IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

KLAMATH IRRIGATION DISTRICT, et al,
SHASTA VIEW IRRIGATION DISTRICT, et al,

Plaintiffs,

v.

UNITED STATES BUREAU OF RECLAMATION, et al,

Defendants.

Case No. 1:19-cv-00451-CL
Case No. 1:19-cv-00531-CL

(Consolidated)

FINDINGS AND RECOMMENDATION

CLARKE, Magistrate Judge

This case comes before the Court on two motions to dismiss under Rule 12(b)(7) for failure to join a required party under Rule 19, filed by the Intervenor-Defendants, Hoopa Valley Tribe and the Klamath Tribes (#74, #75). For the reasons below, the motions should be GRANTED, and these consolidated cases should be dismissed. Previously filed motions to dismiss (#63, 64) should be denied as moot.

INTRODUCTION

This case centers around the water located in the Klamath Basin, and the groups of people who rely on that water for cultural, spiritual, agricultural, and economic subsistence. The history of these issues, between these parties, dates to the nineteenth century, at least. To say it

is multifaceted is to lose the true complexity of the long timeline, the rich cultures, and the many adversities the people groups involved have faced and overcome. This includes the people groups of the Hoopa Valley Tribe and the Klamath Tribes, as well as the generations of farmers, irrigators, and families of water-users in the Klamath Basin. As the federal agency tasked with distributing water in this region, the Bureau of Reclamation has the nearly impossible job of complying with numerous important, long-standing obligations. In this time of frequent drought and water-scarcity, these obligations take on even more significance, conflict, and dire implications for everyone involved. The Court's task today is not to solve the ultimate predicament of competing water rights in the region, but to determine who is required to be at the table when these issues are challenged and decided. As discussed below, the Hoopa Valley Tribe and the Klamath Tribes are so required. Entitled to sovereign immunity, they cannot be forcibly joined. This case must be dismissed for failure to join a required party under Federal Rules of Civil Procedure 12(b)(7) and 19.

BACKGROUND

I. The Klamath Water Basin

The Klamath Basin occupies approximately 12,000 square miles in south-central Oregon and northern California. AR 76065. Upper Klamath Lake (UKL) is controlled by Link River Dam (owned and operated by Reclamation), such that it stores water during higher runoff periods that can be diverted for irrigation, or released to flow downstream, when natural run-off has diminished. AR 76117-8. The Klamath River proper begins downstream of Link River Dam and flows approximately 240 miles before it reaches the Pacific Ocean. AR 76037. Iron Gate Dam is approximately 64 miles downstream of Link River Dam. AR 76153. Salmon in the Klamath River cannot move upstream beyond Iron Gate Dam. AR 76166. Four major tributaries, and numerous

smaller tributaries, add volume to the Klamath River as it flows downstream from Link River and Iron Gate Dams. AR 76076.

II. The Klamath Tribes and the Hoopa Valley Tribe

Since time immemorial, the Klamath Tribes and their members have used, and continue to use, the natural resources of the Klamath Basin in what is now the states of both Oregon and California for subsistence, cultural, ceremonial, religious, and commercial purposes. Gentry Decl., (Dkt. #31) ¶ 3. C'waam (Lost River sucker or *Deltistes luxatus*) and Koptu (shortnose sucker or *Chasmistes brevirostris*) have played a particularly central role in the Tribes' cultural and spiritual practices, and they were once the Tribes' most important food-fish. *Id*. ¶ 4; *Klamath Tribes v. United States Bureau of Reclamation*, 2018 WL 3570865, at *1 (N.D. Cal. July 25, 2018).

In 1864, the United States and the Tribes entered into a treaty whereby the Tribes ceded their interests in millions of acres of land and retained a reservation of approximately 800,000 acres, along with "the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits." Treaty Between the United States and the Klamath and Moadoc Tribes and Yahooskin Bank of Snake Indians, October 14, 1864, 16 Stat. 707. The Ninth Circuit has recognized that the Tribes' treaty fishing rights include "the right to prevent other appropriators from depleting the streams waters below a protected level." *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983).

Similarly, the Hoopa Valley Tribe and its members have, since time immemorial, relied on the water and fish resources of the Klamath and Trinity Rivers, which both flow through its Reservation. The United States located and set aside the Hoopa Valley Reservation on August 21, 1864. *Mattz v. Arnett*, 412 U.S. 481, 490, fn. 9 (1973); *Short v. United States*, 202 Ct. Cl.

870, 875-980 (1973) (discussing Reservation history). On June 23, 1876, President Grant issued an Executive Order formally setting aside the Reservation for "Indian purposes." *Short*, 202 Ct. Cl. at 877. Traditional salmon fishing was one of the "Indian purposes" for which the Reservation was created. *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995). The Klamath and Trinity Rivers flow through the Reservation, which encompasses a 12-mile square historically inhabited by Hoopa people. *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1370 (Fed. Cir. 2000).

In 1864, the United States determined the Reservation a suitable permanent homeland for Hoopa Indians for two principal reasons. The Reservation is within the heart of the Tribe's aboriginal lands, which Hoopa Indians occupied and fished upon for generations. *Parravano*, 70 F.3d at 542. Hoopa Indians possessed fishing and hunting rights long before contact with white settlers and their salmon fishery was "not much less necessary to [their existence] than the atmosphere they breathed." *Id*. at 542, quoting *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981). Second, the Reservation set aside resources of the Klamath and Trinity rivers for Hoopa people to be self-sufficient and achieve a moderate living based on fish. *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986) (noting Indians' right to take fish from the Klamath River for ceremonial, subsistence, and commercial purposes); *Parravano*, 70 F.3d at 544-546 (recognizing Hoopa's reserved fishing rights); *Baley v. United States*, 942 F.3d 1312, 1323 (Fed. Cir. 2019) (citing state and federal cases recognizing Hoopa reserved fishing rights).

In 1993, the Interior Solicitor published an opinion reaffirming Hoopa reserved fishing rights. Solicitor Opinion M-36979, October 4, 1993. Somerville Declaration, Exhibit A (Dkt. #24-1). Solicitor Leshy examined the "history of the reservations, the Indians' dependence on the Klamath and Trinity River fisheries, the United States' awareness of that dependence, and the

federal intent to create the reservations in order to protect the Indians' ability to maintain a way of life, which included reliance on the fisheries." *Id*., at 3. Solicitor Leshy found "it is now well established that the Yurok and Hoopa Valley Indians have federal reserved fishing rights, created in the nineteenth century when the lands they occupied were set aside as Indian Reservations." *Id*. at 14-15. "The . . . Hoopa Indians had a 'vital and unifying dependence on anadromous fish.'" *Id*. at 22. "[T]he Government intended to reserve for the [Hoopa] a fishing right which includes a right to harvest a sufficient share of the resource to sustain a moderate standard of living." *Id*. at 21; *Parravano*, 70 F.3d at 542-46 (citing Solicitor opinion with approval).

III. The Reclamation Act and the Klamath Project

Congress enacted the Reclamation Act in 1902 to encourage land settlement and agricultural economies in the west. The Reclamation Act financed irrigation works, with construction costs repaid by Project water users. The Klamath Project (or Project) was authorized in 1905, one of the first projects authorized under the Reclamation Act. AR 1208.

In 1905, Oregon and California also enacted statutes to develop the Klamath Project. AR 1207-8. Under these state laws, land that was submerged and owned by the states could be reclaimed by farmers for irrigation use. Upon uncovering the submerged lands, state land title passed to the federal government for disposition to individuals under the Reclamation Act. In the federal act of February 9, 1905, Congress authorized the Secretary of the Interior to advance the Klamath Project, to lower the water levels of water bodies in Oregon and California, and "to dispose of any lands which may come into the possession of the United States as a result thereof by cession of any State or otherwise under the terms and conditions of the national reclamation act." Act of February 9, 1905, Pub. L. No. 58-66, 33 Stat. 714.

Pursuant to Oregon law, on May 17, 1905, the United States Reclamation Service (the predecessor to Reclamation) filed a notice of appropriation in Oregon to all of the then-unappropriated waters of the Klamath Basin for the Klamath Project. AR 1226. The notice provides that the United States intends that "water is to be used for irrigation, domestic, power, mechanical, and other beneficial uses in and upon lands situated [in the Klamath Basin in Klamath, Oregon and Modoc, California counties]." *Id*.

Today, farmers rely on water deliveries and make investments in crops based upon expected water deliveries. The Project irrigated land area is about 200,000 acres, with most of that acreage receiving water diverted from the Klamath River system. AR 1257. With few exceptions, this land is irrigated and farmed by private individuals or firms. The total value of agricultural products produced by the Project has been estimated at up to $300 million annually, and, in addition to the families directly supported by agriculture, numerous businesses provide goods and services to farmers. S.A.C. TID ¶ 38 (#73). Agriculture supports a significant portion of the local tax base. *Id*.

IV. The State of Oregon's Klamath Basin Adjudication

The State of Oregon commenced the Klamath Basin Adjudication (KBA) to determine the relative rights of use of the Klamath River and its tributaries[1] in accordance with its general stream adjudication law. *See* ORS 539.005. Oregon law provided that all parties were required to file claims, and contested claims of water rights were subject to trial-type proceedings before the Office of Administrative Hearings and the Oregon Water Resources Department's Adjudicator.

[1] The KBA includes the stream systems within the greater Klamath River Drainage Basin, with the exception of the Lost River drainage, which is a closed drainage basin contiguous to the natural drainage basin of the Klamath River. The KBA does include Upper Klamath Lake, which is fed both by surface water entering from the north and west (the Williamson and Wood Rivers), and large springs and seeps located in the lakebed. ACFFOD 1-2.

See ORS 539.100-539.110. Following more than ten years of administrative contested case litigation, the Adjudicator issued the finding of fact and order of determination in 2013. In 2014, the Adjudicator corrected determinations and submitted them to the Klamath County Circuit Court. *See* Amended and Corrected Findings of Fact and Order of Determination, In re Matter of the Determination of the Relative Rights to the Use of the Water of the Klamath River and Its Tributaries, Oregon Water Resources Department (Feb. 28, 2014) ("ACFFOD"). Consistent with ORS 539.150, the Klamath County Circuit Court is presently managing hearings to approve or modify the ACFFOD. Pursuant to ORS 539.130, 539.170, the Adjudicator's findings of fact and order of determination is in full force and effect, and water use in Klamath Basin is presently subject to regulation pursuant to the ACFFOD.

With respect to irrigation water use in the Project, the Adjudicator confirmed rights with priority no later than May 19, 1905, for all Project lands, including those lands owned by the Plaintiffs. ACFFOD 7155, at AR 1326. The districts and individuals who deliver water to their constituents hold title to the water use rights. ACFFOD 7075-82, at AR 1246-53. The ACFFOD found that the beneficial users of Project water hold a legal interest in the rights recognized in the ACFFOD for the purpose of beneficial use. ACFFOD 7075, at AR 1246. The use rights extend to so-called "live flow" and to water that is stored in UKL. ACFFOD 7086, at AR 1257. Additional water rights recognized in the ACFFOD for Project lands, including Van Brimmer Ditch Company, include priority dates as early as 1883. *See, e.g.*, ACFFOD 7141, at AR 1312.

DISCUSSION

Federal Rule of Civil Procedure ("FRCP") 12(b)(7) authorizes dismissal of an action for failure to join a party required to be joined by FRCP 19. In evaluating the motion to dismiss, the court "must undertake a two-part analysis: it must first determine if an absent party is [required];

then, if the party cannot be joined due to sovereign immunity, the court must determine whether … in 'equity and good conscience' the suit should be dismissed." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *Dine Citizens Against Ruining Our Env't v. BIA*, 932 F.3d 843, 851 (9th Cir. 2019). "The inquiry is a practical one and fact-specific." *Dine Citizens,* 932 F.3d at 851.

I. Hoopa Valley Tribe and the Klamath Tribes are required parties.

A party is required pursuant to FRCP 19(a)(1) 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. Though only one prong is necessary, Hoopa Valley Tribe and the Klamath Tribes satisfy both prongs of Rule 19(a)(1)(B).

Hoopa Valley Tribe and the Klamath Tribes (collectively, "Tribes" or "Intervenors") are required parties to this case because their legally protected treaty water and fishing rights are at a minimum coextensive with Reclamation's obligations to provide water for instream purposes under the ESA. As a practical matter, their ability to protect this interest would be significantly impaired if Plaintiffs' claims prevail. In addition, if Plaintiffs' claims are successful, it would leave Reclamation subject to a substantial risk of incurring multiple inconsistent obligations to provide water for instream purposes and to deliver that same water to Plaintiffs for irrigation purposes.

a) Intervenors have a legally protected interest in their treaty water and fishing rights.

To satisfy Rule 19, an interest must be legally protected and must be ‘‘more than a financial stake.’’ *Makah*, 910 F.2d at 558. ‘‘[A]n absent party has no legally protected interest at stake in a suit merely to enforce compliance with administrative procedures.’’ *Id*. at 971. However, an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted. *Dine Citizens,* 932 F.3d at 851.

i. Plaintiffs' claims are not merely procedural.

Plaintiffs contend that their claims in this case are brought merely to enforce compliance with administrative procedures under the APA. They also contend that they have requested relief on a merely "prospective" basis that would not impair a right already granted to the Tribes. The Court disagrees.

Plaintiffs[2] Shasta View Irrigation District, Klamath Irrigation District, and other irrigators, farmers, and water-users, (collectively, "Plaintiffs" or "Water Users"), bring claims against the United States Bureau of Reclamation ("Reclamation") under the APA to set aside Reclamation's 2019-2024 Operations Plan for the Klamath Project ("Operations Plan"). Reclamation states that it developed the Operations Plan in conformance with (1) the Endangered Species Act's ("ESA") mandate that the agency ensure that actions it authorizes, funds, or carries out do not jeopardize the continued existence of listed species or destroy or adversely modify their designated critical habitat, 16 U.S.C. § 1536(a)(2); (2) reserved water rights held for tribal fishery needs; and (3) contractual agreements with Plaintiffs. The

[2] These cases were consolidated on July 1, 2019. Civ. No. 1:19-cv-00451-CL was determined to be the lead case. All citations to docket numbers refer to the docket in the lead case. After the motions to intervene were granted, Plaintiffs filed two separate Second Amended Complaints, the first filed by Plaintiff KID ("S.A.C. KID") (#70), and the second filed by TID and the remaining Plaintiffs ("S.A.C. TID") (#73). The claims contained in the complaints are substantially similar, and the Court will address the issues collectively.

Operations Plan seeks to meet the requirements of the ESA by not diverting water to Project irrigators that would otherwise jeopardize endangered sucker fish in Upper Klamath Lake and threatened salmon in the Klamath River and/or adversely modify their critical habitat, if used for irrigation purposes. Pursuant to Section 7 of the ESA, Reclamation formally consulted with the National Marine Fisheries Service and the U.S. Fish & Wildlife Service on its Operations Plan, and each consulting agency provided a biological opinion to Reclamation that the Operations Plan would not jeopardize salmon or suckers, or adversely modify their critical habitat.

Plaintiffs' Second Amended Complaints allege, in essence, that Reclamation lacks statutory or other authority to comply with the ESA, or to protect tribal reserved water rights held for tribal fishery needs, by reducing the amount of water to be delivered to Project irrigators pursuant to their state water rights and their contracts with Reclamation. *See, e.g.,* S.A.C. TID (#73) ¶ 64 (alleging that "[n]either section 7(a)(2) of the ESA, nor any other authority or obligation that may be asserted by Defendants, confers legal power or authorities on Defendants to curtail diversion and use of water by and for Water Users or other Association members or their patrons"); S.A.C. TID (#70) ¶ 26 (alleging that Reclamation has "no discretion or authority to limit the amount of water" that 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").

Plaintiffs argue that the relief they seek is "prospective," pointing to the fact that their complaints do not request relief in the form of an injunction. However, they do ask for a declaration "that Defendants must maintain, operate, and direct operations of the Project and Project-related facilities in accordance with the requirements of the Reclamation Act, and that Defendants' authorization . . . of collection and retention and use of stored water for ESA-listed

species, and use of stored water for ESA-listed species in the Klamath River, are not activities authorized by any applicable law." S.A.C. TID (#73) at ¶ 92 and 33 (Prayer for Relief) at ¶ 2; *see also* S.A.C. KID (#70) at ¶ 71 ("KID is entitled to a declaration that Defendant is violating Section 8 of the Federal Reclamation Act by unlawfully using water in UKL reservoir for instream purposes . . . during KID's irrigation season without a water right or other authority under state or federal law and thereby interfering with the vested water rights of KID, its landowners, and other water right holders to whom KID is legally obligated to deliver water.").

Thus, while Plaintiffs' claims are framed as procedural challenges brought under the APA, the main underlying contention is that Reclamation has no discretion to fulfill ESA or other instream obligations prior to fulfilling water delivery obligations to Plaintiffs, as determined by the State of Oregon's Klamath Basin Adjudication and the ACFFOD. As discussed below, this underlying contention, if successful, would ultimately either extinguish or conflict with Reclamation's obligations to provide water instream for ESA purposes, and those ESA obligations are coextensive with the treaty water rights of the Klamath Tribes and Hoopa Valley Tribe. Additionally, Reclamation's Plan of Operations covers the years from 2019-2024, thus any relief granted to Plaintiffs before 2025 would impair the Tribes' rights "already granted." Arguably, based on the caselaw discussed below, any impairment of the Tribes' rights at all, which have been well established in the Courts for decades, would impair rights "already granted." For all of these reasons, the Plaintiffs' suit is not merely "procedural."

ii. Tribal water and fishing rights are, at the bare minimum, co-extensive with the government's obligations under the ESA.

Courts, including the Ninth Circuit, have held that Tribes' federally reserved treaty water and fishing rights are at least co-extensive with the government's obligations to provide sufficient water under the ESA for species survival and environmental purposes. "At the bare

minimum, the Tribes' rights entitle them to the government's compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy." *Baley*, 942 F.3d at 1337 (affirming Hoopa has water right in Klamath River at least equal to what was needed to satisfy Reclamation's ESA obligations to protect SONCC coho from jeopardy); *Klamath Water Users Association v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000), cert. denied, 531 U.S. 812 (2000).

In addition, courts have repeated held and affirmed the priority that these federally reserved water rights have over competing irrigation rights. *Baley v. United States*, 134 Fed. Cl. 619, 668- 680 (2017), aff'd, 942 F.3d at 1341 (Fed. Cir. 2019) (holding Klamath irrigators' water rights are subordinate to Hoopa, Yurok, and Klamath Tribes' federal reserved water rights); *Patterson*, 204 F.3d at 1214 (Reclamation "has a responsibility to divert the water and resources needed to fulfill the [Hoopa Valley] Tribes' rights, rights that take precedence over any alleged rights of the Irrigators"); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197, 1211 (D. Or. 2001) (denying Klamath irrigators request to enjoin Reclamation's 2001 operations plan to release flow for protection of salmon and senior tribal rights); *Hoopa Valley Tribe v. NMFS*, 230 F. Supp. 3d 1106, 1141-42 (N.D. Cal. 2017) (finding that injunction requiring additional water deliveries in Klamath "would also help protect [Hoopa's] fishing rights, which must be accorded precedence over irrigation rights").

This precedence has been upheld even when irrigators argue that state law provides for a different priority: "[Tribal treaty] rights are federal reserved water rights not governed by state law." *Baley*, 942 F.3d at 1430; *see also United States v. New Mexico*, 438 U.S. 696, 702 (1978) ("Where water is necessary to fulfill the very purposes for which a federal reservation was

created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water.").

b) Tribes' ability to protect their interests would be significantly impaired if Plaintiffs' claims prevail.

Plaintiffs contend that the Oregon KBA, resulting in the 2014 ACFFOD, has entirely changed the legal landscape discussed above. They argue that all of the water rights and priorities in the Klamath Basin are now solely determined by the ACFFOD, and Reclamation has no discretion but to fulfill those obligations, regardless of its obligations under the ESA. While this is not a case that directly asks the Court to determine the priority of the competing water rights in the Klamath Basin, the practical reality is that Plaintiffs seek a declaration that their adjudicated water rights under the 2014 Oregon ACFFOD, and the contract water rights between Reclamation and the Water Users, supersede Reclamation's water obligations under the ESA, which are coextensive with the government's water obligations to the Tribes. This would be a radical and extreme shift from the precedence established above.

In fact, Plaintiffs' Second Amended Complaints seek a declaration from the Court that Reclamation has no discretion to act in releasing the water that it stores, while also claiming that "Section 7(a)(2) of the ESA applies to actions with respect to which there is discretionary federal involvement or control." S.A.C. TID (#73) ¶ 68 *citing* 50 C.F.R. § 402.03; *Nat. Res. Def. Council v. Norton*, 236 F. Supp. 3d 1198, 1217 (E.D. Cal. 2017); *Envtl. Prot. Info. Ctr. v. Simpson Timber Co*., 255 F.3d 1073, 1082 (9th Cir. 2001) (EPIC). The practical and legal effect of such a declaration is clear. If Reclamation has no discretion and no authority to act, then Reclamation has no obligation under the ESA at all, thus eliminating the need for the 2019 BiOp and all the other consultations that informed Reclamation's Plan of Operations. *Id*. By extension, if Reclamation has no authority to release water instream for ESA purposes, the

longstanding metric for defining the "bare minimum" of the Tribes' treaty water rights and federally reserved water and fishing rights would be extinguished. For practical and logistical purposes, this would have a significant detrimental impact on those rights.

Even if the practical implications of a declaration precluding Reclamation from releasing water for instream ESA purposes did not impair the Tribes' legally protected treaty rights, the second prong of Rule 19(B) would come into effect. Reclamation would be subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations – namely, the obligation to fulfill Plaintiffs' state law water rights on the one hand, and the obligation to release water instream to fulfill the Tribes' treaty water rights on the other. Thus, under either prong, the Intervenors are required parties under Rule 19(a)(1)(B).

c) Tribes' interests will not be adequately represented by the Bureau of Reclamation.

Plaintiffs argue that, even if the Tribes have an interest in the subject of the litigation in this suit it will not be impaired because the federal government will adequately represent that interest. As argued by the Tribes and acknowledged by Reclamation, this contention is not in line with the current controlling authority in the Ninth Circuit.

A non-party is adequately represented by existing parties if: (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 arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect. *Id*. "In assessing an absent party's necessity under Rule 19(a), the question whether that party is adequately represented parallels the question whether a party's interests are so inadequately represented by existing parties as to permit intervention of right under Rule 24(a)." *Id*. "The requirement of

[Rule 24(a)] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing [inadequate representation] should be treated as minimal." *Trbovich v. United Mine Workers of Am*., 404 U.S. 528, 538, n. 10 (1972).

As discussed in this Court's Order on intervention (#61), Reclamation will not "undoubtedly" make all of the Intervenors' arguments. The Tribes are directly interested 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. Reclamation has a different general interest in defending its decisions made pursuant to the ESA and APA. *Dine Citizens*, 932 F.3d at 854-856 (United States not adequate representative for tribal entity where it had a different general interest in defending compliance with federal law); *Murphy Co. v. Trump,* 2017 U.S. Dist. LEXIS 35959 (D. Or. Mar. 14, 2017) (federal representation of intervenors' interests inadequate where federal defendants' broader interests impair their ability to adequately represent intervenor's narrower interests); *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F. Supp. 791 (D. D.C. 1990) (United States had interest in defending agency authority, but the Tribe "has an interest in its own survival, an interest which it is entitled to protect on its own"). The practical effect of Plaintiffs' requested relief would directly impair the Tribes' federal reserved fishing and water rights and the related resources that the Tribes rely upon. Only the Intervenors can adequately present and defend their distinct interest in the affected fish and water resources, and their interest in sovereign immunity.

II. This case should be dismissed.

Under Rule 19(b), if an absent party is required but cannot be joined, the court must determine whether in equity and good conscience the suit should be dismissed.

a. Sovereign immunity prevents Hoopa Valley Tribe and the Klamath Tribes from being joined and weighs heavily in favor of dismissal.

Although Hoopa Valley Tribe and the Klamath Tribes are required, they cannot be joined due to their sovereign immunity. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014) (reaffirming tribal sovereign immunity as settled law); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (Indian tribes enjoy sovereign immunity and cannot be sued without unequivocal waiver or Congressional abrogation).

Plaintiffs argue that, even if the Tribes are required, they can be joined under the terms of the McCarran Amendment. Plf Resp. 32 (#83). The McCarran Amendment (also known as the McCarran Water Rights Suit Act), 43 U.S.C. § 666, 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). However, the waiver does not extend to the Tribes as parties, even in a McCarran Amendment case. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 567, n.17 (1983).

The Oregon Klamath Basin Adjudication was certainly a McCarran Amendment case. Plaintiffs argue that, by extension, the case at bar could be considered an "enforcement action" of the ACFFOD; indeed, KID's Second Amended Complaint states that the defendants' sovereign immunity is waived "pursuant to 43 U.S.C. § 666(a), as this is a suit for the administration of rights to the use of the water of the Klamath River system." ¶ 7. However, this is not a "state general stream adjudication case." Even if it were, the McCarran Amendment waives the sovereignty of the Indian rights at issue, not the sovereign immunity of the Tribes themselves. *San Carlos Apache Tribe of Arizona*, 463 U.S. at n. 17. The distinction is unnecessary here, however, as this is clearly not a McCarran Amendment case.

Sovereign immunity of a required party weighs heavily in favor of dismissal. *Republic of Philippines v. Pimentel*, 533 U.S. 851 (2008). Where an Indian tribe that cannot be joined due to sovereign immunity is required, courts in the Ninth Circuit regularly order dismissal. *Id*.; 932 F.3d at 857-58 (dismissal required due to inability to join required tribal entity); *White v. Univ. of Cal.,* 765 F.3d 1010 (9th Cir. 2014) (same); *Friends of Amador County v. Salazar,* 554 Fed. Appx. 562 (9th Cir. 2014) (same); *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist*., 276 F.3d 1150 (9th Cir. 2002); (same); *Am. Greyhound Racing v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (same); *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992) (same); *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245 (D. Or. 2017) (same). For this reason, and the reasons below, this case should be dismissed.

b. In equity and good conscience, this case should be dismissed.

Under Rule 19(b) if a required party cannot be joined, the court must consider whether the case may proceed in the party's absence or whether the case should be dismissed. This decision is case specific and based on "equity and good conscience." The rule sets forth four non-exclusive factors for the court to consider: (1) to what extent 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; (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. Prod. 19(b). None of the factors are determinative. Additionally, dismissal is often granted in cases involving an absent party's competing claims to finite natural resources. *Verity*, 910 F.2d at 558; *Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168 (W.D. Wash. 2014); *Keweenaw Bay Indian Cmty. v. State*, 11 F.3d 1341, 1346-47 (6th Cir. 1993).

In equity and good conscience, this case cannot proceed without Hoopa Valley Tribe or the Klamath Tribes. First, as discussed at length above, judgment in the Tribes' absence would significantly prejudice their interest in fulfillment and protection of their reserved fishing and water rights. Second, there is no way this prejudice can be lessened because this case involves conflicting and mutually exclusive interests in finite natural resources. There is insufficient water to fully satisfy Plaintiffs' purported rights while also satisfying Reclamation's purported obligations under the ESA and treaty trust obligations to the Intervenors. Third, if Plaintiffs prevail, Reclamation will either have conflicting legal obligations to Intervenors (and under the ESA), which will likely lead to further litigation, or have no obligation to them at all, effectively distinguishing their treaty water rights. This would make judgment rendered in the Tribes' absence inadequate. Thus, three of the four factors of Rule 19(b) weigh in favor of dismissal.

Plaintiffs argue that allowing the Tribes to veto this litigation functionally closes the doors of justice to Plaintiffs and leaves them uniquely without recourse to ever being able to enforce their rights on their own terms. The Court disagrees. It is clear that the irrigators of the Klamath Basin have had many chances in federal court to challenge the priority of their water rights, and they have generally been unsuccessful each time. *See, e.g., Baley v. United States*, 134 Fed. Cl. 619, 668- 680 (2017), aff'd, 942 F.3d at 1341 (Fed. Cir. 2019) (holding Klamath irrigators' water rights are subordinate to Hoopa, Yurok, and Klamath Tribes' federal reserved water rights); *Patterson*, 204 F.3d at 1214 (Reclamation "has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators"); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197, 1211 (D. Or. 2001) (denying Klamath irrigators request to enjoin Reclamation's 2001 operations plan to release flow for protection of salmon and senior tribal rights); *Hoopa Valley Tribe v. NMFS*, 230

F. Supp. 3d 1106, 1141-42 (N.D. Cal. 2017) (finding that injunction requiring additional water deliveries in Klamath "would also help protect [Hoopa's] fishing rights, which must be accorded precedence over irrigation rights"). The irrigators have not been denied intervention in any of the litigation brought by other parties, and there is no evidence that they would be denied intervention in the future.

Additionally, and as to the fourth Rule 19(b) factor, if the case is dismissed Plaintiffs will not be left completely without a forum. They can pursue monetary damages in the U.S. Court of Federal Claims, which would not require the Intervenors' presence, if they contend Reclamation violated their contract or Fifth Amendment rights. Plaintiffs argue that this is not an adequate forum because it would not remedy all of the due process interests they are asserting. However, when confronted with the competing interests of the Intervenors, Plaintiffs offer a variety of ways to remedy the situation without impacting the Tribes' reserved water rights, and nearly all of those ways involve some form of monetary compensation in exchange for the right to use the water at issue. *See* KID Resp. 17-20 (#82) (suggesting an instream lease, a limited license, a stay of the ACFFOD, condemnation of Plaintiffs' rights, and purchasing the rights voluntarily). Moreover, Plaintiffs are currently seeking recourse through an investigation of Reclamation's actions in the Circuit Court of Marion County (Oregon state court) through a writ of mandamus. (#86-1-5). According to documents filed with the Court in recent weeks, this investigation has begun. (*Id.*; #87-1).

c. The Public Rights Exception does not apply in this case.

The Ninth Circuit, like many courts, has "adopted the 'public rights' exception to the traditional joinder rules." *Makah*, 910 F.2d at 559 n.6. "The public interest exception 'provides that when litigation seeks vindication of a public right, third persons who could be adversely

affected by a decision favorable to the plaintiff are not indispensable parties.'" *Friends of Amador Cty. v. Salazar*, 2011 WL 6141291, at *2 (E.D. Cal. Dec. 9, 2011) (quoting *Kickapoo Tribe of Indians of Kickapoo Reservation in Kan. v. Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995)); *accord Dine Citizens*, 932 F.3d at 858 (same). "[T]he exception generally applies where 'what is at stake are essentially issues of public concern and the nature of the case would require joinder of a large number of persons.'" *Friends of Amador*, 2011 WL 6141291 at *2 (quoting *Kickapoo*, 43 F.3d at 1500) (further quotation and citations omitted); *Watt*, 608 F.Supp. at 324 ("[P]ublic rights cases" involve, "by definition . . . constitutional, national statutory, or national administrative issues.").

Plaintiff KID argues that this exception applies because KID is "a public entity holding property in trust for the constituent farmers it serves and is bringing this case on their behalf in a representative capacity." Plf. KID Resp. 38 (#82). KID argues that Plaintiffs are "bringing this action to vindicate the important constitutional right to due process under the Fifth Amendment and curb an unlawful abuse of power by the federal government that has not only affected KID and its constituents, but also other water right owners and members of the public who do not own any water rights, but are economically suffering as a result of the government's actions." *Id*.

The Court recognizes the importance of the water rights at issue in this case, and it is clear that Reclamation's plans will have severe impacts on the local and regional economy in the Klamath Basin. However, the Plaintiffs' claims are not in the "public interest" as contemplated by the exception. The claims here are framed as administrative claims and civil rights claims for due process, but ultimately the interests of the Plaintiffs are private, economic interests, as belied by their own argument above. Plaintiffs' list of ways they believe Reclamation can satisfy the Plaintiffs' rights without impacting the Tribes' interests are also indicative of their monetary

interests. Finally, as discussed above, the underlying contention of Plaintiffs' case is that Reclamation has no authority to act in accordance with the Endangered Species Act in order to benefit the environment, which is arguably the quintessential "public interest," especially when put into conflict with private economic interests. The public rights exception does not apply in this case.

RECOMMENDATION

The Motions to Dismiss (#74, 75) should be GRANTED and these consolidated cases should be dismissed. Previously filed motions to dismiss (#63, 64) should be denied as moot.

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due no later than fourteen (14) days after the date this recommendation is entered. If objections are filed, any response is due within fourteen (14) days after the date the objections are filed. *See* FED. R. CIV. P. 72, 6.

Parties are advised that the failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED this 15 day of May, 2020.

MARK D. CLARKE
United States Magistrate Judge