

Klamath Irrigation District v. U.S. Bureau of Reclamation: Defending Tribal Treaty Rights in the Drought-Stricken West

INTRODUCTION

Perhaps nowhere along the Pacific coast are the impacts of intense, years-long drought more pronounced than in the Klamath River Basin.¹ Spanning southern Oregon and northern California, the Klamath Basin encompasses a complex hydrologic system.² The Upper Klamath Lake is a crucial habitat for the C’waam (Lost River sucker) and Koptu (shortnose sucker), and downstream, the Klamath River supports the Southern Oregon/Northern California Coast coho salmon.³ These species have tremendous subsistence, spiritual, cultural, and economic value for the Tribal communities that have lived in the Klamath Basin “since time immemorial,” including the Klamath Tribes and Hoopa Valley Tribe (“the Tribes”⁴).⁵ However, the fish species have significantly declined and are now threatened or endangered.⁶ Diversions for irrigation and severe droughts resulting from climate change have resulted in critically reduced water levels.⁷ Water from the Klamath Basin, distributed by irrigation districts,⁸ has also

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1. See *Drought and Climate Change*, CTR. FOR CLIMATE AND ENERGY SOLUTIONS, <https://www.c2es.org/content/drought-and-climate-change/> (last visited Nov. 24, 2024); *U.S. Drought Monitor*, NAT’L DROUGHT MITIGATION CTR., <https://droughtmonitor.unl.edu/> (last visited Nov. 24, 2024).

2. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 938 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 342 (2023); *Klamath River Basin*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/west-coast/habitat-conservation/klamath-river-basin>, (last updated Aug. 2, 2023).

3. *Klamath Irrigation Dist.*, 48 F.4th at 939, 941; *Klamath River Basin*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/west-coast/habitat-conservation/klamath-river-basin> (last updated Aug. 2, 2023); Brief of the Klamath Tribes at 1, *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934 (2022) (Nos. 20-36009, 20-36020).

4. Throughout this In Brief, “the Tribes” will refer to the Klamath Tribes and Hoopa Valley Tribe, intervenors to the case. Other mentions of Tribe, Tribes, Tribal, etc. that do not refer to the Klamath Tribes and Hoopa Valley Tribe are nevertheless capitalized out of respect.

5. *Klamath Irrigation Dist.*, 48 F.4th at 939-40; *Klamath River Basin Condition and Opportunities: Before the H. Comm. on Nat. Res., Subcomm. on Water, Oceans, and Wildlife*, 177th Cong. (Mar. 8, 2022) (testimony of Stephen Guertin, Deputy Director for Policy, United States Fish & Wildlife Service, Department of the Interior).

6. *Klamath Irrigation Dist.*, 48 F.4th at 939.

7. Guertin, *supra* note 5.

8. Irrigation districts transport water from the Klamath Basin to their members, who include farmers, landowners, and other irrigation and drainage districts. *Klamath Irrigation Dist.*, 48 F.4th at 942.

supported farming and ranching since the U.S. Reclamation Service⁹ began constructing dams and levees in 1905.¹⁰ Reliance on this water by the Tribes, fish, and irrigators has led to conflicts regarding the appropriate water level of the Upper Klamath Lake and instream flows of the Klamath River, which are results of decisions made by the U.S. Bureau of Reclamation (“Reclamation”).¹¹

Klamath Irrigation Dist. v. U.S. Bureau of Reclamation followed a 2021 drought year marked by wildfires and water shortages. The Ninth Circuit affirmed that Tribal treaty rights are senior to those of the irrigation districts and are central to Reclamation’s water management procedures. The court additionally found that the federal government did not adequately represent the Tribes’ interests in adequate lake levels and stream flows for the protected fish species.¹² While this case is not the final word on Klamath water rights disputes, it sets the stage for prioritizing the rights of Tribes as water becomes scarcer.

I. BACKGROUND

A. *The Trust and Winters Doctrines*

The Tribal trust doctrine describes the “government-to-government relationship” between the federal government and federally recognized Native American Tribes, arising from the fact that Tribes were “preexisting sovereigns.”¹³ This “general trust relationship”¹⁴ imposes on the federal government “moral obligations of the highest responsibility,” including making the government trustee of Tribes’ property rights.¹⁵ Early and clear examples of this trust relationship are the treaties created between the federal government and Tribes that protect Tribes against intruders.¹⁶ These “established enduring and

9. The U.S. Reclamation Service is the predecessor to the U.S. Bureau of Reclamation. CHARLES V. STERN AND ANNA E. NORMAND, CONG. RSCH. SERV., R46303, BUREAU OF RECLAMATION: HISTORY, AUTHORITIES, AND ISSUES FOR CONGRESS 3 (2020).

10. *Klamath Irrigation Dist.*, 48 F.4th at 940; Guertin, *supra* note 5.

11. *Klamath Irrigation Dist.*, 48 F.4th at 940; *see also* Brief of the Klamath Tribes, *supra* note 3, at 5 (explaining how “Reclamation operates [Upper Klamath Lake] at elevations significantly lower than occurred prior to construction of the [Klamath] Project, depriving C’waam and Koptu of habitat and exposing them to increased risk of predation and the effects of poor water quality”); Second Amended Complaint for Remand and Declaratory Relief at 11, *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 489 F. Supp. 3d 1168 (D. Or. 2020) (Nos. 1:19-cv-00451-CL, 1:19-cv-00531-CL), 2020 WL 13561449, at ¶ 39 (claiming that maintaining levels for the Tribes and fish would “result in an amount of water available that is far less than irrigation water demand”).

12. *Klamath Irrigation Dist.*, 48 F.4th at 938.

13. RESTATEMENT OF THE L. OF AM. INDIANS § 4 (AM. L. INST. 2024). However, the origins of this doctrine are overtly paternalistic and were originally described in terms of a stronger sovereign claiming supremacy over another.

14. *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

15. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); RESTATEMENT OF THE L. OF AM. INDIANS § 4 (AM. L. INST. 2024); *see also* *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (“We do not question the undisputed existence of a general trust relationship between the United States and the Indian people.” (internal quotations and citations omitted)).

16. RESTATEMENT OF THE L. OF AM. INDIANS § 4 (AM. L. INST. 2024).

enforceable . . . obligations” to Tribes as sovereigns.¹⁷ Importantly, this relationship only extends to federally recognized Tribes.¹⁸

While the treaties between the federal government and the Klamath Tribes and Hoopa Valley Tribe do not explicitly set aside water rights,¹⁹ courts have found implied water rights in treaties without expressly reserved water rights.²⁰ This is known as the *Winters* doctrine.²¹ Reservations were established to “create a home for . . . Tribe[s], and water was necessarily implicated in that purpose.”²² These implied water rights are federally protected and reflect “the right to prevent other appropriators from depleting the streams waters below a protected level.”²³ In *United States v. Adair*, the Ninth Circuit confirmed that the Klamath Tribes’ treaty contains “a recognition of the Tribe’s aboriginal water rights . . . [that] necessarily carry a priority date of time immemorial.”²⁴

17. *Arizona v. Navajo Nation*, 599 U.S. 555, 585 (2023) (J. Gorsuch, dissenting) (quoting another source).

18. RESTATEMENT OF THE L. OF AM. INDIANS § 2 (AM. L. INST. 2024).

19. In the 1864 treaty between the U.S. government and the Klamath Tribes, the Tribes retained “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 with the Klamath, etc., 1864, art. 1, Oct. 14, 1864, 16 Stat. 707. The Hoopa Valley Tribe, too, retained “a sufficient area of the mountains on each side of the Trinity river . . . necessary for hunting grounds, gathering berries, seeds, [etc.].” Treaty with the Hoopa, South Fork, Redwood, and Grouse Creek Indians, art. 1 sec. 2, Aug. 6, 1864 (not ratified, but considered valid). The Klamath Tribes’ water rights in the Klamath River and Klamath Lake have been quantified under Oregon law, while the Hoopa Valley Tribe’s has not. See OR. WATER RES. DEP’T, CORRECTED FINDINGS OF FACT AND ORDER OF DETERMINATION, IN RE THE DETERMINATION OF THE RELATIVE RIGHTS TO THE USE OF THE WATERS OF KLAMATH RIVER AND ITS TRIBUTARIES 21-37 (2014).

20. RESTATEMENT OF THE L. OF AM. INDIANS § 86 (AM. L. INST. 2024).

21. *Id.*; see generally *Winters v. United States*, 207 U.S. 564 (1908) (holding that the agreement creating the Fort Belknap reservation impliedly included water rights to the Milk River for the use and benefit of the Native Americans on the reservation).

22. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1270 (9th Cir. 2017); RESTATEMENT OF THE L. OF AM. INDIANS § 89 (AM. L. INST. 2024); see also *Arizona v. California*, 373 U.S. 546, 600 (1963) (affirming *Winters* and explaining that when creating reservations the federal government “intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless,” and “that the water was intended to satisfy the future as well as the present needs of the Indian Reservations”).

23. RESTATEMENT OF THE L. OF AM. INDIANS § 86 (AM. L. INST. 2024); *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983); see also *Arizona v. Navajo Nation*, 599 at 561 (“Under this Court’s longstanding reserved water rights doctrine . . . the Federal Government’s reservation of land for an Indian Tribe also implicitly reserves the right to use needed water . . .” (citations omitted)).

24. *Adair*, 723 F.2d at 1414; see also *id.* at 1415 (“The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights. To assign the Tribe’s hunting and fishing water rights the later, 1864, priority date . . . would ignore one of the fundamental principles of prior appropriations law—that priority for a particular water right dates from the time of first use.”) (citations omitted). By way of background, both Oregon and California, generally, have a system of water rights based on prior appropriations, commonly referred to as “first in time, first in right,” so the determination that Tribes’ water rights pre-date those of all other entities is paramount. JUDITH CALLENS, LEGISLATIVE COMMITTEE SERVICES, STATE OF OREGON, VOL. 2 ISSUE 1, WATER RIGHTS 1 (2004); MARYBELLE D. ARCHIBALD, GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, STAFF PAPER NO. 1, APPROPRIATIVE WATER RIGHTS IN CALIFORNIA: BACKGROUND AND ISSUES 1 (1977). This is in comparison to the riparian water rights system of the eastern United States that establishes water rights based on ownership of land adjacent to water sources. *The Water Rights Process*, CAL. STATE WATER RES. CONTROL BD. (last updated Aug. 20, 2020), <https://www.waterboards.ca.gov/>

B. *The Klamath Basin Adjudication*

Under Oregon's general stream adjudication law,²⁵ the Klamath Basin Adjudication began in 1975 to determine the relative water rights of parties in the Klamath River Basin.²⁶ All parties "claiming any interest in the stream" filed claims with the Oregon Water Resources Department,²⁷ and in 2014, an adjudicator submitted the Amended Corrected Findings of Fact and Order of Determination to the Klamath County Court in 2014.²⁸ This document regulates water use while the county circuit court hears appeals.²⁹

C. *The Reclamation Act*

Reclamation oversees water management projects and manages the Klamath River Basin Reclamation Project following state and federal laws.³⁰ Reclamation has the "nearly impossible" job of weighing the many competing water interests in the Klamath Basin, namely the irrigation districts, Tribal treaty rights, and Endangered Species Act (ESA) obligations.³¹ Subject to availability, Reclamation distributes water to irrigators, but droughts, the need to satisfy more senior Tribal water rights, and compliance with the ESA all complicate this task.³²

waterrights/board_info/water_rights_process.html (providing more details about California's system, which in fact has a hybrid system of both riparian and appropriative rights).

25. The adjudication process aims to determine the validity and quantity of those water rights based on surface water-usage, in addition to federally reserved water rights, to provide future predictability and "understand the full extent of legal surface water use in a given area." *Adjudications and Registrations*, STATE OF OR., <https://www.oregon.gov/owrd/programs/waterrights/adjudications/pages/default.aspx#:~:text=Adjudication%20is%20a%20statutory%20process,prior%20to%20August%203%2C%201955> (last visited Nov. 24, 2024).

26. *Klamath Irrigation Dist.*, 48 F.4th at 941 (citing Or. Rev. Stat. § 539.005).

27. *Id.* (citing Or. Rev. Stat. §§ 539.021, 539.100, 539.130).

28. *Id.* (citing OR. WATER RES. DEP'T, *supra* note 19, at 4); *see also* Brief of the Klamath Tribes, *supra* note 3, at 4 (The Amended Corrected Findings of Fact and Order of Determination "recognizes the Tribes' instream rights to water . . . to support their treaty rights to hunt, trap, gather and—as particularly relevant here—fish.").

29. *Klamath Irrigation Dist.*, 48 F.4th at 941 (citing Or. Rev. Stat. §§ 539.130, 539.150, 539.170).

30. *Id.* at 940 (citing 43 U.S.C. § 383); *cf. Projects & Facilities: Klamath Project*, Bureau of Reclamation, <https://www.usbr.gov/projects/index.php?id=470> (last visited Nov. 24, 2024) (documenting the area within Reclamation's Klamath Project and the Project's history).

31. *Klamath Irrigation Dist.*, 48 F. Supp. 3d at 1173.

32. *Klamath Irrigation Dist.*, 48 F.4th at 939-40. Indeed, the Department of the Interior states that these Tribal water rights guarantee the right to sufficient water quality and flows to support the fish. *See id.* at 939. The Hoopa Tribe, similarly, is entitled to the government's ESA compliance in a manner that does not degrade the existence of the Tribe's fish resources. Hoopa Valley Tribe's Motion to Dismiss Pursuant to FRCP 12(B)(7) and 19; and Memorandum in Support at 8, *Klamath Irrigation Dist.*, 48 F.4th 934 (Nos. 1:19-cv-00451-CL, 1:19-cv-00531-CL) (citing *Baley v. United States*, 942 F.3d 1312, 1337 (Fed. Cir. 2019)). The Tribes' federal reserved water rights take precedence over those of the irrigators. *See id.* at 6 (citing *Klamath Water Users Ass'n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000)).

D. *The Endangered Species Act*

The ESA directs all federal departments and agencies to conserve endangered and threatened species.³³ More specifically, when a federal agency action may affect a listed species, federal agencies must consult with the Fish and Wildlife Service and/or the National Marine Fisheries Service (collectively “the Services”).³⁴ A proposed federal action is assessed in a “Biological Assessment,”³⁵ and then the Services issue a “Biological Opinion” regarding the possible impacts of the action on protected species or habitats.³⁶

In the Klamath Basin, Reclamation developed a Biological Assessment in 2018 as part of its water management operations, and Reclamation amended its action and adopted the Services’ 2019 Biological Opinions, which examined potential impacts to the C’waam, Koptu, and Oregon/Northern California coho salmon.³⁷ In this amended action, Reclamation stated that it would satisfy both its ESA obligations and obligations to the Tribes, with the effect of restricting the water available to those with more junior rights, including the irrigation districts.³⁸

II. KLAMATH IRRIGATION DIST. V. U.S. BUREAU OF RECLAMATION

A. *The U.S. District Court of Oregon*

On March 27, 2019, the Klamath Irrigation District and Shasta View Irrigation District, along with other water users, (collectively “the Irrigators”) sued Reclamation.³⁹ The suit alleged that Reclamation’s incorporation of the Services’ Biological Opinion into its 2019 operating plan violated the Administrative Procedure Act (APA) and that Reclamation failed to adhere to the 2014 Klamath Basin Adjudication Order by allocating water for instream uses without having this water right under Oregon law.⁴⁰

Plaintiffs sought declaratory and injunctive relief,⁴¹ alleging that Reclamation’s operations of the Klamath Project incorporating the 2019 Biological Opinion violated the APA.⁴² The Irrigators claimed that their water supply would be reduced below demand, harming agricultural production and

33. 16 U.S.C. § 1531(c)(1)-(2).

34. 16 U.S.C. § 1536(a)(2); *Klamath Irrigation Dist.*, 48 F.4th at 941; KYNA POWERS ET AL., CONG. RSCH. SERV., RL33098, KLAMATH RIVER BASIN ISSUES AND ACTIVITIES: AN OVERVIEW 3 (2005).

35. 50 C.F.R. § 402.12(a).

36. POWERS, *supra* note 34, at 3.

37. *Klamath Irrigation Dist.*, 48 F.4th at 941.

38. *Id.* at 941-42.

39. *Id.* at 942.

40. *Id.*

41. *Klamath Irrigation Dist.*, 489 F. Supp. 3d at 1168.

42. *Klamath Irrigation Dist.*, 48 F.4th at 942; *see also* Second Amended Complaint for Remand and Declaratory Relief, *supra* note 11, at 1 (arguing that Reclamation “acted arbitrarily and capriciously, abused their discretion, and acted in excess of statutory jurisdiction, authority, or limitation” under the Reclamation Act, APA, and ESA).

income.⁴³ Plaintiffs sought to enjoin Reclamation from releasing water to comply with the ESA and fulfilling its obligations to the Tribes, arguing that Reclamation itself did not have the right to use stored water.⁴⁴ The Irrigators maintained that their action was only procedural and that it did not involve the Tribes' rights.⁴⁵ However, the court disagreed, finding that the underlying challenge was that Reclamation fulfilled its other obligations before meeting the Irrigators' needs, and if granted, that plaintiffs' rights would "ultimately either extinguish or conflict" with Reclamation's ESA and Tribal treaty obligations.⁴⁶

The Tribes recognized these implications and intervened as of right and then moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(7) for failure to join a required party per Rule 19.⁴⁷ The District Court granted the motion, finding that the Tribes were required because their fishing and water rights would be "significantly impaired" if the Irrigators prevailed.⁴⁸ The court stated that Reclamation would not be an adequate representative of the Tribes' interests because the federal government was focused on defending its action pursuant to the ESA and APA. In contrast, the Tribes were focused on preserving their treaty rights.⁴⁹ The Tribes' interests in protecting their sovereignty and their fish and water rights were not sufficiently aligned with Reclamation's interest in ESA and APA compliance such that the government would "adequately represent" the Tribes' interests.⁵⁰ Sovereign immunity prevented the Tribes from being joined, and the case could not continue in equity and good conscience because "judgment in the Tribes' absence would significantly prejudice their interest in fulfillment and protection of their reserved fishing and water rights."⁵¹

43. Second Amended Complaint for Remand and Declaratory Relief, *supra* note 11, at 11-12.

44. *Klamath Irrigation Dist.*, 48 F.4th at 942; Nicole Pla, *United States Court of Appeals for the Ninth Circuit*, 26 U. DENVER WATER L. REV. 147, 147 (2023).

45. *Klamath Irrigation Dist.*, 489 F. Supp. 3d at 1177.

46. *Id.* at 1178 (finding that "those ESA obligations are coextensive with the treaty water rights of the Klamath Tribes and Hoopa Valley Tribe").

47. *Klamath Irrigation Dist.*, 48 F.4th at 942; Pla, *supra* note 44, at 147-48; *see generally* Hoopa Valley Tribe's Motion to Dismiss Pursuant to FRCP 12(B)(7) and 19; and Memorandum in Support, *supra* note 32; The Klamath Tribes' Motion to Dismiss for Failure to Join a Party Under Rule 19, *Klamath Irrigation Dist.* (Nos. 1:19-cv-00451-CL, 1:10-cv-00531-CL).

48. *Klamath Irrigation Dist.*, 489 F. Supp. 3d at 1179-80.

49. *Id.* at 1180; Christen T. Maccone, et al., *Chapter V: Water Resources*, A.B.A., ENV'T, ENERGY, & RES. L.: THE YEAR IN REVIEW, V-1, V-23 (Elizabeth P. Ewens et al. eds. 2022); *see also* Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affs., 932 F.3d 843, 856 (9th Cir. 2019) (holding that a Tribal party's joinder was necessary because "no other party to the litigation can adequately represent [the Tribe's sovereignty] interests"); Kickapoo Tribe of Okla. v. Lujan, 728 F. Supp. 791, 797 (D.D.C. 1990) (holding that the federal government's interest in defending its own authorities were distinct from the Tribe's "interest in its own survival, an interest which it is entitled to protect on its own").

50. *Klamath Irrigation Dist.*, 489 F. Supp. 3d at 1180-81.

51. *Id.* at 1181. Plaintiffs also argued that their case involved the McCarran Amendment (43 U.S.C. § 666), which would waive federal sovereign immunity, including those rights reserved for Tribes, for state general stream adjudications. *Id.* The District Court quickly dismissed this assertion because the case did not adjudicate water rights as the Klamath Basin Adjudication did under state law. *Id.* The Ninth Circuit agreed. *See Klamath Irrigation Dist.*, 48 F.4th at 947. In Judge Bumatay's concurrence, he agreed that this case is not a McCarran Amendment case because the Hoopa Valley Tribe is a California tribe whose relative water rights in the Klamath Basin were not adjudicated under Oregon law. *Id.* at 949.

B. *The Ninth Circuit*

On appeal, the Ninth Circuit agreed that the Tribes were required parties because the Irrigators' requested relief would directly impact the Tribes' water rights and Reclamation's obligations under the ESA. Given the Tribes' sovereign immunity, the court similarly found that they could not be joined and that the case could not continue in equity and good conscience without them.⁵² The court clarified that "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."⁵³ While the Irrigators' challenge centered on a procedural issue, the outcome would have had a significant impact on the Tribes' water and fishing rights.⁵⁴ Though the federal government serves as a trustee of the Tribes' reserved water and fishing rights, "a unity of some interests does not equal a unity of all interests."⁵⁵ Indeed, the Tribes had other active litigation with Reclamation that "would materially limit Reclamation's representation of the Tribes' interests."⁵⁶ The court concluded that the Irrigators' requested relief and the Tribes' interests were "mutually exclusive," affirming that no remedy could avoid prejudice to the Tribes if the case continued without them as parties.⁵⁷

The Klamath Irrigation District petitioned the U.S. Supreme Court in May 2023, arguing that the Ninth Circuit's ruling would be disastrous for deciding water rights cases in the West if Tribes could essentially veto other water users from seeking to enforce their rights.⁵⁸ Despite this, the Supreme Court denied the petition for writ of certiorari in October 2023.⁵⁹

III. ANALYSIS

The Ninth Circuit's decision in *Klamath Irrigation Dist.* represents a recent and long-overdue shift in courts favoring Tribes that represent their own interests and assert their sovereignty as independent, self-governing nations. Looking ahead, Rule 19 joinder will be a crucial tool for Tribes to intervene in cases that

However, he argues it would be a McCarran Amendment case concerning the Klamath Tribes because it deals with the "administration" of previously adjudicated rights. *Id.* at 950.

52. *Klamath Irrigation Dist.*, 48 F.4th at 938; *Pl.*, *supra* note 44, at 147.

53. *Klamath Irrigation Dist.*, 48 F.4th at 943 (quoting *Diné Citizens*).

54. *Id.* at 943-44.

55. *Id.* at 945; see William R. Norman, et al., *Chapter Q: Native American Resources*, A.B.A., ENV'T, ENERGY, & RES. L.: THE YEAR IN REV., Q-1, Q-4 (2022).

56. *Klamath Irrigation Dist.*, 48 F.4th at 945; see, e.g., *Klamath Tribes v. U.S. Bureau of Reclamation*, 537 F. Supp. 3d 1183 (D. Or. 2021); *Klamath Tribes v. U.S. Bureau of Reclamation*, No. 1:22-CV-00680-CL, 2023 WL 7182281 (D. Or. 2023); Ali Sullivan, *Magistrate Says Feds Illegally Prioritized Irrigators Over Fish*, LAW360 (Sep. 12, 2023), <https://www.law360.com/articles/1720366/magistrate-says-feds-illegally-prioritized-irrigators-over-fish>.

57. *Klamath Irrigation Dist.*, 48 F.4th at 948; *Pl.*, *supra* note 44, at 148; Jessica Holmes, et al., 2023 *Ninth Circuit Environmental Review*, 53 ENV'T L. 747, 815 (2023).

58. Petition for Writ of Certiorari at i, *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022) (No. 22-1116), 2023 WL 3479609 at *i; Crystal Owens, *High Court Won't Hear Oregon Water Dispute*, LAW360 (Oct. 30, 2023), <https://www.law360.com/articles/1738149>.

59. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 144 S. Ct. 342 (2023) (mem.).

implicate their rights. However, these protections are far less robust for non-federally recognized Tribes or Tribes without certain treaty rights.

Congress terminated the Klamath Tribes' federal recognition in 1954, and Oregon insisted that Tribal water and fishing rights ended then too.⁶⁰ Facing threats of arrest, the Klamath Tribes continued to exercise their treaty rights by fishing, insisting that the Treaty of 1864 remained enforceable.⁶¹ Decades of self-determination advocacy restored the treaty rights in 1974 and federal recognition status in 1986.⁶² At the time of writing, the Hoopa Valley Tribe maintains federal recognition.⁶³ The Klamath Tribes and Hoopa Valley Tribe's status as federally recognized is pivotal because the trust doctrine does not extend to non-federally recognized Tribes.⁶⁴

By intervening as of right and then moving to dismiss for failure to join required parties under Rule 19, the Klamath Tribes and Hoopa Valley Tribe continued this history of legal advocacy to protect their treaty rights through exercising their sovereignty, even in cases in which they were not a named party. As a result, *Klamath Irrigation Dist.* gives Tribes a stake in cases that implicate their interests. Looking forward, this connection between Rule 19 joinder and Tribal sovereign immunity will be a key consideration for any party seeking to contest a government action that may implicate Tribal rights.⁶⁵

In conjunction with *Klamath Irrigation Dist.*, *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*⁶⁶ and *Backcountry Against Dumps v. Bureau of Indian Affairs*⁶⁷ have created a growing body of caselaw for federally recognized Tribes to rely on when challenging actions that may impede their rights and interests.

In *Diné Citizens*, environmental and Tribal organizations challenged the Bureau of Indian Affairs' (BIA) approval to allow operations to continue at a

60. Reed D. Benson, *Giving Suckers (and Salmon) an Even Break: Klamath Basin Water and the Endangered Species Act*, 15 TUL. ENV'T L. J. 197, 203 (2002); Monika Bilka, *Klamath Tribal Persistence, State Resistance: Treaty Rights Activism, the Threat of Tribal Sovereignty, and Collaborative Natural Resource Management in the Pacific Northwest, 1954–1981*, 48 W. HIST. Q. 255, 256 (2017).

61. Bilka, *supra* note 60, at 256.

62. *Our History: Klamath Tribal History*, THE KLAMATH TRIBES, <https://klamathtribes.org/history> (last visited Nov. 24, 2024).

63. See *About Hoopa Valley Tribe*, HOOPA VALLEY TRIBE K'IMA:W MED. CTR., <https://www.kimaw.org/hvt> (last visited Nov. 24, 2024) (“The Hoopa Valley Tribe is a federally recognized tribal entity.”).

64. See RESTATEMENT OF THE L. OF AM. INDIANS §§ 2, 4 (AM. L. INST. 2024).

65. Benjamin Mayer et al., *Recent Rulings Affirm Tribal Sovereign Immunity And Joinder*, LAW360 (Mar. 30, 2023), <https://www.law360.com/articles/1591070/recent-rulings-affirm-tribal-sovereign-immunity-and-joinder>; see also Susan Smith et al., *2024 Litigation Look Ahead Series: SCOTUS' Pass on Cases Sets Up Continued Fight Over Tribal Water Rights, State Mineral Development Cases in Coming Year*, BEVERIDGE & DIAMOND (Mar. 27, 2024), <https://www.bdlaw.com/publications/2024-litigation-look-ahead-series-scotus-pass-on-cases-sets-up-continued-fight-over-tribal-water-rights-state-mineral-development-cases-in-coming-year/> (“[P]arties seeking to challenge agency actions that implicate tribal water rights must involve the tribes in discussion and negotiation and ensure that all parties with established water rights can be joined in any litigation so that an adjudicating court can grant appropriate relief.”).

66. 932 F.3d 843 (9th Cir. 2019).

67. No. 21-55869, 2022 WL 15523095 (9th Cir. 2022).

mine and power plant.⁶⁸ The Ninth Circuit found that the BIA's interest in compliance with the National Environmental Policy Act (NEPA) and ESA differed "in a meaningful sense" from the "sovereign interest" of the Navajo Nation and Navajo Transitional Energy Company⁶⁹ (NTEC) in profits from the mine and power plant.⁷⁰ The court reasoned that while more than a financial or future interest was needed to make NTEC a required party under Rule 19, the Navajo Nation and NTEC had a "legally protected interest" in controlling their own resources.⁷¹ The Navajo Nation's sovereign interest in profits from the mine and power plant differed meaningfully from BIA's interest in protecting its actions under federal environmental laws, even considering the government's "general trust responsibility" to the Navajo Nation.⁷² If the plaintiff's challenge was successful, the mine would close, and the "Navajo Nation would lose a key source of revenue." Both Arizona Public Service, the operator of the power plant, and BIA argued that they adequately represented the interests of the Navajo Nation. The court disagreed, holding that the "Navajo Nation's interest [was] tied to its very ability to govern itself, sustain itself financially, and make decisions about its own natural resources," which no other entity could adequately advocate on behalf of and represent.⁷³

Similarly, in *Backcountry Against Dumps*, the Ninth Circuit found that the plaintiff's challenge of a lease approval by BIA implicated the sovereignty of the Campo Band of Diegueño Mission Indians ("Band").⁷⁴ The plaintiff argued that BIA and the development company working with the Band would adequately represent the Band's interests.⁷⁵ However, the court reasoned that even if the development company shared "the same interest as the Band in defending the lease, it does not share the Band's sovereign interest in self-governance and use of its natural resources."⁷⁶ Nor would BIA adequately represent the Band's "economic and sovereign interests" because BIA's interest centered only on defending its action under NEPA.⁷⁷ In assessing whether the case could continue in equity and good conscience under Rule 19(b) without the Band, the court

68. *Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d at 847-49.

69. *Id.* at 855. Navajo Transitional Energy Company is a corporation "wholly owned by the Navajo Nation that owns the mine in question." *Id.* at 847.

70. *Id.* at 855.

71. *Id.* at 852-53, 856 (citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558-59 (9th Cir. 1990)).

72. *Id.* at 855 (citations and quotations omitted).

73. *Id.* at 856.

74. *Backcountry Against Dumps v. Bureau of Indian Affs.*, No. 21-55869, 2022 WL 15523095 at *1 (9th Cir. 2022).

75. *Id.*

76. *Id.*

77. *Id.* ("[A] successful outcome for the plaintiffs would affect not only the Band's rights . . . but also investments made in reliance on the agreement and expected jobs and revenue . . . even though the lawsuit only facially challenges the federal defendants' environmental-review processes.") (citations omitted)

stated that Tribal sovereign immunity is “the compelling factor,” so the court granted the Band’s motion to dismiss.⁷⁸

These cases demonstrate that the Ninth Circuit is increasingly recognizing Tribes as sovereigns in their own right by not shying away from dismissing cases where Tribes are necessary parties but cannot be joined due to sovereign immunity.⁷⁹ While this sets an example for other Circuits to follow, these protections are much less robust for non-federally recognized Tribes and Tribes without these rights enshrined in treaties with the federal government.

CONCLUSION

Prolonged and severe droughts are the new normal in the western United States as a result of climate change.⁸⁰ With increasingly scarce water resources, disputes over water will only increase. In *Klamath Irrigation Dist.*, the Ninth Circuit signaled that where government, private, and Tribal interests conflict, courts will be wary of non-Tribal entities alleging they adequately represent Tribal interests. The Court emphasized that Tribes could protect their treaty rights by asserting their sovereign immunity in cases that threaten those rights. Looking forward, Tribal treaty rights to water, fishing, and hunting can be affirmatively extended to protect species’ inherent rights to thrive, especially in a world of climate disruption.⁸¹

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78. *Id.* at *2 (“Because this action seeks to vacate approval of the lease, it plainly threatens the Band’s legal entitlements.”).

79. Mayer, *supra* note 65.

80. See *Droughts and Climate Change*, U.S. GEOLOGICAL SURV., <https://www.usgs.gov/science/science-explorer/climate/droughts-and-climate-change#science> (last visited Nov. 24, 2024) (“The southwestern U.S., in particular, is going through an unprecedented period of extreme drought [which] will have lasting impacts on the environment and those who rely on it.”).

81. Tribal legal scholars have recognized that treaty rights, especially, offer a powerful method for advocating for the rights of nature precisely because Tribes can apply their resource rights, such as fishing and water rights, and these must be protected from interference by the federal government as trustees. See Noelia Gravotta, *A Great Nation Keeping Its Word: The Role of Tribal Treaty Rights in Climate Change Litigation*, 29 N.Y.U. ENV’T L. J. 118, 120 (2021); Chapter Two *Indigenous Interpretations: Invoking the Third Indian Canon to Combat Climate Change*, 135 HARV. L. REV. 1568, 1569 n.14 (2022). Though no U.S. federal law or court has embraced the rights-of-nature framework, through their constitutions and courts, Tribes have become centers for recognizing legal personhood or substantive rights for nature to combat environmental degradation. See Elizabeth Kronk Warner & Jensen Lillquist, *Laboratories of the Future: Tribes and Rights of Nature*, 111 CAL. L. REV. 325, 327-28, 353, 382 (2023). While this In Brief does not cover the rights-of-nature framework, future research could expand on the ways that Tribal treaty rights can uniquely be used to protect species and ecosystems and infuse concepts from the rights-of-nature framework in state and federal courts.

We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.