocal statutory waiver of sovereign immunity, courts lack jurisdiction to entertain a suit."). As such, this Court cannot interpret Rule 19 to conclude the United States is not an adequate representative of the Tribes, if doing so would

override the waiver of sovereign immunity in the McCarran Amendment and thereby realign the boundaries of its jurisdiction. *See Willy*, 503 U.S. at 135.

Yet that is precisely what the District Court here did: it found the U.S. could not adequately represent the Tribes, and the Tribes could not be joined due to sovereign immunity, and therefore this suit for the administration of water rights could not go forward. This directly subverts the purpose and underlying policy behind the McCarran Amendment. Such a holding permits a judicial interpretation (the Ninth Circuit's "undoubtedly make" standard) of an administratively-created rule (the Federal Rules of Civil Procedure) to vitiate the clear intent of Congress in passing the McCarran Amendment. *See San Carlos Apache*, 463 U.S. at 566 n.17 ("[A]ny judgment against the United States, as trustee for the Indians, would ordinarily be binding on the Indians."); *Colorado River*, 424 U.S. at 809–10 ("Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions."); *United States v. Oregon*, 44 F.3d at 770; *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 922 (9th Cir. 1986) (confirming that the Supreme Court held in *San Carlos Apache* that "the McCarran Amendment removed any limitation that statehood Enabling Acts or general federal Indian policy may have placed on state court adjudication of Indian water rights").

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Further, there is every reason to believe the United States *is* an adequate representative of tribal water rights in this case. Countless courts have noted—and accepted—that the federal government holds trustee obligations to federally-recognized Indian tribes in relation to their water rights. *See, e.g., San Carlos Apache*, 463 U.S. at 566 n.17; *Colorado River*, 424 U.S. at 812 ("The Government has not abdicated any responsibility fully to defend Indian rights in state court."); *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 323 (9th Cir. 1956) ("This is a suit brought by the United States as trustee for the Yakima tribe of Indians to establish and quiet title to the Indians' right to the use of the waters of Ahtanum Creek in the State of Washington."); *United States v. Walker River Irr. Dist.*, 473 F.Supp.3d 1150, 1156 (D. Nev. 2020) (finding laches does not apply where the United States is "acting in its sovereign capacity to protect a property right held in trust by the United States for the benefit of the Tribe"); *United States v. Fallbrook Public Util. Dist.*, No. 51cv1247-GPC-RBB, 2019 WL 2184819, at *3 (S.D. Cal. May 21, 2019) ("The United States . . . represents the interests of the Tribes as trustee under federal law."). The Department of the Interior itself consistently recognizes its trust obligations to protect tribal water rights. *See* Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990) ("Indian water rights are vested property rights for which the United States has a

trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians."); *see also* Notice Regarding Upper Klamath Basin Comprehensive Agreement, 82 Fed. Reg. 61582, 61583 (Dec. 28, 2017) (noting the Klamath Tribes seeking enforcement of certain water rights "with the concurrence of the United States as trustee"); Truckee River Operating Agreement, 73 Fed. Reg. 74031, 74037 (Dec. 5, 2008) ("Indian trust resources are legal interests in property or natural resources held in trust by the United States for Indian Tribes or individuals."); Colorado River Interim Surplus Guidelines, 66 Fed. Reg. 7772, 7776 (Jan. 25, 2001) (noting Interior's role as trustee of tribal water rights and directing Reclamation to provide technical and financial assistance to tribes to establish water use plans); Central Arizona Project Water Allocation and Water Service Contracting, 56 Fed. Reg. 28404, 28407 (June 20 1991) (noting "the [Interior] Secretary's obligation as trustee for Indian tribes" in relation to reserved tribal water rights). There simply is no reason to believe the Government will not uphold its responsibilities to act as trustee for tribal water rights in this case.

The District Court's comment that only the Tribes can adequately defend "their interest in sovereign immunity" is misguided. The Tribes have no sovereign immunity interest that must be raised in this case. Congress clearly and unequivocally waived tribal sovereign immunity over water rights. *See San Carlos*

Apache, 463 U.S. at 566 n.17 (finding that, even if "the McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications, it did (as we made quite clear in *Colorado River*) waive sovereign immunity with regard to the Indian *rights* at issue in those proceedings"); *Colorado River*, 424 U.S. at 809–10 ("Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions."); *United States v. Oregon*, 44 F.3d at 770; *White Mountain Apache Tribe*, 784 F.2d at 922. KID did not name the Tribes as defendants; the Tribes *voluntarily* joined the suit for the obvious purpose of creating a procedural roadblock for KID. There simply is no need to have tribal sovereign immunity resolved in this suit.

Arguments about the McCarran Amendment and sovereign immunity are not new. In *San Carlos Apache*, the Government and Tribes expressly made arguments based on the premise that the McCarran Amendment did not waive tribal sovereign immunity:

> The United States and the various Indian respondents raise a series of arguments why dismissal or stay of the federal suit is not appropriate when it is brought by an Indian tribe and only seeks to adjudicate Indian rights[, including] . . . (3) The McCarran Amendment, although it waived United States sovereign immunity in state comprehensive water adjudications, did not waive Indian sovereign immunity. It is therefore unfair to force Indian claimants to choose between waiving their sovereign immunity by intervening in the state proceedings and

> relying on the United States to represent their interests in state court, particularly in light of the frequent conflict of interest between Indian claims and other federal interests and the right of the Indians under 28 U.S.C. § 1362 to bring suit on their own behalf in federal court.

San Carlos Apache, 463 U.S. at 566. The Supreme Court did not ultimately reach the merits of any of these arguments, but instead found the conflict was irrelevant, because "the state proceedings have jurisdiction over the Indian water rights at issue here," and therefore federal litigation was duplicative. *Id.* at 567. In doing so, it noted that "any judgment against the United States, as trustee for the Indians, would ordinarily be binding on the Indians," and therefore, even if the Tribes had the right to refuse to intervene, "the practical value of that right in this context is dubious at best." *San Carlos Apache*, 463 U.S. at 566 n.17. It is clear the Supreme Court has long understood the Government to be an adequate representative of tribal water rights it holds in trust.

This Court should hold that the Government is an adequate representative of tribal water rights in this case under Rule 19, and the Tribes are therefore not necessary parties. To the extent prior precedent focuses on whether the Government will "undoubtedly" make all the arguments the Tribes would make, that precedent must bend to the Congressional will expressed in the McCarran Amendment.

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ii. If the United States is Not an Adequate Representative, the McCarran Amendment Must be Interpreted to Waive Tribal Sovereign Immunity

KID argues in the alternative that, if this Court finds the Government not to be an adequate representative of the Tribes, it must conclude the McCarran Amendment waives sovereign immunity over the Tribes as parties. The District Court found the McCarran Amendment does not waive sovereign immunity of the Tribes as parties. (*See* ER-019.) In doing so, it relied strictly on one footnote in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 566 n.17 (1983). (*Id.*) This authority is not binding, as it is dicta. Instead, other cases suggest sovereign immunity is waived to the extent Tribes seek to intervene in McCarran Amendment cases. Moreover, if Reclamation is not an adequate representative of the Tribes, then the Tribes must be able to be joined to such a suit to avoid eviscerating the McCarran Amendment.

a. The Statement On Which the District Court Relied is Clearly Dicta

The statement on which the District Court relied in reaching this conclusion is clearly dicta. In *San Carlos Apache*, the Supreme Court considered several cases concerning whether states could exercise jurisdiction over Indian water rights if those states' statehood enabling acts contained language disclaiming any right and title to Indian lands. Various parties brought dueling proceedings in state and federal court concerning the adjudication of water rights in Montana and Arizona,

and the question for the Supreme Court was whether the federal cases should be stayed or dismissed pursuant to the *Colorado River* doctrine. 463 U.S. at 553–59. The Supreme Court concluded that the language of the statehood enabling acts was irrelevant because, "whatever limitation the Enabling Acts or federal policy may have originally placed on state court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment." *Id*. at 564. Having concluded this, the Court next inquired whether the *Colorado River* doctrine could apply to suits brought by Tribes, not merely those that included Tribes as interested parties. *Id*. at 565. In concluding the *Colorado River* doctrine did apply to such proceedings, it listed off the arguments of the parties, one of which was that the McCarran Amendment did not waive Indian sovereign immunity and therefore *Colorado River* should not apply lest it force the tribes into the dilemma of either waiving sovereign immunity or defending their water rights. Responding to that argument, the Supreme Court included a footnote saying:

> This argument, of course, suffers from the flaw that, although the McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications, it did (as we made quite clear in *Colorado River*) waive sovereign immunity with regard to the Indian *rights* at issue in those proceedings. Moreover, contrary to the submissions by certain of the parties, any judgment against the United States, as trustee for the Indians, would ordinarily be binding on the Indians. In addition, there is no indication in these cases that the state courts would deny the Indian parties leave to intervene to protect their interests. Thus,

> although the Indians have the right to refuse to intervene even if they believe that the United States is not adequately representing their interests, the practical value of that right in this context is dubious at best.

Id. at 566 n.17 (emphasis added). The Court then went on to note that similar arguments had been made and rejected in both *Colorado River* and *Eagle County*, and that either way, "all of these arguments founder on one crucial fact: If the state proceedings have jurisdiction over the Indian water rights at issue here, as appears to be the case, then concurrent federal proceedings are likely to be duplicative and wasteful." *San Carlos Apache*, 463 U.S. at 567.

This footnote is probably best read as supporting the conclusion that the United States is an adequate representative of tribal water rights. Regardless, it is not critical to the holding in *San Carlos Apache*, and thus is dicta.

b. This Court Has Already Held that the McCarran Amendment Waives Tribal Sovereign Immunity

Further, the Court in *San Carlos Apache* also noted these same arguments—that the McCarran Amendment does not waive tribal sovereign immunity—had been "raised and rejected" in *Eagle County* and *Colorado River*. 463 U.S. at 567. This reinforces this Court's own prior conclusion that the McCarran Amendment waives tribal sovereign immunity.

In *United States v. Oregon*, 44 F.3d 758, the Klamath Tribe and the United States argued they were not required to participate in the Klamath Adjudication—

the very adjudication underlying this case—because their sovereign immunity was not waived by the McCarran Amendment. 44 F.3d at 763 ("Unless the McCarran Amendment waived the sovereign immunity of the federal government *and the Tribe*, neither may be required to participate in a state adjudication in order to preserve water rights that have accrued under federal law.") (emphasis added). This Court *specifically* ruled sovereign immunity was waived. *See id.* at 763–70 (considering and rejecting numerous arguments about whether sovereign immunity was waived by the McCarran Amendment for the Klamath Adjudication). Ultimately, this Court held "that the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment." *Id.* at 770.

This holding necessarily included a decision that the Klamath Tribe's sovereign immunity as waived. *Id.* at 763 ("Unless the McCarran Amendment waived the sovereign immunity of the federal government *and the Tribe*, neither may be required to participate in a state adjudication in order to preserve water rights that have accrued under federal law.") (emphasis added). The Court went further, however, and reviewed and rejected additional due process arguments by

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the Klamath Tribe that it could not be subjected to the Klamath Adjudication, because of the potential for bias by state decision-makers.[5] *See id.* at 771–72.

Similarly, this Court held in *White Mountain Apache Tribe* that the McCarran Amendment waived tribal sovereign immunity. In that case, the White Mountain Apache Tribe contested Arizona's jurisdiction to adjudicate its water rights. 784 F.2d at 924. This Court stated:

> The Tribe persists in misconstruing the McCarran Amendment and the decisions applying it. We find it difficult to respond to the Tribe's contentions at this late date other than to state flatly that the Tribe is wrong. The state court does have the authority to adjudicate tribal water rights in W–1. The Congress has said so, *see* McCarran Amendment, 43 U.S.C. § 666; the United States Supreme Court has said so, *see Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983); *Colorado Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); the Arizona Supreme Court has said so, *see United States v. Superior Court in and for Maricopa County*, 144 Ariz. 265, 697 P.2d 658 (1985); and we have said so, *see Northern Cheyenne Tribe v. Adsit*, 721 F.2d 1187 (9th Cir. 1983). It is time that the Tribe accept the proposition as true.

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[5] If the Klamath Tribe's sovereign immunity was not waived by the McCarran Amendment, there would obviously have been no occasion to consider its due process claim. *See also id.* at 773 n.13 (noting the rejection of the Tribe's assertion of sovereign immunity, which a separate association of water allottees had claimed extended to it as well).

Id. at 924. This Court further noted the Tribe had made "serious charges" about "gross mismanagement of the Tribe's water resources by the government." *Id.* "[T]he remedy is for the Tribe to intervene in that [state] proceeding." *Id.* This Court would not have suggested the Tribe intervene in the state proceeding if the Tribe *retained* its sovereign immunity.

Again, suits falling under § 666(a)(1) of the McCarran Amendment serve the purpose of comprehensively adjudicating water rights to a water system, including federal reserved rights held on behalf of or by Indian tribes. *See, e.g., San Carlos Apache*, 463 U.S. at 569 ("[T]he McCarran Amendment, as interpreted in *Colorado River*, allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications."). Suits falling under Subsection (a)(2) are those suits seeking the administration of rights determined in suits under Subsection (a)(1). *See Eagle County*, 401 U.S. at 524; *South Delta Water Agency*, 767 F.2d at 541; *San Luis Obispo Coastkeeper*, 394 F.Supp.3d at 994; *Hennen*, 300 F. Supp. at 263. The Klamath Basin Adjudication inarguably is an (a)(1) proceeding. (Doc. No. 89 at 16.) This case simply seeks to enforce the terms of the ACFFOD and administer those rights held by KID thereunder. (*See* Doc. No. 70 at ¶¶ 43, 45, 46, 49.) By determining that this suit can be dismissed because the Tribes are necessary parties under Rule 19 who will not waive their sovereign immunity, this Court is

circumventing the clear will and intent of Congress in enacting the McCarran Amendment.

Therefore, to the extent this Court concludes that the Tribes are necessary parties not adequately represented by the Government, it must conclude the McCarran Amendment waived tribal sovereign immunity.

C. The Tribes are Not Necessary Parties to KID's Due Process Claim

The District Court did not distinguish between the various claims KID brought in its SAC, and so did not separately consider whether, at least, KID's due process claim could proceed. Instead, it dealt with all claims in both KID's SAC and a complaint filed by the Klamath Water Users' Association ("KWUA") in a consolidated fashion. (*See, e.g.*, Doc. 89 at 13 [characterizing both suits as alleging that Reclamation has "no discretion to act in releasing the water it stores"].) This fails to appreciate a critical difference between the two suits and, as a consequence, fails to provide separate consideration to whether the Tribes are necessary parties to KID's due process claim.

The critical difference between KID and KWUA's complaints is that KID does not allege Reclamation lacks discretion in its actions associated with the Klamath Project. Indeed, KID acknowledges in its complaint that Reclamation has discretion in its operations of the Klamath Project, including its ability to acquire water—voluntarily or involuntarily—from KID and other water rights holders.

(*See* ER-097–098 at ¶¶ 14–18 [noting Reclamation may lawfully obtain water rights through appropriation, purchase, or condemnation under judicial process]; ER-100 at ¶ 26 ["Defendant has no discretion or authority to limit the amount of water KID and its landowners are entitled to beneficially use under their water rights, to the extent such water is physically available, *without otherwise condemning or appropriating KID's water rights*."] [emphasis added]; ER-105 at ¶ 45 [noting Reclamation had not purchased or condemned KID's water]; ER-107 at ¶ 50 [alleging Reclamation can comply with both the ESA and the Reclamation Act].)

Reclamation possesses the power to acquire water, if necessary. The Reclamation Act states Reclamation may "acquire any rights or property" deemed necessary "by purchase or condemnation under judicial process." 43 U.S.C. § 421; *California v. United States*, 438 U.S. at 693–94 ("Section 7 of the Reclamation Act, now 43 U.S.C. § 421, authorizes the Secretary to acquire any rights or property by purchase or condemnation under judicial process, and the Attorney General is directed to institute suit at the request of the Secretary.") (White, J., dissenting). Reclamation can even acquire such rights in the face of opposition by the owner and even if state law would seem to prevent eminent domain. *See California v. Rank*, 293 F.2d 340, 354 (9th Cir. 1961) ("Assuming, without deciding, that California law gives these plaintiffs a preference over the defendant

districts and the United States as to rights to appropriate surplus waters, it does not follow that such preferred rights cannot be taken by the United States.") *judgment upheld in part, reversed in part on other grounds in Dugan v. Rank*, 372 U.S. 609 (1963). It is clear Reclamation *can* lawfully acquire the water it needs to operate the Klamath Project.

KID's complaint focused on the *method* Reclamation uses to acquire water. Instead of purchasing or leasing the water from KID or condemning KID's water rights through judicial process, any of which would require clarity upfront about the quantity of water needed and the compensation being paid for the same, Reclamation has chosen to arbitrarily seize water for its own purposes without an Oregon water right. (ER-106 at ¶ 47.) KID does not seek in this suit to fully prevent Reclamation from acquiring KID's water. Instead, it seeks to have Reclamation conduct itself through a lawful process, as required by the Reclamation Act and Oregon law. (ER-114–15 [setting forth prayer for relief].)

KID's access to this process is important, which is why it alleged procedural due process claims in its complaint. (ER-112–14 at ¶¶ 74–83.) An orderly process for acquiring or condemning water provides KID an opportunity to consider specific requests for water from Reclamation, which allows KID to effectively marshal the supply of water it has to provide to its farmers and ranchers. It provides an opportunity for KID to identify junior water rights holders who, under

Oregon law, should be curtailed prior to Reclamation's curtailment and seizure of water KID holds rights to. It allows KID the opportunity to identify whether other sources of water might better suit Reclamation's needs. It permits up front discussions about reasonable compensation for the water. And it gives KID the opportunity to contest certain specific water seizures as unnecessary, wasteful, arbitrary, capricious, or otherwise unsupportable based on the best scientific data available.

Moreover, KID's procedural due process claim would ensure that any appropriation of water—particularly one that is disputed for some reason—proceeds before a *neutral* decisionmaker, rather than allowing Reclamation the unilateral right to determine when, where, how, and how much water it will seize from KID. Indeed, courts have emphasized that there are many, varied situations in which due process requires a hearing in front of a neutral decisionmaker, particularly where the proceeding is disputed or adversarial. *See, e.g.*, *Walker v. City of Bradley*, 951 F.2d 182, 184 (9th Cir. 1991) (due process violated where city failed to provide an impartial decisionmaker at post-termination hearing for employee); *Fed. Energy Reg. Comm'n v. Barclays Bank PLC*, No. 2:13–cv–02093–TLN–DB, 2017 WL 4340258, at *11 (E.D. Cal. Sept. 29, 2017) (holding that a proceeding for a regulatory fine must be held before a neutral decisionmaker); *Monroe v. Smith*, No. CV 12–00757–PHX–SRB (SPL), 2012 WL

5381491, at *2 (D. Ariz. Sept. 24, 2012) (noting that the Supreme Court's decision in *Wolff v. McDonnell*, 418 U.S. 539, 564–66 (1974) "implied that a fair hearing requires an impartial decisionmaker" in prison disciplinary hearings).

This request for due process before a neutral decisionmaker is no more than Congress required in the Reclamation Act when it permitted Reclamation to appropriate water or other property "by purchase or by *condemnation under judicial process*." 43 U.S.C. § 421 (emphasis added). In Oregon, transfers and curtailments of water rights are overseen by the OWRD, which specifically holds hearings when curtailments are contested. In fact, less than a year ago, a final judgment was entered against OWRD finding the state violated the procedural due process rights of a Klamath farmer by curtailing his water rights without *first* affording him a contested case hearing, or an adequate due process substitute. *Troy Brooks et al v. Thomas Byler et al.*, Marion County Circuit Court Case No. 19CV27798 (final judgment entered May 6, 2020). Oregon courts have recognized the important procedural role OWRD plays in relation to water rights disputes in the state. This is why KID explicitly alleged a procedural due process claim. (ER-112–14 at ¶¶ 74–83.)

Instead of following an orderly process, Reclamation has repeatedly chosen to simply take stored water from UKL to which it does not have a right and use it to fulfill its own obligations under the ESA and tribal trust responsibilities. (ER-

105–07 at ¶¶ 45–48.) This is done without meaningful process or an opportunity to be heard on the same. (ER-106 at ¶ 47.) The fact that Reclamation can acquire this water if it needs it is not disputed by KID; the *process* by which Reclamation acquires the water is disputed. Were Reclamation to abide by the Reclamation Act and follow an orderly process to acquire the water—assuming Reclamation could not simply purchase the water rights from KID—KID would have a meaningful opportunity to participate in the process. This is clearly what is contemplated in the Reclamation Act, and clearly what the Supreme Court has held Reclamation is required to do. *See* 43 U.S.C. § 421; *California*, 438 U.S. at 693–94. Compliance with the Reclamation Act's mandate to follow state judicial condemnation processes would also discharge Reclamation's obligations under the federal constitution to give KID due process, by ensuring decisions about forced appropriations of water to which KID holds rights are rendered by a neutral decisionmaker.

Because KID's complaints are purely procedural in nature—concerning the process by which Reclamation acquires water, not whether Reclamation can acquire water—the rights of the Tribes, whatever they may be, will not be impacted by this lawsuit. Again, nothing about KID's complaint seeks to prevent Reclamation from acquiring water. (*See* ER-100 at ¶ 26] [alleging Reclamation "has no discretion or authority to limit the amount of water KID and its landowners

are entitled to beneficially use under their water rights, to the extent such water is physically available, *without otherwise condemning or appropriating KID's water rights and the rights of its landowners through judicial process in accordance with Oregon law*"].) This allegation is an acknowledgment that Reclamation *can* appropriate KID's water through judicial process. Thus, to whatever extent Reclamation requires water to fulfill ESA or tribal trust obligations, it can acquire that water. It simply must do so lawfully and in comportment with due process.

The District Court provided absolutely *no* analysis explaining how and why the Tribes have an interest in KID's procedural due process claim. This due process claim is clearly alleged in KID's complaint. (ER-112–14 at ¶¶ 74–83.) Even if the Tribes are somehow necessary parties to the APA claims seeking to administer the rights found in the ACFFOD brought by KID—which KID disputes—the Tribes clearly have no interest in whether KID's procedural due process rights are being violated. It was error for the District Court to dismiss the *entirety* of KID's complaint based on a conclusion that the Tribes are necessary parties to the APA claim. *See Alto v. Black*, 738 F.3d 1111, 1129–31 (9th Cir. 2013) (making clear that the question of necessary parties must be addressed on a claim-by-claim basis); *Jamul Action Comm. v. Chaudhuri*, 200 F.Supp.3d 1042, 1051–52 (E.D. Cal. 2016) (concluding that, even though tribe was a necessary

party to several causes of action, it was not a necessary party to a NEPA cause of action, which could therefore proceed).

Were Reclamation to be ordered by this Court to follow the Reclamation Act and Oregon law when appropriating KID's water, and were Reclamation to refuse to do so, *then* the Tribes might be impacted. However, this would be an entirely separate proceeding, in which Reclamation refused to discharge its statutory duties vis à vis the Tribes. There is no reason to assume that if this Court orders Reclamation to discharge its obligations *lawfully*, Reclamation will respond by refusing to discharge its obligations *at all.*

Because KID's suit seeks to vindicate purely procedural rights, the Tribes cannot possibly have an interest therein. Whatever water rights the Tribes have, they cannot have a legally protectable interest in having those rights supplied *unlawfully*. For instance, the Tribes would not argue (and the Court would not condone an argument suggesting) they have an interest in making sure Reclamation *steals* the water to supply the Tribes' needs. Such a request would be nonsensical. Yet this is precisely what is happening: Reclamation, which holds no rights to use stored water under the ACFFOD and without obtaining such rights, has flushed and continues to flush large quantities of stored water down the river to meet its own ESA and tribal trust obligations. Under Oregon law, this is actually a crime. ORS 540.720 ("No person shall use without authorization water to which

another person is entitled, or willfully waste water to the detriment of another."); ORS 540.990(1) ("Violation of . . . ORS 540.720 . . . is a Class B misdemeanor").

Moreover, the Tribes do not and cannot have an interest in the mechanism by which Reclamation acquires water for them: their interest is *in the water itself*. KID's suit is not directly about water. It is about *water rights*, specifically, those water rights held by KID which were decided under Oregon law as set forth in the ACFFOD.

Understood in this manner, the Tribes do not satisfy Rule 19 with respect to KID's procedural due process claim. Complete relief between Reclamation and KID *is* available on that claim, as the Court can rule on the process required by the Reclamation Act for Reclamation to acquire water in a manner that respects KID's water rights. Fed. R. Civ. P. 19(a)(1)(A). And none of the Tribes' interests will be impaired, because nothing about this claim prevents Reclamation from acquiring and delivering the water it is required to deliver. Fed. R. Civ. P. 19(a)(1)(B).

The District Court erred, both because it failed to consider whether the Tribes were necessary parties to KID's procedural due process claim and because it determined the Tribes have an interest in the process by which Reclamation acquires KID's water.

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D. Even if the Court Finds the Tribes are Necessary Parties that Cannot be Joined Due to Sovereign Immunity, the Court Should, in Equity and Good Conscience, Allow the Case to Go Forward

The District Court found this case should be dismissed, in equity and good conscience, observing, "Where an Indian tribe that cannot be joined due to sovereign immunity is required, courts in the Ninth Circuit regularly order dismissal." (Doc. No. 89 at 17.) However, *not one* of the cases cited by the District Court concerned water rights or the McCarran Amendment. *See Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008) (concerning sovereign immunity of the Republic of the Philippines); *Dine Citizens Against Ruining Our Envt. v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019) (concerning the reissuance of mining permits to a Navajo mining company); *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014) (disputes about Kumeyaay artifacts under the Native American Graves Protection and Repatriation Act); *Friends of Amador County v. Salazar*, 554 Fed. App'x 562 (9th Cir. 2014) (tribal gaming compact with the state of California); *Dawavendewa v. Salt River Project Ag. Imp. & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002) (hiring practices at the Navajo Generating Station); *Am. Greyhound Racing v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (tribal gaming compact with the state of Arizona); *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992) (Hoopa-Yurok Settlement Act); *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245 (D. Or. 2017) (concerning a railroad expansion). This is

unsurprising: water law is fundamentally different than virtually all other types of law.

As discussed above, water law involves a truly unique mix of both federal and state law. Because of the logistical difficulties with resolving disputed water rights claims in the fashion of a traditional civil case, most Western states developed a statutory system for adjudicating all rights on a particular stream or river. The McCarran Amendment was particularly enacted to ensure federal reserved rights could be considered and adjudicated in these comprehensive state proceedings and thereafter administered in a unified system together with state water rights. Because of this desire to subject federal rights to state administration and permit unitary, comprehensive resolution and administration of all competing water claims on a particular water source, the McCarran Amendment is a "virtually unique" federal statute. *San Carlos Apache,* 463 U.S. at 571.

When deciding whether a suit lacking a necessary party should nonetheless proceed, four factors are considered: (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." Fed. R. Civ. P. 19(b); *see also EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1077 (9th Cir. 2010). All factors favor allowing this case to proceed.

i. Neither The Tribes Nor the Government Will Be Prejudiced by Allowing this Suit to Proceed

The first factor weighs heavily in favor of reversing the District Court and allowing the suit to proceed. In the absence of the Tribes, the only judgment that could be rendered is one directing Reclamation to comply with the Reclamation Act and Oregon state law in acquiring water it needs to satisfy its obligations to the Tribes and under the ESA. Luckily, this is *specifically* the relief KID seeks. This relief is entirely procedural in nature.

KID does not allege Reclamation can be entirely prevented from acquiring water. In the absence of a purchase and sale agreement, Reclamation may condemn water through "judicial process." 43 U.S.C. § 421. The Government is not prejudiced by being compelled to act in a lawful manner.

The Tribes will suffer no prejudice from a judgment compelling Reclamation to act in a lawful manner in acquiring water. There is no reason to believe that, if Reclamation is told to act lawfully, it will refuse to act *at all*. If Reclamation *did* refuse to discharge whatever duties it owes the Tribes, the Tribes would then have their own cause of action against Reclamation. However, this is

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entirely speculative, as the Government has not indicated it would abdicate its trust obligations.

ii. To the Extent Prejudice Does Exist, It Can Be Fully Ameliorated by Careful Crafting of the Declaratory Relief

The second factor similarly weighs in favor of reversing the District Court and allowing this action to proceed. Again, KID's suit seeks only to vindicate its procedural rights, and so does not prejudice the Tribes. However, should KID prevail on the merits of its case, and should a concern develop about Reclamation's ability to comply with its obligations under the ESA and its various tribal trust responsibilities, the Court can craft its resulting judgment narrowly. KID can receive the relief it seeks in this case without forestalling Reclamation's ability to acquire and use whatever water it needs to satisfy whatever obligations it has. And now, fully apprised of the Tribes' concerns, the District Court can direct Reclamation to comply with its legal obligations under the Reclamation Act and the Klamath Adjudication *without* violating any legal obligations it owes to the Tribes.

iii. A Judgment Rendered in the Tribes' Absence Would be Fully Adequate

Because KID seeks only procedural relief, the Tribes' absence would not inhibit an adequate judgment. Under Oregon law and the Reclamation Act, state and federal water rights in UKL are to be administered by OWRD, which would

fulfill the due process requirement of a neutral decisionmaker. Appropriation decisions under the Reclamation Act are not intended to be unilaterally resolved by Reclamation fiat. *See* 43 U.S.C. § 383; *California*, 438 U.S. at 647, 666–76 (holding that Reclamation was required to abide by state law-based conditions on water rights it appropriates).

Adherence to the lawful processes of water rights administration ensures KID receives notice and opportunity to be heard before an impartial decisionmaker if a dispute arises about a particular appropriation Reclamation seeks. These disputes are not uncommon, where, for instance, Reclamation might seek to curtail KID's water use without first looking to junior water rights; or seize KID's stored water to supplement other industries, such as the fishing industry; or otherwise seek to take rights arbitrarily. Under Oregon law, made applicable to Reclamation via Section 8 of the Reclamation Act, it is OWRD that is responsible for making these decisions, not Reclamation.

These procedural rights are important to KID. Employing "judicial process," as the Reclamation Act commands, affords KID the ability to negotiate compensation, inform its farmers and ranchers about the availability of water, plan for future water needs, and contest water acquisitions that are unnecessary, wasteful, arbitrary, capricious, or otherwise unsupportable based on the scientific data available.

If Reclamation was *only* ordered to comply with the Reclamation Act and either purchase or condemn water to which KID holds water rights through "judicial process," that judgment would be entirely adequate. Conversely, if the District Court were to find Reclamation need not use judicial process, condemnation, or purchasing in order to seize KID's water, the judgment would adequately—albeit erroneously—resolve the issue. Neither outcome would prevent Reclamation from acquiring water. It would only control *how* Reclamation goes about doing so.

iv. There is a Significant Risk that KID will be Left Without Any Alternative Remedy if This Suit is Dismissed for Nonjoinder

Finally, there is a significant risk KID will be left without any reasonable alternative remedy if the dismissal for nonjoinder is permitted to stand. There simply is no other forum in which KID could seek declaratory relief. The only other possible avenue for seeking this type of declaratory or injunctive relief—bringing a motion or suit in state court against Reclamation to attempt to enforce the ACFFOD—would almost certainly end in the same result. Reclamation and its officers can always remove a suit brought in state court to federal court. *See* 28 U.S.C. § 1442(a)(1); *Willingham v. Morgan*, 395 U.S. 402, 406 (1969) ("[T]he right of removal under § 1442(a)(1) is made absolute whenever a suit in a state court is for any act 'under color' of federal office, regardless of whether the suit could originally have been brought in a federal court. Federal jurisdiction rests on

a 'federal interest in the matter.'") (quoting *Poss v. Lieberman*, 299 F.2d 358, 359 (2d Cir. 1962)). Once removed, the Tribes would again seek to intervene for the limited purpose of seeking dismissal for inability to join them as parties, just as they have done here. This would essentially nullify the purpose of the McCarran Amendment to allow all water rights, including tribal water rights, to be resolved in comprehensive adjudications. Without a mechanism to *enforce or administer* the rights found, the adjudications serve no point. This cannot be (and is not) what Congress intended when it enacted the McCarran Amendment.

Nor, as might be suggested, is a takings suit filed in the Court of Federal Claims an adequate alternate remedy. KID seeks declaratory relief here, and its constituents have as much of an interest in the process as they do in ultimate monetary compensation. Knowing when and how much water may be used allows KID to better allocate its resources in times of scarcity. Having an established and trusted means of dispute resolution such as OWRD permits the orderly and efficient resolution of differences. Both of these are important to the effective running of any business.

Additionally, post-hoc takings suits, especially those relating to water rights, can and do result in exceptionally long delays between the date of taking and the payment of compensation. A suit about the unlawful taking of water in the Klamath Basin in 2000 only recently reached final resolution in 2019, *almost two*

decades after it was filed. *See Baley v. United States*, 942 F.3d 1312, 1323 (Fed. Cir. 2019).[6] In that time, businesses have gone under, land has been sold, and people have moved away. It is not an adequate alternative remedy to wait decades for compensation that may never come.

Meanwhile, the farmers and ranchers of KID will continue to suffer. In truth, in low-water years such as 2020 and 2021, there is little farmers and ranchers can do to prevent their water supplies from being appropriated by Reclamation. However, compelling Reclamation to abide by legal processes would at least provide a level ground on which to contest specific water seizures and assert varying priority rights as water usage is being curtailed. The current system now implemented by the District Court—where Reclamation unilaterally seizes water without acquiring water rights and the Tribes block litigation to administer those rights—provides neither due process nor a workable scheme for KID to operate within.

Even if this Court concludes the District Court did not err in finding the Tribes were necessary parties who were not adequately represented by

[6] While the Federal Circuit concluded in *Baley* that no taking had occurred, this holding is irrelevant to the current proceeding, as it expressly considered *only* rights not at issue in the Klamath Adjudication, which was obviously still pending at the time of the taking. *See Baley*, 942 F.3d at 1327 (noting the trial court had prevented the plaintiffs in that case from "making any claims or seeking any relief in this case based on rights, titles, or interests that are or may be subject to determination in the [Klamath] Adjudication"). The ACFFOD was entered thirteen (13) years after the claims at issue in *Baley* arose.

Reclamation and could not be joined due to their sovereign immunity, this Court should still reverse the lower decision. Equity and good conscience—not to mention the clear Congressional desire to allow states to conduct meaningful water rights adjudications—require this suit be allowed to proceed to the merits.

CONCLUSION

The District Court erred in concluding this was not a suit for the "administration" of water rights under the McCarran Amendment. This suit seeks to vindicate the rights found in the Klamath Adjudication, and this Court has *already* held that adjudication is a McCarran Amendment proceeding.

Additionally, the District Court erred by finding Reclamation is not an adequate representative of the Tribes in this case. To the extent that decision is based on the Circuit's interpretation of Rule 19, it must bend to avoid subverting the clearly expressed Congressional policy in the McCarran Amendment. An adjudication with no means of enforcing the determination is meaningless, and Congress certainly did not intend to encourage meaningless state proceedings.

Conversely, if Reclamation is not an adequate representative of the Tribes, then the McCarran Amendment must be found to have waived sovereign immunity. This Court has already implied this is true, and the Supreme Court has clearly and unequivocally held that tribal water rights *are* subject to state water rights adjudications. The sole authority to the contrary is mere dicta in *San Carlos*

Apache, which strongly suggested Reclamation is an adequate representative of the Tribes.

The District Court also erred by failing to undertake a claim-by-claim analysis of KID's complaint. Whatever might be said of the Tribes' interest in the APA claims, it is clear the Tribes have no interest in KID's procedural due process claim. *All* of KID's claims are procedural in nature, in truth. Nowhere is that more true than KID's procedural due process claim. The Tribes do not and cannot have an interest in ensuring KID has no access to adequate procedures for deprivations of its rights.

Lastly, even if the Tribes are necessary parties that cannot be joined due to sovereign immunity, and Reclamation is not an adequate representative of their tribal rights that it is the trustee for, the Court should allow this case to proceed, in equity and good conscience. There are no feasible alternatives for KID to seek the relief requested here. A state court case would be removed by the Government and objected to by the Tribes on the exact same grounds as this case. A takings claim in the Court of Federal Claims does nothing to vindicate KID's *procedural* rights. And in any event, the practical upshot of such takings claims is that compensation, even if available, might be delayed by decades, which is not a reasonable timeline

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on which to force a business to operate. This case must be allowed to proceed to the merits.

DATED: APRIL 1, 2021.

WANGER JONES HELSLEY PC

By: /s/ Christopher A. Lisieski
John Kinsey and Chris Lisieski,
Attorneys for Appellant

STATEMENT OF RELATED CASE

This case is related to Case No. 20-36020, *Shasta View Irrigation Dist., et al. v. Bureau of Reclamation, et al.* These cases were consolidated in the District Court, Case Nos. 1:19-cv-00451-CL and 1:19-cv-00531-CL.

DATED: APRIL 1, 2021.

WANGER JONES HELSLEY PC

By: __/s/ Christopher A. Lisieski _____
John Kinsey and Chris Lisieski,
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 13,774 words.

DATED: APRIL 1, 2021. WANGER JONES HELSLEY PC

By: __/s/ Christopher A. Lisieski_____
John Kinsey and Chris Lisieski,
Attorneys for Appellant

DECLARATION OF ELECTRONIC SERVICE

Case Name: **KLAMATH IRRIGATION DISTRICT**
v. UNITED STATES BUREAU OF RECLAMATION, et al.
United States Court of Appeals for the Ninth Circuit, Case No.: **20-36009**
United States District Court for the District of Oregon, Medford Division,
Case Nos.: **1:19-cv-00451-CL and 1:19-cv-00531-CL**

I declare: I am employed at Wanger Jones Helsley PC, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On April 1, 2021, I electronically served the attached **APPELLANT'S OPENING BRIEF** by transmitting a true copy via electronic service, addressed as follows:

VIA ELECTRONIC SERVICE TO:

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X **(BY MAIL)** I am readily familiar with the business' practice for collection and processing of correspondence for mailing, and that correspondence, with postage thereon fully prepaid, will be deposited with the United States Postal Service on the date noted below in the ordinary course of business, at Fresno, CA.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 1, 2021, in Fresno, California.

Kimberley Dodd
Declarant

/s/ Kimberley Dodd
Signature